

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

**One Ashburton Place - Room 503
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SEAN S. PUGSLEY,
Appellant

v.

CASE NO: E-10-334

**CITY OF BOSTON
&
HUMAN RESOURCES DIVISION**
Respondents

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Commissioner:

Paul M. Stein

DECISION ON MOTIONS FOR SUMMARY DECISION

The Appellant, Sean S. Pugsley, asserts this appeal pursuant to G.L.c.31,§2(b) against the City of Boston Police Department (BPD) and the Massachusetts Human Resources Division (HRD), claiming that he was bypassed for original appointment as a BPD Police Officer. Both HRD and BPD moved for summary decision dismissing the appeal on various grounds. Mr. Pugsley subsequently waived certain of his initial claims which rendered HRD's motion and a portion of BPD's motion moot. The claim which remains for decision is Mr. Pugsley's contention that he was bypassed for appointment as a result of unlawful and unjustified use of a gender-specific PAR.08 selective certification approved by HRD and employed by BPD to select female candidates for appointment who had

received lower examination scores than he did. BPD and HRD press the motions for summary decision on the remaining claim on grounds that: (1) the appeal is untimely; (2) Mr. Pugsley is not an aggrieved person entitled to appeal under Section 2(b); (3) Mr. Pugsley waived his right of appeal, if any, by bringing a duplicative civil lawsuit against the BPD and HRD alleging discrimination and violation of his civil rights; and (4) the BPD's use of a PAR.08 gender-specific selective certification complies with all applicable civil service law and rules and is justified as a matter of law. The Commission heard oral argument on the motions on August 1, 2011 (which were digitally recorded) and received supplementary submissions from Mr. Pugsley on August 2 & 31, 2011, from HRD on September 29, 2011, and from the BPD on October 14, 2011.

FINDINGS OF FACT

Giving appropriate weight to the documents submitted by the parties, and the argument presented by Mr. Pugsley, BPD and HRD, and inferences reasonably drawn from the evidence, I find the following material facts to be undisputed:

1. The Appellant, Sean Pugsley, is a resident of Dorchester in the City of Boston, Massachusetts. (*Claim of Appeal; Administrative Notice [Complaint, Pugsley v. Human Resources Division, et als, Civil Action SUCV2011-2083 ("Pugsley Civil Action")]*)

2. Mr. Pugsley took and passed the open competitive examination for Police Officer administered by HRD and received a score of 103, which placed him on a November 1, 2008 eligible list, first among non-veterans who were Boston residents but (by HRD's count) below 189 other candidates, mainly, Boston-resident veterans (with statutory preference over resident non-veterans). (*HRD Motion; Administrative Notice [G.L.c.31, §26; Pugsley Civil Action]; HRD Opposition to Appellant's Memo of Law*)

3. The November 1, 2008 eligible list expired on October 31, 2010, except that certain candidates on that list who had also taken a subsequent examination administered by HRD in 2009 had their eligibility extended. Mr. Pugsley did not take the 2009 examination, and his eligibility for appointment as a Police Officer expired on October 31, 2010. (*HRD Motion; Representation of Counsel*)¹

4. Mr. Pugsley is now older than 40 and ineligible to take another examination for appointment to the position of Police Officer. (*Appellant's Opposition to BPD Motion*)

5. In March and April 12, 2010, BPD requisitioned four certifications from HRD for appointment of entry-level police officers. One requisition sought to appoint 24 officers from the “main” eligible list. The other three requisition sought a selective certifications under PAR.08(4) for candidates with special qualifications, including a certification for ten female candidates and two other certifications for foreign-language speaking candidates (eight Cape Verdean speakers and ten Haitian Creole speakers). (*HRD 1/4/2011 Submission; BPD Motion; Appellant's Memo of Law; HRD's Opposition to Appellant's Memo of Law; Appellant's Opposition to BPD Motion; Pugsley Civil Action*)

6. BPD's requisition of PAR.08 certifications for foreign language speakers was based on the data provided about the population of the City of Boston and the need to have officers on duty capable of communicating directly with citizens, without the need for an interpreter, which adds undesirable complications. (*BPD Motion*)²

7. HRD has promulgated a set of guidelines entitled “Human Resources Division Civil Service Unit, Selective Certifications, Descriptions and Questionnaires”. (the “HRD

¹ Mr. Pugsley initially claimed his eligibility should extend beyond October 31, 2010, but has waived that claim. The validity of his claim is now based solely on his status on the November 1, 2008 eligible list.

