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COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 19-01309

VICTOR PAIVA & another[1]

vs.

MASSACHUSETTS CIVIL SERVICE COMMISSION & others[2]

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS AND DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

The plaintiffs, Victor Paiva and Scott Finkle, are Lieutenants employed by the Department of Corrections ("DOC"). In 2017, they took a promotional examination for the position of Captain at the DOC. After neither obtained a passing score on the exam, they both unsuccessfully appealed their scores to the Massachusetts Human Resources Division ("HRD"). The plaintiffs thereafter appealed HRD's decision to the Massachusetts Civil Service Commission ("Commission"), making several arguments as to why they believed the 2017 promotional examination was not a "fair test" of their fitness for the job. The Commission rejected their contentions as well. The plaintiffs bring this action *pro se* seeking judicial review under G. L. c. 30A, § 14, of the decision by the Commission. The parties filed cross motions for judgment on the pleadings.[3] The defendants also filed a motion to dismiss the Second Amended Complaint contending because of events subsequent to the Commission's decision, the plaintiffs' claims are now moot.

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[1] Scott Finkle

[2] Massachusetts Human Resources Division and Massachusetts Department of Correction

[3] Though the plaintiffs titled their motion as one for summary judgment, they state that the motion is brought pursuant to Superior Court Standing Order 1-96, and it relies on the administrative record. The Court, therefore, treats this motion as one for judgment on the pleadings instead of summary judgment.

The Court heard argument on October 5, 2021. For the following reasons, the defendants' motion to dismiss is **DENIED**. The plaintiffs' motion for judgment on the pleadings is **ALLOWED IN PART** and **DENIED IN PART**. The defendants' motion for judgment on the pleadings is also **ALLOWED IN PART** and **DENIED IN PART**.

BACKGROUND

The following facts are taken from the administrative record.

On December 10, 2015, the Commission ordered HRD and the DOC to create a promotional examination for the position of DOC Captain and a list of eligible candidates to be used for promotional appointments. HRD delegated the administration of the exam to the DOC which hired an outside vendor, E.B. Jacobs, to administer the exam. HRD did not execute a written delegation.

The DOC Captain's Examination consisted of three components: (1) a Technical Knowledge ("TK") component consisting of a written multiple-choice test; (2) an Assessment Center ("AC") component consisting of a written work sample and two oral boards; and (3) a Career Experience Board ("CEB") component.

The DOC issued a Human Resources Bulletin announcing the 2017 exam. It stated:

> Applicants must get a passing mark on each of the weighted components in order to receive an overall (general average) examination score . . . . [T]he 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.

A.R. at 0660.

The test takers were identified using a candidate number such that the TK examination and written work sample were scored "blindly" by the vendor's assessors.

Candidates took the TK examination on July 22, 2017. By form letter on August 14, 2017, they received notice of their scores. Paiva scored a 59 out of 100, and Finkle received a 56. The plaintiffs as well as all other candidates, regardless of score, were allowed to proceed to the next two stages of the examination. The letter also advised that candidates had seven days to file a "fair test" appeal regarding the TK test. Neither Finkle nor Paiva appealed his score.

The DOC provided all candidates who took the TK exam access to a preparation guide for the next phases of the exam. As to the AC, the preparation guide explained that the scores on the written work sample and the oral boards would be standardized, weighted, and added together. As to the CEB, although traditionally, candidates were asked to submit a "bubble sheet" listing their education and experience ("E&E") and they were awarded points based on their answers, see A.R. at 208-209, 0664 n.4, the guide explained that the CEB would use a different methodology for awarding points based on E&E.

According to the exam preparation guide, the CEB contained three stages: (1) preparing a "Fact Sheet" (an abbreviated resume) of the candidate's experience and training; (2) preparing written responses containing three "Key Points" for three scenarios which candidates would be provided in advance; and (3) appearing before the CEB for oral presentation of the Key Points and responding to a fourth scenario which was not provided in advance. According to the guide, the CEB assessed "attributes found[] to be critical to effective job performance of Captains," including oral communication, adaptability, accountability, and professional development. See A.R. at 0663-0664. The guide instructed candidates to include work experience within and

outside of the DOC, military service, education, and special training on the Fact Sheet. It also stated:

> **Remember, your Fact Sheet (abbreviated resume) will NOT be scored**; it is simply being provided so that assessors understand the context in which your Career Experience Board answers are being made. Thus, this is not a point system where you will receive a certain number of points for each experience from your past. **You will be scored solely on your responses to the CEB questions** and your ability to indicate that you have learned from your past experiences and are prepared to succeed as a [DOC] Captain.

