

COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

One Ashburton Place - Room 503  
Boston, MA 02108  
(617) 727-2293

MICHAEL L. PETERS,  
Appellant

v.

CASE NO: G2-09-263

HUMAN RESOURCES DIVISION,  
Respondent

Attorney for the Appellant:

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Attorney for the Respondent:

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Boston, MA 02108

Commissioner:

Paul M. Stein

**DECISION**

The Appellant, Michael L. Peters (“Appellant”), brought this appeal pursuant to G.L. c. 31, §§ 2(b) and 22<sup>1</sup>, seeking review of the Human Resources Division’s (“HRD”) denial of his claim for Education and Experience (“E&E”) credit on his application for the position of Police Sergeant for the City of Worcester Police Department (“Police Department”). At hearing on October 22, 2009, the Human Resources Division (“HRD”) presented evidence through one witness, Sally McNeely, while the Appellant testified on

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<sup>1</sup> On May 26, 2009, Appellant filed a Bypass Appeal Form pursuant to G.L. c. 31, § 2(b) claiming that “a decision, action or inaction of the Personnel Administrator ha[d] caused actual harm to [his] employment status.” On the same day, Appellant sent correspondence to the Civil Service Commission, in which he requested review of HRD’s decision to deny his claim for E&E credit pursuant to G.L. c. 31, § 22.

his own behalf and presented evidence through the testimony of Edward Tierney. Twelve (12) Joint Exhibits were received in evidence. The hearing was digitally recorded.

### **FINDINGS OF FACT**

Based upon the Exhibits and the testimony of Ms. McNeely, Mr. Peters and Mr. Tierney, and the inferences reasonably drawn from that evidence, I make the findings of fact set forth below.

#### **Procedural History**

1. Appellant is currently employed as a Police Officer for the City of Worcester Police Department. (Testimony of Appellant)
2. Appellant was first appointed to the Police Department in 2003 after passing the HRD's open police officer examination. (Joint Exhibit 12; Testimony of Appellant)
3. On October 18, 2008, after five (5) years of service as an Officer, Appellant sat for the Promotional Examination for the position of Police Sergeant. (Testimony of Appellant; Joint Exhibit 1)
4. Prior to taking the examination, Appellant completed an Education and Experience Rating Worksheet, claiming "Category 8" work experience for "[e]xperience outside the specified department in a recognized federal, state, or municipal police department in a non-supervisory capacity which involved full police powers such as Police Officer, Sheriff, Court Officer, Federal Marshall, Campus Police Officer, Military Police Officer, or as a special agent employed by a branch of the United States government such as the [FBI], U.S. Customs

Service, U.S. Secret Service, [IRS], Drug Enforcement Agency, or the Bureau of Alcohol, Tobacco, and Firearms” based on his previous employment as a Seasonal Assistant Harbormaster for the Town of Dennis. (Testimony of Appellant; Joint Exhibits 1 & 5)

5. Specifically, Appellant claimed 12-23 months of recent Category 8 experience and 12-23 months of less recent Category 8 work experience. (Joint Exhibit 5)
6. Additionally, Appellant claimed 48-59 months of recent Category 4 work experience based on his service with the Police Department from 2003 up to the date of the promotional examination.
7. Appellant was employed by the Town of Dennis as a Seasonal Assistant Harbormaster during the following periods: 06/26/1999 – 11/05/1999; 05/27/2000 – 11/03/2000; 04/21/2001 – 11/02/2001; 05/18/2002 – 12/13/2002; and 01/18/2003 – 03/17/2004. (Joint Exhibit 6)
8. As a Seasonal Assistant Harbormaster, Appellant was responsible for enforcing all local, state, and federal regulations on all Dennis waterways; protecting persons and property; and maintaining law and order on the waterways and at Town-owned facilities. (Joint Exhibit 6)
9. An Assistant Harbormaster is specifically charged with:
  - “1. Ensur[ing] the orderly use of Dennis’ navigable waterways through patrols and public education.
  2. Enforc[ing] all laws and regulations applicable to the safe use of moorings, anchorages, and dockage.

