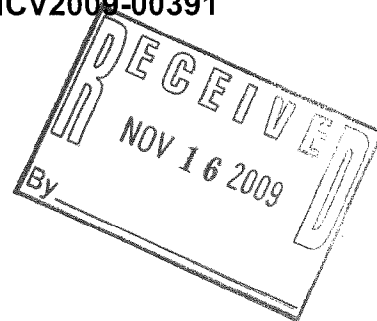


Commonwealth of Massachusetts
County of Middlesex
The Superior Court

Civil Docket MICV2009-00391

RE: O'Neill v Civil Service Commission et al

TO: Iraida J Alvarez, Esquire
Mass Atty General's Office
1 Ashburton Place
20th Floor
Boston, MA 02108-1698



CLERK'S NOTICE

This is to notify you that in the above referenced case the Court's action on **11/12/2009**:

RE: Motion of plaintiff for judgment on the pleadings, with supporting memorandum and certificate of service

is as follows:

Motion (P#8) Plaintiff's motion for judgment on the pleadings is Denied and the Civil Service Commission's dismissal of plaintiff's appeal is Affirmed. See memorandum of decision and order dated November 12, 2009. By the Court (Paul A. Chernoff, Justice). Notices mailed 11/13/2009

Dated at Lowell, Massachusetts this 13th day of November, 2009.

Michael A. Sullivan,
Clerk of the Courts

BY:

Michael Brennan
Assistant Clerk

Telephone: 978-453-0201

Copies mailed 11/13/2009

Commonwealth of Massachusetts
County of Middlesex
The Superior Court

CIVIL DOCKET# MICV2009-00391

Stephen P O'Neill

vs

Civil Service Commission,
Human Resources Division Division Of The Executive Office Of,
City Of Lowell

JUDGMENT

This matter came before the Court, Paul A. Chernoff, Justice, presiding, on the Plaintiff's Motion for Judgment on the Pleadings, and said motion having been denied and in accordance with the Memorandum of Decision and Order dated November 12, 2009,

It is hereby ORDERED and ADJUDGED:

The Plaintiff's motion for judgment on the pleadings is **DENIED** and the Civil Service Commission's decision is **AFFIRMED**.

Dated at Lowell, Massachusetts this 12th day of November, 2009.

Michael A. Sullivan,
Clerk of the Courts

Approved as to Form:
By the Court,

(Paul A. Chernoff)

Justice of the Superior Court

Entered:

Copies mailed:

By: *Carole M. Errico*
Assistant Clerk

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 09-0391

10

STEPHEN P. O'NEILL

v.

CIVIL SERVICE COMMISSION and another¹

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S
MOTION FOR JUDGMENT ON THE PLEADINGS**

The plaintiff, Stephen P. O'Neill (O'Neill), brought this action pursuant to G. L. c. 30A, § 14, seeking review of the Civil Service Commission's (Commission) dismissal of several appeals filed by O'Neill challenging the October 20, 2007 administration and scoring of the police promotional civil service examination. In accordance with Standing Order 1-96, O'Neill filed this motion for judgment on the pleadings. For the following reasons, O'Neill's motion for judgment on the pleadings is **DENIED** and the Civil Service Commission's dismissal of O'Neill's appeals is **AFFIRMED**.

BACKGROUND

Given the technicalities of the Civil Service statutory appeals framework, the following chronology is laid out here for ease of reference:

October 20, 2007	Promotional Examination
December 29, 2007	Exam results mailed to applicants
January 12, 2008	O'Neill submitted request for fair test review and review of training and experience score

¹ Human Resources Division

March 3, 2008	HRD sent notice that the training and experience score would not be changed
March 6, 2008	HRD mailed out notice that the fair test review was denied as untimely because it was not filed within seven days of the exam
April 23, 2008	O'Neill filed appeal to Civil Service Commission challenging the affirmation of his training and experience score and the denial of his request for a fair test review
May 29, 2008	HRD filed motion to dismiss O'Neill's appeal. O'Neill amended his complaint to include a §2(a) request for an investigation by eleven registered voters
December 8, 2008	Telephone conference on motion to dismiss
December 11, 2008	Commission issued decision dismissing O'Neill's claim
December 16, 2008	O'Neill moves for reconsideration
January 9, 2009	Commission denied motion to reconsider