Id. at 0664 (emphasis in original).

Paiva and Finkle took the AC and CEB portions of the exam over the course of two days in October and November 2017. On January 3, 2018, they each received a "Candidate Score Report" from the DOC. The Score Report reiterated the three test components and their respective weights for the scoring and then discussed how a final score was calculated:

> You previously received a raw score on the [TK] 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 score (TK, AC, and CEB) were rescaled to be out of 35, 50 and 15 points, respectively. . . .

Id. at 0665. The Score Report stated that candidates needed an overall score of 70 or higher to pass. Paiva's final score was a 69.12 (19.2 on the TK, 37.95 on the AC, and 11.98 on the CEB). Finkle's final score was a 68.80 (18.04 on the TK, 39.90 on the AC, and 10.85 on the CEB).

Of the fifty-three candidates who took the exam, forty passed. Paiva and Finkle ranked forty-third and forty-fourth, respectively, in terms of overall scores of the candidates.

On January 18, 2018, Paiva and Finkle submitted substantially identical appeals to HRD primarily objecting to the scoring of the TK and the calculation of the CEB. In response, HRD performed a review of the TK answer sheets and confirmed that the answers were accurately

scored. HRD's Director of Test Development also reviewed the exam preparation guide, and investigated the testing procedures, assessor selection and training process, and scoring methodology used for the written work sample and CEB components. She concluded that the preparation materials provided candidates with the proper information and the test components were appropriately designed, administered, and scored.

On March 2, 2018, both Paiva and Finkle filed essentially identical appeals with the Commission. The plaintiffs and HRD filed cross-motions for summary decision, and the Commission held a hearing on the motions on February 12, 2019. On September 12, 2019, the Commission issued a written decision on the motions ("*Paiva I*"). The Commission held that Paiva and Finkle had raised a genuine issue of fact requiring a full hearing on the issue of whether it was a fair test of the candidates' fitness to have substituted a rescaled TK score for the raw score when calculating the points to be awarded toward the overall test score. The decision noted that for reasons not explained, the test administrators had decided to change the original test protocol and do away with the "cut score." It further explained that that the candidates had been given no advance notice that they would be graded on a scale for the TK component.

As to the other issues raised by the plaintiffs, the Commission agreed with HRD that the other components of the test were properly administered and constituted a fair test of the candidate's ability. The decision explained that HRD had confirmed that the written work sample and CEB assessors were well-qualified, the preparation guide thoroughly explained the process and how to prepare for those tests, and that the procedures in place assured the blind scoring was not compromised. However, with respect to the CEB, the decision noted that it presented a legal question that had not been previously considered by the Commission. It further stated the following:

> By allowing the traditional E&E point system, based on a paper record, to be replaced by an "oral board" system used, so far as the Commission knows, for the first time in any Massachusetts civil service examination, HRD has created a tension between the statutory provisions for providing objectively determined "E&E" credit with the statutory limitation on the right of review of subjective "oral" exam exercises. . . .
>
> This statutory tension presents an issue of law that could warrant further scrutiny . . . . For the time being, however, the Commission defers to the HRD's conclusion that the use of a delegated "CEB" type component can be reconciled with the statutory provisions of civil service law that seems to assume some form of "paper" submission to, and computation of E&E credits by HRD, which (unlike 'oral' components) is then specifically entitled to further objective administrative review and appeal to the Commission. It would not be appropriate for the Commission to begin to undertake that complex analysis here (given the late stage of the process and the limited life of the current DOC Captain's eligible list), but, should the issue arise in the future, and were it presented in a timely manner to enable an appropriate review (i.e. in advance, as soon after learning that a "CEB-type" examination was contemplated as feasible), the Commission may be open to revisit this question.

