

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place – Room 503

Boston, MA 02108

(617) 727-2293

BRIAN A. POMEROY,
Appellant

v.

Case No. E-13-105

TOWN OF WEST SPRINGFIELD,
HUMAN RESOURCES DIVISION,
Respondents

Appearance for Appellant:

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NAGE/IBPO/IBCO/IAEP
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Appearance for Appointing Authority:

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Commissioner:

Cynthia A. Ittleman, Esq.

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Mr. Brian A. Pomeroy (“Appellant” or “Mr. Pomeroy”), filed a timely appeal with the Civil Service Commission (“Commission”) against West Springfield (“Town” or “Appointing Authority”) and the state’s

Human Resources Division (“HRD”) on April 11, 2013, contesting HRD’s decision to void the results of the October 27, 2012 promotional exam for the position of Sergeant based on the Town’s failure to properly post the exam announcement.

The Commission conducted a prehearing conference at the Springfield State Building on June 26, 2013, at which HRD filed a package of documents pertaining to this appeal, which were copied to the parties on the same day.¹ On August 29, 2013, HRD filed a Motion to Dismiss the appeal. The Appellant filed an Opposition to the Motion to Dismiss (“Opposition”) on September 9, 2013. In an electronic mail message dated September 10, 2013, the Appointing Authority stated simply that it “... will accept the eventual findings and rulings of the commission.” On September 10, 2013, after receiving the Appointing Authority’s statement, I denied HRD’s Motion to Dismiss at that time.

The Commission conducted a hearing on September 11, 2013 at the Springfield State Building.² At the hearing, a witness was sequestered.³ The hearing was digitally recorded and the parties were given copies of the recording.⁴ HRD renewed its Motion to Dismiss at the hearing. On September 16, 2013, the Commission denied the Motion to Dismiss.

At the hearing, the Town was ordered to produce the eligible list for the promotional exam in October, 2012 and HRD was ordered to produce the names of those who took the exam.

The Appointing Authority produced the pertinent eligible list on September 13, 2013 and HRD

¹ HRD filed a package of documents on June 26, 2013, which package was copied to the parties by the Commission. Attachments to the June 26, 2013 filing appear to be the same as the attachments to HRD’s Motion to Dismiss.

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR § 1.01 and thereafter (formal rules) apply to adjudications before the Commission, with G.L. c. 31 or any Commission rules taking precedence in the event of a conflict.

³ There were two witnesses, the Appellant and one witness called by HRD. The Appellant was not sequestered. HRD’s witness was sequestered but only for the parties’ opening statements, since she was called by HRD immediately thereafter. The hearing was open and Officer A sat in the audience during the hearing. None of the parties called Officer A to testify.

⁴ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal is obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, the recording provided to the parties should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

produced the names of those who took the exam on September 16, 2013. On September 16, 2013, I asked the Town to indicate which of those on the eligible list it provided were on sick leave, military leave, on vacation, or otherwise off the payroll at the pertinent time and to produce documentation that it had contacted those individuals who were off the payroll, giving them notice of the exam. The Appointing Authority responded via electronic mail on September 16, 2013, “I will follow up with the Town’s HRD Director and the Police Department and get back to you as soon as I have the information.” I did not receive the information and I draw a negative inference from the Appointing Authority’s failure to provide it.

The parties submitted post-hearing memoranda on or about October 18, 2013. The Appointing Authority’s post-hearing memorandum was a one-page document which, in summary, stated, “Despite the lack of clarity on the Town’s behalf regarding the appropriate posting dates and notification of the October 27, 2012 examination at issue, the Town is not taking a position regarding the outcome of this matter and will abide by the decision of the Civil Service Commission.”⁵ For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Based on the thirteen (13) exhibits entered into evidence at the hearing, documents submitted thereafter as noted above, the parties’ recommended decisions, the testimony of:

⁵ The remainder of the Appointing Authority’s post-hearing submission states,

“NOW COMES the Respondent Town of West Springfield (“Town”), and provides its Recommended Decision on this matter.

