

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

DAVID O'BRIEN,
Appellant,

CASE NO: G1-11-91

v.

**MASSACHUSETTS HUMAN
RESOURCES DIVISION,**
Respondent

Appellant's Attorney:

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Sandulli Grace PC
44 School Street – Suite 1100
Boston, MA 02108

HRD Attorney:

Tsuyoshi Fukuda, Esq.
Labor Counsel
Human Resources Division
One Ashburton Place
Boston, MA 02108

Commissioner:

Paul M. Stein

SUPPLEMENTARY DECISION ON HRD'S MOTION TO DISMISS

The Appellant, David O'Brien, appealed to the Civil Service Commission (Commission) pursuant to G.L.c.31, §2(b), claiming that he was denied appointment as a Firefighter with the City of Fall River Fire Department (FRFD) because the Massachusetts Human Resources Division (HRD) wrongfully reported to the FRFD that he twice had failed the Physical Abilities Test (PAT) administered by HRD. After pre-hearing conference on April 22, 2011, the Commission, sua sponte, ordered that HRD be substituted for the original respondent, City of Fall River. On May 20, 2011, HRD filed a Motion to Dismiss the appeal on the grounds that the appeal was untimely and the appellant was not an aggrieved person, and, therefore, the Commission lacked

jurisdiction to hear the appeal. The Appellant opposed the motion on June 14, 2011. A Hearing on the motion was held on August 9, 2011 and digitally recorded. By Decision dated 24, 2011, the Commission denied HRD's motion for the time being and requested additional information from the parties to ascertain if the FRD had hired other lower-ranked candidates from Certification #209293 on which the Appellant's name had been placed as a result of Chapter 324 of the Acts of 2008. On December 13, 2011, the Commission received confirmation from both HRD and the Appellant that, in fact, the FRD appointed firefighters who fell below the Appellant on Certification #209293. Accordingly, the Commission concluded that it does have jurisdiction of the appeal and (1) reinstated FRD as a party to this appeal and (2) scheduled a full evidentiary hearing on the appeal, limited to the question of whether the FRD was reasonably justified to bypass the Appellant based on his reported failure to pass the PAT examination..

FINDINGS OF FACT

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

1. The Appellant, David W. O'Brien, resides in the City of Fall River whose name (among others) appeared at the top of the certification list from which the FRFD would next select candidates for appointment as permanent firefighters. (*Claim of Appeal*)¹
2. On or about August 13, 2010, FRFD Chief Paul Ford issued a written conditional offer of employment to Mr. O'Brien, which was contingent upon the successful

¹ The Appellant was a part of a group of candidates for appointment as full-time permanent firefighters who were placed at the top of the eligible list by special act of the legislature, after the Commission rejected their appeals to revive an expired list on which they had appeared. See Acts of 2008, c.324; Burke, et al. v. Human Resources Division et al, 21 MCSR 177 (2008).

completion of the Firefighter's Physical Abilities Test (PAT), among other things. The offer letter stated: "Failure to present yourself for or to successfully pass any of the . . . requirements will disqualify you for the position [of firefighter]. The offer letter did not mention any appeal rights. (*HRD Motion, Exh. A; Appellant's Opposition*)

3. On September 21, 2010, Mr. O'Brien appeared at the test site to take the PAT. (*HRD Motion, Exh. B; Appellant's Opposition*)

4. The Firefighter's PAT consists of seven events, six of which are timed and require the event to be completed within a prescribed limit or "cut score", and one of which requires completion of a specified number of repetitions within a set time. A candidate must successfully complete each event before moving to the next event. A passing score in all seven events is required to pass the PAT. (*HRD Motion, Exh. B; Appellant's Opposition; Administrative Notice [HRD Video of Firefighter's PAT, www.mass.gov]*)

5. The third event in the PAT sequence is called the Hose Advance. This event requires a candidate to pull a fully "charged" fire hose through a maze and then across the finish line within a "cut score" of 20 seconds or less. *HRD Motion, Exh. B; Appellant's Opposition; Administrative Notice [HRD Video of Firefighter's PAT, www.mass.gov]*