² Mr. Pugsley has waived any claims that the foreign-language selective certification list was invalid. The facts concerning the Cape Verdean and Haitian Creole certifications are included only insofar as they bear on any of the arguments raised by the parties concerning the validity of the female selective certification.

Guidelines”) The section of the HRD Guidelines entitled “Gender-Based Selective Certification” contains a sample of the questionnaire, entitled ““Human Resources Division/Request for Gender-Based Selective Certification (the “HRD Questionnaire”), required to be completed by an appointing authority who seeks to requisition a gender-based selective certification, as well as the following guidance:

“Massachusetts General Laws, Chapter 31, Section 21, provides that the Personnel Administrator may limit eligibility for appointment to any civil service position to either male or female persons if the duties and responsibilities clearly and unequivocally so require. Requests for such gender-based selective certifications are carefully reviewed by both the Human Resources Division (HRD) and the Massachusetts Commission Against Discrimination (MCAD) to ensure that such certification is valid and job-related.

“To initiate HRD review of a gender-based selective certification request, the appointing authority must file a completed gender-based selective certification questionnaire, a copy of which is included here, documenting such need. The completed questionnaire is then analyzed by HRD, and, if the request appears to be justified, the request is forwarded to MCAD for its review. Once MCAD approves the request, HRD will issue a selective certification. If the request is denied by either agency, the appointing authority will be so notified.

Selective certifications have, in the past, been requested and approved for female police officers so that municipalities will have sufficient shift coverage to ensure privacy rights of clients within such categories as rape crisis intervention, transportation of female prisoners and search of female prisoners. In these cases, the formula used to determine the validity of the request is that a municipal department is allowed one female police officer per shift plus one additional female officer on each shift as a reserve for vacation and sick leave accommodations.”

(Appellant’s Memo of Law (emphasis added))

8. In accordance with HRD requirements, on or about March 12, 2010, BPD submitted a completed HRD Questionnaire to support its request for a selective female certification. BPD stated that female officers are responsible for gender specific duties involving both female victims and offenders, which include frisking and transporting female suspects, and interviewing and interacting with citizens in sensitive areas of sexual assault and crimes against children. Although the proportion of arrests had not

changed dramatically over the past five years, BPD reported that the number of female victims of aggravated assault had increased from 1,200 to 1,696 (+41%) from 2008 to 2009. In addition, BPD reported that the number of female victims of criminal assault had increased 3% from 2005 to 2009, including a 55% spike (3,116 to 4,389) from 2008 to 2009. In addition, (*BPD Motion; Appellant’s Memo of Law; HRD Opposition to Appellant’s Memo of Law*)

9. BPD reported the following sworn officer strength as of 3/2/2010):

	<u>No. Male (%)</u>	<u>No.Female (%)</u>	<u>Total</u>
Superior Officers	339 (93%)	27 (7%)	366
Detectives	225 (85%)	39 (15%)	264
Patrol Officers	<u>1289 (84%)</u>	<u>218 (16%)</u>	<u>1507</u>
TOTAL	<u>1853 (87%)</u>	<u>284 (13%)</u>	<u>2137</u>

(*Appellant’s Memo of Law; HRD’s Opposition to Appellant’s Memo of Law*)

10. BPD did not include any information in the HRD Questionnaire that identified the current number of female officers by duty assignment. Mr. O’Brien states, and it does not appear disputed, that the BPD operates 11 separate police districts. Absent an unusual distribution of officers by gender, this would translate into approximately 19 or 20 female patrol officers per police district, 3 or 4 detectives, and 2 to 3 superior officers.

(*Appellant’s Memo of Law, citing www.cityofboston.gov/police/districts*)

11. The HRD Questionnaire states that the “information is submitted to HRD and MCAD in documentation of this request for a gender-based selective certification.” Prior to any “limitation of appointment or promotion” on the basis of gender, HRD is required to “submit in writing to the Massachusetts commission against discrimination [MCAD] a request for its recommendation on such proposed limitations.” (*Appellant’s Memo of Law; HRD Opposition to Appellant’s Memo of Law; Administrative Notice [G.L.c.31, §21, ¶4]*)

