

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

KENNETH A. SILVA, JR.,
Appellant

v.

B2-17-066

HUMAN RESOURCES DIVISION,
Respondent

Appearance for Appellant:

Pro Se
Kenneth A. Silva, Jr.

Appearance for Respondent:

Melissa Thomson, Esq.
Human Resources Division
One Ashburton Place: Room 211
Boston, MA 02108

Commissioner:

Christopher C. Bowman

ORDER OF DISMISSAL

On April 6, 2017, the Appellant, Kenneth A. Silva, Jr. (Mr. Silva) pursuant to G.L. c. 31, §§ 22-24, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) to give him a failing grade on the promotional examination for Fire Captain based on his failure to complete the "education and experience" (E&E) portion of the examination.

On April 25, 2017, I held a pre-hearing conference at the offices of the Commission, which was attended by Mr. Silva and counsel for HRD.

Based on the statements at the pre-hearing conference and the documents submitted, it appears that the following is not in dispute:

1. Mr. Silva, a Fire Lieutenant for the New Bedford Fire Department, took a promotional examination for Fire Captain on November 19, 2016.
2. All candidates for Fire Captain were required to electronically submit an E&E claim with HRD.
3. The E&E submission is considered by HRD to be a separate component of the examination, which must be completed in order for an applicant to receive a passing score.
4. In order to complete the E&E component, applicants must access an online application page and complete a series of questions related to E&E.
5. Applicants must also submit any supporting documentation via the online application or via email.
6. For this promotional examination, the deadline for completing the E&E component was November 26, 2016.
7. Although Mr. Silva submitted supporting documentation, he did not access the online application page and complete a series of questions related to E&E.
8. HRD forwarded all applicants a reminder notice via email on November 10th, 16th, 18th, 23rd and 25th, 2016 regarding the need to complete both parts of the E&E component of the examination.
9. The reminder notices explicitly state that “an application is not complete until receive [a] confirmation email.”
10. Although Mr. Silva received a confirmation email regarding the supporting documentation, he never received a confirmation email regarding the completion of the questions on the online application page, as he did not complete the questions.

11. Based on Mr. Silva's failure to complete the online E&E application page, HRD notified Mr. Silva that he failed the promotional examination.

Applicable Civil Service Law

G.L. c. 31, § 2(b) addresses appeals to the Commission regarding persons 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" It provides, *inter alia*, "No decision of the administrator involving the application of standards established by law or rule to a fact situation shall be reversed by the commission except upon a finding that such decision was not based upon a preponderance of evidence in the record."

Pursuant to G.L. c. 31, § 5(e), HRD is charged with: "conduct[ing] examinations for purposes of establishing eligible lists.

G.L. c. 31, § 22 states in relevant part: "In any competitive examination, an applicant shall be given credit for employment or experience in the position for which the examination is held."

In Cataldo v. Human Resources Division, 23 MCSR 617 (2010), the Commission stated that "... under Massachusetts civil service laws and rules, HRD is vested with broad authority to determine the requirements for competitive civil service examinations, including the type and weight given as 'credit for such training and experience as of the time designated by HRD.' G.L. c. 31, § 22(1)."

Analysis

As referenced above, HRD, as the Personnel Administrator, is vested with broad authority regarding the administration of examinations, including the awarding of credit for training and experience as part of examinations. The Commission, however, must ensure that HRD's decisions are uniform, and not arbitrary or capricious.

There is no evidence, nor has Mr. Silva shown that he would present any evidence, to show that HRD's decisions here were not uniformly applied to all candidates and/or were arbitrary or capricious.

It appears that what occurred here is that Mr. Silva mistakenly believed that he had completed the E&E online portion of the examination when he first signed up to take the promotional examination. Although I am sympathetic to the possible confusion, it is undisputed that Mr. Silva received five (5) separate emails from HRD informing him that the E&E portion of the examination was a separate component of the examination that consisted of two (2) parts: completing the online E&E questionnaire and submitting supporting documentation. Despite these reminders, he failed to complete the online E&E questionnaire. Since the harm that resulted was not through no fault of his own, his is not an aggrieved person for whom relief is warranted.

As previously noted by the Commission, however, it is somewhat perplexing that HRD takes the draconian step of issuing a failing score on the entire examination when an individual does not submit the E&E claim online and/or on time. While it is logical that the exam taker would receive no *E&E credit* when this occurs, it is NOT logical to effectively invalidate the *entire* examination, including the written portion. Although that decision falls under HRD's broad authority to administer examinations, I would, once again, encourage HRD to reconsider that policy.

For all of the above reasons, Mr. Silva's appeal under Docket No. B2-17-066 is ***dismissed***.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan) on May 25, 2017.

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 to:
Kenneth A. Silva, Jr. (Appellant)
Melissa Thomson, Esq. (for Respondent)