

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

MATTHEW RICHARD,
Appellant

v.

CASE NO. G2-12-164

HUMAN RESOURCES DIVISION,
Respondent

Appellant (Pro Se):

Matthew Richard

Human Resources Division’s Attorney:

Challis McNally, Esq.
Human Resources Division
One Ashburton Place – Room 207
Boston, MA 02108

Commissioner:

Cynthia A. Ittleman, Esq.¹

DECISION ON HUMAN RESOURCES DIVISION’S MOTION TO DISMISS

On May 2, 2012, Mr. Matthew Richard (hereinafter “Appellant”) filed an appeal with the Civil Service Commission (hereinafter “Commission”) pursuant to G.L. c. 31, § 2(b) to contest the decision of the Commonwealth of Massachusetts’ Human Resources Division (hereinafter “HRD”) not to grant him additional semester hour credit on the Education and Experience portion of the November 19, 2011 Correction Officer II Promotional Exam.² On June 12, 2012, a pre-hearing conference took place at the offices of the Commission.

¹ The Commission acknowledges the assistance of Law Clerk Beverly J. Baker, Esq., in the drafting of this decision.

² The Department of Correction was initially named as the Respondent in this Appeal. However, at the pre-hearing conference, it became apparent that the issue involves the award of experience and education points and, therefore, HRD is the proper Respondent.

On or about June 22, 2012, HRD filed a Motion to Dismiss the appeal, alleging that the appeal was untimely and that the Appellant's training and experience was not fully stated on the training and experience sheet filed by the Appellant. On or about July 3, 2012, the Appellant filed a Motion in Opposition to Respondent's Motion to Dismiss (hereinafter "Opposition").

Based on the Motion to Dismiss, the Opposition, and taking administrative notice of all matters filed in the case, as well as pertinent statutes, case law, policies and rules, a preponderance of the evidence establishes:

1. On November 19, 2011, the Appellant sat for the Correction Officer II Promotional Exam, Announcement 3605. (Appellant Appeal Attach. A³; Resp't Mot. Attach. 1)
2. In accordance with the Education and Experience Rating Sheet Instructions, the Appellant submitted his official academic transcript from Mount Wachusett Community College, which indicated that the Appellant had earned an Associate's Degree in Criminal Justice. The Appellant also claimed twenty-four semester hours in Section IV, Category 2 (semester hours taken towards an unfinished degree in an unrelated field which were not counted towards a completed degree). (Resp't Mot. Attach. 1)
3. HRD notified the Appellant of his examination score by a letter dated March 5, 2012. It is unclear when the letter was actually mailed to the Appellant, however. A detailed listing of the Appellant's Education and Experience (hereinafter "E&E") score was enclosed with this letter, which also included instructions for requesting review of the score. (Appellant Attachs. A-C; Resp't Mot. Attach. 5)
4. The Appellant's adjusted E&E score was 80.20; a reduction of .80 points from the Appellant's original score of 81.00. The adjusted E&E score does not include the

³ The attachments to the Appellant's appeal were not marked. For purposes of clarity, the Commission has marked the attachments A-E.

twenty-four semester hours the Appellant claimed in Section IV, Category 2. The E&E score sheets enclosed in HRD's letter provide the following description of the E&E score adjustment: "no credit cert. program." (Appellant Appeal Attachs. A, B)

5. Despite conducting a "full and thorough audit," HRD arrived at the adjusted E&E score after erroneously assuming that the Appellant was seeking credit for a certificate program, based on the fact that he was claiming twenty-four semester credits and a typical certificate programs only require thirty semester hours. (Resp't Mot. Attach. 1)
6. On or about March 20, 2012, the Appellant submitted a written request for review of his E&E score to HRD. Along with his request for review, the Appellant enclosed his official transcript and a letter from Mount Wachusett Community College verifying that he was enrolled in the Computer Graphic Design Web Degree Program. HRD received this letter on March 23, 2012. (Resp't Mot. Attachs. 6(a), 6(b))
7. After receiving the Appellant's request, HRD conducted a careful review of his E&E appeal. In a letter sent from HRD to the Appellant dated April 13, 2012, HRD denied the Appellant any additional E&E credit. Even though HRD concluded that the Appellant was enrolled in the Computer Graphic Design Web Degree Program at Mount Wachusett Community College, not a certificate program, HRD would not approve any additional credit without an official degree audit showing which courses were applied to which of the two degree programs. (Appellant Appeal Attach. D; Resp't Mot. Attach. 7)
8. While the above-mentioned letter sent from HRD to the Appellant was dated April 13, 2012, the envelope was not postmarked until April 24, 2012.

