**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION**
One Ashburton Place: Room 503
Boston, MA 02108
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STEPHEN O'DONOGHUE &
BRUCE TRIEU,
Appellants

O'Donoghue: B2-13-288
Trieu: B2-13-290

v.

HUMAN RESOURCES DIVISION,
Respondent

Appearance for Appellants:

*Pro Se*
Stephen O'Donoghue
Bruce Trieu

Appearance for Respondent:

Ernest Law, Esq.
Human Resources Division
One Ashburton Place: Room 211
Boston, MA 02108

Commissioner:

Christopher C. Bowman

DECISION ON CROSS MOTIONS FOR SUMMARY DECISION

*Procedural History of the Instant Appeal*

On December 30th and 31st, 2013, the Appellants, Stephen O'Donoghue (Sgt.O'Donoghue) and Bruce Trieue (Sgt. Trieu) (Appellants), both police sergeants in the City of Quincy (City), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) that they were ineligible to take the promotional examination for the position of police lieutenant on October 19, 2013. I held a pre-hearing conference on February 4, 2014 (O'Donoghue appeal) and February 18, 2014 (Trieu appeal). I also held a status conference for both appeals on March 4, 2014, which was

attended by the Appellants, counsel for HRD, counsel for the City and the City's Human Resources Director. The Appellants and HRD subsequently filed cross Motions for Summary Decision.

*Question Presented*

HRD is responsible for conducting civil service examinations, for purposes of establishing eligible lists. G.L. c. 31, § 5(e). G.L. c. 31, § 59 establishes the criteria upon which HRD relies to determine whether an individual is eligible to sit for a promotional examination for public safety positions. The question here is whether HRD erred in its interpretation of Section 59 when it denied the Appellants the opportunity to sit for a promotional examination for police lieutenant. This is not a new issue for the Commission – or the Court.

*Applicable Civil Service Law*

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. at 259, citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. at 304. "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, § 1. Personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge at 304.

G.L. c. 31, § 59 provides in pertinent part,

> "An examination for a promotional appointment to any title in a police or fire force shall be open only to permanent employees in the next lower title in such

> force . . . provided, however, that no such examination shall be open to any person who has not been employed in such force for at least one year after certification in the lower title or titles to which the examination is open." (emphasis added)

*History of Prior Commission and Court Decisions*

Pre-Weinburgh

For many years, HRD – and the Commission - interpreted Section 59 as requiring a candidate to have been employed *in the next lower title* for at least one year before being eligible to sit for a promotional examination in the next higher title. For example, a candidate for police lieutenant, under HRD's prior interpretation, must have been employed *as a police sergeant* for at least one year in order to sit for a police lieutenant promotional examination.

Ruling on a challenge brought by Haverhill Fire Lieutenant Paul Weinburgh, who HRD and the Commission determined to be ineligible to sit for a Fire Captain's promotional examination, the Court concluded that this was an incorrect reading of the statute. In Weinburgh v. Haverhill and Civ. Serv. Comm'n, Suffolk Superior Court No. 2006-3187-D (2007), the Court stated in relevant part:

> " … in my view, the legislature chose to separate the requirement of employment in the force (no rank) from that of a year's certification in the lower rank. At the very least, this wording indicates that an administrative landmark, rather than a factual one, should be used to determine eligibility to sit for a civil service exam.
>
> Moreover, the statute uses the term 'certification' rather than language closer to the Commission's interpretation, such as 'promotion' or 'having served". This is of particular significance as 'Certification' is a term of art with respect to Chapter 31. G.L. c. 31, § 1 states: "Certification is the designation to an appointing authority by the administrator of sufficient names *from an eligible list* or register *for consideration of the applicants' qualifications* for appointment pursuant to the personnel administration rules." Reviewing the plain language of the whole statute, I read Section 59 to only require that candidate have been placed on the *promotion list* for the immediate lower position a year prior, not that he have been actually promoted to it. As the Administrative

> Record establishes, Weinburgh was on the promotion list for Fire [] Lieutenant in the Summer of 2003, more than fifteen months prior to the date of the Captain's exam … (emphasis added) (*emphasis in original*)

In affirming the Superior Court's decision, the Appeals Court stated in relevant part:

> " … the judge correctly concluded that G. L. c. 31, § 59, requires that an employee: (1) be on the promotion list (and, thus, certified) for the immediate lower position one year prior to taking the exam for the higher position; and (2) actually serve in the force for one year after certification, but not necessarily in that lower position. In this case, because the plaintiff was certified for the lower position of fire lieutenant in the summer of 2003 and had been employed "in such force," see G. L. c. 31, § 59, for one year after certification, he was qualified to sit for the fire captain's examination in November, 2004." (emphasis added)
> Weinburgh v. Civil Service Commission & City of Haverhill, 72 Mass. App. Ct. 535, 538 (2008).

