

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

**One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900**

**VICTOR PAIVA,
SCOTT FINKLE,**

Appellants.

**B2-18-038 (Paiva)
B2=18-039 (Finkle)**

v.

HUMAN RESOURCES DIVISION

Respondent

and

DEPARTMENT OF CORRECTION

Participant

Appearances for Appellants:

Victor Paiva, Scott Finkle, Pro Se

Appearances for Respondent:

Melissa A. Thomson, Esq.
Labor Counsel
Human Resources Division
100 Cambridge Street – Suite 600
Boston, MA 02114

Appearance for DOC:

Joseph Santoro, Labor Relations Advisor
Norman Chalupka, Jr., Esq.
Department of Correction
PO Box 946 – Industries Drive
Norfolk, MA 02056

Commissioner:

Paul M. Stein

DECISION (CORRECTED)

The Appellants, Victor Paiva and Scott Finkle (collectively, the Appellants) are Lieutenants employed with the Massachusetts Department of Correction (DOC) who brought these appeals from decisions by the Massachusetts Human Resources Division (HRD) denying their respective

requests for review of the results of the 2017 promotional examination for DOC Captain.¹ After pre-hearing conferences on March 27, 2018 and April 17, 2018 on the Appellants' appeals, together with the related appeals of two other DOC Lieutenants, the Commission held a consolidated hearing before me on February 12, 2019 to consider a series of Motions for Summary Decision filed by HRD in each respective appeal. By Decision dated September 12, 2019 (as corrected), the Commission allowed HRD's Motions for Summary Decision in the two related appeals and those appeals were denied. As to the Appellants' appeals, the Commission allowed HRD's Motions for Summary Decision, in part; denied the motions, in part, and ordered the appeals of Lt. Paiva and Lt. Finkle to proceed to a full evidentiary hearing on a limited issue:

. . . [W]hether or not the 2017 DOC Captain's examination and/or the Technical Knowledge component thereof, constituted a fair test of the fitness to become a DOC Captain consistent with basic merit principles of civil service law, notwithstanding the use of a rescaled Technical Knowledge score in determining that Lt. Paiva and Lt. Finkle failed to achieve a passing Overall Test Score."

Pursuant to 801 CMR 1.00(9)(e), the Department of Correction was granted participant status for purposes of further proceedings in these two appeals. See Paiva et al v. Massachusetts Human Resources et al, 32 MCSR xxx (2019) [*Paiva I*]²

On November 19, 2019, I conducted a full evidentiary hearing on the "fair test" issues. Thirty-two (32) exhibits were introduced in evidence (*Exhs.1 through 32*). On January 31, 2020, HRD filed the "Respondent HRD's Proposed Decision" and an "Affidavit of Brianna Ward" (*Ward Aff't*), and "The Appellants Post Technical Knowledge Examination Full-Hearing Brief". For the reasons stated below, the Appellants' appeals are denied.

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

²The Appellants filed a Motion for Reconsideration of the Commission's Decision which the Commission denied. The Appellants then duly filed an appeal of the *Paiva I* Decision to the Superior Court, where the matter has been stayed, subject to further order of the Superior Court.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of Jay Silva, PhD (PSI Enterprises) and Briana Ward (Deputy Director of Civil Service), and taking administrative notice of all matters filed in the case and pertinent law, as well as the reasonable inferences from the credible evidence, a preponderance of the evidence establishes these facts:

Findings Incorporated From *Pavia I*

1. On December 10, 2015, following an investigation by this Commission, and after many years without HRD or DOC having administered a promotional examination for the position of Correction Officer IV (DOC Captain), this Commission ordered, among other things, that: “[f]orthwith, HRD and DOC shall take all necessary steps to: a) create a promotional examination for the position of Captain at DOC; and b) create an eligible list of candidates for the position of Captain that will be used to make promotional appointments to the position of Captain at DOC.” (*See In Re: Mograss et als, CSC Tracking No. I-14-304, 28 MCSR 601 (2015)*)

2. Pursuant to the Commission’s orders, HRD delegated the administration of a DOC Captain’s promotional examination to DOC, which hired E.B. Jacobs, an outside vendor to develop and administer the examination, with HRD’s verbal approval but without the execution of any formal written delegation agreement. (*Paiva I; Testimony of Silva*)³

3. The DOC Captain’s Examination consisted of three components: (A) a Technical Knowledge (TK) component consisting of a written multiple-choice test administered on July 22, 2017; (B) an Assessment Center (AC) component consisting of a Written Work Sample (WWS), administered on October 11, 2017 and two (2) Oral Boards (OBs), administered in November, 2017; and (C) a Career Experience Board (CEB) component also administered in November, 2017. (*Paiva I*)

³ In 2017, E.B.Jacobs was acquired by PSI Services, LLC (*Testimony of Dr. Silva*)

4. The DOC Human Resources Bulletin announcing the 2017 Captain's Exam stated, in part:

WEIGHTS: Applicants must get a passing mark on each of the weighted components in order to receive an overall (general average) examination score the examination weights are: 35% Technical Knowledge Examination; 50% Assessment Center; 15% Career Experience Board.”

