

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

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

MICHAEL PELLIZZARO,
Appellant

v.

B2-20-034

HUMAN RESOURCES
DIVISION,
Respondent

Appearance for Appellant:

Pro Se
Michael Pellizzaro

Appearance for Respondent:

Melinda Willis, Esq.
Human Resources Division
100 Cambridge Street: Suite 600
Boston, MA 02114

Commissioner:

Christopher C. Bowman

DECISION ON HRD'S MOTION TO DISMISS

1. On February 26, 2020, the Appellant, Michael Pellizzarro (Mr. Pellizzarro) filed a "fair test" appeal with the Civil Service Commission (Commission) regarding the November 16, 2019 promotional examination for Fire Lieutenant.
2. On March 24, 2020, I held a pre-hearing conference via videoconference which was attended by Mr. Pellizzarro and counsel for the state's Human Resources Division (HRD).
3. As part of the pre-hearing conference, the parties stipulated to the following, unless otherwise noted:
 - A. On November 16, 2019, Mr. Pellizzarro took the promotional examination for fire lieutenant.

- B. On November 21, 2019, Mr. Pellizzarro filed what is effectively a fair test appeal with HRD.
 - C. On January 17, 2020, HRD denied Mr. Pellizzarro's fair test appeal.
 - D. On February 3, 2020, Mr. Pellizzarro received his score notice.
 - E. On February 26, 2020, Mr. Pellizzarro filed the instant appeal with the Commission.
 - F. On March 4, 2020, HRD established an eligible list for Fire Lieutenant.
4. As part of the Appellant's appeal with HRD, he provided a list of 11 questions that he alleged had not been taken from the reading list. Further, he listed additional questions for which he believed more than one correct answer was possible.¹
 5. At the pre-hearing, counsel for HRD indicated that, after receiving Mr. Pellizzarro's appeal (and others), HRD did a careful and thorough review of the examination and determined that some questions on the examination did not correspond with the reading material. Those questions were removed from the examination and were not counted in the score. For reasons attributed to confidentiality and the integrity of the testing process, HRD has opted not to indicate how many such questions were removed.
 6. Further, after the above-referenced review, HRD identified additional questions in which more than one answer would be considered correct. Those questions remained in the score with candidates being given credit for a correct answer if they responded with one of the multiple correct answers. As part of prior appeals heard by the Commission, it was established that 4 questions fell into this category.
 7. At the time of the pre-hearing conference, two other similar appeals were pending before the Commission. On March 26, 2020, the Commission issued decisions dismissing those appeals. (See Kelley v. HRD & Barrasso v. HRD) which I forwarded to the Appellant.
 8. As part of decisions in Kelley and Barrasso, the Commission concluded in part, that:

“[T]he Commission squarely addressed this issue in O’Neill v. Lowell and Human Resources Division, 21 MCSR 683 (2008). Although the appeal was dismissed based on timeliness, the Commission did still address the issue of certain questions being faulty and/or effectively removed from the examination. In O’Neill, 20% of the examination questions were determined to be faulty. The Commission concluded that the “defect rate” of 20% did not, standing alone, rise to the level of proof necessary to deem the test unfair. The underlying facts here are not distinguishable from O’Neill, nor should the result be.”

¹ On March 24, 2020, I conducted pre-hearing conferences in separate appeals involving the same issue presented here. As part of those pre-hearing conferences, HRD indicated that the total number of questions removed entirely was “less than 13”.

9. After reviewing the above-referenced decisions, Mr. Pellizzarro indicated that he still wished to move forward with his appeal. I established a briefing schedule. HRD submitted a motion to dismiss and Mr. Pellizzarro submitted an opposition.

Parties' Arguments

First, HRD argues that the Appellant's appeal with the Commission is not timely, as it was filed with the Commission more than 17 days after HRD sent him its decision. Even if the starting date for timeliness purposes was the date that the Appellant received his score notice (2/3/20), his appeal to the Commission, which was received on 2/26/20, would still be beyond the 17-day statutory filing deadline.

Even if the appeal were timely, HRD makes the same argument here that it did in Kelley and Barrasso, arguing that, even if, after review, 13 of the 80 test questions were effectively removed from the examination because those questions were not referenced in the reading list, the Appellant cannot show that this promotional examination was not a fair test of his abilities to perform the duties of a Fire Lieutenant. Further, HRD argues that the circumstances here are no different than the circumstances before the Commission when it decided O'Neill.

Mr. Pellizzarro, in his brief, expresses frustration that, many years after the Commission's decision in O'Neill, HRD has administered another examination with a high rate of faulty questions. He also argues that he has received inconsistent communication from HRD and, generally, that exam applicants have a right to expect a better process, particularly in light of the cost of examination fees and reading materials, in addition to the considerable time and effort spent on studying for the examination.

In regard to the appropriate relief, Mr. Pellizzarro asks that HRD re-grade his examination and include those questions that were removed because they were not in the reading material.

Applicable Law

G.L. c. 31, s. 2(b) states in part:

“No person shall be deemed to be aggrieved under the provisions of this section unless such person has made specific allegations in writing that a decision, action, or failure to act on the part of the administrator was in violation of this chapter, the rules or basic merit principles promulgated thereunder and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status.”

G.L. c. 31, s. 22 states in part:

“An applicant may request the administrator to conduct a review of whether an examination taken by such applicant 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 the administrator no later than seven days after the date of such examination.”

G.L. c. 31, s. 24 states in part:

An applicant may appeal to the commission from a decision of the administrator made pursuant to section twenty-three relative to (a) the marking of the applicant's answers to essay questions; (b) a finding that the applicant did not meet the entrance requirements for appointment to the position; or (c) a finding that the examination taken by such applicant was a fair test of the applicant's fitness to actually perform the primary or dominant duties of the position for which the examination was held. Such appeal shall be filed no later than seventeen days after the date of mailing of the decision of the administrator.

Analysis

As a threshold matter, this appeal was filed with the Commission outside the 17-day statutory filing deadline referenced above in Section 24. Thus, the Commission lacks jurisdiction to hear this appeal.

That notwithstanding, I did, however, carefully review all of Mr. Pellizzarro’s arguments, including his overarching concern that a number of questions were effectively removed from the examination because they were not referenced in the reading material.

I am not unsympathetic to Mr. Pellizzarro’s argument that, more than a decade after O’Neill, examination applicants are, once again, faced with an examination in which a troubling percentage of examination questions were faulty. The Commission believes that the quality and integrity of the promotional exam process calls for HRD to take a thorough and pro-active approach in the design of future examinations to assure that the troubling problem presented in these recent cases does not repeat itself in the future. Should the problem occur in the future, the Commission will consider whether or not further review is appropriate, including but not limited to, a more formal review of the examination design process.

Finally, the relief requested by Mr. Pellizzarro would have the unintended consequence of treating certain exam applicants differently and bringing about a result that is contrary to his own fair test appeal with HRD, in which he stated that including questions on the examination that were not referenced in the reading material resulted in an “unfair” test.

For all of the above reasons, HRD’s Motion to Dismiss is allowed and Mr. Pellizzarro’s appeal under Docket No. B2-20-034 is hereby *denied*.

Civil Service Commission

/s/ Christopher Bowman

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 23, 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)(l), 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:

Michael Pellizzarro (Appellant)

Melinda Willis, Esq. (for Respondent)