Counsel for the Town, Attorneys Simon J. Brighenti, Jr. and Daniel T. Wright, attended the Hearing of this matter held in Springfield, Massachusetts on September 11, 2013 before Commissioner Ittleman. The Town did not call any witnesses or submit any exhibits on its behalf. The Town presented oral argument and cross-examined the witness for the Human Resources Division (“HRD”), Loren Fitzgibbons (Columbare).

The Town has acknowledged that there is confusion regarding the timing of the requisite posting of the examination and notice date of the October 27, 2012 date at issue in this matter. The Town has challenged the sufficiency of HRD’s evidence by its submitted exhibits 1, 3 and 4 regarding the notification of the Exam Announcements to the Appointing Authority; the admitted confusion created by the HRD’s transition to a new online system; and Ms. Fitzgibbons’ (Columbare’s) alleged conversations with the Town’s Human Resources Director, Sandra MacFadyen. ...”

Called by HRD:

- Lauren Fitzgibbons (nee Columbare), Supervisor of Examination Administration and Examination Development, HRD⁶

Called by the Appellant:

- Brian A. Pomeroy, Appellant

Appointing Authority:

- none

and taking administrative notice of all matters filed in this case, as well as all pertinent statutes, case law, rules, regulations and policies, the credible evidence and drawing reasonable inferences therefrom, a preponderance of the evidence establishes the following:

1. The Appellant is a sixteen (16) year, tenured police patrol officer in the West Springfield Police Department. At the pertinent times, he was working the 4 pm to midnight shift at the Department. (Testimony of Appellant)
2. The Appellant has taken a number of civil service promotional examinations for the position of Sergeant in West Springfield since he was eligible to do so. (Testimony of Appellant)
3. The Appellant took the 2011 Sergeant promotional exam but failed. Approximately ten (10) officers took the 2011 exam. Since only one person (Officer A) passed the 2011 exam and he believed there would be promotional openings, the Appellant believed that the Appointing Authority would request another Sergeant exam in the fall of 2012. (Testimony of Appellant)
4. At or about the time that Police Chief Thomas Burke retired in March, 2012, the Appointing Authority appointed Captain Ronald Campurciani to be Acting Chief of

⁶ Ms. Fitzgibbons has since left the employ of HRD. (Administrative Notice)

Police. The Acting Chief met with the superior officers at around the time he was appointed. Shortly after that meeting, Captain Wilkinson announced at or around a midnight shift change involving the 4pm to 12am and 12am to 8am shifts that the Appointing Authority may request a Sergeant's exam for the fall. The Appellant was present at Captain Wilkerson's announcement and he began studying for the exam shortly thereafter. The Acting Chief was subsequently appointed Police Chief. (Testimony of Appellant)

5. In mid-to-late August 2012, the Appellant began checking the HRD website almost daily to see if there was any news about the scheduling of the Sergeant's exam. On or about September 10, 2012, the Appellant saw a notice online about signing up for the exam. He printed out the website page with the information on it, made copies and posted them himself, putting one on the Department detail clipboard and one in the patrol officers' room. The Appellant did not ask eligible officers if they were taking the exam but he knew that Officer C was eligible and stated that he would not be taking the exam because he had not had a chance to study for it. Rather, the Appellant kept to himself in this regard. The Appellant did not contact any eligible officers who were on sick leave and/or an officer who was out with a knee injury to inform them of the exam announcement. There were no eligible officers on military leave at that time. In early October, Sgt. Harlow showed the exam announcement to the Appellant and to Officer B, who were the only two officers who took the 2012 exam. Beside himself, the only other officer that the Appellant knew was studying for the exam was Officer B. (Testimony of Appellant; Post-Hearing email information provided by HRD and the Town)