All eligible candidates who sign up to take the DOC Captain promotion exam and remain in good standing will be permitted to attend and complete the Written Technical Knowledge Test. A cut score will be established and candidates who fail to meet that score will not be eligible to proceed to the final two (2) phases of the examination.”

(Paiva I; Exh.14)

5. All candidates received a Candidate ID number for use during all testing components. DOC maintained a master list of candidates' names and Candidate ID numbers, but no other form of personal identification was recorded on testing materials or provided to the test vendor until after all test components were administered and scored. In particular, the TK were computed entirely “blindly” by the vendor's assessors. *(Paiva I)*

6. The TK Test was a closed-book exam consisting of one hundred (100) multiple choice questions designed to assess the candidates' “understanding of job-related technical knowledge of the job [of a DOC Captain]”. The 2017 Captain's Examination TK exam preparation guide stated: “Your score on the Closed Book Written Technical Knowledge Test will be based upon the number of test questions/items you answer correctly. Thus, the more items you answer correctly, the higher your Technical Knowledge Test score.” No mention of rescaling the numerical scores was mentioned in the pre-test materials. *(Paiva I; Exh.1)*

7. By form letter from DOC dated August 14, 2017, candidates received notice of their scores on the TK test component (which ranged from the maximum score of 100 (for 100

correct answers to 46 (out of 100) correct answers. The letter to each candidate stated, in part: “[Y]ou received a [numerical score] on the Technical Knowledge portion of the promotional exam. The result of this exam will serve as 35% of your overall score.” All candidates, regardless of score, were allowed to proceed to the next two stages of the examination. No mention of rescaling the numerical scores was mentioned. (*Paiva I; Exhs.10 & 11*)

8. The Appellants were informed that their TK test scores were as follows:

- Victor Paiva – 59 (out of 100)
- Scott Finkle – 56 (out of 100)

(*Paiva I; Exhs12 & 13*)

9. On or about January 3, 2018, all candidates who took the Captain’s Examination received a DOC e-mail with a “CANDIDATE SCORE REPORT”.⁴ This document stated, in part:

“As described in the candidate preparation guide, your score for this examination is comprised of three components with the following weights:

Technical Knowledge (TK) Score:	35%
Assessment Center (AC) Score:	50%
Career Experience Board (CEB) Score:	15%

“You previously received your raw score on the Technical Knowledge Test which corresponded to the number of items correct out of 100. To ensure that each test component carried the proper weight in determining your final position on the promotion list, your component scores (TK, AC and CEB) were rescaled to be out of 35, 50 and 15 points, respectively. The 50 points for the AC was computed as 20 points for the Written Work Sample and 30 points for the Oral Boards. You can confirm your rescaled TK score using the chart on the right side of this page. Simply look up your raw TK score in the first column and find the corresponding scaled TK score in the second column.”

“To pass this test you needed to score 70 or higher on your Overall Test Score.”

Candidates had no previous notice that the TK scores would be “rescaled.” This report was also the first notice that an Overall Test Score of 70 would be required to pass. (*Paiva I; Exhs 12 & 13*)

⁴ Hard copy of the CANDIDATE SCORE REPORT was also transmitted by first class mail postmarked 1/3/18. (*Paiva I*)

10. The RAW TK column ran from 100 down to 46; the corresponding RESCALED TK column ran from 35.00 (for a RAW TK of 100) down to 14.19 (for a RAW TK of 46). Thus, the rescaled TK score of a candidate who answered all 100 multiple choice questions correctly would earn the full 35 points of the total possible Overall Test Score of 100 points; a candidate with 86 correct answers received a rescaled TK score of 29.60 points toward the total possible Overall Test Score; a candidate with 59 correct answers received a rescaled TK score of 19.20 points; a candidate with 46 correct answers received a rescaled TK score of 14.19 points. (*Paiva I; Exhs.12 & 13*)

