

COMMONWEALTH OF MASSACHUSETTS

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

**VICTOR PAIVA,
SCOTT FINKLE,**

Appellants

v.

HUMAN RESOURCES DIVISION,
Respondent

and

DEPARTMENT OF CORRECTION,
Participant

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

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
Department of Correction
PO Box 946 – Industries Drive
Norfolk, MA 02056

Commissioner:

Paul M. Stein

DECISION ON REMAND

The Appellants, Victor Paiva and Scott Finkle (collectively, the Appellants), 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 (2017 Captain's Promotional Examination), for which they received a failing score. By Decision dated September 12, 2019 (as corrected), the Commission allowed HRD's Motions for Summary Decision in these appeals, in part; denied the motions, in part; and ordered the Appellants' appeals

to proceed to a full evidentiary hearing on a limited “fair test” issue. By Decision dated November 5, 2020, the Commission entered a final decision which denied the “fair test” appeals. After institution of an action for judicial review filed in the Norfolk Superior Court (Civil Action No. 19-01309), the Superior Court (Cannone, J.), by Memorandum of Decision and Order dated December 1, 2021, affirmed the Commission’s Decision, in part, as to the dismissal of Appellants’ challenge to HRD’s calculation of the Technical Knowledge (TK) Component of the examination and the Appellants’ challenge to other alleged irregularities. The Court, however, allowed the Appellants’ motion for judgment on the pleadings as to their challenge to HRD’s use of an oral Career Experience Board (CEB), rather than the written statement prescribed by G.L. c. 31, § 22, to determine a candidate’s score for Education and Experience (E&E). The Court also denied the motion filed by HRD and DOC to dismiss the Appellants’ Complaint, rejecting the argument that the Appellants’ challenge was moot due to the expiration of the eligible list generated by the 2017 Captain’s Promotional Examination and the issuance of a new eligible list on September 15, 2021 (2021 Captain’s Eligible List). HRD generated the 2021 Captain’s Eligible List after a new examination (2021 Captain’s Promotional Examination) in which all candidates’ E&E scores were calculated in accordance with G.L. c. 31, § 22. Both Appellants took and passed the 2021 Captain’s Promotional Examination and, as such, both of their names appeared on the new subsequent eligible list.¹ The Court remanded the appeal to the Commission to determine a remedy consistent with the Court’s Memorandum of Decision and Order.

Remand Proceedings

After receipt of the Court’s Memorandum of Decision and Order, the Appellants sought an order from the Commission seeking to prevent DOC from making any promotions from the 2021

¹ The Appellant Scott Finkle’s name appears in 32nd place on the 2021 Captain’s Eligible List; the Appellant Victor Paiva’s name appears in 38th place on the 2021 Captain’s Eligible List.

Captain's Eligible List, as well as other forms of relief, pending the Commission's consideration of the appropriate relief to the Appellants consistent with Court's Memorandum of Decision and Order. I declined to grant immediate relief without prejudice.

Following a series of status conferences, the Commission requested and received additional information from the parties which included: (a) HRD's recalculation of what the Appellants' final scores on the 2017 Captains' Promotional Examination would have been had their E&E been calculated according to the method prescribed by G.L. c. 31, § 22; (b) each party's proposed form of relief; (c) notice that, effective January 30, 2022, the DOC had promoted eleven (11) Captains from the new eligible list (all ranked more than 25 places above the Appellants' current rank on the new eligible list); (d) notice of the retirement of the Appellant, Scott Finkle, in October 2021; and (e) notice that prior to the expiration of the 2017 Captain's Eligible List, DOC had promoted 38 of the 40 candidates on that list with scores of 71 or above, leaving only two candidates with the lowest passing scores of 70 left on the list when it expired.

On March 3, 2022, I held a final status conference and motion hearing on the Appellants' pending motions and reviewed the plans for relief proposed by the parties.² I requested that HRD provide additional calculations, similar to what it provided for the Appellants, showing what the E&E scores would have been for the five additional candidates who took both the 2017 Captain's Promotional Examination and the 2021 Captain's Promotional Examination, given that HRD represented it had sufficient information from those candidates to permit it to make such calculations.³ I received the requested additional calculations from HRD on March 14, 2022. On

² The final status conference and motion hearing was held by remote video conference (Webex) and audio/video recorded. A link to the recording was provided to the parties.

