

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503

Boston, MA 02108

(617) 727-2293

KENNETH A. SOUSA,

Appellant

v.

**HUMAN RESOURCES DIVISION and
BOSTON POLICE DEPARTMENT**

Respondents

B2-15-86

Appearance for Appellant:

Pro Se

Appearance for Respondent, HRD:

Michael Downey, Esq.

Melissa Thompson, Esq.

Human Resource Division

One Ashburton Place

Boston, MA 02108

Appearance for Respondent, BPD:

Nicole I. Taub, Esq.

Boston Police Department

1 Schroeder Plaza

Boston, MA 02120-2014

Commissioner:

Paul M. Stein¹

DECISION ON RESPONDENTS' MOTIONS TO DISMISS

The Appellant, Kenneth A. Sousa, currently a Police Sergeant with the Boston Police Department (BPD), appeals to the Civil Service Commission (Commission), pursuant to G.L.c.31,§24, to contest the failure to review and correct the marking he received on the “In Basket Test” component of the 2014 promotional examination for Police Lieutenant administered by the BPD under delegation from the Massachusetts Human Resources Division (HRD). A pre-hearing conference was held at the Commission on April 21, 2015. On June 12,

¹ The Commission acknowledges the assistance of Law Clerk Barbara Grzonka in the drafting of this decision.

2015, BPD filed a Motion to Dismiss on the grounds that the appeal was untimely and the Commission lacked jurisdiction to review the marking of an In-Basket Test. On July 22, 2015, the Commission held a hearing on the BPD's Motion to Dismiss, together with a hearing on Motions to Dismiss filed in two other related appeals (Sean Wilbanks v. Boston Police Department, et al, CSC No. B2-15-57 ["Wilbanks Appeal"] and Wayne Clarke v. Boston Police Department, et al., CSC No. B2-15-58) ["Clarke Appeal"].² After the hearing, the Commission received supplemental materials from the Appellants in all three appeals and from BPD, as well as a Motion for Summary Decision from HRD in each of the three appeals, further addressing the contention that the Commission lacked jurisdiction to hear the In-Basket Test appeal.

FINDINGS OF FACT:

Giving appropriate weight to the documents submitted by the parties, the arguments of counsel and the inferences reasonably drawn from the evidence, I find the following material facts to be undisputed:

1. The Appellant, Kenneth M. Sousa, is a permanent BPD Police Sergeant. (*Administrative Notice [Undisputed Facts]*)
2. In April 2013, after years without giving any promotional examinations for BPD superior officer positions since the establishment of the last eligible list in 2008, HRD entered into a Delegation Agreement with BPD to enable BPD to engage a consultant to design and administer departmental promotional examinations for the positions of Boston Police

² During the hearing, Sgt. Sousa belatedly claimed that he and Sgt. Clarke had joined the BPD at the same time and, as Sgt. Clarke argued in the Clarke Appeal, they both had been wrongfully denied credit for 25 years of service under G.L.c.31,§59. It does not appear that Sgt. Sousa previously asserted this claim to BPD or HRD, but, even assuming he had done so, the claim fails on the merits for the same reasons set forth in the Commission's decision in the Clarke Appeal.

Sergeant, Boston Police Lieutenant and Boston Police Captain. (*Administrative Notice [Clarke Appeal, HRD Motion & Exh. 2]*)³

3. According to the terms of the Delegation Agreement, HRD was required to approve the selection of the consultant and to “work with and approve the actions of the consultant” , including, among other things:

- Determination of the knowledge, skills, abilities and personal characteristics (KSAPs) supported by job analysis data that will be evaluated in the examination exercises
- Discussions relative to the job-related, content valid questions/activities that will be used during the Examination
- Content of the training materials or sessions that will be distributed to/conducted for applicants
- Review of validation materials which support the Examination Plan components
- Composition and selection of the assessors for the Examination Plan exercises
- The determination of a passing point for the Examination

HRD’s responsibility under the Delegation Agreement was assigned to George Bilbos, the Director of the Organizational Development Group of HRD’s Civil Service Unit. BPD’s responsibility under the Delegation Agreement was assigned to (then) BPD Police Commissioner, Edward Davis, who was designated as Delegation Administrator. (*Clarke Appeal, HRD Motion & Exh. 2*)