11. The CANDIDATE SCORE REPORTS for the Appellants stated their respective scores as follows:

Victor Paiva

COMPONENT	YOUR SCORE
Technical Knowledge	19.20* out of 35
Assessment Center	37.95 out of 50
Career Experience	11.98 out of 15
Veteran's Points ⁵	0 out of 2
Overall Test Score	69.12

* = RAW TK score 59

Scott Finkle

COMPONENT	YOUR SCORE
Technical Knowledge	18.04* out of 35
Assessment Center	39.90 out of 50
Career Experience	10.85 out of 15
Veteran's Points	0 out of 2
Overall Test Score	68.80

* = RAW TK score 56

(*Paiva I; Exhs.12 & 13*)

⁵ Lt. Paiva, a veteran, did not receive the 2-point veteran's preference because he did not achieve a passing grade on the examination. (*Paiva I*) See also PAR.14(2) ("In competitive examinations for promotion to any position in the classified civil service, [HRD] shall add two points to the general average mark obtained by any veteran . . . provided such veteran has first obtained a passing mark in said examination").

12. On or about February 22, 2018, the eligible list for DOC Captain was issued, containing forty (40) names. Lts. Paiva and Finkle did not appear on the eligible list as their Overall Test Scores were below the required passing Overall Test Score of 70. (*Paiva I; Exhs. 12 & 13*)

13. Since the eligible list has been in effect, DOC has promoted twenty-nine (29) candidates to the position of Captain, one candidate declined the promotion and one candidate was promoted to a senior management (non-civil service) position. This leaves the following nine Lieutenants on the eligible list:

- One Lieutenant remaining in 27th place (Rounded Score: 74)
- Two Lieutenants (in 32nd place (Rounded Score: 73)
- One Lieutenant in 34th place (Rounded Score: 72)
- Three Lieutenants in 36th place (Rounded Score: 71)
- Two Lieutenants in 39th place (Rounded Score: 70)

(*Paiva I*)

14. On January 3, 2018, Lt. Paiva and Lt. Finkle promptly contacted the DOC's HR department. Lt. Paiva stating, in part:

“Patti. [sic] I receive a score of 59 on the TK part. If you multiply 35% by 59 you get 20.65. Not 19.20. I think this was a mistake. Let me know what you think? Thanks Victor Paiva.”

Lt. Finkle's messages also questioned, among other things, of the calculation of his TK score:

“After some review of my score, I did see a calculation error. On the technical knowledge test I got a score of 56. $56 \times .35(35\%)$ is 19.6”.

(*Paiva I; Exhs.24 & 25*)

15. After unsuccessfully exhausting their administrative remedies for review by DOC, the Appellants requested review of their examination scores by HRD. After such review, as to the use of a Rescaled TK score, rather than the actual Raw TK score (i.e., number of correct answers), HRD determined:

“This is done so that it is easier to compare individual scores; critical when using an examination to determine how qualified individuals are, compared to one another for

promotion. The . . . argument that the math is incorrect is without merit, because it does not take into consideration the standardization of the scores.”

(Paiva I; Exhs3 through 6, 9A & 9B)

16. On March 2, 2018, both Lt. Paiva and Lt. Finkle filed essentially identical appeals with the Commission. Each appeal alleged numerous errors and, in particular, asked the Commission to “correct all exam ‘Fair Test’ inequities prior to certification, and make me whole.” *(Paiva I; Exhs.16 & 17)*

17. By its Decision in Paiva I, the Commission dismissed most of the claims asserted by Lt. Paiva and Lt Finkle, but did find that they had duly filed a timely “fair test” appeal and that, in that one limited respect, their appeal raised disputed issues of fact as to the methodology used to “standardize” the scores for the TK component, that warranted an evidentiary hearing.*(Paiva I)*

Findings After Evidentiary Hearing on the Standardization of TK Scoring

18. At the Commission hearing on November 19, 2019, I heard testimony from Dr. Jay Silva, the Director for Public Safety and Analysis of PSI Services LLC. He holds a Ph.D. in Industrial/Organizational Psychology from the Pennsylvania State University. He was a nineteen-year (19) year employee of E.B. Jacobs when it was acquired by PSI at the end of 2017. He has authored a half-dozen professional articles and has given numerous professional presentations in his field of expertise. *(Exh.27; Testimony of Silva)*

19. In his current position, Dr. Silva directs, manages and executes projects that develop selection and promotional tests for various employers, including, in particular, public safety organizations. He also provides high end statistical analysis expertise and manages statistical and data management staff, He demonstrated that had thoroughly reviewed and he was well-informed about the DOC Captains Examination that was developed and administered by E.B.Jacobs prior to the acquisition of that company by PSI Services LLC. *(Testimony of Silva)*