³ HRD had the information to make these recalculations for the two Appellants and the five other candidates who took both examinations because these candidates had supplied the information as part of their submission of E&E data for the 2021 Captain's Promotional Examination and HRD was able

that same date, I received the Appellant’s objections to the use of those calculations unless HRD also recalculated the entire 2017 Captain’s Eligible list by determining the E&E scores of all 38 other candidates who took the 2017 Captain’s Promotional Examination (but did not take the 2021 Captain’s Promotional Examination).

Analysis

HRD’s recalculations of what the Appellant’s final scores on the 2017 Captain’s Promotional Examination would have been if their E&E had been calculated according to the method prescribed by G.L. c. 31, § 22 are as follows:

<u>Appellant</u>	<u>CEB Score</u>	<u>Final Score</u>	<u>Recalculated E&E</u>	<u>Recalculated Final Score</u>
PAIVA	11.97610	69.12174	14.87000	74.01564*
FINKLE	10.85092	68.79524	14.64000	72.58432

*Includes 2 points for
Veteran’s Preference

Thus, had the E&E written scoring method, rather than the CEB method, been used for the 2017 Captain’s Promotional Examination, Appellant Victor Paiva would have received a rounded final score of 74 and Appellant Scott Finkle would have received a rounded final score of 73. Since the DOC promoted all candidates on the 2017 Captain’s Eligible List with rounded scores of 71 or above prior to the expiration of that list, I am persuaded that, at some point during the life of that list, DOC would have reached both Appellants for consideration for promotion to an opening for Captain. Based on this information, I conclude that the Appellants’ civil service rights were impaired by the failure of DOC to consider each of them for promotion to a vacancy for Captain that arose at some point during the life of the 2017 Captain’s Eligible List.

to interpolate from that data what those candidates’ E&E would have been at the time of the 2017 Captain’s Promotional Examination. HRD did not have information available to it that was necessary to make such recalculations for candidates on the 2017 Captain’s Promotional Examination who did not take the 2021 Captain’s Promotional Examination and who, therefore, did not provide the E&E information HRD would need to make such interpolated recalculations for those other candidates.

When a person who passed a civil service promotional examination and whose name appeared on an eligible list was not in fact considered for promotion when that person's name should have been reached, had the list been properly compiled in strict rank order, and there is no sound and sufficient reason for a bypass, the Commission, acting under its broad discretion to grant equitable relief pursuant to Chapter 310 of the Acts of 1993, ordinarily orders very specific, but limited, relief. Namely, the adversely affected candidate's name shall be placed on the current and all future eligible lists for promotion so that the person receives at least one future consideration for promotion to the position for which the appointing authority improperly failed to consider them. The Appellants, however, argue that they are entitled to additional relief beyond being allowed an opportunity for a future promotion, including ordering their immediate and retroactive promotions and requiring that they be awarded back pay and other retroactive monetary compensation and benefits. These arguments are not persuasive.

First, a candidate whose name appears on an eligible list, no matter his or her score, has no guarantee or property right to be appointed or promoted at any time or upon any specific event. See, e.g., Brackett v. Civil Service Comm'n, 447 Mass. 233, 252-53 (2006); Bielawski v. Personnel Administrator, 422 Mass. 459 (1996); Staveley v. City of Lowell, 71 Mass. App. Ct. 400, 409-410, *rev. den.*, 451 Mass. 1105 (2008); Davis v. Personnel Administrator, 27 Mass. App. Ct. 1113, *rev. den.*, 405 Mass. 1202 (1989).⁴

⁴ In effect, the Commission would be speculating were it to decide whether and when the Appellants in this appeal actually might have been suitable for promotion to fill any particular vacancy in the past, or if and when the Appellants might be promoted in the future. As this record shows, the DOC did not promote from the 2017 Captain's Eligible List or the 2021 Captain's eligible list according to the absolute rank order of candidates—and other factors, such as the location and shift of the available promotion, as well as a candidate's unique qualifications for a particular position, can also play a part in the selection process.

