

COMMONWEALTH OF MASSACHUSETTS

**CIVIL SERVICE COMMISSION
One Ashburton Place – Room 503
Boston, MA 02108
617-979-1900**

JOSE SILVA,
Appellant

CASE NO. B2-21-247

v.

**HUMAN
RESOURCES DIVISION,**
Respondent

Appearance for Appellant:

Jose Silva, Pro Se

Appearance for Respondent:

Melinda Willis, Deputy General Counsel
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

Commissioner:

Paul M. Stein

DECISION ON RESPONDENT’S MOTION TO DISMISS

On December 20, 2021, the Appellant, Jose Silva, a permanent, full-time police officer in the Springfield Police Department (SPD), appealed to the Civil Service Commission (Commission), pursuant to G.L. c. 31, § 22 through § 24,¹ to contest the determination by the Massachusetts Human Resources Division (HRD) that he had failed to submit an “online” Education & Experience (E&E) form, a required component of the 2021 departmental promotional examination for SPD Police Sergeant and, therefore, he had failed to pass that examination and his name was not included on the 2021 SPD Sergeant’s Eligible List from which future promotions to SPD Sergeant would be made. The Commission held a pre-hearing conference on

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

February 1, 2022 via remote videoconference (Webex) and issued a Procedural Order suggesting that, based on the unique, largely undisputed semantical issue presented by the appeal, the parties consider entering into a non-precedent-setting resolution. On February 11, 2022, HRD reported that such a resolution was not possible and, on February 22, 2022, HRD filed a Motion for Summary Decision. On April 11, 2022, I held a hearing on the Motion for Summary Decision via remote videoconference (Webex) which was audio-digitally recorded. Officer Silva filed one post-hearing document and HRD submitted a Supplemental Post-Hearing Memorandum. For the reasons stated below, the Commission denies HRD's Motion for Summary Decision and grants Officer Silva relief.

FINDINGS OF FACT

Based on the submissions of the parties, I find the following material facts are not disputed:

1. The Appellant, Jose Silva, is a tenured sworn SPD full-time permanent police officer with a civil service seniority date of 06/04/2007. (*Stipulated Facts; Appellant's NEOGOV Master Record attached to HRD's Pre-Hearing Memorandum dated 1/31/2022; Appellant's 2021 Police Sergeant E&E Claim Form attached to Claim of Appeal*)

2. On September 19, 2021, the Appellant took the police sergeant examination administered by HRD (the 2021 Sergeant's Exam). (*Stipulated Facts*)

3. As stated in the poster for the 2021 Sergeant's Exam, in order to be eligible to sit for that examination, an SPD officer must hold a permanent appointment as a sworn police officer on the date of the examination with at least three years tenured service as a police officer with the SPD. (*Exh.A, Lefort Aff't; See G.L.c.31, §59*)

4. The 2021 Sergeant's Exam consisted of two components – a written test weighted 80% and an E&E component weighted 20%. (*Exh. A, Lefort Aff't*)

5. The poster for the 2021 Sergeant's Exam stated the following concerning the E&E component:

Education & Experience (E&E): All candidates must complete the 2021 Police Sergeant E&E Claim application online. Submitting an E&E claim in any way other than through the online claim process will result in a failed examination component. Instructions regarding this E&E Claim application will be emailed to candidates prior to the examination date. A confirmation email will be sent upon successful submission of an E&E Claim application.

All claims and supporting documentation must be received within seven calendar days following the examination. Supporting documentation must be scanned and attached to your application or sent to civilservice@mass.gov no later than September 25, 2021.

Please note that:

- E&E is an examination component, and therefore must be completed by the examinee.
- Failure to complete this component as instructed will result in a candidate not receiving any credit for E&E.
- Credit for E&E will be calculated for all candidates.

Please be sure to read the instructions carefully. In order to ensure that no one receives any type of unfair advantage in the claim process, we are unable to provide individualized assistance to any candidate and so, no phone calls or email inquiries regarding the content of this examination component will be accepted or responded to. Once you receive your examination mark, you will have 17 calendar days from the emailing of your mark to appeal in writing your E&E score.

(Exh. A, Lefort Aff't)

6. By email from HRD dated September 18, 2021 to Officer Silva, he received a reminder to submit his E&E claim. The email stated, in relevant part:

As stated in the exam poster, all E&E claims must be submitted ONLINE.

The Online E&E Claim is now available. To access this exam component:

1. Click here to access the application.
2. Carefully read all information in the posting;
3. Click "Apply";
4. Log in to your account;
5. Complete the online E&E claim as instructed.
6. If you have successfully completed and submitted the E&E claim application you will receive a confirmation email.

