

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

**SUFFOLK, ss.**

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

**STEPHEN P. O'NEILL,**  
Appellant

v.

**CASE NO: G2-08-97**

**CITY OF LOWELL &  
HUMAN RESOURCES DIVISION**  
Respondents

Appellant's Attorney:

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Assonet, MA 02702

Appointing Authority's Attorney:

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HRD's Attorney:

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Commissioner:

Paul M. Stein

**DECISION ON HRD'S MOTION TO DISMISS**

The Appellant, Steven P. O'Neill, acting pursuant to G.L.c.31,§2(b), asserts an appeal against the City of Lowell (Lowell) and the Massachusetts Human Resources Division (HRD), challenging his education and experience scoring on the October 20, 2007 police promotional examination and claiming that the examination was not a "fair test". The Appellant also requests that the Commission conduct an investigation of the merits of the examination pursuant to the authority of G.L.c.31,§2(a). HRD filed Motions to Dismiss both the Section 2(b) appeal and the Section 2(a) investigation request, which motions the Appellant opposed. A telephone conference hearing on the motions was held by the Civil Service Commission (the Commission) on December 8, 2008.

## **FINDINGS OF FACT**

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

1. The Appellant, Stephen P. O'Neill is a tenured civil service employee in the position of Police Sergeant with the Lowell Police Department. (*Claim of Appeal*)

2. On October 20, 2007, HRD administered a statewide civil service police promotional examination for the ranks of Police Sergeant, Police Lieutenant and Police Captain (2007 Police Promotional Exam). Sergeant O'Neill sat for the 2007 Police Promotional Exam for the rank of Police Lieutenant in the Lowell Police Department (2007 Police Promotional Exam). (*HRD 2(b) Motion; Appellant's Opposition*)

3. On the date of the 2007 Police Promotional Exam, Sergeant O'Neill completed and submitted the education and experience component of the examination, claiming two points to be added to his score for training and experience credit. (*Claim of Appeal*)

4. On December 29, 2007, HRD mailed notice to Sergeant O'Neill containing his examination score and examination answer key. (*HRD 2(b) Motion*)

5. By letter dated January 12, 2008, received by HRD on or about January 17, 2008, the Appellant requested that HRD review his education and experience score and his claim that the 2007 Police Promotional Exam was not a "fair test" because allegedly over 20% of the examination questions had been determined by HRD to be flawed. (*HRD 2(b) Motion; Claim of Appeal*)

6. On March 3, 2008, HRD mailed written notice to the Appellant that HRD had determined that his education and experience score was correct and explained the reasons for that conclusion. (*HRD 2(b) Motion*)

7. On March 6, 2008, HRD mailed written notice to the Appellant that HRD denied his “fair test” review because it was untimely. (*HRD 2(b) Motion; Appellant’s Opposition*)

8. On April 25, 2008, the Appellant filed the present appeal with the Commission. (*Claim of Appeal*)

9. On or about May 29, 2008, the Commission received letters from eleven persons (five of whom reside with Sergeant O’Neill and six other residents of Tyngsborough or Lowell), stating that they are registered voters and “demanding pursuant to c.31, §2(a)” that the Commission “forthwith conduct an investigation into the testing process concerning the Lowell Police Sergeants examination administered on October 20, 2007.” (*Section 2(a) Letters*)

## **CONCLUSION**

### **Appellant’s Section 2(b) Appeal**

Sergeant O’Neill’s Section 2(b) appeal from the “decision” of HRD denying his request for review of his education and experience score and his claim that the 2007 Police Promotional Exam was not a “fair test” are governed by Sections 22 through 24 of the Civil Service Law, G.L.c.31, § 22-24. These statutes prescribe a specific process, with specific deadlines that must be complied with in order to press any such appeals.

In particular, Section 22 provides:

“An applicant may request the administrator to conduct a review of whether an examination taken by such applicant was a fair test of the applicant’s fitness

actually to perform the primary or dominant duties of the position for which the examination was held, provided that such request shall be filed with the administrator no later than seven days after the date of such examination.”