6. Ms. Fitzgibbons was hired by HRD in 2006 as a Personnel Analyst. In 2012, she became HRD's Supervisor of Examination Administration and Examination Development. Her duties include overseeing the HRD teams involved in job analyses, addressing requests for alternate exams, posting of eligible candidates, and physical administration of exams. With regard to posting of exam announcements, appointing authorities are required to post notices in all departments or stations, indicating when an exam is to be given so that people can apply to take the exam. In addition, appointing authorities are required to notify anyone on authorized leave or otherwise absent about the exam announcement. HRD oversees this process by giving appointing authorities the exam announcement and requiring them to submit a signed certificate indicating that they have, indeed, posted the exam announcement in the required manner. (Testimony of Fitzgibbons, Ex. 1)
7. In August 2012, HRD began operating a new system for this exam called MaCS (Massachusetts Automated Civil Service), although certain parts of the system were the same.⁷ The Sergeant's exam was the first major exam posting using the new system. The difference between the old system and the new one is where the candidate goes on the Internet to find an exam posting. In the old system, candidates applied on the HRD website. In the new system, there is a different website where candidates can view job postings and sign up for exams. The new online system also provides appointing authorities with information about forms for which they are responsible, how to access them, and the deadlines for each form. (Testimony of Fitzgibbons)
8. On September 10, 2012, Ms. Fitzgibbons sent a lengthy, single spaced email message to all appointing authorities regarding Police Sergeant, Lieutenant, and Captain Exam

⁷ See www.mass.gov/hrd/macs, as indicated in Ex. 1.

Announcements with the information indicated in Fact No. 7.⁸ The email message also specifically requires appointing authorities to print five (5) copies of the exam announcement and to post them in conspicuous places throughout the Department. One of the forms that appointing authorities are required to fill out is the exam announcement Posting Certificate, which requires appointing authorities to post the exam announcement in specific manners, and complete, sign and return the Posting Certificate to HRD by October 1 (2012). At the top of the Posting Certificate, it states, “This will certify that the following actions have been taken on the dates set forth below in connection with the notices for the examination Announcement for promotion to: [job title] .” The purpose of posting is to make sure that all who are eligible have access to the exam for merit based testing. (Testimony of Fitzgibbons, Ex. 1)

9. The Sergeant’s exam was scheduled to be conducted on October 27, 2012. The deadline to apply to take the exam was five (5) Mondays prior to the exam (September 24, 2012). Ms. Fitzgibbons received the Town’s Posting Certificate, signed by then-Mayor Neffinger on or about October 5, 2012, as an attachment to an email message sent by Ms. Sandra MacFadyen, Director of the Town’s Human Resources office to HRD. Above the signature of the appointing authority, the Posting Certificate states, in part, “All persons on sick or military leave; or vacation; or off the payroll but eligible to take this examination have been notified and applications sent to them not later than [date] .”

Underneath the signature of the appointing authority, the Posting Certificate states that,

⁸ Exhibit 1 is a copy of an electronic mail message from HRD to appointing authorities. It was noted that the email message does not indicate “TO” whom the email message was addressed. However, Ms. Fitzgibbons confidently and credibly testified that although this is the manner in which the email message appears when printed, on her office computer screen she can see all of the names of persons at each appointing authority to whom the message was sent, including Ms. MacFadyen, at the West Springfield Human Resources office.

- (1) The notices of examination should be posted without delay.
- (2) The notices (or copies thereof) must be posted in conspicuous places so that any employees eligible to compete may be informed and, insofar as practicable, notices should be sent to any employee on sick, vacation or military leave or justifiably off the payroll during the period that applications may be accepted by this Division.
- (3) This certificate, properly filled out, including the date notices were posted, must be returned to the Human Resources Division as soon as possible.
(Ex. 2)

As filled in by the Town, the Posting Certificate also states that it posted the exam announcement on October 27, 2012, which is the date of the exam. In addition, the Posting Certificate also states that the Town had or would notify officers on leave by October 9 (2012), which was past the registration deadline. This prompted Ms. Fitzgibbons to contact the Town to clarify if the dates on the Town's Posting Certificate were errors and when the exam announcement was actually posted. (Testimony of Fitzgibbons, Exs. 2 and 8)