DISCUSSION

The Legal Standard for Consideration of a Motion to Dismiss

The United States Supreme Court has held that in order to survive a motion to dismiss, the non-moving party must plead only enough facts to state a claim to relief that is plausible on its face. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007). Thus, the non-moving party must plead enough facts to raise a reasonable expectation that discovery will reveal evidence in support of the allegations. *See id.* at 545. Similarly, the Massachusetts Supreme Judicial Court has held that an adjudicator cannot grant a motion to dismiss if the non-moving party's factual allegations are enough to raise a right to relief above the speculative level based on the assumption that all the allegations in the appeal are true, even if doubtful in fact. *See Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008). The Standard Adjudicatory Rules of Practice and Procedure (hereinafter "Rules") govern administrative adjudication at the Commission. 801 CMR 1.01, *et seq.* However, Commission policy provides that when such rules conflict with G.L. c. 31, the latter shall prevail; there appears to be no such conflict here. The Rules indicate that the Commission may dismiss an appeal in the event the appeal fails to state a claim upon which relief can be granted. 801 CMR 1.01(7)(g)(3).

Applicable Civil Service Statutes

Pursuant to G.L. c. 31, § 22, an applicant may request the administrator to conduct a review of the marking of the applicant's training and experience. The statute states, in pertinent part, that such a request for review "shall be filed with the administrator no later than seventeen days after the date of mailing by the administrator of the notice to the applicant of his mark on the examination" G.L. c. 31, § 22.

In accordance with G.L. c. 31, § 24, an applicant may appeal to the Commission no later than seventeen days after the mailing of the decision of the administrator. In addition, G.L. c. 31, § 24 provides, *inter alia*:

The commission shall refuse to accept any petition for appeal unless the request for appeal, which was the basis for such petition, was filed in the required time and form and unless a decision on such request for review has been rendered by the administrator. In deciding an appeal pursuant to this section, the commission shall not allow credit for training or experience unless such training or experience was fully stated in the training and experience sheet filed by the applicant at the time designated by the administrator.

While the first paragraph of G.L. c. 31, § 24 concerning examination-related appeals to the Commission does not expressly list “training and experience” appeals, such appeals are listed in the second paragraph of the statute and provides the Commission with jurisdiction over these issues. *See, e.g., Peters v. Human Res. Div.*, 23 MCSR 647, 649 (2010); *McGrath v. Human Res. Div.*, 14 MSCR 83, 84 (2001); *Riley v. Human Res. Div.*, 14 MCSR 85, 86 (2001).

Appointing Authority’s Argument

In support of its motion, HRD argues, *inter alia*, that the present appeal should be dismissed because it was not timely under G.L. c. 31, § 22, which requires an applicant to submit his or her request for review to HRD no later than seventeen days after the date of mailing of the notice to the applicant of his mark on the examination. HRD claims that the Appellant’s score was mailed to him on March 5, 2012 and that HRD did not receive the Appellant’s request for review of his education credits until March 23, 2012, eighteen days later.

In addition, HRD argues that by failing to provide HRD with the appropriate supporting documents in his request for review, the Appellant has “forfeited his right to do so outside of the appeals period.” Resp’t Mot. 4. Because the Appellant’s unofficial degree audit, which was included in his appeal to the Commission, was not previously submitted to HRD prior to or

during the seventeen day “appeals period” following the mailing of the Appellant’s examination score, HRD contends that the Commission may not consider the information contained within the unofficial degree audit.

Appellant’s Argument

The Appellant believes that HRD erroneously denied him E&E credits. The Appellant contends that his appeal is timely. In his Opposition, the Appellant disputes the mailing date of HRD’s letter containing his score information. The letter itself is dated March 5, 2012, but the Appellant claims that it is unlikely the letter was actually mailed on the same day. In addition, the Appellant asserts he was not enrolled in a certificate program and that he provided HRD with documentation with his request for review that shows the credits were from an unfinished degree program.

Analysis

There is no doubt that G.L. c. 31, § 22 allows no more than seventeen days from the date of mailing by the administrator of the notice to the applicant of his score for the applicant to request a review. However, in the current appeal, it is unclear when HRD mailed the Appellant his scores. While the letter itself is dated March 5, 2012, it appears unlikely that the letter was actually mailed on the same day. For instance, another letter sent to the Appellant from HRD denying his appeal was dated April 13, 2012, but was not postmarked until April 24, 2012. Furthermore, in the April 13, 2012 letter, HRD informs the Appellant that he may appeal this decision to the Commission with seven days, which is inaccurate. Under G.L. c. 31, § 24, the Appellant may appeal to the Commission within seventeen days. Based on HRD’s eleven day delay in mailing the April 13th letter, it is reasonable for the Commission to infer that the letter

dated March 5th was not mailed on the same day. Even if we are to generously assume that HRD mailed the letter the very next day, on March 6, 2012, the Appellant's request would be timely.

In addition, if HRD truly believed the Appellant's request for review to be outside the seventeen day appeal period, HRD could have properly rejected the Appellant's request. Instead, HRD "conducted a careful review of the information supplied . . . by the Appellant" and even contacted the Assistant Dean of Records for Mount Wachusett Community College, Ms. Rebecca L. Forest, in an attempt verify which credits were applied to the Associate Criminal Justice Degree. Resp't Mot. Attachs. 1, 7. By going forward with the review, rather than rejecting it as untimely, HRD waived any objections concerning the timelines of the Appellant's request for review. For the foregoing reasons, the Commission rejects HRD's argument that the Appellant's request for review of his E&E credits was untimely.