6. Mr. O'Brien completed the first two events within the required time. He failed the the "Hose Advance" with a recorded time of 28.06 seconds, which was 8.06 seconds over the required 20 seconds "cut score". He failed to make the allotted time, in part, because he tripped and fell during the event. Because he failed the Hose Advance event, Mr. O'Brien was disqualified and was not allowed to continue on to attempt the remaining four events. (*HRD Motion, Exh. B; Appellant's Opposition*)

7. A candidate for original appointment as a firefighter may request one additional re-test of the PAT. If a candidate fails the PAT on his or her second try, the conditional offer of employment “shall be rescinded.” (*Administrative Notice [G.L.c.31, §61A, ¶3]*)

8. Mr. O’Brien requested a re-test and appeared for his second PAT on September 23, 2010. The two HRD test monitors who followed him during his September 23, 2010 retest were the same two monitors who had followed him on September 21, 2010. (*HRD Motion, Exhs. B & C; Appellant’s Opposition*)

9. Mr. O’Brien again successfully completed the first two PAT events and proceeded to the Hose Advance. (*HRD Motion, Exh. C; Appellant’s Opposition*)

10. Mr. O’Brien completed the Hose Advance without tripping. He claims he, and two other observers from the FRD, saw the test monitor nearest to him stop his stopwatch and say: “Good”. The Appellant’s Opposition. The Appellant’s Opposition also states that the second monitor, who did not appear to have a stop watch, came over, took the watch from the first monitor, cleared it, and told Mr. O’Brien he had failed the Hose Advance event and could not continue the PAT. (*Appellant’s Opposition*)

11. Mr. O’Brien’s PAT score sheet for the September 23, 2010 PAT, states, for the Hose Advance:

“**HOSE ADVANCE**
COMPLETED EVENT: YES NO IF NO, WHY _____
TOTAL TIME 27:72 (CUT SCORE 20.00 secs) **PASS** **FAIL** (circle one)”
(*HRD Motion, Exh. C*)

12. HRD represented that it is standard practice for both test monitors to carry a stop watch, to time a candidate’s performance, and to record the lower of the two times as the candidate’s score. This representation is consistent with what appears to be shown in the

HRD video demonstration of the test, where two monitors are present and each appears to be holding a stop watch. (*Representation of HRD Counsel; Administrative Notice [HRD Video of Firefighter's PAT, www.mass.gov]*)

13. The Appellant's Opposition states that Mr. O'Brien received a written document describing his appeal rights after he was told he had failed the PAT for the second time. Neither HRD nor the Appellant was able to locate and produce such a document. (*Appellants' Opposition; HRD Pos- Hearing Exh. H*)

14. HRD asserts that Mr. O'Brien was given a document after he failed the second PAT, addressed to and to be delivered by him to the FRFD Chief, for the purpose of informing the Chief of the results of Mr. O'Brien's PAT. Neither party could produce the original or a copy of that document. HRD did produce a copy of a blank form of such a document (referencing an April 20, 2010 test date). (*HRD Post-Hearing Exh. G*)

15. HRD also produced a copy of an August 24, 2011 letter from FRFD Chief Ford to HRD Counsel, along with an e-mail sent by HRD's Fire PAT Training and Testing Administrator, Phil Ierardi, to FRFD Chief Ford, informing him of the "PAT results for the Fall River fire candidates who participated in the [PAT] conducted on September 21, 2010. . . ." No copy of a similar e-mail was produced concerning Mr. O'Brien's retest on September 23, 2010. (*HRD Post-Hearing Exh. H*)

16. According to Chief Ford's letter to HRD Counsel, Chief Ford recalled speaking with Mr. O'Brien at the end of September 2010, "within a day or two" of his second PAT test and that Mr. O'Brien stated that he thought he had passed the Hose Advance event the second time. (*HRD Post-Hearing Exh. H*)

17. On or about January 21, 2011, FRFD Chief Ford sent Mr. O'Brien a letter which stated that he "did not successfully complete the physical abilities test administered through civil service and, therefore [was] disqualified form the hiring process." The letter stated that Mr. O'Brien had the "right to appeal this determination by filing your appeal, I writing, within sixty calendar days of receipt of this notice, with the Civil Service Commission. . . ." (*HRD Post-Hearing Exh. H*)