12. The BPD's request for selective certification bears a date stamp indicating it was received by the HRD Civil Service Unit on March 12, 2010 at 2:19 PM. The cover page also contains a hand-written endorsement which appears to read "OK SAM 3/12/2010". The requisitions for selective certification of Cape Verdean and Haitian speakers bear the same date stamp and hand-written endorsements. The reasonable inference to be drawn from these endorsements – most likely the initials of its former Civil Service Unit Director – is that HRD approved all three of BPD's requests within hours after they were received. (*Appellant's Memo of Law; HRD's Opposition to Appellant's Memo of Law*)

13. HRD acknowledged that, due to an "administrative oversight", HRD did not submit BPD's request for a special female certification to MCAD. (*Appellant's Memo of Law; HRD's Opposition to Appellant's Memo of Law*)

14. On April 16, 2010, HRD issued Certification # 290999 containing the first 13 names from the active eligible list from which to appoint 24 permanent full time BPD Police Officers from the 49 highest on the list willing to accept an appointment. (*BPD Motion; Appellant's Memo of Law; HRD Opposition to Appellant's Memo of Law*)

15. On April 16, 2010, HRD also issued Certification # 201759 containing the names of approximately 273 females on the active eligible list from which to appoint 10 female officers from the first 21 highest who were willing to accept appointment. HRD attributed its inclusion of an unusually large number of names on the selective female certification for 10 officers (3 times the number of the "main" Certification #290999 for 24 officers) to another "technical error." (*HRD 1/4/2011 Submission*)

16. Of the 113 persons on the "main" Certification #290999, 76 persons signed willing to accept. After completing background investigations and drug screening,

conditional offers were made to 19 candidates, subject to further satisfactory completion of a medical screening and the Physical Abilities Test (PAT). Of the candidates who received conditional offers, nine entered the Police Academy class that began in December 2010. (*BPD Motion; Appellant's Opposition to BPD Motion*)

17. Of the 273 names on the selective female Certification #207159, 191 persons signed willing to accept. After completing background investigations and drug screening, conditional offers were made to 75 candidates, subject to further satisfactory completion of a medical screening and the Physical Abilities Test (PAT). Of the candidates who received conditional offers, 28 entered the Police Academy class that began in December 2010. (*BPD Motion; Appellant's Opposition to BPD Motion*)

18. In addition, 19 candidates from the Cape Verdean selective Certification #207160 of 40 names received conditional offers and 10 entered the December Police Academy; 12 candidates from the Haitian selective Certification #207138 of 55 names received conditional offers and 8 entered the December 2010 Police Academy; 28 additional candidates who had served as Boston Police Cadets also entered the December 2010 Academy pursuant to Chapter 277 of the Acts of 1984, which permits BPD to place a number of qualified Boston Police Cadets into each academy class without certification from an eligible list. (*BPD Motion; Appellant's Opposition to BPD's Motion*)

19. In making these appointments, the BPD reached the lowest scoring applicants (Burke & McCarthy) on the list of 113 names on the "main" Certification # 290999 and reached the 234th lowest ranked candidate (Zilberg) on the female Certification #207159. (*HRD 1/4/2011 Submission; BPD Motion; Appellant's Opposition to BPD Motion; Appellant's Memo of Law*)

20. According to Mr. Pugsley' undisputed affidavit, the first he heard that the BPD had started the process for hiring Police Officers was in May 2010, when he learned that some candidates had received a card in the mail indicating their placement on a certification list. In October 2010, he was perplexed because he had come to learn that a large number of female candidates had been called in for interviews. He believed that he ranked much higher than most of the women on the eligible list, but had still not received a card instructing him to begin the application process. He had no knowledge that BPD was working off a selective certification on which only female names appeared. (*Appellant's Memo of Law [Affidavit of Sean Pugsley]*)

21. Mr. Pugsley spoke to someone at BPD to see if there had been a mistake made in where he was placed on the eligible list, and was told to contact HRD. He was told by HRD that his name was still on the eligible list and that he had not been reached yet. He was not told that BPD was working off a selective certification list on which his name did not appear. (*Appellant's Memo of Law [Affidavit of Sean Pugsley]*)

22. According to Mr. Pugsley, on November 22, 2010, he checked the HRD website and found that his name still appeared on the eligible list for Police Officer. (*Appellant's Memo of Law [Affidavit of Sean Pugsley]*)

23. Mr. Pugsley knew that BPD was planning to start a new Police Academy in December 2010. (*Appellant's Memo of Law [Affidavit of Sean Pugsley]*)