In its Motion to Dismiss, HRD claims that because the Appellant failed to provide HRD with appropriate documents supporting a claim for E&E credits in his request for review, he has "forfeited his right to do so outside of the appeals period." Resp't Mot. 5. As a result, HRD asserts that the Commission may not consider the degree audit information the Appellant included with his appeal. Appellant Attach. E. In support of this position, HRD cites to G.L. c. 31, § 24, which states, in pertinent part: "the commission shall not allow credit for training or experience unless such training or experience was fully stated in the training and experience sheet filed by the applicant at the time designated by the administrator."

The Appellant does not seek to include additional credits that were not originally listed on his E&E report. Rather, the Appellant seeks to obtain the E&E credits he should have been granted, but for HRD's erroneous assumption that the credits were from a certificate program.

According to G.L. c. 31, § 24, an applicant may appeal to the Commission from the decision of the administrator and, after acceptance of such an appeal, the Commission shall conduct a hearing. If the statute allows for a hearing, it follows that such a hearing would include the submission of evidence and testimony. If the Commission could not consider any evidence outside of the seventeen day appeal period, as HRD suggests, it would severely limit the Commission's ability to perform its intended role.

When the Appellant requested HRD to review his E&E score, he believed that he was providing HRD with sufficient documentation to support his claim. The E&E Rating Sheet Instructions state that HRD "requires the submission of supporting documentation for all claims presented" Applicants are instructed to bring copies of documentation "such as official college transcripts, instructor certificates, etc." to the exam site. Further down the second page of the E&E Rating Sheet Instructions, applicants are informed that supporting documentation "such as college transcripts, copies of licenses, etc." should be provided to the appointing authority upon request. In step three of the Education and Training portion of the E&E Rating Sheet, applicants are instructed to indicate successfully completed courses at a regionally accredited college or university which were not counted toward a finished degree. Applicants were also told not to "double-count" any transferred courses which were previously taken toward a completed degree claimed in step two. The E&E Rating Sheet Instructions do not make any mention of an official degree audit or its necessity in order to determine that courses were not "double-counted." It is not until the April 13th letter from HRD, denying the Appellant additional E&E credits, that HRD specifically informs the Appellant that an official degree audit is required. Once the Appellant understood the type of documentation that HRD required, he was able to obtain it and include it with his appeal to the Commission.

HRD had ample opportunity to be proactive and clearly inform the Appellant exactly what information was necessary to support his claim for additional E&E credits. Instead of contacting the Appellant, HRD telephoned the Assistant Dean of Records at Mount Wachusett Community College, Ms. Rebecca L. Forest, and attempted to verify which credits had been applied to the Appellant's Associate of Criminal Justice Degree. Unsurprisingly, Ms. Forest could not verify this information with HRD. Had HRD informed the Appellant directly that a degree audit was necessary, it is apparent that he would have been able to obtain the required documentation, as it was included with his appeal to the Commission.

HRD erroneously assumed that the Appellant was enrolled in a certificate program, based on the number of credit hours he was claiming. The Appellant made a good faith effort to supply HRD with the necessary supporting documentations. HRD became aware of the mistake when the Appellant requested a review of his E&E score and enclosed a letter from Mount Wachusett Community College verifying that he was enrolled in the Computer Graphic Design Web Degree Program. Instead of clearly informing the Appellant the specific documentation it was seeking, HRD denied the Appellant's request for additional E&E credits and continues to resist correcting this mistake. For instance, HRD points out that neither the institute's name nor official seal appear anywhere on the degree audit that was included in the Appellant's appeal to the Commission. As such, HRD argues that the document is not an official document pursuant to page two of the E&E Rating Sheet Instructions. However, an examination of page two of the E&E Rating Sheet Instructions reveals that neither an official seal nor the institute's name are expressly mentioned or required features of supporting documentation. Pursuant to G.L. ch.30A, § 11(2), the Commission accepts that the degree audit submitted with the Appellant's appeal is authentic, despite the absence of an official seal or institute name. The information contained

within the document matches the information on Appellant's official transcript, but lists the "Courses Not Used" in a separate section.

It is worth noting that page two of the E&E Rating Sheet Instructions states: "Be prepared to provide copies of supporting documentation such as college transcript, copies of licenses, etc. to the appointing authority upon request." This language implies that if additional information is required, the appointing authority will request it from the applicants. However, at no point did HRD request the necessary documentation from the Appellant. As mentioned above, HRD only informed the Appellant that a degree audit is required in the April 13, 2012 letter denying his request for additional E&E credit.

CONCLUSION

As indicated above, the Appellant has raised sufficient facts to state a claim to relief. Specifically, the Appellant has offered enough facts to indicate that HRD erroneously denied him additional E&E credit. Therefore, HRD's Motion to Dismiss is *denied*.

Further, the facts establish that the Appellant is entitled to relief. Therefore, HRD is hereby *ordered* to provide the Appellant with the appropriate amount of E&E credit based on the degree audit submitted with his appeal.

Civil Service Commission

Cynthia A. Ittleman, Esq.
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, and McDowell [Stein – absent], Commissioners) on Aug. 9, 2012.

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:

Matthew Richard (Appellant)

Challis McNally, Esq. (for HRD)