20. I found Dr. Silva to be a qualified expert in the field of organizational/industrial psychology, and in particular, found him to be qualified to offer expert opinions on the design and administration of public safety promotional examinations and, in particular, the statistical analysis and justification for the decision to use “standardized”, rather than “raw” scores, for determining the final test scores of the candidates on the DOC Captains Examination. (*Exh.27: Testimony of Silva*)

21. In Dr. Silva’s opinion, the DOC TK component “raw scores” were converted into a “rescaled” score through the “widely accepted” statistical process known as standardization which is commonly used in examinations. Dr. Silva testified that approximately 95% of his clients at PSI utilize standardization in the testing process. (*Exhs.27; Testimony of Silva & Ward*)

22. The use of rescaled standardized score versus raw scores serves a number of purposes:

- When examinations include several components that are to be weighted in arriving as a final score, the combining of raw scores may distort the actual “effective” weight given to one or more component scores. For complex, statistical reasons, if the range of variance in scores in one component is significantly different than the range of variance in another component, using “raw” scores will not actually produce the desired “effective” weight for each component (i.e., here 50% Writing Sample and Oral Board; 15% Career Experience; and 35% TK).
- Rescaling enables fixing the overall passing score at a standardized level of 70, which provides a more flexible and equitable “cut-off” in any particular examination than if raw scores, alone, were used. For example, in the case of the Captains Examination, if the raw scores were used, the lowest scoring candidate with an overall rescaled

passing score of 70 would not pass, because his overall score would have been 60 using raw scores.

- Rescaling to a standardizes 100-point scale for each component generally provides a uniform way to compare relative performance by component and overall.

(Exhs.27 through 32; Testimony of Silva) & Ward)

23. Dr. Silva explained that if one imagined that raw scores were placed in rank order on an elastic band from highest to lowest and the band were stretched (equivalent to rescaling to a scale of 100), the absolute distance between the scores would change but the relative order of the scores on the elastic band would stay the same. This analogy corresponds to the type of rescaling performed for the DOC Captains Examination, which was tantamount to stretching the elastic band. The order of candidate scores did not change. *(Exhs.28 through 30; Testimony of Silva)*

24. Fifty-three (53) candidates took the Captains Examination; forty (40) received a “rescaled” passing score of 70, which placed their names on the eligible list for hire. Mr. Paiva and Mr. Finkle were ranked 43rd and 44th, well below the lowest ranked passing candidate. Mr. Silva explained the statistically rational basis for using the 40th position (score 70) as the “cut” score for passing the exam. There is a noticeably larger break between the Overall Total Score of the 40th candidate (70.000) and the 41st candidate (69.43037), as compared to the difference between candidate 40 and candidate 39 (70.01826). *(Exhs.28 through 30; Testimony of Silva)*

25. Also, as noted above, in addition to the statistical justification for the cutoff at the 40th position, overall, approximately 75% of the candidates who took the Captains Examination received a passing grade (40 out of 53), which Dr. Silva believed was “pretty lenient already”. He would not recommend going any lower. In his experience, most employers are reluctant to promote below the top 20% to a senior superior officer position. *(Exh.28; Testimony of Silva)*

26. Finally, Dr. Silva compared the Appellant’s raw scores to the standardized scores:

<u>Candidate</u>	<u>Rescaled</u>	<u>Raw</u>
40 th ranked candidate (lowest passing score)	70.00	60.21
Lt. Finkle	68.80	58.48
Lt. Pavia	69.12	56.77

Thus, if the Appellants’ raw scores were used, each Appellant would fall well below the “cut off” score of the lowest ranking candidate who received a passing grade. (*Exh.32; Testimony of Silva*)

APPLICABLE CIVIL SERVICE LAW

G.L.c.31,§3 directs HRD to “make and amend rules which shall . . . include provisions for . . . (c) Open competitive and other examinations to test the practical fitness of applicants . . .”

Pursuant to this authority, Personnel Administration Rule PAR.06 provides, in relevant part:

PAR.06. EXAMINATIONS

(1) Procedure

- (a) The administrator shall establish procedures for competitive and other examinations to test the practical fitness of applicants.
- (b) The grading of the subject of employment or experience as part of a promotional examination shall be based on a schedule approved by [HRD] which shall include credits for elements of training an experience related to the position for which the examination is held.

