

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

EUGENE H. SALOIS, III,
Appellant

v.

CASE NO. B1-12-32

HUMAN RESOURCES DIVISION,
Respondent

Appellant (Pro Se):

Eugene H. Salois, III

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 RESPONDENT'S MOTION TO DISMISS

On January 30, 2012, Mr. Eugene H. Salois, III, (hereinafter "Appellant"), pro se, filed a petition 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 credit for his training and experience on the October 15, 2011 Police Promotion to Lieutenant Exam held in the Town of North Andover and to contest HRD's determination regarding the Appellant's challenges of certain multiple choice questions

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

on the written component of the examination.² On March 6, 2012, a pre-hearing conference took place in this case at the offices of the Commission.

HRD filed a Motion to Dismiss the appeal on or about March 29, 2012 alleging that the appeal was untimely, that the Commission lacks jurisdiction to hear appeals over multiple choice exam questions, that the Appellant is not “a person aggrieved” under G.L. c. 31, § 2(b), and that it has discretion to require that applicants pass each component of the examination before training and experience credits are added to their scores. On or about June 4, 2012, the Appellant filed a Motion in Opposition to Respondent’s Motion to Dismiss (hereinafter “Opposition”). The Commission conducted a hearing on the Motion to Dismiss on June 4, 2012. The hearing was digitally recorded. On or about June 15, 2012, HRD submitted a Supplemental Affidavit at the request of the Commissioner assigned to this case. On or about July 5, 2012, the Appellant submitted a Response to HRD’s Supplemental Affidavit (hereinafter “Response”). As indicated herein, the Motion to Dismiss is granted and the appeal is denied.

Based on the Motion to Dismiss, Opposition, Supplemental Affidavit, Response, and arguments made at the hearing on the Motion to Dismiss, and taking administrative notice of all matters filed in the case as well as pertinent statutes, regulations, case law, policies and rules, a preponderance of the evidence establishes:

1. The Appellant is employed as a Sergeant in the Town of North Andover’s Police Department. (Resp’t Mot.; Opposition)
2. On October 15, 2011, the Town of North Andover held the writing component of the Police Promotion to Lieutenant Exam. This component was worth forty percent of the entire examination and consisted of one hundred multiple choice questions, each

² The Town of North Andover was the original Respondent in this appeal. However, as the administrator of the examination, HRD was substituted as the Respondent on February 23, 2012, pursuant to G.L. c. 31, § 22 and 801 CMR 1.01(7)(i).

weighted equally. This was the first of three components of the exam. (Resp't Mot. Attach. 1) The Appellant took the exam. (Appeal)

3. Also on October 15, 2012, the Appellant completed a training and experience sheet which he submitted along with all supporting documentation, in accordance with the instructions, at the examination site. (Opposition)
4. By letter postmarked October 18, 2011, the Appellant filed a request for HRD to review multiple choice question number twenty-four on the exam, as the Appellant believed this question to be vague. (Resp't Mot. Attachs. 1 & 2)
5. By letter postmarked October 21, 2011, the Appellant filed a request for HRD to review multiple choice question number fifteen. The Appellant believed that this question did not contain enough information to arrive at the correct answer. (Resp't Mot. Attachs. 1 & 3)
6. By letter dated and mailed January 13, 2012³, HRD responded to the Appellant's request for review of questions twenty-four and fifteen. HRD determined that these questions were indeed ambiguous and prevented applicants from answering the questions correctly. As a result, any, all, or no response would be accepted as correct on the exam. The Appellant was given credit for these questions accordingly. (Resp't Mot. Attach. 1 & 4; Appellant Appeal Attach. B⁴)

³ HRD sent the Appellant two separate letters, both dated January 13, 2012. In the Affidavit submitted with HRD's Motion to Dismiss, Loren Fitzgibbons, a Personnel Analyst for HRD, states that both letters were mailed the same day, on January 13, 2012. The Appellant does not contest the date of mailing of either letter and there is no evidence to suggest that the letters were not mailed on this date.

⁴ The attachments to the Appellant's appeal were not marked. For purposes of clarity, the Commission has marked the attachments A-D.