10. Ms. Fitzgibbons attempted to reach Ms. MacFadyen by phone to inquire about the posting but Ms. MacFadyen was out of the office. On October 10, 2012, Ms. Fitzgibbons received a call from Ms. Joan George, Mayor Neffinger's assistant, who said that the posting was late and she asked Ms. Fitzgibbons if the Town should go forward with the exam under the circumstances. Ms. Fitzgibbons told Ms. George that if the posting was late, HRD advises appointing authorities to contact all employees who are eligible to ensure that no one who is eligible feels they missed the opportunity to apply for the exam; if, after the Town notified eligible employees and there were no problems, HRD would let the exam go forward and Ms. George indicated that she understood. HRD tells appointing authorities to notify all who are eligible in writing so there is a record of

it, although phone calls may have sufficed under the circumstances here. (Testimony of Fitzgibbons, Ex. 3)

11. On October 15, 2012, Ms. MacFadyen informed Ms. Fitzgibbons by phone that she forgot to post the exam but she stated that they all knew about the exam. Based on this assurance, the exam was held on October 27, 2012, as scheduled. If HRD knew that all eligible employees had not been properly notified of the exam, it would have cancelled the exam before it was given because, by that time, the application deadline had passed and to conduct the exam under such circumstances would violate basic merit principles. (Testimony of Fitzgibbons, Ex. 4)
12. On December 12, 2012, Ms. Fitzgibbons received an email message from Officer A at the Police Department, asking HRD to void the test because it was inadequately posted, leaving him and “several other officers” inadequate opportunity to prepare for the exam. Officer A was the only officer on the promotion list from the 2011 exam. He found the notice for the October 2012 exam on the HRD website and signed up to take the exam but subsequently withdrew from the exam registration based on the belief that there was insufficient time for him to study and that his 2011 score could be merged with the eligible list resulting from the October 27, 2012 exam. (Testimony of Fitzgibbons, Ex. 5)

13. On January 10, 2013, Ms. Fitzgibbons sent the following email message to Ms.

MacFadyen,

Our office has received an inquiry regarding the posting of the announcement for the 2012 Promotion to Police Sergeant, West Springfield. I spoke with Joan George in your absence, and with you upon your return, regarding the Town’s efforts to confirm that no eligible individual missed the opportunity to sign up for the examination due to the late posting of the announcement. In order to respond to the inquiry at hand, I am requesting that you provide me with the details of the steps that the Town took (either you personally or Ms. George in your absence) to confirm the above. Please include dates and names of individuals contacted, as

well as copies of any written notice provided, if any, and all other information that may be pertinent to this issue. Should you have any questions, please feel free to give me a call.

(Ex. 6)

14. Not having received a response to her January 10, 2013 email message, Ms. Fitzgibbons re-sent her January 10 message to Ms. MacFadyen on February 11, 2013 stating, “We need a response to the below from the Town. Can you please advise on timeframe of response.” (Ex. 7, Testimony of Fitzgibbons)

15. On February 21, 2013, Ms. MacFadyen sent an email message to Ms. Fitzgibbons stating, “I do not know if this is significant to the issue of Police Sergeant. This was given to the Chief in 2011, and I handed the Chief this year in September the posting for the same examination” (Ex. 8 (ellipses in original)) Attached to the email message from Ms. MacFadyen was an undated Town email message she sent to Police Chief Burke with the subject title, “Police Departmental Promotional Examinations,” stating,

Attached please find announcements on Police Departmental promotional examinations to Sergeant and Captain. Both examinations are scheduled to be held on **October 15, 2011**. (emphasis added) I have attached five (5) copies of the examination announcements which should be posted in conspicuous places in all offices throughout the Police Department. ***Please notify all employees on sick or military leave; or vacation; or off the payroll but eligible to take this examination. Please note that the announcement number of the Police Captain is: 2185[.] The announcement number for the Police Sergeant is: 3444[.]*** (emphasis in original) Thank you for your cooperation. Please contact me should you have any additional questions.
(Ex. 8, Testimony of Fitzgibbons)