24. Mr. Pugsley again attempted to log into the HRD website on November 28, 2010 and this time he was denied access. He contacted HRD and was told that he was no longer on the eligible list. According to Mr. Pugsley, this was the first time he realized

that he would not be called in for an interview by the BPD, although he still didn't know why he had never been reached. (*Appellant's Memo of Law [Affidavit of Sean Pugsley]*)

25. On December 7, 2010, Mr. Pugsley filed this appeal. (*Claim of Appeal; Appellant's Memo of Law [Affidavit of Sean Pugsley]*)

26. On February 10, 2011, Mr. Pugsley filed a complaint against BPD and HRD with MCAD. On June 2, 2011, he filed a civil action in Suffolk Superior Court alleging discrimination by HRD and BPD under G.L.c.151B and other laws. HRD's motion to dismiss that action is pending. (*Pugsley Civil Action; Appellant's Memo of Law; HRD Opposition to Appellant's Memo of Law; BPD Opposition to Appellant's Memo*)

27. After BPD had made the appointments to the December 2010 Police Academy class, HRD inquired why BPD had hired 30 female police officers, twenty more than the ten female officers authorized to be hired by the selective female Certification #207159. On January 19, 2011, BPD explained in a letter to HRD that BPD had experienced an increased need for additional female police officers due to an unspecified "number of police officers leaving the force coupled with a continuous need for female officers to carry out gender-specific job related tasks." BPD's January 19, 2011 letter was not supported by any additional documentation. (*BPD Motion; Appellant's Memo of Law; HRD Opposition to Appellant's Memo of Law*)

CONCLUSION

Summary

The undisputed evidence establishes that the process employed to select candidates for BPD's December 2010 Police Academy class was seriously flawed. The approval of a selective certification for female candidates did not comply with the express mandate of civil service law and HRD practice and procedure that such requests "shall" be approved

by the MCAD. In addition, BPD unilaterally elected to proceed to consider additional candidates from the peculiarly lengthy selective female certification, rather than request additional names from the full eligible list, without prior notice or authority from HRD. Material and bona fide issue of fact are presented that cannot be decided on this record as to whether these flaws have prejudiced the rights of Mr. Pugsley (and, possibly, dozens of military veterans on the “main” certification list above him) who were never given consideration for selection to the December 2010 class according to their rank order and statutory preference on the then active eligible list, as prescribed by civil service law and rules. Mr. Pugsley pursued his claims with reasonable diligence and his appeal will not be deemed untimely or duplicative of his civil suit, but, even if it were, the Commission is warranted to open its own investigation of this flawed process pursuant to G.Lc.31,§2(a).

Applicable Legal Standard

The Commission may, either on motion or upon its own initiative, dismiss an appeal at any time for lack of jurisdiction or for failure to state a claim upon which relief can be granted. 801 CMR 7.00(7)(g)(3). A motion for summary decision of an appeal before the Commission, in whole or in part, may be filed pursuant to 801 C.M.R. 1.00(7)(h) when “there is no genuine issue of fact relating to all or part of a claim or defense” and the moving party is “entitled to prevail as a matter of law.”

These motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., after viewing the evidence in the light most favorable to the non-moving party, the substantial and credible evidence established that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case”, and has not rebutted this evidence by “plausibly suggesting” the

existence of “specific facts” to raise “above the speculative level” the existence of a material factual dispute requiring evidentiary hearing. See, e.g., *Pease v. Department of Revenue*, 22 MCSR 754 (2009); *Lydon v. Massachusetts Parole Board*, 18 MCSR 216 (2005). cf. *Milliken & Co., v. Duro Textiles LLC*, 451 Mass. 547, 550n.6, 887 N.E.2d 244, 250 (2008); *Maimonides School v. Coles*, 71 Mass.App.Ct. 240, 249, 881 N.E.2d 778, 786-87 (2008). See also *Iannacchino v. Ford Motor Company*, 451 Mass. 623, 635-36, 888 N.E.2d 879, 889-90 (2008) (discussing standard for deciding motions to dismiss); cf. *R.J.A. v. K.A.V.*, 406 Mass. 698, 550 N.E.2d 376 (1990) (factual issues bearing on plaintiff’s standing required denial of motion to dismiss)

Applicable Civil Service Law

Candidates for original civil service appointments are considered in the order of their place on a “Certification” issued to the appointing authority by HRD, which is generated from the current “eligible list” established by ranking candidates according to their scores on the competitive qualifying examination, along with certain statutory preferences such as veterans’ status, and points for education and experience. As a general rule, in order to deviate from this paradigm, an appointing authority must show specific reasons – either positive or negative, or both, consistent with basic merit principles, that affirmatively justify picking a lower ranked candidate. G.L.c. 31, §§1, 6,16, 25 through 27.