Post-Weinburgh

Following the Court's decisions in Weinburgh, HRD modified its criteria regarding who was eligible to sit for a public safety promotional examination. At the time, HRD concluded that, in accordance with Section 59 and the Appeals Court decision in Weinburgh, eligibility for promotional examinations should be calculated by adding the time an applicant's name appears on the certification from which he was appointed to the qualifying title and the time spent in the qualifying title.

Five (5) individuals challenged HRD's "Post-Weinburgh" interpretation of Section 59 by filing appeals with the Commission. In a series of 26-page decisions[1], the Commission agreed with the Appellants, stating in relevant part:

> "In summary, HRD has misapplied the Weinburgh decision and, in doing so, is ignoring the plain language of Section 59 by adding words that do not exist. Based on the plain reading of Section 59 and the Weinburgh decision, HRD must calculate an individual's eligibility to sit for a promotional examination as follows. First, is the individual serving

[1] Hallissey and Dickinson v. HRD, 24 MCSR 200 (2011); Martucci and Toledo v. HRD, 24 MCSR 215 (2011); and Jordan v. HRD, 24 MCSR 208 (2011).

in the next lower title as of the date of the examination? If so, has the individual served in the force for at least one year[2] since his name was first certified for that lower qualifying title, regardless of whether that certification resulted in his appointment to the lower qualifying title. It is irrelevant how long an individual's name appeared on any individual certification."

HRD subsequently modified its Section 59 criteria accordingly and has applied the above-referenced criteria from the Commission's Post-Weinburgh decisions since 2011.

*Facts Related to Instant Appeal*

1. On October 15, 2011, HRD administered an examination for promotional appointment to the position of police sergeant.
2. On March 31, 2012, HRD established the eligible list resulting from the October 15, 2011 sergeant examination.
3. By electronic mail dated April 5, 2012, HRD sent the City of Quincy the entire eligible list for sergeant, which would expire on March 31, 2014. The name of Mr. Trieu appeared first on the eligible list and the name of Mr. O'Donoghue was tied for second with three other individuals.
4. The April 5, 2012 email from HRD to the City informed the City of its responsibility, pursuant to certification delegation guidelines effective September 1, 2009, of its responsibility "to properly generate certifications from the eligible list and to document the promotional selection process."
5. Although the City made promotional appointments from the eligible list which was created on March 31, 2012, it failed to "properly generate Certifications from the eligible list" prior to making these promotions in 2013 (as noted below).
6. On or about April 1, 2013, the City sent an "employment interview notice" to the Appellants for the position of permanent full-time police sergeant.

[2] A longer duration of time is required in cities and town with a population grater than 50,000.

7. Instead of creating a Certification for the Appellants to sign indicating their willingness to accept appointment, the City (erroneously) had interested candidates sign the eligible list, which had been sent to the City approximately one year prior.
8. The Appellants signed the eligible list on or about April 1, 2013.
9. On April 17, 2013, Mr. Trieu was promoted to the position of Police Sergeant in Quincy.
10. On July 10, 2013, Mr. O'Donoghue was promoted to the position of Police Sergeant in Quincy.
11. On August 20, 2013, HRD contacted appointing authorities, including the City, regarding the upcoming police lieutenant promotional examination. HRD informed the City of the examination posting requirements and the forms that it would need to complete, including the "Public Safety Eligibility Form" that provides the information used to determine an applicant's eligibility to take the examination.
12. On September 12, 2013, the City provided HRD with the signed examination announcement posting certificate and the public safety eligibility form for the police lieutenant promotional examination. The Appellants' names do not appear on this public safety eligibility form.
13. Sometime after September 12, 2013, the Appellants registered for the police lieutenant examination.
14. On October 9, 2013, HRD contacted the City's Human Resources Assistant, Lori Connelly, via email, indicating that HRD required more information about three (3) candidates, including the Appellants, who had applied to take the lieutenant promotional examination, but were not on the public safety eligibility form the City submitted.
15. By electronic mail dated October 10, 2013, Ms. Connelly responded that she "did not include [the Appellants] on the eligibility form for the Lieutenant Exam because they were promoted

less than one year from the exam date." However, Ms. Connelly noted that she was "confused by appointment date v. certification date."

16. In response, HRD clarified with Ms. Connelly on October 11, 2013, stating, in part that "A certification is different from an eligible list; the certification is when three people are selected to fill one vacancy, and the people come in to sign the cert willing to accept. So we need the date that the person's name first appeared on a cert and they had the chance to come in and sign willing to accept." (emphasis added)
17. On October 15, 2013, the City confirmed that the Appellants were first certified for promotion to the position of police sergeant on April 1, 2013.
18. On October 19, 2013, HRD administered the police lieutenant promotional examination.
19. The Appellants both sat for the examination despite being advised by HRD not to do so.
20. HRD did not grade the Appellants' examination based on their ineligibility.
21. On November 1, 2013, the Appellants filed individual appeals with HRD, contesting HRD's decision regarding their ineligibility to sit for the lieutenant promotional examination.
22. In a letter dated December 16, 2013, HRD notified the Appellants that their appeals (to HRD) were denied.
23. On December 30 and 31, 2013, the Appellants filed the instant appeals with the Commission.