O'Neill is a police sergeant employed by the City of Lowell, Massachusetts. On October 20, 2007, he participated in the statewide police promotional civil service examination, seeking a promotion to lieutenant.² In addition to completing the exam, O'Neill submitted a request for credit for his training and experience. On December 29, 2007, the Commission mailed exam results. O'Neill received his exam results, which included his exam score, his training and experience score and an answer key. The answer key indicated that 22.5%, or 18 out of 80, of the questions in the sergeant's portion of the exam (questions 1-80) were faulty, 20%, or 20 out of 100, of the questions in the lieutenant's portion (questions 1-100) were faulty, and 19.16%, or

² The exam consists of three parts. Questions 1-80 must be answered by all applicants. In addition, applicants for a lieutenant promotion must answer questions 81-100. Applicants for captain must answer an additional set of questions, numbers 101-120.

23 out of 120, of the questions in the captain's portion (questions 1-120) were faulty.³

O'Neill believed that the high fault rate of the questions rendered the exam unfair, and on January 12, 2008, he submitted a written request for a "fair test" review by the Commission's administrator pursuant to G. L. c. 31, § 22. On the same day, he also submitted a request for a review of his training and experience score, which he believed had been improperly calculated. On March 3, 2008, the Human Resources Division (HRD) mailed written notice to O'Neill that his training and experience score was properly calculated and would not be changed. On March 6, 2008, HRD mailed written notice to O'Neill that his fair test review request was denied because it was not filed within seven days of the date of the exam administration, as required by G. L. c. 31, § 22.

On April 23, 2008, O'Neill filed an appeal with the Civil Service Commission pursuant G. L. c. 31, § 2(b), challenging HRD's affirmation of his training and experience score and its denial of his request for a fair test review. O'Neill also requested an investigation on the merits of the police promotional examination administered on October 20, 2007. The Commission sent written notice to O'Neill confirming that it received his appeal on April 25, 2008.

On May 29, 2008, HRD filed a motion to dismiss O'Neill's § 2(b) appeal on the grounds that it was untimely, O'Neill was not an aggrieved person, and the Commission did not have jurisdiction. Also on May 29, 2008, O'Neill amended his complaint to include a request by eleven registered voters for an investigation by the Commission into the police promotional exam, pursuant to G. L. c. 31, § 2(a). O'Neill submitted eleven supporting affidavits from

³ The questions that did not evoke the correct response from applicants were determined to be faulty and were either discarded or double-scored.

registered voters. The Commission conducted a telephone conference hearing on the motion to dismiss on December 8, 2008. On December 11, 2008, the Commission issued its decision dismissing O'Neill's claims. O'Neill filed a motion for reconsideration on December 16, 2008, which was denied on January 9, 2009. O'Neill appealed from the final decision of the Commission to this court pursuant to G. L. c. 30A, § 14.

DISCUSSION

Under G. L. c. 30A, § 14(7), this court may reverse, remand, or modify an agency decision if the substantial rights of any party may have been prejudiced because the agency decision is based on an error of law or on unlawful procedure, arbitrary and capricious, or unwarranted by the facts found by the agency and unsupported by substantial evidence. The petitioner bears the burden of demonstrating the invalidity of the agency's decision. See Merisme v. Board of App. on Motor Vehicle Liab., 27 Mass. App. Ct. 470, 474 (1989). In reviewing an agency decision, the court is required to give "due weight to the experience, technical competence and specialized knowledge of the agency, as well as to the discretionary authority conferred on it." Flint v. Commissioner of Pub. Welfare, 412 Mass. 416, 420 (1992) (quoting G. L. c. 30A, § 14(7) (1990 ed.)).

O'Neill argues that the Commission erroneously interpreted and applied G. L. c. 31, §§ 2(a), 2(b) and 24. "[W]here the Legislature has delegated its decision making authority [to an agency]," the court will defer to the expertise of the agency. See Cambridge v. Department of Telecomm., 449 Mass. 868, 875 (2007). The agency under review "has considerable leeway in interpreting a statute it is charged with enforcing." Martinez v. Commissioner of Pub. Welfare,

397 Mass. 386, 392 (1986). An agency's interpretation of its related regulations should only be overturned if it is unreasonable. Id.

A. O'Neill's § 2(b) Appeals

The Commission dismissed O'Neill's § 2(b) appeal as untimely because he did not file his appeal of HRD's decision on his fair test review request and training and experience score within seventeen days. Section 2(b) permits an "aggrieved person" to appeal a decision, action or inaction of the administrator, "except as limited by the provisions of section twenty-four relating to the grading of examinations." Under § 24, an appeal from a decision of the administrator regarding:

"(a) the marking of the applicant's answers to essay questions; (b) a finding that the applicant did not meet the entrance requirements for appointment to the position; or (c) a finding that the examination . . . was a fair test . . . shall be filed no later than seventeen days after the date of mailing of the administrator's decision."