The authority to approve a gender-specific limitation on the selection of candidates for civil service positions is set forth in Section 21 of Chapter 31:

“The administrator [HRD] may limit eligibility for any examination for an original appointment to either male or female persons if the appointing authority requests such limitation in its requisition. Both male and female persons shall be presumed to be eligible for a promotional appointment to any civil service position; provide, however, that the administrator may limit such eligibility to either male or female persons if the duties and responsibilities of such position

require special physical or medical standards or require custody or care of a person of a particular sex. Prior to any such limitation of appointment or promotion, the administrator shall submit in writing to the Massachusetts commission against discrimination a request for its recommendation on such proposed limitations.” (Emphasis added)

Pursuant to its rule making authority (which is subject to Commission approval), HRD duly promulgated “Personnel Administration Rules” (PARs), which provide:

PAR.08 Civil Service Requisition and Certification

- (1) Whenever an appointing authority shall make requisition to fill a position, the Personnel Administrator [HRD] shall, if a suitable eligible list exists, certify the names standing highest on such list in order of their place on such list, except as otherwise provided by law or civil service rule. Insofar as possible sufficient names shall be certified to enable such appointing authority to make appointments from among the number specified in PAR.09.
- . . .
- (4) If a requisition is made calling for persons having special qualifications in addition to the general qualifications tested by an examination, the administrator may issue a selective certification of the names of such persons from the appropriate eligible list.

PAR.09 Civil Service Appointments

- (1) When names have been certified to an appointing authority under PAR.08 and the number of appointments or promotional appointments actually to be made is n, the appointing authority may appoint only from among the first $2n + 1$ persons named in the certification willing to accept appointment, e.g.,
- | when the number of
appointments to be made is | the appointing authority may
appoint only from among the first |
|--|---|
| 1 | 3 |
| 2 | 5 |
| 3 | 7 |
| 4 | 9 |
| 5 | 11 |
- persons named in the certification willing to accept . . .
- . . .
- (5) If additional names are certified to an appointing authority under the provisions of PAR.10, said appointing authority may appoint by selecting from among the number of persons specified in PAR.09 and from a like number of persons whose names have been certified under the provisions of said PAR.10³

³ The “selective” certification of candidates with “special qualifications” under PAR.08(4), is distinguished from the different PAR.10 “special certification” based on “race, color national origin or sex” used to address past practices of discrimination against those protected classes. The request involved here was a PAR.08(4) “selective certification” and the PAR.10 rule for a “special certification” is not directly applicable. cf. Brckett v. Civil Service Comm’n, 447 Mass. 233 (2006) (affirming validity of PAR.10 to remediate prior discrimination against women and minorities in hiring MBTA police officers)

The Flawed Selective Certification Process

Section 21 of the Civil Service Law, and the clear language of HRD's rules of practice and procedure expressly require that every gender-based selective certification of a list of female-only candidates for any civil service position must be submitted for review and approval by both HRD and MCAD. According to HRD's own rules, the purpose of this requirement is "to ensure that such certification is valid and job-related" and the "duties and responsibilities of such position clearly and unequivocally so require" an exception to the prescribed procedure for selection of candidates for civil service based on their relative civil service test scores and specific statutory preferences established by legislative mandate. HRD does not dispute this requirement or deny that it failed to comply with the law, but argues that the Commission should summarily excuse this omission as an "administrative oversight" and dismiss the appeal on procedural grounds.