16. On March 5, 2013, Ms. Fitzgibbons sent an email message to Ms. MacFadyen stating,

This is not what we have requested. During your absence I spoke with Joan, and upon your return with you, about steps the Town should take to ensure that all potential applicants were aware of the Police Sergeant exam and had the opportunity to apply. I am asking you again to provide me with a write up of what exactly the Town did and when with regard to this. I am not looking for Forms that were already submitted, or information from 2011. I am asking for additional information relevant to the issue of posting the 2012 Police Sergeant

exam. I am including below my original email from January for your reference. However, as this is the third time we are requesting this same information, it is important that you provide everything that you can that is relevant to the 2012 Police Sergeant exam.
(Ex. 9)(emphasis in original)

Ms. MacFadyen sent an email response to Ms. Fitzgibbons on March 5, 2013 stating,

I have no further information to provide to you. The posting was done by the Police Chief I suggest that you contact him for further information as to what he did. His cell phone is: (redacted)
(Ex. 9 (ellipsis in original), Testimony of Fitzgibbons)

17. On March 13, 2013, Bruce Howard, Director of Operations, at the HRD Civil Service Unit, sent an email message to Police Chief Campurciani stating,

Sorry to bother you but I'm hoping you can assist with the information we are seeking regarding West Springfield's participation in the 2012 Police Promotional Exam. As you can see below, we are being directed to you. Our office has been notified that posting requirements were not met by the Town of West Springfield with regard to participation in the examination and that eligible candidates were not aware and therefore given the opportunity to participate. The information being requested below is necessary for our consideration before we can release the results. Any information you can provide would be greatly appreciated.
(Ex. 10, Testimony of Fitzgibbons)

18. On March 13, 2013, Chief Campurciani sent an email message to Mr. Howard at HRD stating,

Thank you for bringing this to my attention. I have read the attached emails, and I think I should tell you what I know about this for clarification. Sometime after the first of the year of 2012, I told our Human Resources Director that we would need to call for a sergeants exam. If you remember subsequent to West Springfield going to a Mayor form of government⁹, the police department use (sic) to be responsible for posting, announcing and scheduling the exams through your office. Since that time, that responsibility has shifted to Human Resources. So after this conversation with the HR Director, I was lead (sic) to believe that an exam would be called for and posted per civil service guidelines. During the spring and throughout the early summer, I had a number of officers come and ask me if we were going to have a Sergeants exam. I repeated to them what I just told

⁹ The Town apparently changed its form of government to include an elected Mayor in or about the year 2000, which also involved the establishment of various personnel procedures at a Human Resources office.

you, and told each officer to contact the Human Resources Director regarding this exam.

In the early part of October, I was in the Human Resources Directors (sic) office on another matter, and she handed me a stack of yellow papers, told me they were the examination announcement for the Sergeants exam, and asked me to post them around the police station. I went back to the station and immediately posted them around our station.

I have also attached to this email an email from Sergeant Harlow to Human Resources about this issue from October, and her response. I hope this helps with your inquiry.

(Ex. 11, Testimony of Fitzgibbons)

19. Attached to the Police Chief's email message was an email exchange between Officer

Harlow and Ms. MacFadyen. On October 8, 2012, Officer Harlow wrote to Ms.

MacFadyen,

The Sgt exam notice scheduled to be taken on 10/27/12 was not posted within the police department until 10/5/12, almost 2 weeks after the application deadline date. Is there a specific reason for this as it contradicts the wording within the Examination Announcement Posting Certificate.

