

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

WESLEY REGAN,
Appellant

v.

E-10-330

CITY OF SALEM AND
HUMAN RESOURCES DIVISION,
Respondents

Appellant's Attorney:

Pro Se
Wesley Regan

City of Salem's Attorney:

Daniel B. Kulak, Esq.
Attorney at Law
147 Russell Street
Peabody, MA 01960

Human Resources Division's Attorney:

Martha O'Connor, Esq.
Human Resources Division
One Ashburton Place: Room 211
Boston, MA 02108

Commissioner:

Christopher C. Bowman

DECISION

The Appellant, Wesley Regan (hereinafter "Regan" or "Appellant"), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (hereinafter "Commission"), claiming that the state's Human Resources Division (hereinafter "HRD") erroneously removed his name from an eligible list of police officer candidates on November 1, 2010.

The appeal was filed with the Commission on November 23, 2010. A pre-hearing conference was held on December 21, 2010, at which time I heard oral arguments from the Appellant and counsel for the City and HRD. HRD filed a Motion for Summary Decision on December 29, 2010. The Appellant and the City did not file a reply.

Based on the documents submitted, including the Motion for Summary Decision (hereinafter, the “HRD Brief”), the attachments thereto, each party’s statement at the Pre-Hearing Conference, and Appellant’s written statement attached to his original appeal, I find the following:

FINDINGS OF FACT:

1. On June 28, 2008, the Appellant took and passed an open Competitive Examination for Police Officer, Announcement #8027, with a score of 98. (HRD Brief: Exhibit A).
2. On November 1, 2008, HRD established a new eligible list for Police Officer by merging the names of those who passed the 2007 examination with the new eligible list from the 2008 examination. (HRD Brief: Exhibit B).
3. On April 25, 2009, HRD held another open competitive examination for: 1) Police Officer and State Trooper, Announcement #8434; 2) just Police Officer, Announcement #8265, and 3) just State Trooper, Announcement #8373. (HRD Brief: Exhibit C) .
4. The examination poster also informed applicants that if they passed the 2008 Police Officer examination but chose not to take the 2009 Police Officer examination, their eligibility would expire in October 2010. Specifically, the examination poster stated, “Q: I took the 2008 Police Officer test and I do not want to be a State Trooper, do I

need to take the 2009 test to remain on the Police Officer list. **A:** No, if you took the 2008 test you may opt not to take the 2009 exam, since your eligibility from the 2008 exam will continue until October 2010 on the Police Officer eligible list.” (emphasis added). (HRD Brief: Exhibit C).

5. Applicants were also informed that if they took “both the 2008 and 2009 Police Officer exams, your 2009 exam result will replace your 2008 exam result on the Police Officer list when the exam result 2009 list becomes active...” (HRD Brief: Exhibit C).
6. Appellant did not take the 2009 Police Officer examination. (Appellant’s Statement of Appeal).
7. On March 16, 2010, HRD established a new eligible list for Police Officer appointments. The results from the 2008 Police Officer examination were merged with the 2009 Police Officer examination results in accordance with the provisions of M.G.L. c. 31§25. (HRD Brief: p. 5).
8. On August 2, 2010, HRD received a requisition from Captain Rodney Campeau of the Salem Police Department, for a certification to appoint thirteen reserve officers and 2 additional reserves officers fluent in Spanish.
9. After receiving the above-referenced requisitions, HRD replied via email to a Lieutenant Butler in the Salem Police Department indicating that the request for requisition must come from the Appointing Authority, Salem Police Chief Paul Tucker.

10. According to the City, the Police Chief did not request the requisition as he had recused himself from this review and selection process as his son's name was on the eligible list of candidates.
11. In response to HRD's August 2, 2010 email, the City, after consulting with counsel, decided that it would be more appropriate, in this circumstance, for the City's Mayor to assume the responsibilities of the Appointing Authority, not an individual that reported to the Police Chief.
12. It appears that the City drafted a letter dated August 10, 2010 to HRD explaining the modified procedure, but that letter was not sent to HRD until September 24, 2010.
13. On September 24, 2010, HRD received a requisition from the Mayor of the City of Salem, the designated appointing authority, for a certification to appoint fifteen Reserve Police Officers. (HRD Brief: Exhibit D).
14. On September 29, 2010, HRD issued Certification #202445 to the City of Salem for thirteen (13) Reserve Police Officers. Each candidate's eligibility expiration date was listed on said certification next to his/her name. (HRD Brief: Exhibit E).¹
15. Certification #202445 listed each candidate's eligibility expiration date next to his/her name. Appellant's name appeared on Certification #202445, and the date "1/11/10" appeared in the "Eligibility Expires" column next to the Appellant's name on said Certification. (HRD Brief: Exhibit E).
16. On October 19, 2010, HRD sent an email to a number of appointing authorities, including the City of Salem, stating that if the Appointing Authority "is considering Police Officer candidates who have a November 1, 2010 eligibility expiration date,

