

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

100 Cambridge Street, Suite 200
Boston, MA 02114
(617) 979-1900

Tracking Nos. I-23-190 & I-23-191

**Re: REQUEST FROM IGNACIO RODRIGUEZ AND LUIS NOVA TO INVESTIGATE
ALLOWANCE OF CERTAIN MAKEUP EXAMINATIONS FOR THE 2023
STATEWIDE FIRE LIEUTENANT PROMOTIONAL EXAMINATION**

Summary of Commission Response

The Commission declined the Petitioners' request for investigation as nothing in the request warrants further investigation by the Commission into HRD's decision to grant the requests of certain Lawrence Firefighters who did not sit for the regularly scheduled March 2023 Statewide Fire Lieutenant Promotional Examination to take a make-up examination at a later date.

COMMISSION RESPONSE TO REQUEST FOR INVESTIGATION

Background

On September 27, 2023 and October 2, 2023, the Civil Service Commission (Commission) received two related petitions from Ignacio Rodriguez and Luis M. Nova, respectively (the Petitioners), both Firefighters with the Lawrence Fire Department (LFD), who took and passed the Statewide Fire Lieutenant Promotional Examination (Statewide Fire Lieutenant Exam) administered by the state's Human Resources Division (HRD) on March 25, 2023. Both petitions asked the Commission to open an investigation, acting under its discretion pursuant to G.L. c. 31, § 2(a), into certain decisions by HRD to excuse other LFD Firefighters from taking the examination and allowing the others to take a makeup examination at a later date.

On October 20, 2023, I held a show cause conference to provide the Petitioners with the opportunity to show cause why such an investigation should be initiated by the Commission. HRD counsel was unable to attend due to another commitment.

By Interim Order dated October 24, 2023, I noted the following facts presented by the Petitioners at the Show Cause Conference:

1. The current eligible list for LFD Fire Lieutenant includes 22 LFD firefighters.
2. Firefighter Nova is 8th on the list.

3. Firefighter Rodriguez is tied in 9th place with two other candidates, both of whom have more seniority than he does.
4. Three candidates on the list above the Petitioners have been appointed as permanent Lieutenants.
5. The candidate ranked 2nd on the list (now at the top of the list) did not take the March 25, 2023 examination and was allowed to take a makeup examination at a later date.
6. The candidate ranked 7th on the list (now 4th in line) also did not take the March 25, 2023 examination and was allowed to take a makeup examination at a later date.
7. Lawrence has a past practice of strictly following the eligible list in rank order when making permanent promotions as well as filling temporary and “acting” assignments.
8. The Statewide Departmental Promotional Examination for Fire Lieutenant (3YP) notice issued for the March 25, 2023 examination, stated:

Makeup Examination: With the exception of current military personnel as described above, no candidate has a right to a makeup examination due to personal or professional conflicts on the testing date. Candidates are advised to consider this before applying for the examination. If you file an examination application by the application deadline but are unable to appear for the examination on the examination date due to an emergency or unanticipated hardship, you may request a makeup examination by filing a written request with verifiable documentation to HRD no later than seven calendar days from the original examination date. HRD reserves the right to approve or deny your request. HRD may require an additional examination processing fee upon approval of your request. (*emphasis added*)

9. According to the Petitioners, neither of the two candidates allowed to take a make-up examination are in military service. The Petitioners alleged that they were not aware of any “emergency or unanticipated hardship” that prevented the other two candidates from sitting for the examination on March 25, 2023.

On November 15, 2023, pursuant to the Interim Order, HRD provided me with certain information containing the requests for makeup examinations and HRD’s approval of the requests received from the two LFD Firefighters who were excused from the March 25, 2023 Statewide Fire Lieutenant Exam and allowed to take a makeup examination. As the information contains certain personal and medical information, I accepted HRD’s response to the Interim Order for my “in camera” review only.

Commission’s Authority to Conduct Investigations

The Commission, established pursuant to G.L. c. 7, § 4I, is an independent, neutral appellate tribunal and investigative entity that is a co-steward of the civil service system with, but not subject

to the control of, HRD or its civil service unit. Section 2(a) of Chapter 31 grants the Commission broad discretion upon receipt of an alleged violation of the civil service law's provisions to decide whether and to what extent an investigation might be appropriate.

Further, Section 72 of Chapter 31 provides for the Commission to “investigate all or part of the official and labor services, the work, duties and compensation of the persons employed in such services, the number of persons employed in such services and the titles, ratings and methods of promotion in such services.”

The Commission exercises its discretion to investigate only “sparingly,” typically only when there is clear and convincing evidence of systemic violations of Chapter 31 or an entrenched political or personal bias that can be rectified through the Commission’s affirmative remedial intervention.