Second, absent extraordinary circumstances, the Commission does not intervene to vacate promotions or order that an appointing authority immediately appoint a particular candidate as it is generally the prerogative of the appointing authority, not the Commission or a court, to decide if and when to make a promotion and/or whether to choose to promote a particular candidate on an eligible list or to bypass that candidate for sound and sufficient reasons in favor of another more suitable candidate (subject to further de novo review by the Commission). *See, e.g., Gannon v. Boston Police Dep't*, 28 MCSR 541 (2015), *aff'd sub nom. Boston Police Dep't v. Civil Service Comm'n*, 483 Mass. 461, 468-470 (2019); *Kavaleski v. Boston Police Dep't*, 22 MCSR 597 (2009), *aff'd sub nom. Kavaleski v. Police Dep't of Boston*, 463 Mass. 680 (2012). As stated in Bielawski:

“The plaintiff complains . . . that the [civil service] commission, by failing to order his promotion, did not do enough. Although the commission’s remedy did not correspond in tone or vigor with its rebuke of the appointing authority, this would not be that rare case in which the courts will second guess the commission’s choice of remedy . . .”

422 Mass. at 465. *Cf. Blanchette v. City of Methuen*, 34 MCSR 431 (2021) (citing examples of the type of egregious and willful violations of civil service law for which the Commission exercised its rarely used discretion to order extraordinary relief). Here, although the Appellants did not receive the consideration for promotion that they deserved, that error was the result of a good-faith misinterpretation of unsettled civil service law (which the Commission, itself, believed might warrant only prospective, but not retrospective, remediation). Under these circumstances, the Commission is not warranted to grant the extraordinary equitable relief of an immediate or retroactive promotion.

Third, in choosing to rarely exercise its discretion to vacate a promotion or order a promotion of a candidate over another candidate already on an eligible list, the Commission must always be

mindful that to do so necessarily impacts the civil service rights of one or more other individuals through no fault of their own and, often, as here, without prior notice or an opportunity to be heard.

Fourth, I have considered the Appellants' argument that HRD should be required to reconstruct the entire 2017 Eligible List using the appropriate E&E scores for the more than 50 candidates (the 40 who received a passing score of 70 or above as well as the dozen who failed the examination). I reject this argument as impractical and of little, if any, value. HRD has no access to the information that it would need to interpolate an E&E for all candidates who took the 2017 Captain's Promotional Examination. HRD was able to make such an interpolation for the Appellants because they submitted an E&E information sheet when they took the 2021 Captain's Promotional Examination. There are no comparable sheets for those who were already promoted or who did not take the 2021 examination. Moreover, as to the seven (7) persons who did take both examinations for which HRD was able to make an E&E calculation, every one of those candidates' written E&E score turned out to be higher than their oral CEB score; thus, a recalculation of all 50 scores would, more likely than not, also elevate at least some of the other similarly lower scoring CEB candidates already above the Appellants on the eligible list, making no change to the Appellants' ranking, and, possibly, further lowering the Appellants' relative place on the list.⁵ Thus, there is little basis to believe that such a time-consuming and impractical exercise would bring any further clarity to the Appellants' place on the 2017 eligible list, the point at which they might have been reached for consideration, or their right to more than the traditional equitable relief as explained above. I find no reason to order DOC or HRD to undertake such a fruitless exercise.

⁵ The HRD recalculation showed the following: (A) Candidate CEB – 11.76513; E&E – 14.49000; (B) Paiva CEB – 11.97610; E&E – 14.87000; (C) Finkle: CEWB – 10.85092; E&E 14.64000; (D) Candidate CEB – 10.00704; E&E – 14.51000; (E) Candidate CEB - 10.56963; E&E – 14.63000; (F) Candidate CEB - 12.18707; E&E - 14.10000; (G) Candidate CEB – 13.31224; E&E – 14.78000.

Fifth, the Appellants' argument that they are entitled to immediate, retroactive benefits is also without merit. The requirement that the Commission order that a successful appellant receive retroactive back pay is limited to disciplinary cases only. See G.L. c. 31, § 43. It is not required in bypass, examination challenges (such as this) or other forms of equity appeals. The Appellants have provided the Commission with no judicial authority that requires such unprecedented relief and the Commission is not aware of any. Moreover, as to the Appellant's specific claims to choice of assignment and seniority dates, those are not matters of civil service law but governed by collective bargaining agreements over which the Commission lacks jurisdiction. See, e.g., Izatt v. City of Chicopee, 33 MCSR 81 (2020) (vacation benefits); Otero v. City of Lowell, 32 MCSR 289 (2019) (promotional seniority); Hatfield v. Town of Hull, 31 MCSR 233 (2018) (overtime); Lizette v. Department of Correction, 30 MCSR 287 (2017) (vacation picks). Similarly, as to claims for shift differential pay, shift commander pay, weekend differential pay and overtime pay, the law expressly precludes the Commission (and the courts) from awarding such amounts. See Boston Police Dep't v. Jones, 98 Mass. App. Ct. 762 (2020).