18. On March 18, 2011, Mr. O'Brien filed the present appeal. (*Claim of Appeal; HRD Motion, Exh. E*)

CONCLUSION

Summary

Although Mr. O'Brien has filed a timely appeal pursuant to G.Lc.31, §2(b) to challenge the reasonable justification for his bypass by the FRD, he does not have the right to pursue a claim for any relief directly against HRD for alleged failure to properly administer the PAT examination. The undisputed records maintained by HRD establish that he was informed in September 2010 that he twice failed the PAT, nearly six months later. Given given the lengthy passage of time between the PAT tests and his appeal to the Commission, Mr. O'Brien's laches bar him from any relief against HRD.

Applicable Legal Standard

The Commission may, either on motion or upon its own initiative dismiss an appeal at any time for lack of jurisdiction or for failure to state a claim upon which relief can be granted. 801 CMR 7.00(7)(g)(3). A motion for summary disposition of an appeal before the Commission, in whole or in part, may be filed pursuant to 801 C.M.R. 1.00(7)(h).

These motions are decided under well-recognized standards for summary disposition as a matter of law, i.e., “viewing the evidence in the light most favorable to the non-moving party”, the substantial and credible evidence established that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case”, and has not rebutted this evidence by “plausibly suggesting” the existence of “specific facts” to raise “above the speculative level” the existence of a material factual dispute requiring evidentiary hearing. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, (2008). See also Iannacchino v. Ford Motor Company, 451 Mass. 623, 635-36, (2008) (discussing standard for deciding motions to dismiss); cf. R.J.A. v. K.A.V., 406 Mass. 698 (1990) (factual issues bearing on plaintiff’s standing required denial of motion to dismiss)

Relevant Civil Service Law

All candidates for original appointment to a civil service position of firefighter must take and pass a physical abilities test, designed and administered by HRD, that demonstrates the candidate’s ability to handle the routine and essential physical requirements of the job of a firefighter. See G.L.c.31 §61A, ¶¶1 & 3. A candidate is entitled to two, and only two fair and valid chances to pass the test. If a candidate “fails to pass the reexamination, his appointment shall be rescinded” by the appointing authority. Id., at ¶3. See generally, Commonwealth of Massachusetts Human Resources Division, “Massachusetts Fire Departments Physical Abilities Test Preparation Guide.

A person whose name appears on a certification for appointment to a civil service position, and who is “bypassed” for appointment in favor of a candidate whose name

appears lower on the certification may appeal to the Commission for a determination as to whether the reasons for the bypass were reasonably justified. G.L.c.31,§2(b) & §27: PAR.08(3). That appeal must, by Commission Rule, be filed within 60 days of the candidate's receipt of notice of the bypass decision. The Commission agrees with the Appellant that he his bypass appeal met this requirement and that he is entitled to a hearing of that appeal.

The Commission does not agree, however, that Appellant is entitled to bring a claim for relief against HRD for an alleged violation of his civil service rights due HRD's "decision, action or failure to act", and that the Commission should take jurisdiction to hear such an appeal pursuant to the express language of G.L.c.31,§2(b) which provides:

"In addition to its other powers and duties, the [civil service] commission shall have the following powers and duties. . . .(b) To hear and decide appeals by a person aggrieved by any decision, action or failure to act by the [personnel] administrator [i.e., HRD], except as limited by the provisions of section twenty-four relating to the grading of examinations . . . No person shall be deemed to be aggrieved under the provisions of this section unless such person has made specific allegations in writing that a decision, action or failure to act on the part of the administrator was in violation of this chapter, the rules or basic merit principles promulgated thereunder and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status."²

See also Chapter 310 of the Acts of 1993 (authorizing Commission to take such action as will to restore or protect the rights of any person acquired under Chapter 31 [civil service law] or any rule made thereunder which have been "prejudiced through no fault of his own . . . notwithstanding the failure of any person to comply with any requirement of civil service law or rule as a condition precedent to the restoration or protection such rights."