HRD and BPD rely on the 1997 Superior Court Memorandum Decision in Boston Police Dep't v. Choukas, Superior Court SUCV199606895 (December 9, 1997), *modified sub nom* Choukas v. Boston Police Dep't, 48 Mass.App.Ct. 1116 (2000) (Table), for the proposition that Mr. Pugsley was never bypassed and lacks standing to contest the use of a selective certification on which his name did not appear, and that the Commission lacks jurisdiction to hear this appeal. The Choukas decision is not controlling. In that case, HRD had complied with the statutory requirements for submission and approval of the selective certification by MCAD. The Superior Court suggested, in dicta, and the Appeals Court's modification without any opinion stated, that the Commission lacked jurisdiction and that the remedy lay with a discrimination claim under Chapter 151B. Choukas is most appropriately construed to imply that, under the facts of that case, the

Commission had exceeded its authority to substitute its judgment for the appropriate exercise of the judgement of HRD and MCAD to approve a gender based certification which had been approved by both agencies in compliance with the statute. Here, however, it is clear that the civil service law and rules have not been complied with and the jurisdiction of the Commission to grant relief to remediate such a violation is clear.

In addition, substantial questions are raised here about why BPD chose to continue down the list of female applicants, rather than continue down the main eligible list, to reach the necessary number of $2n + 1$ candidates willing to accept appointments. This appears to have been a unilateral decision on BPD's part, without HRD's prior knowledge or approval. When HRD questioned BPD on this point in January 2011 after the class had already entered the Police Academy, BPD replied:

“During the lengthy hiring process to this class, the intended target of hires continued to increase with Departmental attrition. Furthermore, there was a significant drop off rate in the applicants initially processed. All of these factors, coupled with the Department's continuous need for female officers, contributed to the Department reaching down on the female certification thus increasing the number of female hires to ultimately 30. The female certification was the most likely and accessible certification to hire additional officers from, as HRD inadvertently sent postcards out to the entire female list. Therefore we already had may additional names on hold after signing the list.”

(HRD Opposition to Appellant's Memo, Exh. D [Letter from BPD to HRD dated 1/19/2011]) (*emphasis added*)

BPD may well have had legitimate justification for its decision to triple the number of female candidates selected from 10 to 28 or 30, and thereby select females who scored lower than other candidates ranked above them on the eligible list, or who did not have a statutory veteran's preference. See generally, G.L.c.41, §97B (mandating that each police department establish a rape reporting and prosecution unit and make efforts to assign female police officers to the unit) The authority to do so, however, is not unilateral. In

order to deviate from basic merit principles of civil service law and increase the number of candidates selected other than those ranked within in the 2n+1 formula on an active eligible list, BPD requires prior approval of HRD and MCAD. BPD obtained neither.

The rationale stated by BPD in its January 19, 2011 letter to HRD suggests, essentially, that it acted on an administrative snafu made “inadvertently” at HRD. This explanation does not justify a deviation from merit principles that govern the hiring process. Substantial questions remain to be answered about the process, including, whether HRD has a consistent practice to submit PAR.08 gender specific certifications to MCAD, whether that process has been abandoned, and if, so when and for what reasons. Also, questions arise as to HRD’s practice when an appointing authority asked to increase the number of gender specific candidates and whether HRD requires prior notice and justification to HRD and MCAD for such changes.

Standing and Timeliness

BPD and HRD make legitimate arguments that Mr. Pugsley must show that he was aggrieved by the failure of HRD and BPD to comply with the statute and rules in the hiring of additional females for the December 2011 class. Their argument is that, even if BPD continued down the main certification, rather than the female certification, Mr. Pugsley was below some 85 other more highly ranked veterans, who achieved a lower exam score, but had statutory preferences that put them ahead of him. Thus, BPD and HRD contend that Mr. Pugsley cannot prove he would ever have been reached within the 2n+1 formula of candidates that could properly have been selected for appointment.

On the facts presented on this record, however, that determination is a question of disputed fact that cannot be decided on a motion for summary disposition. The initial

main certification drawn by HRD contained a total of 113 names from which to select 24 candidates, and from which 76 persons signed willing to accept, conditional offers were made to 19 candidates, subject to further satisfactory completion of a medical screening and the Physical Abilities Test (PAT) and nine candidates were eventually hired. Of the 273 names on the selective female certification, 191 persons signed willing to accept, conditional offer were made to 75 candidates and 28 were hired. These ratios, while not necessarily conclusive, do warrant the inference that, had BPD continued down the main certification rather than the female certification to acquire the additional 28 candidates eventually hired, it likely would have reached Mr. Pugsley's name, which was about 85 places further down the eligible list. Mr. Pugsley has made a satisfactory showing of his status as an aggrieved person to have standing to press this appeal.