(Ex. 11)

Ms. MacFadyen replied to Officer Harlow on October 15, 2012,

Forms were just received from HRD in Boston

(Ex. 11)(ellipsis in original)

However, HRD sent the information on September 10, 2012. (Testimony of Fitzgibbons,

Ex. 1; *see* Fact #8, *infra*)

20. On April 2, 2013, Mr. Howard sent an email message to then-Mayor Neffinger with a

letter attached stating,

This office is in receipt of a complaint regarding the posting of the examination announcement for the Town of West Springfield's Promotion to Police Sergeant examination, scheduled for October 27, 2012. In response, this office initiated an audit of the Town's compliance with the examination posting guidelines. Due to the Town's inability to verify that the examination announcement was posted in accordance with such guidelines, I regret to inform you that the results from this examination are being rescinded, and that no Eligible List will be established pursuant to this examination.

Candidates who participated in this examination will be notified by this office of our decision, and will be refunded their exam processing fee.
(Ex. 12, Testimony of Fitzgibbons)

On April 3, 2013, Mr. Howard sent a similar letter to the Appellant. (Ex. 13, Testimony of Fitzgibbons)

21. There were sixty (60) officers in the Town who were eligible to take the exam, three (3) of whom signed up for the exam; two (2) of the three (3) who signed up for the exam actually took it (the Appellant and Officer B). (Post-Hearing email information from the Town and HRD) The Appellant passed the 2012 examination. (Post-Hearing email information from HRD)
22. As of the date of the hearing in this case at the Commission, the Town had requested a new Sergeant's exam, with a 9/16/13 registration deadline for an exam on 10/19/13. (Testimony of Fitzgibbons) The Appellant registered for the 2013 exam. (Testimony of Appellant)
23. The Appellant filed this appeal on April 11, 2013. (Administrative Notice)

DISCUSSION

Applicable Statutes

G.L. c. 31, § 2(b) provides that, in addition to its other powers and duties,

... the commission shall have the following powers and duties:

(b) To hear and decide appeals by a person aggrieved by any decision, action, or failure to act by the administrator

Id.

Section 2(b) requires that a person appealing a decision of the administrator to the Commission shall be aggrieved. Specifically, the statute conditions such an appeal as follows,

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.

Id.

In appeals regarding “... the decision of the administrator involving the application of standards established by law or rule to a fact situation ...[,]” such decisions are subject to reversal if they were not supported by a preponderance of the evidence. Id.

The phrase “basic merit principles” references a tenet of civil service law. Section 1 of G.L. c. 31 defines basic merit principles as,

... (a) recruiting, selecting and *advancing of employees on the basis of their relative ability, knowledge and skills* including open consideration of qualified applicants for initial appointment; (b) providing of equitable and adequate compensation for all employees; (c) providing of training and development for employees, as needed, to assure the advancement and high quality performance of such employees; (d) retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected; (e) *assuring fair treatment of all applicants and employees* in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens, and; (f) assuring that all employees are protected against coercion for political purposes, and are *protected from arbitrary and capricious actions*.

Id. (emphasis added)

The law assigns the administrator considerable discretion to ensure adherence to the tenets and purposes of civil service law. For example, section 77 of the civil service statute provides that, “The administrator may take any necessary and appropriate action to enforce the civil service law and rules.” Id. Further, section 5 of G.L. c. 31 states,

In addition to his other powers and duties, imposed upon him by this chapter, chapter seven and chapter thirty the administrator shall have the following powers and duties:

(a) To administer, enforce and comply with the civil service law and rules and the decisions of the commission. ...[and]

(e) To conduct examinations for purposes of establishing eligible lists. ...

Id.