² Section 24 authorizes appeals to the Commission from HRD's grading of "essay" questions (as opposed to "multiple choice questions), grading of "training and experience" credits", the determination of "minimum entrance requirements" for examinations, as well as appeals that the examination was not a "fair test" of the applicant's qualifications. See G.L.c.31,§22-§24.

HRD contends that the statutory scheme precludes any appeal from the failure to pass a PAT examination. The Commission has not formally decided the scope of its jurisdiction to review decisions made by HRD in the course of conducting PAT examinations.. HRD's argument that these decisions are immune from any form of scrutiny does seem problematic. Whether as a "fair test" appeal or as a Section 2(b) appeal from HRD's "decision, action or failure to act", basic merit principles of civil service law do warrant the conclusion that a person who asserts that they failed the PAT because it was improperly, arbitrarily or invalidly designed or administered does deserve a vehicle to obtain an impartial de novo review of such a career-determining decision. See Stavely v. City of Lowell, 71 Mass.App.Ct. 400, rev. denied, 451 Mass. 1105 (2008),


The authority cited by HRD does not seem quite as current or as apt. G.L.c.31,§61A,¶4 provides a remedy for current public safety officers to seek review of a failed "in service" PAT, through collective bargaining. The fact that such collective bargaining rights are acknowledged in ¶4, does not infer that the absence of reference to a specific right of review in ¶3, the one applicable to an initial hire, was intended to preclude application of Section 2(b) review. There is a clear distinction between police and fire officers, who customarily belong to a collective bargaining unit and are covered by a collective bargaining agreement (CBA), and candidates for employment who are not members of any union and have no such alternative source of advocacy. Similarly, case law cited by HRD pertains to "medical and physical fitness" standards established under G.L.c.31,§21, as opposed to review of written "examinations" (Sections 22 through 24) or tests of "physical abilities" (Section 61A). See

HRD is correct, however, that, in general (except for bypass appeals for which a specific 60-day limitations period has been established), an appeal from a “decision, action or failure to act” by HRD under Section 2(b), must be brought to the Commission within a period of 30 days from the date of “notice” to the party. 801 C.M.R. 1.00(6)(b). See Garfunkel v. Department of Revenue, 22 MCSR 291 (2009). Here, the Appellant concedes that HRD told him he had failed the Hose Advance event during his PAT reexamination on September 23, 2010 and denied him the right to continue to complete the test. Of more particular note, Mr. O’Brien acknowledges that he received some form of paperwork that confirmed this fact and described his appeal rights. Although neither Appellant nor HRD has been able to produce such paperwork, these undisputed circumstances clearly demonstrate that, here, the Appellant was on some form of written “notice” of the “decision, action or failure to act” by HRD that he now asserts was a violation of his civil service rights. Thus, under the Commission’s established practice and procedure, the time within which he was obliged to appeal to the Commission expired on or about October 23, 2010, months before this appeal was filed. cf. O’Toole v. Human Resources Division, 21 MCSR 561 (2008) (suggesting, but not deciding whether that written notice may be necessary to trigger the time for a section 2(b) appeal in all cases) The present appeal, to the extent it seeks relief against HRD, therefore, must be dismissed as untimely.

Although not necessary to the decision, the Commission would point out that the delay in bringing this appeal raises considerable doubt that the Appellant could produce the substantial evidence that HRD’s documentation was unreliable and false and that he

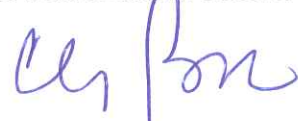
is entitled to any relief. The time limit to bring this type of appeal was presumably established, among other reasons, with such sound policy reasons in mind.

In sum, for the reasons stated above, HRD's Motion to Dismiss will be and hereby is granted and the appeal of the Appellant, David O'Brien, is hereby, *dismissed, in part, insofar as it seeks any relief against HRD.*

Paul M. Stein

Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, McDowell & Stein, Commissioners; Marquis [Absent]) on February 9, 2012.

A True Record. Attest:



Commissioner

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)(I), 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 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:

John M. Becker, Esq. (for Appellant)
Tsuyoshi Fukuda, Esq.. (HRD)
William Silvia, Fire Chief, City of Fall River