(AN APPLICATION IS NOT COMPLETE UNTIL YOU RECEIVE THIS CONFIRMATION EMAIL)

The claim application must be submitted online and no later than 11:59 pm on **Saturday September 25, 2021**. Late applications will not be accepted. If you do not receive an automated confirmation email after

you submit your claim, your E&E claim application is considered incomplete and will not be accepted.

Information on how to provide supporting documentation:

1) Scan and attach documents to your online E&E claim application at the time of submission.

or

2) Email scanned documents to civilservice@mass.gov.

(Exh. B, Lefort Aff't)

7. On or about September 24, 2021, Officer Silva proceeded to complete his E&E claim.

When he landed on the web page “2021 Police Sergeant E&E Claim”, he was directed to read the instructions carefully which stated, in part:

Preparing and Saving Your Claim: The Human Resources Division (HRD) recommends that candidates download and print a copy of the Online E&E Claim to work with offline before attempting to complete the online claim. Printed copies of your E&E claim submitted to HRD are not considered an officially submitted claim.

(Appellant's 2021 Police Sergeant E&E Claim Form attached to Claim of Appeal; Screenshots posted during Motion Hearing)

8. As he was instructed, Officer Silva clicked on the “Print” icon (which appeared at the top of the web page he was viewing) which sent him to a printer-friendly version of the Instructions and E&E Claim Form. He downloaded and printed a copy of the E&E Claim Form. He proceeded to complete the form, marking each E&E question by hand, indicating, in particular, that he claimed 79.9 E&E points: (a) 70 points for having been approved as eligible to take the 2021 Sergeant's Exam; (b) 5.4 points for five (5) years of experience as an SPD police officer immediately prior to the date of the exam; and (c) 4.5 additional points for additional prior experience as a police officer. *(Appellant's 2021 Police Sergeant E&E Claim Form attached to Claim of Appeal)*

9. The intent of the HRD's instructions is that, if a candidate downloads and completes the printed form by hand, they need to return to the “2021 Police Sergeant E&E Claim” web page to find and click on the green “APPLY” button at the top of that page as stated in HRD's September 18, 2021 email. Had the Appellant done so, he would have been redirected to another

web page, where he would have been instructed to sign into his NEOGOV account and then redirected to another webpage (monitored by an HRD vendor) containing the online claim module (a/k/a the online “bubble sheet” version) of the E&E Claim Form which he could complete electronically and transmit electronically directly from the webpage. (*Appellant’s 2021 Police Sergeant E&E Claim Form attached to Claim of Appeal; Screenshots posted during Motion Hearing*)

10. Believing he was complying with the instructions to submit his E&E claim “online”, however, Officer Silva scanned the printed copy of the E&E claim form he had downloaded manually and completed by hand along with another manually completed form prepared by the SPD to verify his years of employment. (*Copy of E&E Claim and email trail filed with Appellant’s Claim of Appeal; Undisputed Representation of Appellant at Motion Hearing*)

11. At approximately 1:23 pm on September 24, 2021, Officer Silva sent an email to the HRD email address, civilservice@mass.gov, provided in the instructions he had received, at civilservice@mass.gov, to which he attached his completed E&E claim and employment verification form. (*Copy of E&E Claim and email trail filed with Appellant’s Claim of Appeal*)

12. At approximately 1:24 pm on September 24, 2021, Officer Silva received an automated reply from HRD acknowledging that his email had been received and that HRD would “respond accordingly as soon as possible.” (*Email trail attached to Appellant’s Claim of Appeal*)

13. On November 19, 2021, Officer Silva received an email notice from HRD informing him that he had failed the 2021 Police Sergeant Exam. He had passed the written exam with a score of 76.59 but received an E&E score of 0.00 because he “[d]id not file an online E&E claim.” When the written exam score (weighted 80%) was combined with the E&E score (weighted 20%), Officer Silva received a Final Score of 61, nine points below the minimum overall passing score of 70. (*HRD email dated 11/19/2021 attached to Appellant’s Claim of Appeal*)

14. Based on his failing score, Officer Silva's name does not appear on the eligible list of 76 candidates for Springfield Police Sergeant, established by HRD on 11/19/21. (*Stipulated Facts; Administrative Notice [https://www.csexam.hrd.state.ma.us/eligiblelist/eligiblelistpromo.aspx?ListId=9&Location_Id=297&referrer=https%3a%2f%2fwww.csexam.hrd.state.ma.us%2feligiblelist%2fcommunities.aspx%3fListTypeId%3d2%26ListId%3d9&name=Police+Communities+Promotional+Lists]*)