A.R. 0682-0683 (emphasis in original).

Finally, the Commission noted that it was a "misstep" for the HRD to not execute a written delegation to the DOC for the design, administration, and scoring of the exam, but the lack of writing did not invalidate the delegation. *Id.* at 0683-0684.

On May 31, 2019, before the Commission held the evidentiary hearing, the plaintiffs appealed the Commission's decision to this Court.

In accordance with the decision in *Paiva I*, the Commission held an evidentiary hearing on the TK scoring issue on November 19, 2019. Dr. Jay Silva, the Director for Public Safety and Analysis of PSI Services LLC, testified at the hearing. The Commission found Dr. Silva to be a qualified expert to offer opinion on the design and administration of public safety promotional examinations including the statistical analysis and justification for the decision to use

standardized rather than raw scores for determining the overall test scores of candidates for the promotional exam. Dr. Silva testified that rescaling the TK scores was an example of a widely accepted statistical process which is a commonly used in scoring examinations and he explained the useful purposes of doing so in an exam such as the one at issue. He further explained the "statistically rational basis for using the 40th position (score 70) as the 'cut' score for the passing exam." A.R. at 1382. Dr. Silva also compared the plaintiffs' raw scores to the standardized scores to demonstrate that if their raw scores on the TK component were used, both Paiva and Finkle would have fallen "well below the 'cut off' score for the lowest ranking candidate who received a passing grade" and thus, neither would have been permitted to take the second two test components. *Id.* at 1383.

The Commission issued its second decision on November 5, 2020 ("*Paiva II*"). The decision found the methodology used for the examination was "statistically justified, consistent with general practices, and produced a fair test result." *Id.* at 1385. It explained that the rescaling of the TK raw scores did not change the ranking of the candidates' scores in that component, and the failure to notify candidates in advance that the TK scores would be standardized did not result in an unfair test. Finally, the Commission noted that even if it were to require the plaintiffs' final scores to be recalculated using the "raw" TK scores, they would be even further below the minimum passing grade. For those reasons, the Commission denied the plaintiffs' appeal.

The plaintiffs' filed a Second Amended Complaint in this Court on December 7, 2020.

DISCUSSION

"General Laws c. 31, § 2(b), requires the commission to determine, on the basis of the evidence before it, whether the appointing authority sustained its burden of proving, by a

preponderance of the evidence, that there was reasonable justification for the action taken by the appointing authority." *Brackett* v. *Civil Serv. Comm'n*, 447 Mass. 233, 241 (2006). "Reasonable justification in this context means 'done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.'" *Id.*, quoting *Selectmen of Wakefield* v. *Judge of First Dist. Court of E. Middlesex*, 262 Mass. 477, 482 (1928).

Pursuant to G. L. c. 31, § 44, a party aggrieved by a final order or decision of the civil service commission may seek judicial review. The court reviews the Commission's decision under the standards set forth in G. L. c. 30A, § 14 and will not disturb the decision unless it is made in excess of the agency's statutory authority; is unsupported by substantial evidence; or is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *J.M. Hollister, LLC* v. *Architectural Access Bd.*, 469 Mass. 49, 55 (2014). The Court must "give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." G. L. c. 30A, §14. "This standard of review is highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom." *Flint* v. *Commissioner of Pub. Welfare*, 412 Mass. 416, 420 (1992). However, the Court is "required to overturn commission decisions that are inconsistent with governing law." *Plymouth* v. *Civil Serv. Comm'n*, 426 Mass. 1, 5 (1997). See *Boston Police Superior Officers Fed'n* v. *Labor Relations Comm'n*, 410 Mass. 890, 892 (1991) (considerable deference generally accorded to agency's decision, unless agency commits error of law). Plaintiffs bear the burden of demonstrating the invalidity of an agency's decision. *Brackett*, 447 Mass. at 242.

The plaintiffs here seek judicial review of *Paiva I* and *Paiva II*, arguing that the Commission's decision was arbitrary and capricious and not in accordance with the law. Their Second Amended Complaint requests that the Court award them "full promotional points on all examination components" or decertify the 2018 list of eligible candidates and order a reexamination of the candidates, and that this Court order monetary damages of past and future earnings. See Second Amended Complaint at 53.