¹ Said Certification #202445 was only for thirteen (13) Reserve Police Officers as two (2) of the fifteen (15) appointments referenced in Paragraph 8, supra, were for officers proficient in Spanish.

please note that the conditional offers of employment on them must be received by the Human Resources Division (HRD) or postmarked on or before October 31, 2010. (HRD Brief: Exhibit F).²

17. The eligibility of those individuals who only took the 2008 Police Officer examination expired on November 1, 2010, pursuant to the provisions of M.G.L. Chapter 31 § 25. (HRD Brief: p. 5, Exhibit E).
18. HRD removed Appellant's name from the eligible list for Police Officer on November 1, 2010, pursuant to M.G. L. Chapter 31 § 25. (HRD Brief: p.6).
19. HRD did not receive notice from the City of Salem that it made a conditional offer of employment to the Appellant prior to the expiration of Appellant's eligibility, or after. (HRD Brief, p. 3, paragraph 15).
20. Salem sent a letter to the Appellant dated November 5, 2010 notifying him that he was no longer eligible for appointment as a Reserve Police Officer. (Applicant's Statement of Appeal).
21. One thousand fifty-nine (1,059) applicants who had already passed the 2008 Police Officer examination took the 2009 examination, even though they might obtain a lower score, in order to gain two new years of eligibility, and as a result had their 2009 score apply to the position of Police Officer. (HRD Brief: p. 2, paragraph #10).

Appellant's Argument

² Referenced email was sent to an email address of mayor@saalem.com.

The Appellant argues that he is being penalized, and therefore is a person aggrieved, because HRD did not conduct an examination for Police Officer in 2010. Appellant contends that the expiration of his eligibility should continue past November 1, 2010 until HRD conducts its next examination and certifies a new eligibility list from said examination. Appellant further argues that had he taken the 2009 exam, he would have been denied two (2) years of eligibility on his score from the 2008 Police Officer eligibility examination.

HRD's Argument

HRD argues that the Appellant was not denied any eligibility rights under civil service law or rules. He took the 2008 examination for Police Officer, received a score of 98, and received a full two (2) years of eligibility from the date the eligibility list was certified after the 2008 examination. HRD contends that by choosing not to take the 2009 examination, the Appellant affirmatively chose to have his guaranteed score of 98 carried forward through the expiration of the two year eligibility period, i.e., October 31, 2010, rather than take the risk of having an unknown and possibly lower score that would provide him a new eligibility period of two years starting on March 16, 2010. Based on the Appellant's decision not to take the 2009 examination for Police Officer, HRD argues that it properly granted Appellant two years of eligibility from November 1, 2008 through October 31, 2010, and, as a result, this appeal should be dismissed.

Conclusion

Most of the relevant facts are not in dispute here. The Appellant aspires to be a police officer in his home town of Salem, a community where such appointments are subject to the civil service law. Thus, candidates such as the Appellant must first take and pass a

competitive civil service examination and have their names placed on an “eligible list”, created by HRD in rank order based on the Appellant’s exam score, veteran’s status and residency.

The Appellant took and passed a civil service examination for police officer in 2008 and received a score of 98. The eligible list was certified on November 1, 2008, and the Appellant’s eligibility was set to expire as of November 1, 2010, by statute, unless certain exceptions applied. HRD then offered another civil service examination for Police Officer in 2009.

The Appellant, and hundreds of others who also took the 2008 examination and were already on the eligibility list, had a choice at the time: 1) take the 2009 examination for police officer and risk receiving a lower score that would replace the 2008 score on a merged list; or 2) *don’t* take the 2009 examination for police officer and preserve the 2008 score.

For Appellant and the other individuals who chose option 2, their eligibility for appointment as a police officer expired on October 31, 2010, exactly two years after the creation of an eligible list from the 2008 examination. Over one thousand (1,000) applicants who passed the 2008 Police Officer examination instead chose option 1, hoping for an extended eligibility period of two new years. Those individuals subsequently had their eligibility and ranking determined by their 2009 examination score, for better or worse. While the November 1, 2010 expiration of Appellant’s eligibility was unfortunate, the Appellant received the full two years of eligibility as outlined in the legislative scheme and is not aggrieved by the expiration.

G.L. c. 31, § 25 is clear on how long a candidate's name can remain on an eligible list of candidates stating:

“The administrator [HRD] shall establish, maintain and revise eligible lists of persons who have passed each examination for appointment to a position in the official service. The names of such persons shall be arranged on each such list, subject to the provisions of section twenty-six, where applicable, in the order of their marks on the examination based upon which the list is established.