In sum, I find that the circumstances present in this appeal do not warrant the extraordinary relief requested by the Appellants and, with one exception, do not justify the Commission deviating from the traditional discretionary, equitable relief it has granted in similar cases—i.e., ordering HRD and/or DOC to place the name of the Appellants at the top of the current and future Captain's Eligible List and to require DOC to consider them to fill the next promotional opportunity for Captain.

As noted above, the Appellants were clearly deprived of the opportunity for promotion which they would have received had the 2017 Captain's Examination calculated the scores using the E&E formula method instead of the CEB method. Although it is not appropriate to order that they

receive a retroactive promotion, they do deserve some measure of relief to compensate them for the financial cost that lost opportunity more than likely caused them to suffer. As also noted, it is impracticable to vacate all of the appointments made from the 2017 Captain's Eligible List or to recalculate with complete precision or perfection the scores of most of the candidates on the 2017 Captain's Eligible List, using an E&E formula method rather than the CEB score. There is sufficient evidence, however, upon which to base a reasonably accurate, albeit imperfect, approximation of the financial consequences that the Appellants likely suffered by the lost opportunity for promotion from the 2017 Captain's Eligible List, that I conclude does form a reasonable basis to calculate an appropriate level of monetary relief..

In particular, based on the undisputed documents provided by the parties, I find it reasonable to conclude that;

- Appellant Victor Paiva would have been included in the tie group with final rounded scores of 74 and would have been reached for consideration as part of that tie group (the first of whom was promoted on 7/22/2018 and the last of whom was promoted on 9/27/2020). I also find that the first promotion made from the next lower tie group (score of 73) was made on 1/5/2020. Thus, more likely than not, Appellant Paiva would have been first considered for promotion at some point during that timeframe, depending on the location and shift assignment involved, and any unbiased "tie-breaking" method used by DOC to consider the order of candidates for consideration who were tied (e.g., seniority' raw unrounded score; etc)
- Appellant Scott Finkle would have been included in the tie group with final rounded scores of 73 and would have been reached for consideration as part of that tie group (both of whom were promoted on 1/5/2020). I also find that the first promotion from

the next lower tie group (score of 71) was made on 4/2/2020. Thus, more likely than not, the Appellant Finkle would have been first considered for promotion during that timeframe, depending on the location and shift assignment involved, and any unbiased “tie-breaking method used by DOC to consider the order of candidates for consideration who were tied (e.g., seniority’ raw unrounded score; etc)

- As I have informed the parties, I take administrative notice of the differential in DOC Lieutenant’s pay and DOC Captain’s pay, based on the terms of the respective collective bargaining agreements between DOC and bargaining units for those officers.
- Finally, I take notice that Appellant Scott Finkle retired from the DOC in October 2021.

Relief to be Granted

CSC No. B2-18-038. Consistent with the Superior Court’s Memorandum of Decision and Order, the appeal of the Appellant, Victor Paiva is ***allowed in part***. Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission ORDERS:

1. HRD and/or DOC in its delegated capacity place the name of Victor Paiva at the top of any current or future Certification for the position of DOC Captain until he is appointed or bypassed after consideration consistent with this Decision.

2. When and if the Appellant Victor Paiva is promoted to Captain he shall receive a stipend, to be determined by DOC with input and concurrence from HRD, equal to the differential between his Lieutenant’s base pay and the base pay of a Captain during the period from when he would have first been considered for promotion until the effective date of his future promotion.

3. The Commission will retain jurisdiction to entertain a motion for clarification if and when the DOC, HRD and the Appellant Victor Paiva are unable to agree on the stipend amount as specified in this Decision.

CSC No. B2-18-038. Consistent with the Superior Court’s Memorandum of Decision and Order, the appeal of the Appellant, Scott Finkle is *allowed in part*.. Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission ORDERS:

1. The Appellant Scott Finkle shall receive a stipend, to be calculated by DOC with input and concurrence of HRD, equal to the differential between his Lieutenant’s base pay and the base pay of a Captain during the period from when he would have first been considered for promotion until the effective date of his retirement in October 2021.

2. The Commission will retain jurisdiction to entertain a motion for clarification if and when the DOC, HRD and the Appellant Scott Finkle are unable to agree on the stipend amount as specified in this Decision.

Civil Service Commission

/s/ Paul M. Stein
Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Camuso, Stein and Tivnan, Commissioners) on March 24, 2022.

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 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. 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)