1. Fair test review request

HRD initially denied O'Neill's fair test review request because he did not file it within seven days of the exam administration, as required by G. L. C. 31, § 22. This court does not agree that the seven day filing limit begins running from the date of the exam in the present situation, because the applicant could not know the number of faulty questions until he receives his answer key. In that situation, due process would seem to impose a discovery rule, in which the time limit begins at the time the applicant knew or should have known of the facts giving rise to his fair test challenge. Thus, O'Neill would be required to file his fair test review request within seven days of December 29, 2009, or by January 7, 2009. O'Neill did not file his request until January 12, 2009.

Regardless of the propriety of HRD's fair test denial, this court cannot not consider the merits of O'Neill's appeal where he failed to file the appeal with the Commission within seventeen days of the date of the mailing of HRD's decision, as required by G. L. c. 31, § 24. O'Neill does not contend that he complied with the seventeen day deadline, nor does he contend that the seventeen day time limit does not apply. Thus, the Commission's dismissal of his fair test request appeal must be **AFFIRMED**.

2. Training and experience score appeal

The Commission denied O'Neill's training and experience score appeal, in part, on the grounds that he did not file his appeal within seventeen days of receiving HRD's decision, pursuant to G. L. C. 31, § 24. O'Neill claims that § 24 does not apply to training and experience score appeals because the first paragraph of § 24 lists three subject of appeals to which it applies, but does not list training and experience. The second paragraph of § 24, however, does refer to training and experience appeals:

"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."

The Commission held that the inclusion of training and experience in the second paragraph 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. Because O'Neill filed his § 24/§ 2(b) appeal fifty-one days after receiving notice from HRD, the Commission dismissed his appeal.

As explained above, this court may only overturn an agency's interpretation of its statutes and regulations if it is unreasonable. Martinez, 397 Mass. at 392. The Commission's reading of

§ 24 to include training and experience appeals is reasonable, and the statute cannot be fairly read any other way. The inclusion of training and experience in the second paragraph is unnecessary and illogical if § 24 does not apply to training and experience appeals. Thus, the Commission's interpretation of § 24 and its dismissal of O'Neill's § 2(b) appeal on his training and experience score is **AFFIRMED**.

B. Ten Registered Voters § 2(a) Request for Investigation

In addition to his § 2(b) appeal, O'Neill also submitted eleven affidavits from registered voters requesting the Commission to investigate the October 20, 2007, police promotional examination, pursuant to G.L. c. 31, § 2(a). The Commission denied the voter's request because it opined that there was insufficient information to warrant an investigation. The Commission nonetheless acknowledged that the default rate on the exam questions was grounds for concern, and urged HRD to take appropriate measures to address concerns surrounding the October 20, 2007 exam. O'Neill appeals from the Commission's denial and disputes its interpretation of § 2(a), contending that the Commission does not have discretion to deny a request for an investigation when made by ten registered voters.

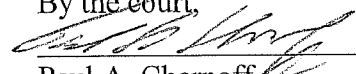
Section 2 states: "[T]he commission shall have the following powers and duties: (a) To conduct investigations at its discretion or upon written request of the governor, the executive council, the general court or either of its branches, the administrator, an aggrieved person, or by ten persons registered to vote in the commonwealth." The Commission read this provision to give it discretionary power to investigate, regardless of who requests the investigation. This court, Brassard, J., previously agreed with this interpretation of § 2(a) in Boston Police Patrolmen's Association, et. al. v. MA Civil Service, et. al., Mass. Super. SUCV-07-1220 (Dec.

18, 2007). Judge Brassard stated “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.” *Id.* This court agrees, and holds that the Commission’s interpretation of § 2(a) is reasonable. The statute gives the Commission the power to initiate an investigation upon request from the eleven registered voters, but does not require it to do so. Therefore, the Commission’s dismissal of the § 2(a) request is **AFFIRMED**.

ORDER

For the above reasons, the plaintiff’s motion for judgment on the pleadings is **DENIED** and the Civil Service Commission’s decision is **AFFIRMED**.

By the court,



Paul A. Chernoff
Justice of the Superior Court

Date: November 12, 2009

Entered: November 13, 2009.