Persons on an eligible list shall be eligible for certification from such list for such period as the administrator shall determine, but in any event not to exceed two years, unless one of the following exceptions applies: (1) such eligibility is extended by law because such persons are in the military or naval service; (2) the administrator is temporarily enjoined by a court order from certifying names from an eligible list, in which case eligibility of persons on such list shall be extended for a period equal to the duration of such order; or (3) no new list is established, in which case eligibility of all persons on such list shall be extended until a new list is established for the same position for which the original list was established; provided, however, that the administrator may revoke the eligibility of the entire list or of any persons on such list subsequent to said two-year period if he shall determine that the effective maintenance of the merit system so requires such revocation and, provided further, that a written notice and explanation for said revocation is sent to the clerks of the senate and house of representatives.” (emphasis added)

None of the statutory exceptions are applicable to the present matter. Specifically, the Appellant was not in military or naval service; HRD was not temporarily enjoined by a court order from certifying names from an eligible list; and a new list was established on March 16, 2010 pursuant to Section 25. If the Legislature had intended that an individual's eligibility could be extended for a reason other than those provided, it would have so stated. The Legislature, however, did not state this. Therefore, the Commission may “not add words to a statute that the Legislature did [or did] not put there, either by inadvertent omission or by design.” Commonwealth v. Callahan, 440 Mass. 436, 443, 799 N.E.2d 113 (2003), quoting Commonwealth v. McLeod, 437 Mass. 286, 294, 771 N.E.2d 142 (2002), and cases cited.

When drafting Section 25, the Legislature contemplated that a new eligibility list may be created during the active life of an older list. See id. (providing that most recent examination results for an individual determine ranking on merged eligible list). “Applicants are able to protect their interests in remaining eligible by taking the later examinations.” Callanan v. Personnel Administrator, 400 Mass. 597, 602 (1987).

The Supreme Judicial Court and the Commission have held that individuals who fail to take a later examination and lose their eligibility are not entitled to relief. See Callanan *supra* at 601 (“The system the Legislature created, in which eligibility lists expire and are replaced by new lists, involves the risk that position might become available immediately after the expiration of an old list or immediately before the establishment of a new list. The overall pattern of the statute does not justify expectations that certain positions will become available during the period of a single list.”); Saunders v. Haverhill, 21 MCSR 337 (2008)(no relief granted to appellant who chose not to take the most recent examination and was, thus, not on the eligible list for certification).

Although the Appellant admits that he knew of the two year eligibility of his 2008 test score, he argues that he has been aggrieved because HRD did not offer an exam in 2010 and was not afforded the opportunity to retain his eligibility on the civil service list. (Appellant’s Statement of Appeal). This assertion is not correct. The Appellant could have retained his eligibility by taking and passing the 2009 Police Officer examination. Instead, he chose not to take the 2009 examination, the only action by which he could extend his eligibility.

The examination poster for the 2009 examination clearly informed applicants that if they passed the 2008 Police Officer examination but chose not to take the 2009 Police

Officer examination, their eligibility would expire in October 2010. (See HRD Brief: Exhibit C). Further, the certified list sent to the City listed the expiration date of each candidate's eligibility. (See HRD brief: Exhibit E). Put simply, the Appellant voluntarily chose not to take the examination for Police Officer in 2009 and to "roll the dice" that he would receive an appointment on or before October 31, 2010.

Despite HRD's notice and directive, the Appellant now asks the Commission to extend the expiration of his eligibility from the 2008 Police Officer examination in violation of the statutory provisions of M.G.L. Chapter 31 § 25. I do not doubt the Appellant's sincere desire to become a Salem police officer. However, permitting the Appellant to extend his eligibility on the Police Officer eligible list would violate M.G.L. Chapter 31 § 25 and basic merit principles by infringing on the rights of other candidates who chose to, or not to, take the 2009 examination and who are currently living with the consequences.

In reaching this conclusion, I am mindful that one of the reasons that contributed to the City's failure to process the appointments prior to November 30, 2010, was the delay caused by the Police Chief's recusal from the selection process and the time spent by the City to modify the process accordingly. These actions, however, were entirely appropriate and designed to ensure that the process was not tainted by even the appearance of a conflict of interest. It would be ironic – and unwarranted – for the Commission to intervene under such circumstances. As referenced above, the only way to ensure that such legitimate delays do not prevent a candidate from being considered is to continue taking all subsequent civil service examinations, which the Appellant did not.

For all of the above reasons, the Appellant's appeal under E-10-330 is hereby

dismissed.

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman, Henderson, Marquis, McDowell and Stein, Commissioners) on September 8, 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)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice:

Wesley Regan (Appellant)
Daniel Kulak, Esq. (for Appointing Authority)
Martha O'Connor, Esq. (for HRD)