3. Implement[ing] maintenance, repair, and security plans for waterways facilities as directed.

(Joint Exhibit 6)

10. As Assistant Harbormaster, the Appellant was further authorized to make warrantless arrests when he had probable cause to believe someone had committed or was in the process of committing a crime. (Testimony of Appellant)
11. The Appellant had authority to make on-the-water arrests and would transport a suspect to shore, and transfer him to the custody of the local police department. (Testimony of Appellant; Testimony of Tierney)
12. Appellant was not vested with authority to photograph and/or fingerprint criminal suspects. (Testimony of Appellant)
13. Appellant did not attend a police academy or have equivalent training prior to becoming a Seasonal Assistant Harbormaster in 1999. (Testimony of Tierney)
14. On or about February 13, 2009, Appellant was mailed notice of his promotional examination score from HRD. Appellant received a written score of 76.25 and an E&E score of 84.40, for a general score of 77.88. (Joint Exhibits 3 & 4)
15. HRD rounded Appellant's general score of 77.88 to 78, which placed him 29<sup>th</sup> out of 32 applicants on HRD's Eligible List for the Sergeant's position at the Police Department. (Joint Exhibits 3 & 4)
16. Chapter 31 of the Massachusetts General Laws gives HRD discretion over the creation, maintenance, expiration and revocation of an Eligible List and issuance of certifications for appointment that are established from the Eligible List. *See* G.L. c. 31, § 3 *et seq.*

17. An Eligible List contains the names of individuals who have passed the relevant civil service examination, ranked according to statutory preferences and examination marks. G.L. c. 31, § 1.
18. When an appointing authority has a vacancy, it must file a requisition with HRD for a certification setting forth the position and the number of vacancies. G.L. c. § 7.
19. Once a list of names has been certified to an appointing authority, and the number of appointments or promotional appointments available is  $n$ , the appointing authority may only select from the first  $2n + 1$  individuals on the Eligible List willing to accept appointment.
20. HRD did not credit Appellant with any Category 8 work experience in its E&E assessment based on its determination that Appellant was not vested with “full police powers” while he was employed as a Seasonal Assistant Harbormaster. (Joint Exhibit 8; Testimony of McNeely)
21. By correspondence of February 28, 2009, Appellant requested HRD to review its decision to deny him Category 8 work experience credit for his previous employment as Seasonal Assistant Harbormaster, pursuant to G.L. c. 31, §§ 2(b) and 22. (Joint Exhibit 7)
22. By letter dated March 28, 2009, HRD affirmed its decision to deny Appellant credit for Category 8 work experience based on its determination that the “[Town of] Dennis Seasonal Assistant Harbormaster does not have or exercise full police powers.” (Joint Exhibit 2)

23. By correspondence of May 26, 2009, Appellant filed an appeal to the Civil Service Commission (“Commission”), pursuant to G.L. c. 31, § 22, requesting review of HRD’s assessment of his Education and Experience Rating as claimed prior to the October 18, 2009 promotional examination for the Police Sergeant’s position. (Testimony of McNeely)
24. If HRD had credited Appellant for his service with the Town of Dennis, his E&E score would have increased from 84.40 to 84.85. However, this incremental increase in his E&E score would have resulted in an even smaller increase to his General Score, and no change to his rounded General Score of 78.<sup>2</sup> (Testimony of McNeely; Joint Exhibit 8)
25. In 2003, when Appellant sat for the open police officer examination, HRD gave him Category 8 credit for his service as a Seasonal Assistant Harbormaster. (Testimony of Appellant)

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<sup>2</sup> HRD calculates an applicant’s score by taking eighty (80) percent of an applicant’s written score, and adding it to twenty (20) percent of an applicant’s Education and Experience score.

Appellant’s General Score *without* his Category 8 service included:

$$\begin{array}{r}
 76.25 \times .80 = 61 \\
 + \\
 84.40 \times .20 = 16.88 \\
 \hline
 61 + 16.88 = 77.88 \rightarrow \mathbf{78.00} \text{ (final score rounded to the nearest whole number)}
 \end{array}$$

Appellant’s General Score *with* his Category 8 service included:

$$\begin{array}{r}
 76.25 \times .80 = 61 \\
 + \\
 84.85 \times .20 = 16.97 \\
 \hline
 61 + 16.97 = 77.97 \rightarrow \mathbf{78.00} \text{ (final score rounded to the nearest whole number)}
 \end{array}$$

(Testimony of McNeely; Joint Exhibit 1)

## CONCLUSION

### Appellant's Section 2(b) Appeal

Massachusetts General Laws Chapter 31, § 2(b) grants the Civil Service Commission authority “[t]o hear and decide appeals by *a person aggrieved by any decision*, action, or failure to act by the administrator...” (*emphasis added*). It defines an “aggrieved” person as one whose “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, § 2(b).