BPD and HRD also contend that Mr. Pugsley's appeal should be dismissed because it is untimely. The Commission's rules require that appeals brought under G.L.c.31, §2(b), challenging the bypass of a candidate for appointment or promotion to a permanent civil service position must be filed within 60 days of the receipt of notice of the reasons for the bypass. Other forms of Section 2(b) appeals are required to be brought within 30 days "from the date that the Agency notice of action was sent to the party." 801 C.M.R. 1.00 (6). See Garfunkel v. Department of Revenue, 22 MCSR 291 (2009). In prior decisions, the Commission has construed these provisions, as a general rule, to imply a written notice of HRD's action would be essential to establish the trigger date for the limitations period, or the violation could be considered a continuing one. See O'Toole v. Human Resources Division, 21 MCSR 561 (2008) (suggesting, but not deciding that written notice may be necessary to trigger the time for a section 2(b) appeal in all cases)

The Commission also embraces the principle that a party coming before the Commission to seek equitable relief, as Mr. Pugsley does here, must exercise reasonable diligence in pursuit of that relief. Accordingly, where a person has had actual notice – whether in writing or not – of an action or inaction by HRD or an appointing authority that the person reasonably knew or should have known was a violation of civil service law or rules, that person cannot sit on those rights indefinitely. Thus, it is a fair requirement that once such a person discovers that he or she has been harmed by an action or inaction of HRD, he had an obligation to promptly file a claim of appeal, or lose the right to press it. See, e.g., White v. Peabody Constr. Co., Inc., 286 Mass 121 (1980); Day v. Kerkorian, 72 Mass.App.Ct. 1 (2008)

BPD and HRD argue that Mr. Pugsley admits that he knew some time in October 2010 that BPD had interviewed a large number of women below him on the eligible list, that he knew or should have known that his eligibility to be considered for appointment as a BPD police officer expired on October 31, 2010, and that his appeal was filed more than 30 days thereafter (December 7, 2010). Mr. Pugsley agrees that, by October, he suspected something was amiss, and inquired of the BPD and HRD, believing that his name must have been placed in the wrong order on the list. He claims that he was told by HRD simply that he had not been reached. He contends that it was not until late November 2010 that he came to learn the reason he had not been reached was due to a possible violation of his civil service rights. The fact that even HRD, itself, apparently did not know about BPD's unauthorized use of the female certification until January 2011 also bears notice. These facts, viewed in a light most favorable to Mr. Pugsley, suggest reasonable diligence in bringing this appeal.

In addition, even if there were no disputed question of fact as to timeliness or standing, the Commission is empowered, on its own motion, to open an investigation into violations of civil service law, pursuant to the broad discretion granted to the Commission under G.L.c.31,§2(a). Given the serious nature of the alleged violations here, and the questions raised about possible systemic and wider implications, this is precisely the type of matter that touches the core oversight mission of the Commission, and warrants the exercise of its discretion to investigate further. See Boston Patrolmen's Ass'n v. Massachusetts Civil Service Comm'n, Suffolk C.A. SUCV2006-4617; SUCV2007-1220 (Mass.Sup.Ct. December 18, 2007) (Brassard, J.), *affirming*, Commission's Response to Petition for Investigation Filed By Boston Police Patrolman's Ass'n CSC Docket No. I-07-34 (2007) (“ [T]he statute certainly does not require that a petition for investigation need only be made by an aggrieved person, the statute, in my view, can only be fairly read to confer significant discretion upon the Civil Service Commission in terms of what response and to what extent, if at all, an investigation is appropriate.”); cf. Boston Police Superior Officers Federation v. Civil Service Commission, 35 Mass.App.Ct. 688,693-94, 624 N.E.2d 617, 620-21 (1993) (construing Commission's discretion and authority to conduct a de novo hearing on a “fair test” appeal)

The Duplication of Remedy

At this Commissioner's request, the parties addressed what effect Mr. Pugsley's pending Superior Court civil action had on the need for and viability of his appeal before the Commission. BPD and HRD argue that the civil action seeks the same relief as Mr. Pugsley claims in the appeal and, therefore, his pursuit of a civil action moots his right to

pursue his administrative remedy. Mr. Pugsley acknowledges that the underlying facts which gave rise to the Superior Court action do parallel those presented in this civil service appeal, but the Superior Court action seeks relief for a violation of Chapter 151B and other laws, based on a claim of discrimination, while this appeal complains about a statutory violation of the civil service law, i.e., improper use of a selective certification, which is not included as an element of his civil action. After considering the respective positions of the parties, there does not appear to be any clear mandate that requires Mr. Pugsley to elect to pursue these various claims in only one forum.