The law also places specific, detailed responsibilities on the administrator, for example, with regard to promotional exams, while maintaining the administrator's considerable discretion where appropriate. In particular, section 19 of G.L. c. 31, provides that,

The administrator shall prepare a notice of each competitive examination to be held for a promotional appointment in the official service. The administrator shall send copies of such notice to the appointing authority for the departmental unit in which the promotional appointment is to be made and to the appointing authority for any other departmental unit in which persons eligible to take such examination may be employed. Any appointing authority receiving such notice shall cause it to be posted in conspicuous places in the departmental unit and in each of its branch offices. Such appointing authority shall mail a copy of such notice to any eligible employee of such unit who, during the entire period of such posting, is on sick or military leave, on vacation, or off the payroll. The appointing authority shall make provision for fully informing all employees in such departmental unit of the places where such notices are posted.

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.

Id. (emphasis added)

Analysis

A preponderance of the evidence establishes that the Town failed to properly post the 2012 Sergeant's exam, providing sound and sufficient reasons for HRD to void the exam and not establish an eligible list based thereon. As in McLaughlin v Department of Personnel Administration, 10 MCSR 176 (1997), voiding of the test here was within HRD's discretion. When HRD received the Town's Posting Certificate with incorrect dates, it contacted the Town prior to the exam. Specifically, HRD contacted Ms. MacFadyen, the Director of the Town's Human Resources office, and/or Ms. George, an assistant to the Mayor, to inquire if the Town had posted the exam announcement as required. HRD emailed the exam announcement information to appointing authorities on September 10, 2012. The deadline to register for the

exam was September 24 and yet the announcement was not posted until early October. HRD repeatedly asked the Town for assurances that the announcement had been posted so that all eligible officers could register for the exam in a timely manner. The best the Town could offer, prior to the exam, was to say that everyone knew about the exam. HRD relied upon the Town's assurances that all eligible officers had been appropriately advised of the exam announcement and the exam went forward on October 27, 2012, as scheduled. It wasn't until December 2012 that HRD received an email message from Officer A, stating that he and others had not received sufficient notice of the exam and, therefore, he had been unable to adequately prepare for the exam. Although Officer A had signed up for the 2012 exam, he stated that he would not take the exam, in the belief that his passing score from the 2011 exam would be merged into the eligible list that would emerge from the 2012 exam. Upon receipt of this information, HRD repeatedly inquired of the Town what efforts it made to inform all eligible officers about the exam, including officers who may have been on leave. After months of exchanges between the Town and HRD, the Town failed to provide any information indicating that all eligible officers, including those who were on leave, had been appropriately informed of the exam. Indeed, I requested the same information after the hearing but never received it. I draw a negative inference from the Town's failure to produce evidence that it properly notified all eligible officers, including officers on leave, the inference being that the Town did not notify all eligible officers as required.

The Appellant avers that HRD's action should be reversed because he is aggrieved by it. However, some of the reasons he provides in support of his argument conflict. On one hand, the Appellant believes that the test should not have been voided because he posted the exam announcement in two places in the Police Department so that other officers would be aware of

the exam. On the other hand, when asked if he knew if other eligible officers who had not signed up for the exam, he stated that he did not know, that he kept to himself in this regard. Section 19 of G.L. c. 31 specifically requires the appointing authority to post an exam announcement, not someone who is interested in registering for the exam. The Appellant identified two (2) locations where he posted the exam announcement. However, HRD's September 10, 2012 email to appointing authorities clearly states (as it has previously) that they shall post five (5) such notices in conspicuous places. Having ultimately determined that the Town failed to post the exam announcement as required, HRD acted to ensure basic merit principles. One cannot be said to be aggrieved by an action taken by HRD to enforce civil service law by ensuring that promotional exams are open and competitive exams.

The Appellant also argues that if HRD was going to take action regarding the 2012 exam, it should have done so prior to administration of the exam, rather than after it. However, as soon as HRD received the Town's Posting Certificate with the erroneous dates (which was after the registration deadline), HRD contacted the Town to find out whether the Town had, in fact, informed all eligible officers of the exam announcement. HRD's instructions to the Town in this regard were clear and yet the Town responded only that everyone knew about the exam. For those reasons, HRD allowed the exam to go on as scheduled. It was not until HRD received the email message from Officer A, two months after the exam, stating that the Town had failed to provide an equal opportunity to the eligible officers to prepare and register for the exam. HRD did not void the test until it asked the Town, repeatedly but without success, to provide evidence that it had in fact appropriately informed all eligible officers of the exam. In view of these circumstances, there were sound and sufficient reasons for HRD's actions and it acted within its discretion.