At the October 22, 2009 hearing, HRD presented credible evidence establishing that, even if it had granted Appellant E&E credit for his service as an Seasonal Assistant Harbormaster, his resulting overall General Score would have remained the same. (Testimony of McNeely) Sally McNeely, the Director of both the Policy and Civil Service Units at HRD, testified that granting Appellant credit for this service would have added 0.45 points to the E&E portion of his score. Because E&E only accounts for twenty percent of an applicant’s General Score, the inclusion of Appellant’s service in this instance would have only added 0.09 points to his overall General Score. Moreover, because HRD rounds applicants’ general scores to the nearest whole number, Appellant’s General Score would have remained 78, with or without the inclusion of the credit for his service with the Town of Dennis.

Because Appellant’s General Score would not have increased even with the credit for his service as a Seasonal Assistant Harbormaster, his ranking on the HRD’s Eligible List for the Police Sergeant’s position at the Police Department would not have been affected by inclusion or exclusion of this service. Accordingly, Appellant is unable to show that he was aggrieved by HRD’s decision to exclude his experience as a Seasonal Assistant

Harbormaster during its assessment of his application for the Sergeant's position. For this reason, Appellant's Section 2(b) appeal must be dismissed.

#### Appellant's Section 22 Appeal

Appellant also brought an appeal pursuant to Section 22 of Chapter 31, which states that:

“[i]n 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.

The section further states, “an applicant may request the administrator to conduct ... a review of the marking of the applicant's training and experience.” G.L. c. 31, § 24. Following the administrator's determination, Section 24 allows an applicant to file an appeal with the Commission. It specifies that “[s]uch appeal shall be filed no later than seventeen days after the date of mailing of the decision of the administrator...” G.L. c. 31, § 24.

On February 28, 2009, Appellant timely filed an appeal with HRD requesting a review of his E&E score. On March 28, 2009, HRD denied Appellant's appeal, affirming its decision to deny Appellant credit for Category 8 work experience based on its determination that the “[Town of] Dennis Seasonal Assistant Harbormaster does not have or exercise full police powers.” Thereafter, on May 26, 2009, fifty-nine (59) days after HRD had mailed its letter affirming its decision, Appellant submitted his appeal with the Commission, requesting review of HRD's decision to deny his claim E&E credit.



Accordingly, Appellant's May 26, 2009 filing with the Commission is untimely, thus the Commission lacks jurisdiction to hear the appeal.

Chapter 31, Section 24 further provides, "[t]he Commission shall refuse to accept any petition for appeal unless the request for appeal, which was the basis for such petition, was filed in the required time...." See e.g., *Corwin v. Boston Fire Dep't*, 16 MCSR 6 (2003) (Commission refused to consider an education and experience appeal that was untimely filed because "the Human Resources Division does not have the flexibility to deviate from the statutory requirement clearly articulated under G.L. c. 31, § 22).

Although the first paragraph of Section 24, concerning examination-related appeals to the Commission, does not expressly list "training and experience" appeals, such appeals are listed in the second paragraph of Section 24, as well as Section 22, which leads the Commission to conclude that the Legislature intended for the same filing requirements to apply to all four types of examination-related appeals which the Commission is authorized to hear. Moreover, even if the Legislature intended for the seventeen (17) day appeal period to apply only to three types of appeals listed in the first paragraph of Section 24, the default thirty (30) day deadline for filing an appeal found in the Commission's rules would apply in the absence of a statutory deadline. 801 CMR 1.01(6)(b).

Whether the seventeen (17) or thirty (30) day deadline for filing a training and experience appeal is applied, the Appellant's appeal to the Commission fifty-nine (59) days after HRD affirmed its initial decision is untimely. Thus, Appellant's Section 22 appeal is dismissed.

### Appellant's Service as a Seasonal Assistant Harbormaster

Although the instant appeal is dismissed on jurisdictional grounds, for both untimeliness and Appellant's failure to show that he was an aggrieved party, the Commission will nonetheless briefly address the merits of Appellant's claim that HRD should have granted him Category 8 credit for his service as Assistant Harbormaster for the Town of Dennis. According to the Education and Experience Rating Sheet Instructions, HRD describes Category 8 experience as "[e]xperience outside the specified department in a recognized federal, state, or municipal police department in a non-supervisory capacity *which involved full police powers* such as Police Officer, Sheriff, Court Officer, Federal Marshall, Campus Police Officer, Military Police Officer, or as a special agent employed by a branch of the United States government ..." (*emphasis added*) (Joint Exhibit 1) The Commission has previously attempted to define full police powers as:

- (1) the authority to suppress and prevent all disturbances and disorders;
- (2) the authority to make arrests and imprison with or without a warrant;
- (3) full arresting authority; and
- (4) the power to fingerprint and photograph a person arrested.

*Perotti v. Human Resources Div.*, 14 MCSR 118 (2001). The various powers on this list are a compilation of the factors contained in G.L. c. 41, § 98.