7. In another letter, also dated and mailed January 13, 2012, the Appellant was notified of his score on the written component of the exam. The passing score was set at 70.00 by HRD and the Appellant received a score of 66.99. Specifically, the letter states:

Dear Mr. SALOIS:

This is to notify you of your mark for the written component of the Promotion to Police Lieutenant Examination Process, North Andover Police Department, for Announcement Number 1760, held on October 15, 2011. The examination weights for this Announcement Number are: 40% for the written examination component, 40% for the assessment center exercises, and 20% for the education and experience rating. Passing the written component qualifies an examination applicant to continue with the assessment center exercises.

The passing score for the written component has been set at 70.00. Your mark for the written component is 66.99.

(Appellant Appeal Attach. A; Resp't Mot. Attach. 5) HRD policy provides, "the assessment center and education experience ratings were included in the overall examination mark *subject to the applicant scoring at or above the passing point on the written examination component.*" (Resp't Supplemental Aff. (emphasis added))

8. The Appellant's score reflected "key changes" made to a total of seven items during the post-examination analysis, including the two questions the Appellant specifically requested HRD to review. "Key changes" can include "double-keying" an item, where two specific response options are considered correct, or crediting "any, all, or no response" to the item as correct. Any key changes made affect all individuals who took the examination(s) that contained the specific exam item. (Resp't Mot. Attach. 1) Thus, the Appellant received credit not only for the two multiple choice questions for which he sought HRD review but also for five other multiple choice questions.

9. The Appellant did not appeal to HRD regarding the lack of training and experience credit in determining his examination score. (Administrative Notice)
10. The Appellant filed an appeal at the Commission on January 30, 2012, the date indicated by the postmark on the envelope in which it was sent, seventeen days following the date HRD mailed him his score. (Appellant Appeal Attach. D; February 2, 2012 Acknowledgement of Appeal sent to parties)

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. 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 for lack of jurisdiction or 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 and Rules

Individuals aggrieved by an action of the HRD Administrator may appeal to the Commission pursuant to G.L. c. 31, § 2(b). The statute gives the Commission the power to:

[H]ear and decide appeals by a person aggrieved by any decision, action, or failure to act by the administrator, *except as limited by the provisions of section twenty-four relating to the grading of examinations*; provided that no decision or action of the administrator shall be reversed or modified nor shall any action be ordered in the case of a failure of the administrator to act, except by an affirmative vote of at least three members of the commission, and in each such case the commission shall state in the minutes of its proceedings the specific reasons for its decision.

G.L. c. 31, § 2(b) (emphasis added). Section 2(b) also states:

No person shall be deemed to be aggrieved . . . 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.

According to G.L. c. 31, § 16, “[e]xaminations shall be conducted under the direction of the administrator, who shall determine their form, method, and subject matter.” This affords HRD significant authority with regard to examination administration. However, the statute also provides the parameters of HRD's authority, stating that, “[e]xaminations shall fairly test the knowledge, skills and abilities which can be practically and reliably measured and which are actually required to perform the primary or dominant duties of the position for which the examination is held.” G.L. c. 31, § 16. Similarly, G.L. c. 31, § 22 affords HRD significant authority with regard to determination by HRD of a passing score. It provides that, “[t]he administrator shall determine the passing requirements of examinations.” *Id.* In addition, Rule PAR.06(1) of the Personnel Administration Rules, promulgated by HRD, provides the manner in which training and experience are to be assessed, stating, “[t]he grading of the subject of

training and experience as a part of a promotional examination shall be based on a schedule approved by the administrator which *shall* include credits for elements of training and experience related to the position for which the examination is held.” PAR.06(1) (emphasis added). However, G.L. c. 31, § 22 also provides that, “[i]n any competitive examination, an applicant *shall* be given credit for employment or experience in the position for which the examination is held[,]” (emphasis added) creating a tension between sections 16 and 22 of G.L. c. 31 which we need not address, as concluded below.

Section 22 of G.L. c. 31 also indicates the appropriate subjects, and timing, of requests to review certain HRD determinations. Specifically, it provides, in part:

Except as otherwise provided by sections sixteen and seventeen, an applicant may request the administrator to conduct one or more of the following reviews relating to an examination: (1) a review of the marking of the applicant’s answers to essay and multiple choice questions; (2) a review of the marking of the applicant’s training and experience *Such request for review of the marking of the applicant’s answers to essay questions, of the marking of the applicant’s training and experience, or of a finding that the applicant did not meet the entrance requirements for appointment to the position 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 or his failure to meet the entrance requirements for appointment to the position. An applicant may request the administrator to conduct a review of whether an examination taken by such applicant was a fair test of the applicant’s fitness to perform the primary or dominant duties of the position for which the examination was held, provided that such request shall be filed with the administrator no later than seven days after the date of such examination.*

