

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 MOTIONS FOR CLARIFICATION AND RECONSIDERATION

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 Decisions dated September 12, 2019 (as corrected), and November 5, 2020, the Commission denied the Appellants’ 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, 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 – as the basis to determine candidates' scores for Education and Experience (E&E) and remanded the appeals to the Commission for a determination of the appropriate relief, if any, that should be awarded to the Appellants. The Court affirmed the Commission's Decisions in all other respects.

Upon remand, the Appellants and HRD submitted proposed forms of relief that each believed was appropriate. HRD claimed that the only relief that would be warranted was to place the Appellants on the top of the current certification and provide them the opportunity to be appointed as DOC Captains to fill the next vacancies in those positions. The Appellants claimed that they should receive an immediate promotion to Captain and retroactive pay and other benefits.

After fully considering the parties' submissions and argument, for the reasons stated in the Commission's Decision on Remand dated March 22, 2022 (the Remand Decision), the Commission determined:

1. The appropriate equitable relief for the violation of the Appellant Victor Paiva's civil service rights was to order (A) that his name be placed at the top of the current and all future eligible lists for DOC Captain until such time as he is promoted or bypassed, and (B) if promoted to DOC Captain in the future, he shall receive a stipend 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; and
2. Taking account of the fact that the Appellant, Scott Finkle retired from the DOC in October 2021 the appropriate equitable relief for the violation of his civil service rights was to order that he receive a stipend 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.
3. The Commission ordered DOC and HRD to calculate the Appellants' stipend for the period of time and at the pay differential set forth in the Remand Decision and retained jurisdiction to review the calculation if the parties were unable to agree on the stipend amount.

On April 4, 2022, the Commission received the “Respondent HRD’s Motion for Reconsideration” and the “Appellants’ Motions for Clarification and Reconsideration”. After careful review, the Commission finds that neither Motion identified a clerical or mechanical error in the decision or a significant factor the Commission or the presiding officer may have overlooked in deciding the case, as prescribed by 801 CMR 1.01(7)(1).

In particular, the Commission did not overlook the fact that, if scores for all candidates who took the 2017 DOC Captain’s Promotional Examination were recalculated using the E&E formula rather than the CEB score, the order of candidates, other than the Appellants, may have also changed. The Commission determined, however, that, there is now no practical way to recalculate all scores. HRD concurred in this conclusion. Moreover, whether any changes to the scores of others would result in the Appellants’ names remaining below all candidates appointed from the 2017 Captains’ Eligible List, or whether the “cut score” would have been raised to 75 instead of 70, is speculation.¹ It is not the Appellants’ fault that a perfect determination of their precise place on the 2017 DOC Captain’s Eligible List is now impossible due to the passage of time. The Commission considered this imprecision and found that the Appellants’ scores place them high enough to have been reached for promotion at some point during the life of the 2017 Captain’s Eligible List (although not guaranteed a promotion, as HRD correctly notes) and, therefore, after balancing all of the equities, found their civil service rights were impaired through no fault of their own which entitled them to such discretionary relief as Commission determined was appropriate.²

¹ The Commission is not aware of any DOC promotional examination administered by HRD in which the final passing score was set above 70, and HRD has pointed to no such example.

² Both HRD and the Appellants misconstrue the scope of the Commission’s discretionary, remedial powers in their Motions for Reconsideration. Although the Appellants are not guaranteed a promotion and the Commission is not mandated by statute to order them promoted or to provide them any specific form of relief, that does not detract from the equitable power of the Commission to fashion the relief that the Commission deems appropriate, in its discretion, when the rights of tenured civil servants (such as the Appellants) have been impaired through no fault of their own.

As to the Appellants' arguments that the Remand Decision is "ambiguous" because it orders relief contingent upon proper calculation of stipend amounts dependent on further consultations among the parties, the Commission made a deliberate decision to leave those calculations to the parties in the first instance as there are many variables that need to be considered, such as tiebreakers, pay differentials, collective bargaining issues, and other factors and data, to which the Commission is not privy. Ordinarily, the Commission's proceedings do not include a "damages" calculation process, which is typically undertaken by the parties once a Decision issues, with results subject to judicial review and/or enforcement of any disputed monetary issues. See, e.g., Boston Police Dep't v. Jones, 98 Mass. App. Ct. 762 (2020). For these reasons, here the Commission concludes that the traditional and most efficient process to make the necessary calculations pertains and is best left to the parties, subject to the Commission's intervention only if necessary.

As to the Appellants' other arguments for reconsideration, none of them raise a clerical or mechanical error or significant factor the Commission overlooked. The Appellants' reliance on the matter of In re: Request by Jon Mograss, et al., 28 MCSR 261 (2015), 31 MCSR 96 (2018), is entirely misplaced. That matter involved an Investigation into the failure of HRD to administer a civil service examination for the position of DOC Captain for over 25 years, resulting in an initial order to require that a plan (acceptable to all stakeholders) to hold such an examination be provided to the Commission within 90 days and to include as part of that plan a process for granting tenure to all the DOC Captains who had been "provisionally" appointed as Captains over that 25-year period. The Mograss decisions have no relevance here.

Accordingly, the Respondent HRD's Motion for Reconsideration and the Appellants' Motions for Clarification and Reconsideration are both **denied**.

Civil Service Commission

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

By vote of the Civil Service Commission (Bowman, Chair; Stein and Tivnan, Commissioners [Camuso – Absent]) on April 21, 2022.

Notice to:

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