As to a review of the marking of an applicant’s training and experience, G.L.c.31, Section 24 prescribes that such a request “. . . 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 . . .”<sup>1</sup> No appeal to the Commission may be taken if these time limits have not been complied with. G.L.c.31, §24, ¶2. See Robbins v. Town of Mansfield, 21 MCSR 244, 245 (2008) (failure to request a “fair test” review from HRD within 7 days of exam)

Here, although the Appellant’s January 12, 2008 request to HRD is deemed timely as to the review of his training and experience score, it is plainly untimely as to the “fair test” review. The Appellant argues that the basis for his fair test review is the number of examination questions (approximately 20% of the total number of questions) that HRD determined to be faulty, which he claims he could not possibly have known within seven days of taking the examination. Although the Appellant’s logic is not without reason, the Commission cannot bend a clear statutory filing requirement. The Commission also takes note that the short time limit for making a “fair test” objection clearly took into account the implications that such a review could have, possibly leading to considerable upheaval if it were determined that the examination was not a “fair test” and should be cancelled and all the applicants retested. The Appellant’s Section 2(b) “fair test” appeal must be dismissed as untimely.

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<sup>1</sup> This seventeen day rule also applies to review of “the marking of the applicant’s answers to essay questions” and to “a finding that the applicant did not meet the entrance requirements for appointment to the position.” G.L.c.31, §24.

While the Appellant’s training and experience claim meets the threshold timing requirement for submission to HRD under Section 22, that claim also founders as untimely because it was not filed with the Commission within the required seventeen days following the mailing of HRD’s notice to the Appellant of its decision that the education and experience score given to the Appellant was correct. Section 24 expressly requires that such an appeal also “shall be filed no later than seventeen days after the date of mailing of the decision of the administrator.” G..L.c.31,§24,¶1.

Although the first paragraph of Section 24, concerning examination-related appeals to the Commission does not expressly refer to “training and experience” appeals, the second paragraph of Section 24 does (as does Section 22), which leads the Commission to conclude that the Legislature must have intended that the same filing requirements are intended to apply to all four of the specific types of examination-related appeals to which appeal to the Commission is permitted, and decides that such a deadline is to be implied by implication from the overall statutory scheme. Moreover, as HRD points out, if the seventeen day rule only applies to the other three types of examination-related appeals, then, in the absence of a statutory deadline, the default 30-day deadline in the Commission’s rules applies. 801 CMR 1.01(6)(b). Either way, the Appellant’s education and experience appeal was not filed with the Commission within the prescribed time and must be dismissed.<sup>2</sup>

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<sup>2</sup> HRD also points out that even if the additional points requested by the Appellant were added to his education and experience score, because of the weight given to that component and the procedure that requires rounding of final weighted scores to the closest whole number, the Appellant’s final score would still be 88, which is the score he has been awarded. (*HRD 2(b) Motion*) The Appellant has not contested this point.

Request for Section 2(a) Investigation

G.L.c.31, Section 2(a) provides:

“In addition to its other powers and duties, the commission shall have the following powers and duties: (a) To conduct investigations at its discretion on upon the written request of the governor, the executive council, the general court or either of its branches, the administrator, an aggrieved person, or by ten persons registered to vote in the commonwealth.”