15. On December 1, 2021, Officer Silva timely appealed to HRD for a review of his E&E score. HRD denied his appeal and this appeal to the Commission duly ensued. (*Stipulated Facts; Claim of Appeal*)

16. According to Gilbert Lefort II, HRD Deputy Director of the Civil Service Unit, Officer Silva was one of less than 35 candidates (out of a total of 836 candidates who took the 2021 Police Sergeant's Exam), who failed to complete an E&E claim correctly using the online claim module. (*Lefort Aff't*)²

17. As of the date of this decision, the SPD had promoted four (4) Sergeants from the 2021 Sergeant's Eligible List. (*Administrative Notice [https://www.springfield-ma.gov/cos/newsstory?tx_news_pi1%5Baction%5D=detail&tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Bnews%5D=15490&cHash=707ebf50a3cdd5cc8459adb3e235c67]*)

18. Had Officer Silva been awarded the full E&E points he claimed, that would change his final rounded score to 77, ranking him tied with four (4) other candidates in 22nd place on the 2021 Sergeant's Eligible List. (*HRD email dated 4/29/2022 with Supplemental Post-Hearing Memorandum*)

²At the motion hearing, Office Silva argued that HRD provided at least one other candidate a reminder notice that he had filed an incomplete E&E claim and provided a document purporting to support this contention. In his Supplemental Post-Hearing Memorandum, HRD explained that notice was not distinguishable and not relevant to Officer Silva's situation in that the other officer had never completed or submitted any form of E&E claim and HRD had also denied his denied. (*Appellant's Post-Hearing Submission: HRD's Supplemental Post-Hearing Memo*)

APPLICABLE LEGAL STANDARD

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. 1.01(7)(h). These motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., “viewing the evidence in the light most favorable to the non-moving party”, the undisputed material facts affirmatively demonstrate that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case”. See, e.g., Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 n.6 (2008); Maimonides School v. Coles, 71 Mass. App. Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005).

ANALYSIS

HRD correctly argues that the Commission normally defers to the broad discretion granted to HRD’s technical expertise as the statutorily delegated agency to establish the form, content and passing grades for all civil service examinations as set forth in G.L. c. 31, §5(3), §22 through §24. See, e.g., Cataldo v. Human Resources Div., 23 MCSR 617 (2010). See also Wilbanks v. Human Resources Div., 29 MCSR 22 (2016) [Wilbanks I], citing Lincoln v. Personnel Administrator, 432 Mass. 208 (2000), aff’d other issues sub nom. Wilbanks v. Massachusetts Civil Service Comm’n, Suffolk CA 2016-0356 (Sup. Ct. 2017), further decision, 30 MCSR 316 (2017). In particular, the Commission has affirmed HRD’s determination that completing the E&E claim form in a timely manner is a component of the examination and a candidate who cannot prove to HRD’s satisfaction that he or she did so may be denied all E&E credit. Amato v. Human Resources Div., 34 MCSR xxx (2021); Shackelford v. Human Resources Div., 31 MCSR 232 (2018); DuPont v. Human Resources Div., 31 MCSR 184 (2018); O’Connell v. Human Resources Div., 29 MCSR 90 (2016); Pavone v. Human Resources Div., 28 MCSR 611 (2015); Foley v. Human Resources Div., 31 MCSR 132 (2018).

HRD's discretion to make rules governing the design and marking of examinations, however, is not absolute and the Commission has intervened when necessary to "ensure that HRD's decisions are uniform, and not arbitrary and capricious." See Pearson v. Human Resources Div., 30 MCSR 261 (2017); Sullivan v. Human Resources Div., 30 MCSR 264 (2017). Nor has the Commission overlooked or been unsympathetic to the "draconian" effect that strict application of HRD's requirements for completing an E&E claim sometimes produces. See Wetherbee v. Human Resources Div., 34 MCSR 173 (2021); Flynn v. Human Resources Div., 33 MCSR 237 (2020); Silva v. Human Resources Division, 30 MCSR 247 (2017); O'Neill v. Human Resources Div., 29 MCSR 186 (2016); Grenier v. Human Resources Div., 29 MCSR 560 (2016).

Unlike other appellants who either started the online E&E claim process but never completed it or mailed a claim form to HRD via first-class mail and could not produce a copy of the "automated confirmatory email" that HRD required to establish that the application was received and completed on time, Officer Silva did go "online", downloaded the correct E&E claim posted there, completed it, scanned it, emailed it to HRD and received an "automated confirmatory email" from HRD confirming that his submission had been received, all one day prior to the required deadline. His one misstep was in believing that downloading, scanning and emailing the form was equivalent to submitting it "online", when HRD construes its instructions to mean that the E&E claim form (identical in substance to the downloaded copy Officer Sylva submitted) must be electronically completed and electronically submitted on the NEOGOV website connection to be deemed submitted "online".