*Summary Decision Standard*

Section 1.01(7)(h) of the applicable standard adjudication Rules of Practice and Procedure at 801 CMR provides that, "When a Party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he is entitled to prevail as a matter of law, the Party may move, with or without supporting affidavits, for summary decision on the claim or defense. If the motion is granted as to part of a claim or defense that is not dispositive of the case, further

proceedings shall be held on the remaining issues". 801 CMR 1.01(7)(h). The notion underlying the summary decision process in administrative proceedings parallels the civil practice under Mass.R.Civ.P.56, namely, when no genuine issues of material fact exist, the agency is not required to conduct a meaningless hearing. *See* Catlin v. Board of Registration of Architects, 414 Mass. 1, 7 (1992); Massachusetts Outdoor Advertising Counsel v. Outdoor Advertising Board, 9 Mass.App.Ct. 775, 782-83 (1980).

*Arguments of the Parties in the Instant Appeal*

The Appellants argues that a candidate is first "certified" for the next lower title when his / her name first appears on an "eligible list" as opposed to when his / her name first appears on a "Certification". If that interpretation were applied here, the Appellants would have been first certified for the lower title of police sergeant on March 31, 2012, the date that HRD created the eligible list. Applying the March 31, 2012 date, the Appellants would be eligible to sit for the lieutenant's promotional examinations since, as of October 19, 2013, they were in the next lower title of sergeant and had been employed in the (Quincy Police) force for at least one year after certification in the lower title of sergeant.

HRD argues that its actions were consistent with Section 59, the Courts' decisions in Weinburgh and the post-Weinburgh Commission decisions regarding this matter. Specifically, HRD argues that earliest date that the Appellants' could be considered certified is April 1, 2013, the date that the vacancies for sergeant first arose and the Appellant's first signed as willing to accept appointment. Thus, as of the October 19, 2013 lieutenant's examination, the Appellants, although serving in the next lower title, had not been employed in the force for at least one year after certification in the lower title of sergeant.

*Analysis*

The Appellants are effectively asking the Commission to reconsider its "post-Weinburgh" decisions regarding this matter. I carefully considered each of their arguments and have concluded that they do not support such a reversal for the reasons listed below.

First, the Appellants argue that references by HRD to a "certified eligible list" show that it was the intent of HRD that an individual meets the "after certification" requirement in Section 59 upon being placed on an eligible list. Had that been the case, this appeal would not be necessary. That was not HRD's intent, as evidenced by 1) their decision to deny these two (2) appeals and 2) the email communication, at that time, from HRD to the City, which clearly stated in relevant part that, "A certification is different from an eligible list; the certification is when three people are selected to fill one vacancy, and the people come in to sign the cert willing to accept. So we need the date that the person's name first appeared on a cert and they had the chance to come in and sign willing to accept." (emphasis added)

Second, the Appellants argue that HRD's decision in 2009 to delegate various administrative functions to appointing authorities, including the creation of promotional certifications, is confusing and prone to abuse. Thus, the date upon which a person's name appears on a Certification should not be the start date for the purposes of determining eligibility to sit for a promotional examination. This issue was fully vetted in the Commission's post-Weinburgh decisions and, while it may be an argument against delegation, it does not permit any party to re-write a statute that was enacted many years prior. The argument in favor of HRD assuming responsibility again for the creation of Certifications for promotional titles was reinforced here when the City failed to follow the delegation guidelines and create an actual Certification. Rather, the City had candidates sign the eligible list, which the Appellantd did on April 1, 2013.

While it could be argued that the Appellants' names never appeared on a Certification, and thus, they were not eligible to be promotionally appointed to the position of sergeant, such a result would be illogical and draconian, unfairly harming the Appellants. Unless and until HRD again assumes responsibility for creating Certifications for promotional titles, the City, and all appointing authorities, should understand the importance of complying with all of the delegation guidelines, including the requirements pertaining to the creation of a Certification.

The Appellants also reference the Court's decisions in Weinburgh and the Commission's subsequent post-Weinburgh decisions. HRD's actions here, for the reasons discussed below, are entirely consistent with both.