(2) Content of Examinations

- (a) All selection procedures shall be practical in character and shall relate directly to those matters which fairly determine the relative ranking of the persons examined based on the knowledge, abilities and skills required to perform the primary duties (critical and frequent tasks) of the position title or occupational group as determined by reliable and representative job information available to [HRD]. Examinations may be assembled or unassembled and may include written, oral, practical or performance tests, training and experience rating . . . other generally accepted selection procedures, or combinations of these, which, in the discretion and judgment of [HRD], are appropriate for the position title or occupational group being tested.

(3) Examination Results

The passing mark for each examination shall be established by [HRD] in accordance with generally accepted selection procedures.

Also, G.L.c.31,§22 provides, in relevant part, that HRD “shall determine the passing requirements of examinations”.

G.L.c.31,§22,¶4 entitles a civil service test candidate to request that HRD “conduct a review of whether an examination . . . 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 [HRD] no later than seven days after the date of such examination.” HRD’s decision on a fair test review may be appealed to the Commission for further limited review by the Commission. G.L.c.31,§22 through §24. *See generally*, Clarke v. HRD, 29 MCSR 1 (2016), *on further appeal*, 30 MCSR 410 (2017); Wilbanks v. HRD, 29 MSCR 22 (2016), *aff’d sub nom Wilbanks v. Massachusetts Civil Service Comm’n*, Suffolk C.A. 2016-0356 (Sup. Ct. 2017)

The Commission has construed the applicable Massachusetts civil service laws and rules to vest HRD with broad, although not unfettered, discretion to determine the technical requirements for competitive civil service examinations, including the type and weight given as credit for training and experience, subject to scrutiny solely when HRD’s decisions, actions or failure to act are devoid of any rational explanation, are not firmly grounded in common sense, have not been uniformly applied, are arbitrary, capricious or otherwise run afoul of basic merit principles of civil service law. *See, e.g.*, Borjeson v. Human Resources Div., 31 MCSR 267 (2018) (Interim Decision), 31 MCSR 297 (Final Decision) (allowing appeal and requiring rescoring of E&E when HRD had arbitrarily changed its long-standing traditional methodology for reasons that were neither “persuasive nor logical”); Clarke v HRD, 29 MCSR 1 (2016) (allowing appeal, in part, to grant education credit when documentation submitted indistinguishable from information previously found sufficient to grant such credit); Merced v. Human Resources Div., 28 MCSR

396 (2015) (affirming HRD’s requirement that university teaching credit required faculty status of adjunct professor or higher); Carroll v. Human Resources Div., 27 MCSR 157 (2014)(deferring to HRD’s technical expertise in defining criteria for educational credit); Cataldo v. Human Resources Div., 23 MCSR 617 (2010) (allowing E&E appeal, in part, for education credit that HRD denied for reasons that could not be reconciled with a reasonable construction of HRD’s examination instructions). See generally, G.L.c.31,§1 (basis merit principles means “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills”, “assuring fair treatment of all applicants” and protecting employees from “arbitrary and capricious actions”); City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 303, rev.den., 426 Mass. 1102 (1997) (decision “is arbitrary and capricious when it lacks any rational explanation.”)

ANALYSIS

After careful review of the evidence presented at the Commission hearing, I conclude that HRD has provided a reasonable justification to use a standardized, rescaled TK component score in calculating the final exam scores of the Appellants on the DOC Captain’s Examination. The sue of such a methodology has been shown to be statistically justified, consistent with general practice, and produced a fair test result.

In particular, standardization of the raw TK scores to achieve the “effective” weights prescribed in the examination materials is a legitimate, statistically-based judgment within the purview of HRD as the entity vested by statute with determining the “passing” scores on civil service examinations. The methodology resulted in a decision to pass an unusually high percentage (75%) of the candidates who took the examination. Also significant is the fact that the rescaling of the TK raw scores did not change the ranking of the candidates scores in that

component. Although it would have been preferable for the examination materials to expressly explain that the TK scores would be standardized, as was done for the other components, I find that omission insufficient to conclude that the examination was not a “fair test.”

Finally, in the case of the Appellants, even if the Commission were to require that their final scores be recalculated using the “raw” TK scores, they would fall short, and even further below, the minimum acceptable passing grade.

CONCLUSION

For the reasons, the ‘fair test’ appeals of the Appellants, Victor Paiva and Scott Finkle, in Docket Nos. B2-18-38 and B2-18-39 are hereby *denied*.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman, Camuso, Ittleman, Stein & Tivnan, Commissioners) on November 5, 2020.

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)(1), 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 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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

Victor Paiva (Appellant)
Scott Finkle (Appellant)
Melissa A. Thomson, Esq. (for HRD)
Joseph Santoro (for DOC)
Norman Chalupka, Jr., Esq. (for DOC)