There may be reason in another appropriate case, for the Commission to dismiss an appeal if it were established that an appellant has already been made whole, or has another statutorily-prescribed forum in which an appellant is already able to fully adjudicate his or her rights. See Caporelli v. City of Worcester, 21 MCSR 107 (election of remedy required under whistleblower statute). See, also Ung v. Lowell Police Dep't, 22 MCSR 471(2009) and cases cited (discussing standards for dismissal of Commission appeals when Appellant elects to pursue arbitration under collective bargaining agreement)

This case, however, does not present such a circumstance. Although there are many facts in common to both the civil suit and the civil service appeal, the remedies are not necessarily identical and it cannot be said at this point that they would clearly be duplicative. In fact, it is more likely that the civil suit would result in a money judgment but not equitable relief, and the civil service appeal order equitable relief but no money damages. In addition, the Commission has the responsibility to inquire into the broader issues that are raised by the circumstances presented by Mr. Pugsley's appeal.

Relief To Be Granted

For the reasons stated above, the Commission makes the following interim orders:

1. The BPD and HRD motions for summary disposition are *denied*.
2. The Commission hereby initiates an investigation pursuant to its authority under Chapter 31, Section 2(a) and requests that HRD and/or BPD provide the following for the purpose of determining the scope of further investigation and hearings, if any, that should be conducted:
 - a. A copy of all selective certification requests, including any amendments, for gender specific civil service appointments received by HRD from January 2001 to the present, together with (1) all documentation reflecting the analysis and approval of those requests by HRD and MCAD and (2) documentation or other information that identifies the number of candidates hired from those gender specific certifications;
 - b. A copy of all internal operating procedures, guidelines and forms currently used by HRD to evaluate a selective certification request for gender specific civil service appointments;
 - c. A list of all persons whose name appeared within the first 250 names on the eligible list from which Certification #290999 was derived, annotated or otherwise broken down to identify: (1) which such persons were subsequently hired as police officers by BPD after subsequent certifications prior to the expiration of their eligibility on that list; (2) which such persons were subsequently hired as police officers by another municipality prior to the expiration of their eligibility on that list; (3) which such persons were hired as police officers by BPD

or another municipality from any certification from the current eligible list; (4) as to any such persons whose names appear on the current eligible list and have not been hired as police officers by BPD or another municipality, their rank order on the current eligible list.

d. Such publicly available documentation or other information that was provided to HRD or is currently in the possession of BPD, that led to the conclusion that the number of female candidates to be hired for the December 2010 class should be increased from the number of 10 initially requested and approved to the 28 eventually hired, including but, not limited to, the number of male and female police officers who left the BPD (resignation, termination, retirement, etc.) or were placed on leave (maternity, IOD, etc) for any reason between March 2010 and December 2010.

e. Such publicly available documentation or other information that was provided to HRD or is currently in the possession of BPD that describes how the BPD female patrol officer force is deployed, including without limitation, the assignment of patrol officers to districts and to the units of the Family Justice Division and any other rape reporting and prosecution unit established pursuant to M.G.L.c.31,§97B.

3. The information requested above shall be provided to the Commission, with a copy to the Appellants, on or before December 31, 2010.
4. The Commission will provide a copy of this decision to the MCAD and will invite the MCAD to intervene as a party or participate in this investigation.

5. The Commission will schedule a hearing in January 2012 for the purpose of making further inquiry from HRD and BPD concerning the validity of the use of the selective certification process in the present appeal as well as generally, and what further action, if any, would be appropriate under Section 2(a).
6. The Commission stays further proceedings in the Appellant's Section 2(b) appeal pending completion of the Section 2(a) investigation.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell & Stein, Commissioners) on November 3, 2011.

A True Record. Attest:

Commissioner

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)(1), 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 does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of a Civil Service Commission's final decision.

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:

Joseph L. Sulman, Esq. (for Appellant)
Harold Lichten, Esq. (for Appellant)
Martha Lipchitz O'Connor, Esq. (for HRD)
Nicole I. Taub, Esq. (for BPD)
Julian T. Tynes, Esq., Chairman (MCAD)