However, the statutory scheme set forth in Chapter 31 affords the administrator of a promotional test considerable discretion to make determinations regarding an applicant's claim for training and experience credit. *See Callanan v. Personnel Adm'r for the Commonwealth*, 400 Mass. 597 (1987); *citing* G.L. c. 31, § 23 ("administrator shall make

any necessary adjustment to correct such error” in grading of examination); G.L. c. 31, §§ 18, 19 (statute does not specify when examinations should be administered, leaving the timing of an examination to the sound discretion of the administrator; *McCue v. Director of Civil Serv.*, 325 Mass. 605, 608 (1950) (“The director may revise the list by placing ahead of [an applicant's] name the names of disabled veterans who had failed to claim, until after the list was established, the preference accorded them”). In contrast, “the civil service system confers only limited rights to those on eligibility lists.” *Callanan*, 400 Mass. at 601. In general, “[t]he Legislature has conferred on HRD, through the Personnel Administrator, the authority to create, administer, and score public safety promotional examinations ... the methodology by which HRD scores examinations is left to the sound discretion of the Personnel Administrator.” *Araica v. Human Resources Div.*, 22 MCSR 183 (2009). With this understanding, it follows that an administrator also has a high degree of discretion to award or deny applicants credit for prior training and experience during promotional testing, as long as the decision does not violate basic merit principles. The administrator typically has a better understanding and is better positioned to make these types of assessments regarding what categories of past experiences are best indicative of candidate’s qualifications for the promotion.

Appellant relies on the Commission’s decision in *Perotti* in support of its position that Appellant is entitled to receive E&E credit for his service as Assistant Harbormaster even if that service had only a “tangential connection to police work.” 14 MCSR 118 (2001). The Commission’s decision in *Perotti* appears to be based on HRD’s Education and Experience Rating Sheet Instructions for 1999, or an even earlier year. The language from these instructions, regarding what types of positions qualify for Category 8 service,

is not contained in the 2008 version of the Education and Experience Rating Sheet Instructions. (Joint Exhibit 1) HRD has apparently revised these instructions to better and more narrowly define what qualifies as Category 8 service. Accordingly, the *sui generis* nature of *Perotti* merely illustrates an administrator's authority to amend its assessment criteria for promotional applicants, and does not bind the Commission in this instance.

That said, the Appellant's contention on the merits does bear notice. The Commission has previously decided that a campus police officer serves in a position of limited jurisdiction but still exercises "full police powers" within the meaning of the civil service law and rules governing E&E credits. Figueiredo v. Human Resources Division, 14 MCSR 174 (2001) (E&E credit allowed for MIT police work). The Commission has similarly noted that the duties of armed officers of the former Boston Municipal Police Department, save for their jurisdictional limitation only to patrol property owned by the City of Boston, performed substantially equivalent duties and exercised the same police powers as sworn officer of the Boston Police Department. See Twenty Seven Former Boston Municipal Police Officers, Sergeants & Lieutenants v. City of Boston, 20 MCSR 235 (2007); Boston Police Patrolman's Association (BPPA) v. City of Boston, 20 MCSR 174 (2007); Certain Boston Municipal Police Officers & Sergeants v. City of Boston, 19 MCSR 352 (2006). At first blush, the Appellant's contention that a Harbormaster or Assistant Harbormaster has the same kind of "full police powers" within his authorized, albeit limited jurisdiction, i.e. certain waterways of the Commonwealth, seem indistinguishable from the status of campus police and the former armed BMPD. Because the Commission must dismiss this appeal on other grounds discussed above,

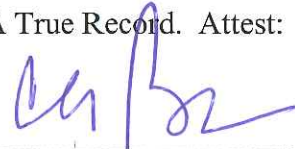
however, the question as to whether or not service as an Assistant Harbormaster should qualify as Category 8 E&E service for purposes of HRD's assessment of candidates for police promotional positions in future examinations is best left to HRD in the first instance. It certainly would behoove the Appellant forthwith to marshal whatever information he may have to present to HRD on this subject and for HRD to give that information serious consideration.

For the reasons stated herein, Mr. Peters' appeal is hereby *dismissed*.

Civil Service Commission  
  
Paul M. Stein  
Commissioner

By vote of the Civil Service Commission Bowman, Chairman; Henderson, Marquis, McDowell and Stein, Commissioners) on October 21, 2010.

A True Record. Attest:

  
\_\_\_\_\_  
Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of the 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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.

Notice to: Gary P. Peters, Esq.  
Tsuyoshi Fukuda, Esq. (HRD)  
John Marra, Esq. (HRD)