As a general rule, the Commission accords HRD broad latitude in matters involving the design and administration of civil service examinations although the Commission is mindful that, when such matters are shown to be unreasonable, arbitrary or otherwise inconsistent with basic merit principles, the Commission may choose, in its discretion, to intervene. Issues associated with the March 25, 2023 fire promotional examinations have been previously addressed in several prior appeals and requests for investigation. See, e.g., Ranahan v. Human Resources Division, CSC No. E-22-170 (2023); Kelly v. Human Resources Division, CSC B2-23080 (2023); Request for Investigation of the Commonwealth’s Human Resources Division by Richard McKinnon, Jr., et al., CSC Tracking I-23-035 (2023); Request by Waltham Police Dep’t to Revive Revoked Eligible List, CSC E-23-020 (2023); Lynch v. Human Resources Division, CSC No. B2-23-005 (2023); Request for Investigation against the Human Resources Division (HRD) by Petitioners The Professional Firefighters of Massachusetts (PFFM), et al., CSC Tracking I-22-149 & I-22-150 (2022).

Commission’s Response

The March 25, 2023 Statewide Fire Promotional Examination (along with a Boston Fire Promotional Examination administered on that same date), followed a months-long process by HRD to redesign the civil service fire promotional examinations following the judicial decision of the Suffolk Superior Court that held that prior promotional examinations administered by HRD had unlawfully discriminated against minority candidates. See *Findings of Fact and Conclusions of Law on Phase I (Liability)*, Tatum v. Commonwealth, Suffolk Sup. Ct. No. 0984CV00576 (10/27/2022) (Wilkins, J.) (Tatum Decision).

The Tatum decision caused HRD to reschedule certain fire and police promotional examinations conducted or scheduled (in the ordinary course) during 2022, pending the completion of the redesign of the examinations by outside Subject Matter Experts (SMEs). HRD also established a working “stakeholders” group (including representatives from the Commission, appointing authorities, fire service unions, and other governmental agencies and interested parties) to provide information and feedback on the progress of HRD’s work in producing new examinations.

I find nothing in the request for investigation by the Petitioners that warrants further investigation by the Commission into HRD's decision to excuse two LFD firefighters from taking the Statewide Fire Promotional Exam on March 25, 2023 and instead take a makeup examination on another date. One of the LFD firefighters allowed to take a makeup examination had traveled to Arizona to be with a gravely ill sibling during surgery and recovery that had only been approved on March 13, 2023, to be performed on March 28th. That request was approved on March 15, 2023. The other LFD firefighter had pre-scheduled plans to travel to Georgia on March 24, 2023 for a family commitment that he could not change and his absence would be likely to cause significant hardship to a sibling. He first notified HRD of the commitment in January 2023 and offered to take the exam "before or after" March 25, 2023. His request was approved on February 18, 2023. Although HRD's notice explaining the process for requesting a makeup examination could have been expressed more clearly, I do not find that HRD's decision in either case to be unreasonable or arbitrary.

The March 2023 Statewide Fire Promotional Examinations and creation of new eligible lists were put on a fast-track for reasons not entirely within HRD's control and for the express benefit of appointing authorities and fire service officers, some of whom faced the prospect of being unable to make permanent promotions for an unusual period of time due to the Tatum decision, which is a situation that is not likely to be repeated. Finally, to the extent the Petitioners seem to suggest that the alleged flaws in granting the makeup requests would require the Commission to revoke a promotion already made or to remove a candidate from the eligible list who had duly taken and passed the examination, such actions would be problematic as a matter of basic merit principles and likely do more harm than good.

Finally, I acknowledge that the process may not have been perfect and HRD may wish to reconsider some of the wording in its examination instructions. Although the ambiguity about the date to request a makeup before the date of the "original" examination may be an isolated instance, just reading the first sentence of the makeup paragraph could lead candidates to believe that military commitments are the only reason to seek a makeup and an emergency must be arising "on the examination date." Despite these ambiguities, however, under all the circumstances, the Petitioners have not shown cause for the Commission to intervene.

In sum, I recommend that the Commission deny the Petitioners' requests for investigation.

Civil Service Commission

s/ Paul M Stein
Commissioner

On November 30, 2023, the Commission (Bowman, Chair; Dooley, McConney, Stein and Tivnan, Commissioners) voted to accept the above recommendation and close the request for investigation.

Notice:

Ignacio Rodriguez (Petitioner)

Luis M. Nova (Petitioner)

Michele Heffernan, Esq. (for HRD)