As HRD notes, voiding a test is not without precedent. In McLaughlin, *supra*, prior to a Lieutenants exam, HRD repeatedly “... attempted to verify the eligibility of all four applicants who had applied to take the test. Specifically, the issue of whether or not one of the applicants, not the appellant, had timely filed his application, remained unresolved...” Id. At issue was the requirement to have a minimum of four eligible applicants under G.L. c. 31, § 59. HRD’s attempts to resolve the matter in that case prior to the exam were “inconclusive.” McLaughlin at 177. The test was administered in McLaughlin but HRD voided it afterward because “... there still was no sufficient verification that four applicants eligible for the examination had applied to take the test.”¹⁰ Id. The appellant in that case argued that HRD lacked authority to question exam applications after the test was administered and that statements by HRD employees in this regard estopped HRD from voiding the test. However, the Commission concluded in McLaughlin that,

... HRD acted within its statutory authority in canceling the examination. HRD provided sound and sufficient reasons for their action. There is sufficient evidence to conclude that four eligible applicants had not timely applied for the examination and therefore the examinations is not valid.
Id.

Addressing the issue of voiding the test after it had been given, the Commission added, “... Chapter 31 Sec.59 does not limit HRD from taking retroactive measures to assure statutory compliance.” Id. The instant case is analogous to McLaughlin, warranting the same conclusion.

There are additional matters in this case indicating that there were sound and sufficient reasons for HRD’s actions. First, the Appellant was among the officers at a shift change who were advised there would be a sergeant exam, which was months before the exam announcement was issued, and there is no indication that other shifts, in addition to eligible officers on leave,

¹⁰ HRD provided no indication why, in the instant case (Pomeroy v Town of West Springfield and HRD, E-13-105), the exam proceeded without the minimum four eligible applicants, pursuant to G.L. c. 31, § 59.

were similarly advised at or around that time. Secondly, if the Commission were to reverse HRD's voiding of the 2012 test result, which test the Appellant passed, he would benefit from the added time he had to study for the exam because he was informed of the test months before the exam announcement and before at least some eligible officers. Third, in 2011 there were ten (10) eligible officers, out of approximately sixty (60) eligible officers at the Police Department, who took the sergeant exam but in 2012 only two (2) out of the sixty (60) took it, suggesting that the Town's failed posting affected registration for the exam, reducing competition for the promotion. These concerns, added to those above, further support HRD's actions.

The Town avers that the 2012 promotional exam announcement and related information were conveyed in a new manner, which contributed to the Town's difficulties. While the information may have been conveyed in a new manner, the September 10, 2012 email message to appointing authorities included links to the necessary information and forms. There was no indication that the Town had questions relating to the 2012 promotional exam and/or that the Town consulted HRD in this regard. In addition, there is no indication that the 2012 promotional exam announcement and related information caused such difficulties for other appointing authorities. There was also a suggestion that a change in the Town's form of government may have contributed to the Town's difficulties in regard to the 2012 promotional exam. However, since the Town changed its form of government more than a decade ago, its effect on the 2012 promotional exam is doubtful at best.

Conclusion

Based on the foregoing facts and the applicable law and rules, HRD had sound and sufficient reasons for its actions, which actions were within its discretion and not arbitrary or

capricious. Therefore, the appeal herein is *denied*.

Civil Service Commission

Cynthia A. Ittleman, Esq., Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on May 1, 2014.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten (10) 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 (30) 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.

Notice:

Michael Clancy, Esq. (for Appellant)

Robert F. Dickson (for Appellant)

Simon Brighenti, Esq. (for Appointing Authority)

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