I. Defendants' Motion to Dismiss the Second Amended Complaint

The defendants' move to dismiss the Second Amended Complaint in its entirety on mootness grounds. They contend that after the plaintiffs instituted this action, the HRD and DOC administered a new promotional examination which resulted in a new eligibility list ("2021 List"). Both plaintiffs passed this examination and are on the 2021 List. The defendants argue that pursuant to G. L. c. 31, § 25, the 2018 eligible list (created from the 2017 promotional exam) has been replaced by the 2021 List. See G. L. c. 31, § 25 ("Eligibility of a person for placement on, and the standing of such person on, an eligibility list for any position shall be determined by the results of the last examination taken by such person for such position."). Thus, they contend that even if the plaintiffs were to prevail, their remedy—placement on the expired 2018 List—would offer them no relief.

The Court does not agree with the defendants that the matter has become moot. The defendants' motion ignores that the plaintiffs are seeking retroactive pay from the denial of a promotion that they claim they were entitled to receive and that such wages could have an impact on their future retirement. Thus, it is not that case that by virtue of their placement on the 2021 List, the plaintiffs "no longer have a stake in the determination of [the] issue." See *First Nat. Bank of Bos.* v. *Haufler*, 377 Mass. 209, 211 (1979); see also *Doe* v. *Superintendent of Schs. of*

Worcester, 421 Mass. 117, 123 (1995) (controversy not moot where defendants failed to show plaintiff had been adequately compensated for wrong).

Moreover, the defendants incorrectly assert that the Court can order "no further effective relief" on the plaintiffs' claim. See *Lawyers' Comm. for C.R. & Econ. Just.* v. *County Adm'r of Trial Ct.*, 478 Mass. 1010, 1011 (2017). Under G. L. c. 30A, §14(7), a Court may remand a matter for further proceedings before the agency if the agency decision is unsupported by substantial evidence or arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law. Pursuant to Chapter 310 of the Acts of 1993, "[i]f the rights of any person acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights . . . ." See *Thomas* v. *Civil Serv. Comm'n*, 48 Mass. App. Ct. 446, 446–447 (2000). Thus, the Commission may (and, for the reasons discussed below, should) fashion a remedy that offers relief to the plaintiffs. See *Bielawski* v. *Personnel Administrator of Div. of Personnel Admn.*, 422 Mass. 459, 465 (1996) (to remedy bypassing the plaintiff for promotion, the Commission ordered that the plaintiff be placed at the top of the next certification of candidates and be given an effective seniority date retroactive to the improper bypass).

Accordingly, the defendants' motion to dismiss the Second Amended Complaint as moot is denied.

II. Cross Motions for Judgment on the Pleadings

The plaintiffs challenge several conclusions made by the Commission in *Paiva I* and *Paiva II.* The Court considers each in the order they were made.[4]

[4] The arguments addressed by the Court are those raised in the plaintiffs' motion for judgment on the pleadings. The plaintiffs' Second Amended Complaint raised additional challenges to the Commission's actions which the plaintiffs

1. Lack of a Delegation Agreement

The plaintiffs first argue that the Commission erroneously concluded that the 2017 examination was still valid despite the fact that HRD did not execute a written delegation agreement with the DOC and E.B. Jacobs for them to design, administer, and certify the exam. According to the plaintiffs, without a written delegation, the DOC and E.B. Jacobs had no statutory authority to design, conduct, score, or certify the 2017 exam. The Court does not agree.

Under G. L. c. 31, § 5(l), HRD has authority "[t]o delegate the administrative functions of the civil service system, so far as practicable, to the various state agencies and cities and towns of the commonwealth." See *Malloch* v. *Town of Hanover*, 472 Mass. 783, 789 (2015) (noting that HRD has "broad authority to delegate its administrative functions"). There is no statutory requirement that such delegation must be written. Nor have the plaintiffs pointed this Court to any authority stating that without a written agreement, any delegation is void. Therefore, the Court sees no error in the Commission's determination that although it would have been preferable for HRD to have executed a written delegation to the DOC for the design, administration, and scoring of the exam, such a "misstep" did not invalidate the delegation.