The Superior Court, as part of its decision in Weinburgh, explicitly referenced the "Certification", its definition under the civil service law and that it was drawn *from* an eligible list, clearing distinguishing the two, stating:

> "Moreover, the statute uses the term 'certification' rather than language closer to the Commission's interpretation, such as 'promotion' or 'having served". This is of particular significance as 'Certification' is a term of art with respect to Chapter 31. G.L. c. 31, § 1 states: "Certification is the designation to an appointing authority by the administrator of sufficient names *from an eligible list* or register *for consideration of the applicants' qualifications* for appointment pursuant to the personnel administration rules." Reviewing the plain language of the whole statute, I read Section 59 to only require that candidate have been placed on the *promotion list* for the immediate lower position a year prior, not that he have been actually promoted to it. As the Administrative Record establishes, Weinburgh was on the promotion list for Fire [] Lieutenant in the Summer of 2003, more than fifteen months prior to the date of the Captain's exam … (emphasis added) (*emphasis in original*)"

Further, the Commission, in its post-Weinburgh decisions, including Dickinson and Hallissey, thoroughly examined the specific facts pertaining to Mr. Weinburgh to confirm that the Court was indeed referring to the date Mr. Weinburgh's name first appeared on a *Certification,* stating in relevant part:

> I asked HRD to produce information regarding when Mr. Weinburgh's name appeared on Certifications for the lower qualifying title. According to HRD records, Mr. Weinburgh's name first appeared on Certification No. 230772 on August 28, 2003 for the position of Haverhill Fire Lieutenant. He was not appointed from this Certification. His name then appeared on a second Certification (No. 230912), that was created on October 16, 2003. He was also not appointed from this Certification. Finally, his name appeared on a third Certification (No. 231131) that was created on December 12, 2003. This is the Certification from which Mr. Weinburgh was actually promoted to the position of lieutenant. The captain's promotional examination was administered on November 20, 2004. In its decision, the Court stated in relevant part that: "In the summer of 2003 … Weinburgh was certified for the position of fire lieutenant and placed on the fire lieutenant promotion list. After officially being appointed to this position on December 21, 2003, [Weinburgh] filed a bypass appeal with the [Commission]." The Court ultimately concluded that since Mr. Weinburgh's name was certified in the "summer of 2003", he was eligible to sit for the promotional examination that was held more than one year later, on November 20, 2004. Although the record before the Court did not clearly delineate that Mr. Weinburgh was not actually promoted from the August 28, 2003 certification, I reasonably infer that it would not have altered their conclusion, given their reasoning that "certification" was a mere "administrative landmark." Mr. Weinburgh took and passed a civil service examination for the lower qualifying title of lieutenant and his name was "certified" for this qualifying title on August 28, 2003. Although he was not promoted from this Certification, this is the Certification that the Appeals court relied on in deciding that he met the statutory 1-year requirement."

As stated above, the Court not only referenced the actual definition of a Certification, but then identified the actual Certification (Summer 2003) upon which Mr. Weinburgh's name first appeared, clearly distinguishable from the date that his name first appeared on an eligible list, which was May 13, 2012.

More generally, acceptance of the Appellants' definition of when a name becomes certified would effectively re-write the civil service law and potentially upend the entire appointment and promotion process which depends on highly consequential distinctions between "eligible list" and "certification".

G.L. c. 31, § 1 defines "Eligible List" as:

> "a list established by the administrator, pursuant to the civil service law and rules, of persons who have passed an examination; or a re-employment list established pursuant to section forty; or a list of intermittent or reserve fire or police officers as authorized under the provisions of section sixty;

> or any other list established pursuant to the civil service rules from which certifications are made to appointing authorities to fill positions in the official service."

There is nothing in this definition that states or suggests that the establishment of an eligible list is equivalent to "certification". In fact, the definition actually distinguishes the two processes by stating " … *from which certifications are made* to appointing authorities to fill positions in the official service."

The distinction between the two processes is further stated in the definition of "Certification".

G.L. c. 31, § 1 defines "Certification" as:

> "the designation to an appointing authority by the administrator of sufficient names from an eligible list or register for consideration of the applicants' qualifications for appointment pursuant to the personnel administration rules."

In summary, Section 59 states in relevant part that:

> "no such examination shall be open to any person who has not been employed in such force for at least one year after certification in the lower title or titles to which the examination is open."

Section 59 does not state, nor was it intended to mean, that a person is eligible to take a promotional examination one year after the person's name appeared on an eligible list. That is clear from the plain meaning of the statute and the recent Court decisions regarding this matter.

*Conclusion*

For all of the above reasons, HRD's Motion for Summary Decision is allowed and the Appellants' appeals under Docket Nos. B2-13-288 and B2-13-290 are hereby *dismissed.*

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Civil Service Commission

/s/Christopher C. Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on August 7, 2014.

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 this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice:
Stephen O'Donoghue (Appellant)
Brue Trieu (Appellant)
Ernest Law, Esq. (for HRD)
Janet S. Petkun, Esq. (for City of Quincy)