Although the Appellant (and the eleven registered voters) characterize the Section 2(a) request for a Commission investigation as a purportedly mandatory “demand”, the Commission construes the statute to grant it considerable discretion in whether, and if so, in what manner, and to what extent, it may elect to conduct any investigation of matters concerning civil service law and rules. See “Memorandum and Decision” in Boston Patrolmen’s Association v. Massachusetts Civil Service Commission, Suffolk C.A. SUCV2006-4617; SUCV2007-1220 (Mass.Sup.Ct. December 18, 2007) (Brassard, J.), *affirming*, Commission’s Response to Petition for Investigation Filed By Boston Police Patrolman’s Association, CSC Docket No. I-07-34 (2007) (“The plaintiffs here also urge that their request to seek an investigation was improperly denied. Judgment should enter for the defendants on this issue . . . . [W]hile the statute certainly does not require that a petition for investigation need only be made by an aggrieved person, the statute, in my view, can only be fairly read to confer significant discretion upon the Civil Service Commission in terms of what response and to what extent, if at all, an investigation is appropriate.”); cf. Boston Police Superior Officers Federation v. Civil Service Commission, 35 Mass.App.Ct. 688,693-94, 624 N.E.2d 617, 620-21 (1993) (construing Commission’s discretion and authority to conduct a de novo hearing on a “fair test” appeal)

The Commission is not persuaded, on the allegations presented, that formally initiating an investigation of the fairness of the 2007 Police Promotional Exam would be a fruitful and appropriate use of the limited resources available to the Commission and HRD at this time. The Commission notes that any specific relief that the results of such an investigation might provide would be likely to impact all police officers on the current eligibility list created from that examination, and the many municipalities who make, and presumably already have made, many police promotional appointments based on the presumed validity of that list. The bar for granting such relief, if any, would be set particularly high by this Commission.

Nevertheless, the alleged fact that more than 20% of the questions on the 2007 Police Promotional Exam were deemed flawed in some respect certainly does raise a legitimate issue of concern to the Commission as to the level of quality control that HRD receives for the quite considerable sums expended to prepare and administer these examinations. While a so-called “defect rate” of 20% may not rise to the level of proof necessary in a “fair test” appeal (as a 50% defect rate surely would), the allegations are at least significant enough to raise an eyebrow.

Accordingly, the Commission urges HRD to take all appropriate measures to assure that public safety civil service examinations are conducted according to the highest practicable standards that provide, with reasonable professional certainty, that the number of rejected or double-keyed questions have been, or will be, reduced to the lowest possible level in all future examinations. In addition, in order to facilitate this goal, the Commission requests HRD to confer with the Commission as soon as practicable with a view to providing the Commission with the information necessary to fully understand the

relevance and perspective of the so-called “defect rate” in the 2007 Police Promotional Exam (i.e. the number of such rejected or “double-keyed” questions) to the fairness of the administration of that test and to the public safety civil service examination process, generally. The Commission will not initiate the Section 2(a) investigation requested by the Appellant (or the eleven registered voters) at the present time. The Commission, however, reserves the right to initiate such a Section 2(a) investigation on its own initiative or as otherwise called for by the statute, should the Commission receive information on the subject that, in its discretion, warrants doing so at any time in the future. See, e.g., Antonowitch v. Civil Service Commission et al, SUCV1995-1565 (Mass.Sup.Ct.) (Botsford, J.), 9 MCSR 6 (1996) (Section 2(a) investigation of practices affecting custodians in school department); Donahue et al v. Weymouth, 20 MCSR 424 (2007)(dismissing Section 43 termination claims of provisional employee for lack of jurisdiction but initiating Section 2(a) investigation of town reorganization plan; cf. PAR.01 (“The Civil Service Commission is an administrative appellate forum authorized to investigate all aspects of administration and implementation of the civil service system on its own initiative or upon request of others, as specified in M.G.L.c.31,§2(a)”)

Accordingly, the Section 2(b) appeal of the Appellant, Stephen P. O’Neill, in this matter, and the Appellant’s Section 2(a) request for an investigation (as well as the parallel request of the eleven registered voters) are hereby *dismissed*.

Civil Service Commission

Paul M. Stein  
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on December 11, 2008.



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)(l), 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:

Patrick Michael Rogers, Esq. (for Appellant)

Kimberley A. McMahon, Esq. (for Appointing Authority)

Martha Lipchitz O'Connor, Esq. (for HRD)