2. Elimination of the Cut Score on the TK

The plaintiffs next object to the Commission's decision regarding the HRD/DOC's decision to eliminate the cut score for the TK component after it was included on the Human Resources Bulletin announcing the 2017 exam. The plaintiffs argue that the Commission acted

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have not addressed in their present motion. It is the plaintiffs' burden to show that the Commission's decision should be set aside and that their substantial rights have been prejudiced by the Commission's actions. See G. L. c. 30A, § 14(7); *Brackett*, 447 Mass. at 242; *Wilson* v. *Department of Soc. Services*, 65 Mass. App. Ct. 739, 747-748 (2006). Having made no argument, the plaintiffs have not carried their burden as to these additional claims.

arbitrarily and capriciously by not invalidating the exam, asserting that the fact that the cut score was published in the announcement but not implemented violated G. L. c. 31, § 19.[5]

General Laws c. 31, § 19 sets forth the requirements for notices of examinations for promotional appointments. The statute states, in pertinent part:

> Each notice required by this section shall state the duties, compensation, and title of and required qualifications for the position for which the examination is to be held, the time, place and manner of applying for admission to the examination, the entrance requirements, and any other information which the administrator determines should be included because of its relevancy and usefulness.

The notice at issue indicated that although all candidates could take the TK, "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." A.R. at 0660. Evidence before the Commission demonstrated that despite this notice, a cut score was not implemented and all candidates were permitted to take the final two components of the exam regardless of their score on the TK component. The defendants acknowledge that no cut score for the TK was implemented but maintain that the notice set forth no definitive passing grade and the decision to not implement a cut score inured to the benefit of the plaintiffs.

The Court need not determine if defendants technically violated G. L. c. 31, § 19 by not utilizing a cut score on the TK because, as accurately concluded by the Commission, had a cut score been implemented (and had it been seventy percent as plaintiffs contend it should have been) neither plaintiff would have made the cut and thus neither would have been permitted to

[5] Had the plaintiffs also argued in their motion, as they did before the Commission, that the rescaling or standardization of the TK scores (as opposed to using the raw scores) resulted in an exam which did not fairly test the applicants' fitness for the position, they would not have been successful. There was ample evidence before the Commission that the use of a rescaled standardized test score is common practice and serves a number of useful purposes and that the use of the practice in this instance was justified. See A.R. at 1381-1382.

take the other two portions of the examination. Because the plaintiffs are unable to show they have been prejudiced by the disregard of the cut score, they cannot show reversible error on these grounds. See G. L. c. 30A, §14(7); *Fisch* v. *Board of Registration in Med.*, 437 Mass. 128, 133 (2002).[6]

3. Grading of the AC Assessment

The plaintiffs contend that the Commission erred in failing to recognize that internal captains and/or senior level managers graded the written work sample section—a practice which the plaintiffs assert is prohibited under G. L. c. 268A, § 23(b)(2). There is, however, nothing in the language of Section 23(b)(2) that prohibits DOC employees from grading the exam at issue. Rather, Section 23(b)(2) prohibits an employee from the following:

> (i) solicit[ing] or receiv[ing] anything of substantial value for such officer or employee, which is not otherwise authorized by statute or regulation, for or because of the officer or employee's official position; or (ii) us[ing] or attempt[ing] to use such official position to secure for such officer, employee or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals[.]

While plaintiffs assert that the exam graders may have "use[d] their 'official status' to secure promotional appointments of subordinates to achieve 'full' permanent status for themselves[,]" there was no evidence before the Commission suggesting that took place.

Moreover, in *Paiva I*, the Commission's factual findings explained that the exam takers received a candidate identification number for use during all testing components and that "no other form of personal identification was recorded on testing materials or provided to the test

[6] To the extent the plaintiffs contend that the elimination of the cut score rendered the examination an unfair test of the candidates' abilities, they have pointed to no evidence before the Commission supporting this argument. Moreover, evidence before the Commission was sufficient to support the conclusion that allowing all candidates to take all three portions of the examination did not result in an unfair test. See A.R. at 864.

vendor until after all test components were administered and scored. In particular, the TK and written work sample scores were computed entirely 'blindly' by the vendor's assessors." A.R. at 0660. The Commission accepted HRD's assessment that its "assessors were well-qualified and suitably trained" and that "the procedures in place to assure 'blind' scoring were not compromised." *Id.* at 0682. The Court will not displace the Commission's findings in this regard. See *Police Dep't. of Boston* v. *Kavaleski*, 463 Mass. 680, 689 (2012) (citations omitted) (noting the standard of review under G.L. c. 30A, § 14(7) is "highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom").