(emphasis added). Section 24 of G.L. c. 31 addresses the timing and nature of HRD’s response to requests for review of certain of its determinations. It states, in pertinent part:

Within six weeks after receipt of a request pursuant to section twenty-two, the administrator shall, subject to the provisions of this section, conduct such review, render a decision, and send a copy of such decision to the applicant. If the administrator finds that an error was made in the marking of the applicant’s answer to an essay question, or in the marking of the applicant’s training and experience . . . the administrator shall make any necessary adjustment to correct such error.

When an applicant has requested that HRD review certain matters related to an examination pursuant to the statutes cited herein, the applicant may appeal the pertinent HRD decision to the Commission. Specifically, pursuant to G.L. c. 31, § 24:

An applicant may appeal to the commission from a decision of the administrator made pursuant to section twenty-three relative to (a) the marking of the applicant's answers to essay questions; (b) a finding that the applicant did not meet the entrance requirements for appointment to the position; or (c) a finding that the examination taken by such applicant was a fair test of the applicant's fitness to actually perform the primary or dominant duties of the position for which the examination was held. Such appeal shall be filed no later than seventeen days *after the date of mailing of the decision of the administrator. . . . 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 and experience was fully stated in the training and experience sheet filed by the applicant at the time designated by the administrator. . . .

(Emphasis added). Thus, section 24 does not include among the matters appealable to the Commission the marking by HRD of answers to multiple choice questions but does include the subject of training and experience grading as long as training and education information was properly entered on an applicant's training and experience sheet, as was the case here.

HRD's Argument

In its Motion to Dismiss, HRD argues, *inter alia*, that the appeal to the Commission should be dismissed because it was untimely under G.L. c. 31, § 24. It is HRD's position that its response to the Appellant was mailed on January 13, 2012, and the Appellant filed his appeal with the Commission eighteen days later, on January 31, 2012, the date the appeal was marked "received" by the Commission. In addition, HRD contends that the appeal should be dismissed because the Commission does not have jurisdiction over multiple choice questions, pursuant to G.L. c. 31, § 24. HRD also submits that the Appellant is not a "person aggrieved" according to G.L. c. 31, § 2 because he sought review of two multiple choice questions and was granted credit

for them on his examination. Further, HRD asserts that G.L. c. 31, § 16 authorizes it to require that applicants pass the written component of the exam before being credited with the appropriate training and experience.

Appellant's Argument

In his Opposition, the Appellant concedes that the Commission does not have jurisdiction concerning the grading of answers to multiple choice questions. See G.L. c. 31, § 24.⁵ However, he argues that his appeal was timely filed and that the essence of his appeal is that HRD failed to take his training and experience into consideration in determining his written exam score. Specifically, the Appellant contends that the language of G.L. c. 31, § 22 sets forth a mandate that HRD grant credit to applicants for employment or experience and that HRD failed to do so.

Analysis

Massachusetts civil service law establishes specific requirements for an applicant to follow when requesting review by the Administrator and appealing to the Commission from a decision of the Administrator. G.L. c. 31, §§ 22, 24. For example, an applicant may request that the Administrator conduct various reviews relating to an examination no later than seventeen days after the date of mailing by the Administrator of the applicant's scores. G.L. c. 31, § 22. After a decision has been made by the Administrator, an applicant may appeal to the Commission no later than seventeen days after the date of mailing of the decision of the Administrator. G.L. c. 31, § 24.

⁵ In the appeal filed with the Commission, the Appellant described the difficulties he encountered in attempting to ascertain his rights of appeal relating to the exam. In the interest of transparency, the Commission urges HRD to clarify applicants' rights of appeal with regard to examination matters that are subject to appeal to the Administrator and the deadlines therefor, as well as deadlines for appealing appropriate HRD rulings to the Commission.

Just three days after sitting for the written component of the examination on October 15, 2012, the Appellant requested that HRD conduct a review of question number twenty-four of the multiple choice component of the exam. Three days after his first request for review, the Appellant made a similar request with respect to question number fifteen of the multiple choice questions. Pursuant to G.L. c. 31, § 22, the Appellant had seventeen days from the date HRD mailed his score, on January 13, 2012, to request that HRD review the marking of his answers and/or the marking of his training and experience. As the Appellant made his requests for review of two of the examination questions before he even received his score, there can be no question of the timeliness of these requests to HRD. By letter dated and mailed January 13, 2012, HRD notified the Appellant that the post-examination analysis concluded that questions fifteen and twenty-four, both of which the Appellant asked HRD to review, were ambiguous and, therefore, any, all, or no response to these items would be marked correct.