HRD and Officer Silva maintain a reasonable disagreement as to what can fairly be deemed compliance with the requirement that the E&E claim must be submitted "via the online claim process". Officer Silva gains succor from the ordinary meaning of "online", i.e., "connected to a compute, a computer network, or the Internet" or "done over the Internet", compared to its

opposite, “off-line”, i.e. “not connected to a computer, a computer network, or the Internet” or “not done on a computer network or the Internet”, THE BRITANNICA DICTIONARY, <https://www.britannica.com/dictionary/online>. See also WIKTIONARY, https://en.wiktionary.org/wiki/online#Alternative_forms (“Connected to the Internet”, e.g., “I’ll be online tonight, so I’ll be able to reply to your email.”)

HRD posits that the only practical interpretation for its mandate to use the “online claim process” is to follow the instructions provided to candidates to click “Apply” and then fill out and submit the “online claim module” electronically. HRD contends that, since this form is monitored by an outside vendor, HRD has no way to track whether applicants may have submitted the claim in some other way. I find this position problematic for at least three reasons: (1) the “online claim process” explicitly authorizes candidates to download a hard copy; (2) HRD expressly authorizes candidates to submit supplementary material, including the required employment verification form, via HRD’s general email address, civilservice@mass.gov; and (3) the HRD general email address issues an “automated email reply” acknowledging receipt of messages sent there that seems to mimic what candidates are told to expect when they submit a claim electronically via NEOGOV.

HRD also makes the point that most applicants (all but about 35 out of 836 police officers who took the 2021 Sergeant’s Exam) used the “online module” to submit their E&E claims as HRD intended. This point, however, cuts two ways. Since there were only a few dozen candidates who did not use the E&E “online module”, it significantly dilutes HRD argument that it would be impractical to check its own email box for those few who may have sent it “online” that way, especially, when HRD also directs necessary other documentation necessary to complete a proper claim to be sent to HRD via such email. Surely, HRD can be expected to check and reply daily to time-sensitive matters sent to its email inbox and, if it does not, it should

seriously consider doing so. I also take notice that HRD's NEOGOV records plainly disclose Officer Silva's civil service tenure and that he would not have been eligible to take the 2021 Sergeant's examination if he did not have, at least, the minimum statutory experience (here, at least three years of service as an SPD police officer).

In sum, although this is a close call, given the ambiguity in HRD's description of the "online claim process" and under the unique circumstance presented in his particular case, Officer Silva has demonstrated that his civil service rights have been infringed. To deny this candidate (who has served his community as a sworn police officer for more than a decade) ANY E&E credit which he has clearly earned and give him an overall failing grade on a promotional exam, thereby denying him the opportunity for promotion, SOLELY because of his choice to submit a completed and timely claim "online" via the HRD email address set forth in the examination instructions, for which he received an "automated confirmation email", rises to the level of an inequitable, arbitrary and capricious result that warrants appropriate relief from this Commission.

Although the design of examinations remains a matter of HRD's discretion, HRD should give serious thought to whether its process interpretation espoused here is truly fair and equitable to the public safety community and the members that it regulates, and whether that interpretation may be modified to ameliorate the problematic results that this appeal brought into clear focus. At a minimum, further clarity in the instructions provided to candidates would seem in order. With confidence that appropriately clear instructions will be issued in future administrations of HRD examinations, I note that the facts presented here are rare, unlikely to be repeated if such instructions are forthcoming, and, thus, today's decision by the Commission should be viewed limited to the specific facts of this appeal.

CONCLUSION

In sum, for the reasons stated herein, HRD's Motion for Summary Decision is hereby *denied*.

The appeal of the Appellant, Jose Silva, CSC No. G1-20-073, is *allowed*.

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission ORDERS that the Massachusetts Human Resources Division recalculate the E&E score of the Appellant, Jose Silva, on the 2021 Sergeant's Exam, granting him all E&E points he should have been awarded had HRD considered the E&E form that the Appellant submitted to HRD electronically in a timely manner, and place his name on the 2021 Sergeant's Eligible List accordingly.

Civil Service Commission

/s/Paul M. Stein

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Camuso, Stein and Tivnan, Commissioners) on May 20, 2022.

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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice:

Jose Silva (Appellant)

Melinda Willis, Esq. (HRD)

Regina Caggiano (HRD)