4. Use of the CEB Instead of E&E Point System

The plaintiffs assert that the use of the CEB did not properly credit their E&E as required by G. L. c. 31, § 22. The Court agrees.

Section 22 provides:

> The administrator shall determine the passing requirements of examinations. In any competitive examination, an applicant shall be given credit for employment or experience in the position for which the examination is held. In any examination, the applicant shall be allowed seven days after the date of such examination to file with the administrator a training and experience sheet and to receive credit for such training and experience as of the time designated by the administrator.

If an applicant believes he or she was not afforded the correct amount of credit for past education and experience, Section 22 permits the applicant to request "review of the marking of the applicant's training and experience." Thus, Section 22 furthers the "fundamental purpose of the civil service system . . . to guard against political considerations, favoritism, and bias in governmental hiring and promotion," see *Massachusetts Ass'n of Minority L. Enf't Officers* v. *Abban*, 434 Mass. 256, 259 (2001), by ensuring that applicants are treated equally with respect to crediting their education and experience. See, e.g., *Sullivan* v. *Human Resources Division*, CSC

B2-17-052 (2017) (awarding specific points based on degree obtained); *Cataldo* v. *Human Resources Division*, 23 MCRS 617 at *8 (2010) (awarding E&E credit for prior service as a police officer which applicant was improperly denied).

Here, HRD chose to forgo the traditional format wherein an applicant records his or her training and experience and is awarded points that correspond, and instead graded applicants based on their responses to scenarios and their "ability to indicate that [they] have learned from [their] past experiences and are prepared to succeed as [DOC] Captain[s]." A.R. 0664.[7] In essence, HRD replaced the statutorily required objective basis for crediting education and experience with a subjective test which instead measured how well an individual could orally articulate responses to hypothetical scenarios—an action clearly contrary to G. L. c. 31, § 22. In doing so, the CEB also deprived applicants of a statutory right to review. See *Wilbanks* v. *Civil Service Commission*, 2017 WL 3440546 at *3 (Mass. Super. 2017) (Leighton, J.) (recognizing that there is no right to appeal from oral boards).

There is no merit to the defendants' argument that the CEB complied with the requirements of Section 22 because it required applicants to submit a "Fact Sheet" and administered credit based on responses to questions about past experiences and learning opportunities. The statute plainly states an applicant is to "file with the administrator a training and experience sheet and to receive credit for such training and experience" listed on the sheet. G. L. c. 31, § 22. However, the preparation guide for the CEB indicated "your Fact Sheet (abbreviated resume) will NOT be scored . . . You will be scored solely on your responses to the

[7] For instance, a sample CEB question provided in the preparation guide stated: "At the Career Experience Board, you will be asked to describe a challenging situation you had as a Massachusetts DOC Lieutenant where you implemented a plan to deal with a novel (unique) situation for which you had no specific training or Department procedures to guide your approach. At the assessment, you will be asked to describe the event, what you did, and the rationale behind your decision." A.R. at 0463.

CEB questions." A.R. at 0664. While the statute provides leeway for the HRD to determine the content of the fact sheet and how much credit is given for education and training, the basic requirements of the statute, of which there is no ambiguity, were not met by the CEB.