In a separate letter from HRD, also dated and mailed January 13, 2012, the Appellant was notified of his score and informed of the weights for the examination: 40% for the written component, 40% for the assessment center exercises, and 20% for the training and experience. The letter expressly states that “[p]assing the written component qualifies an examination applicant to continue with the assessment center exercises.” Resp’t Mot. Attach. 5. HRD requires applicants to pass the written component of the exam before it will apply training and experience credit. Even though the Appellant was aware of the need and timing of appeals regarding multiple choice questions to HRD, he did not ask HRD to review the applicability of his training and experience to the written exam score. The Appellant instead filed an appeal at the Commission on January 30, 2012, within seventeen days of the letter from HRD regarding his score. While G.L. c. 31, § 2(b) allows aggrieved individuals to appeal to the Commission,

G.L. c. 31, § 24 provides, “[t]he 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.*” (Emphasis added). Since the Appellant did not ask HRD to conduct a review of his training and experience score, or lack thereof, there was no decision rendered on this issue by HRD from which the Appellant could appeal to the Commission.

Although the appeal process can be arduous, it is clear that the Appellant was able to file other appeals with HRD. Specifically, the Appellant successfully requested that HRD review two multiple choice questions from the written component of the exam, on October 18th and October 21st of 2011, indicating that the Appellant had at least some knowledge of the process for requesting review by HRD. When the Appellant received the January 13, 2012 letter indicating his failing score and that training and experience credit is not applicable unless you pass the written component of the exam, under section 22 of G.L. c. 31, he had seventeen days within which to file an appeal with HRD, which he failed to do. Because the Appellant failed to request a review of his training and experience score from HRD and, therefore, HRD did not render a decision on this issue, the Commission must deny the Appellant’s petition for appeal in this instance.

With respect to HRD’s argument that the appeal was untimely, the “postmark rule” applies to initial filings. *See* G.L. c. 31, § 2(g); *Town of Falmouth v. Civil Serv. Comm.*, 447 Mass. 814, 815 (2006). Under this rule, the Appellant’s petition for appeal is deemed to have been filed with the Commission on January 30, 2012, the date that appears on the postmark. Finding of Fact No. 11. Therefore, timeliness is not an issue in this regard.

HRD submits that the Commission lacks jurisdiction over multiple choice questions because G.L. c. 31, § 24 does not explicitly mention multiple choice questions, unlike G.L. c. 31, § 22. The Commission agrees that it lacks jurisdiction over issues relating to multiple choice questions. *See, e.g., Hickey v. Human Res. Div. & Civil Serv. Comm'n*, No. 99-0120, Suffolk Super. Ct. (2000); *Jones v. Bos. Fire Dep't*, 19 MCSR 5, 6 (2006); *Stallworth v. Bos. Fire Dep't*, 19 MCSR 9, 9 (2006). In any event, the Appellant concedes that he asked HRD to conduct a review of two exam items and was given credit with regard to both questions that he challenged. Thus, the remaining issue is whether the Appellant should have been granted credit for his training and experience despite the fact that he did not pass the written component of the exam. 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, which 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 MCSR 83, 84 (2001); *Riley v. Human Res. Div.*, 14 MCSR 85, 86 (2001). However, since the Appellant did not first ask HRD to review the lack of training and experience credit in determining the Appellant’s score for the written component of the exam, HRD did not render a decision on the matter that is subject to appeal to the Commission and we reach no conclusion thereon.

CONCLUSION

For the reasons stated herein, the Appellant cannot appeal HRD’s response to his request to review multiple choice questions to the Commission and the Appellant cannot appeal the issue related to the application of credits for training and experience because he failed to first seek

HRD's review of the matter. Therefore, HRD's Motion to Dismiss is hereby *granted* and the appeal is *dismissed*.

Civil Service Commission

Cynthia A. Ittleman, Esq.
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell, and Stein, Commissioners) on Sept. 20, 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:

Eugene H. Salois, III (Appellant)
Challis McNally, Esq. (for HRD)