The Commission recognized that the CEB did not comply with Section 22. Specifically, the Commission noted that Section 22 "seem[s] to assume some form of 'paper' submission to, and computation of E&E credits by HRD, which (unlike 'oral' components) is then specifically entitled to further objective administrative review and appeal to the Commission." A.R. 0683. Nevertheless, the Commission deferred to "HRD's conclusion that the use of a delegated 'CEB' type component can be reconciled with the statutory provisions of civil service law." *Id.* Such deference under these circumstances was improper as there could be no reasonable justification for HRD's actions where they were contrary to the law. See *Ten Local Citizen Grp.* v. *New England Wind, LLC*, 457 Mass. 222, 228 (2010) (courts generally accord "considerable deference" to an agency's interpretation of its own rules, but an interpretation that is not rational is not entitled to deference); *Boston Police Superior Officers Fed'n*, 410 Mass. at 892 (deference to an agency's decision is inappropriate when the agency commits an error of law).

The Commission further reasoned that it was inappropriate to consider the plaintiff's challenge to the CEB "given the late stage of the process and the limited life of the current DOC Captain's eligible list" suggesting that such an objection should have been raised "in advance, as soon after learning that a 'CEB-type' examination was contemplated as feasible." A.R. at 0683. The Commission's decision in this regard was arbitrary and capricious. See *City of Cambridge* v. *Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 304 (1997) ("A decision is arbitrary and capricious when it lacks any rational explanation that reasonable persons might support."). There was no basis for the plaintiffs here to challenge the CEB upon seeing the notice for the

exam or receiving the preparation guide. Grounds for appeal of the fairness of the examination only occur *after* the examination is scored. See G. L. c. 31, §§ 22 and 24. Moreover, the Commission's reasoning improperly places the burden of recognizing and ensuring a scheduled promotional exam complies with G. L. c. 31, § 22 on the applicant.

For these reasons, the Court will allow the plaintiffs' motion for judgment on the pleadings insofar as it pertains to the use of the CEB for administering E&E points.

5. Dr. Silva's Expert Witness Testimony

Finally, the plaintiffs contend that the Commission erred in permitting the testimony of Dr. Silva during the evidentiary hearing. Specifically, the plaintiffs assert that the Commission should not have allowed Dr. Silva to testify regarding the standardization of the test scores on the three components of the exam because a foundation for his expertise was not established and it was improper to allow testimony on matters beyond the TK exam. The Court disagrees.

With respect to whether Dr. Silva was qualified to provide expert testimony on the standardization of the test scores, the Commission explained that, among other qualifications, Dr. Silva held a Ph.D. in Industrial/Organizational Psychology. In his current position as the Director for Public Safety and Analysis for PSI Services, LLC, he provided "high end statistical analysis expertise and manages statistical and data management staff." A.R. at 1380. The Commission found that he "demonstrated that he had thoroughly reviewed and he was well-informed about the DOC Captain Examination that was developed and administered by E.B. Jacobs prior to the acquisition of that company by PSI Services LLC[,]" and it concluded that Dr. Silva was qualified to offer an expert opinion on 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." *Id.* at 1380-1381. The Court defers to the

Commission's credibility determinations and factual findings, including assessment of expert evidence. See *Town of Brookline* v. *Alston*, 487 Mass. 278, 305 (2021), citing *Boston Police Dep't* v. *Civil Service Comm'n*, 483 Mass. 461, 474 (2019).

The Court also perceives no error with the Commission's conduct in permitting Dr. Silva to testify regarding the standardization of the overall test scores. In *Paiva I*, the Commission concluded that a full evidentiary hearing was necessary "on the issue of whether or not the 2017 DOC Captain's examination and/or the Technical Knowledge component thereof, constituted a fair test of 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." A.R. at 0684. Dr. Silva's testimony regarding the rescaling and standardization of test scores generally as well as in the three components of this exam was relevant to the issue. Accordingly, the Court perceives no error with Dr. Silva's testimony.

ORDER

For the foregoing reasons, the defendants' motion to dismiss the Second Amended Complaint is **DENIED**.

The plaintiffs' motion for judgment on the pleadings is **ALLOWED** insofar as it argues that the Commission's decision with respect to the CEB was in error. The plaintiffs' motion is otherwise **DENIED**.

The defendants' motion for judgment on the pleadings is **DENIED** insofar as it argues that the Commission's decision with respect to the CEB was proper. The defendants' motion is otherwise **ALLOWED**.

The matter is **REMANDED** to the Commission to determine a remedy consistent with this decision.

Date: December 1, 2021

Beverly J. Cannone
Justice of the Superior Court