4. Pursuant to the Delegation Agreement, BPD retained, as its consultant, with HRD’s approval, the firm of EB Jacobs who designed and administered the examinations for each position (Sergeant, Lieutenant & Captain) that comprised three examination components

³ I take administrative notice of the fact that the hiatus between the 2008 and 2014 promotional examination process can be attributed largely to pending legal challenges asserted by certain BPD officers that the written multiple-choice style examinations employed in 2008 (and in prior examinations) had a racially disparate impact on minority candidates and were insufficiently job-related to pass muster under federal civil rights laws. I also take notice that the intent of the parties to the Delegation Agreement, in significant part, was to conduct a “comprehensive” analysis that addressed the concerns raised in that litigation, and that over \$1,600,000 was spent in development of the 2014 examination process. *See* Findings of Fact, Rulings of Law and Order, *Smith v. City of Boston*, -- F.Supp.3d --, 2015 WL 7194554 at 9-10 (November 16, 2015). *See also*, *Lopez v. City of Lawrence*, 2014 U.S. Dist. LEXIS 124139, *appeal pending*, No. 14-1952 (1st Cir. 2014)

administered in two phases.

- Phase I was a Written Technical Knowledge Test administered to all candidates on June 28, 2014. (This component is not the subject of any claims in any of the three current appeals.)
- Phase II was an Ability Based Assessment, consisting of two examination components: (A) an In-Basket Test administered to all candidates on September 6, 2014 and (B) an Oral Board Test administered to all Lieutenant Candidates over the course of two days, October 8 and 9, 2014.

(BPD Motion & Exh. 1; Clarke Appeal, HRD Motion)

5. As to appeals of examination results, the Delegation Agreement stated:

“Reviews permitted pursuant to Section 22 of Chapter 31 shall be the responsibility of the consultant, with the approval of HRD.”

(Clarke Appeal, HRD Motion, Exh. 2)

6. The In-Basket Test was a one-day, “open-book” style examination in which the candidate was asked to assume the role of a newly promoted Lieutenant and to provide “written, essay-style responses to a variety of job situations typical of those a Lieutenant might encounter.” Candidates received a Background Information Packet that included such documents as calendars, personnel roster and organizational charts, as well as a series of memos, reports and other correspondence typical of those documents that might come across a Lieutenant’s desk. Candidates had approximately three hours to review the background materials and prepare a written Response Booklet addressing the main issues presented in the scenario. The Response Booklet was evaluated by a two-member panel of trained examination assessors (superior officers in police departments outside the Commonwealth) who separately score the test on a nine point scale (where 9 is high and 1 is low) in four categories: Written Communication, Interpersonal Interactions, Analyzing and Deciding, Managing Activities. The two assessors’ scores in each category were averaged and then totaled to arrive at the final In-Basket test score. *(BPD Motion & Exh. 1)*

7. The Oral Board Test was a two-day “closed-book” style examination, with a different exercise administered each day. This test was designed for “assessment of abilities underlying effective job performance” and “technical knowledge is not the primary focus.” The “Incident Command” exercise simulated the kinds of activities involved in responding to, and taking command, of an incident scene. The “Subordinate Performance” exercise simulates the kinds of activities involved in correcting subordinate performance problems. Candidates were allowed approximately 15 to 25 minutes to review the materials provided and, then, make a 12 to 15 minute oral response to a panel of three assessors. The Incident Command exercise was scored, using the 9-point scale, in the categories of Oral Communication, Analyzing and Deciding, Managing Activities and Adaptability. The Subordinate Performance exercise was scored, using the 9-point scale, in the categories of Oral Communication, Interpersonal Interactions, Analyzing and Deciding and Managing Activities. The total score for the Oral Board Test was derived by computing the average ability scores across the two Oral Board exercises and adding those average scores together.

(BPD Motion, Exh. 1)

8. Prior to computing the overall component scores, EB Jacobs “standardized” the raw component scores using an unspecified statistical method meant to account for unusual deviations from average scores for any particular component. In addition, EB Jacobs staff compared ratings given out by each of the panels of assessors and made adjustments that it deemed necessary to “standardize the ratings by panel to remove any advantage/disadvantage as a result of the panel to which the candidate was assigned.” *(BPD Motion, Exh. 1)*
9. The final step in arriving at a candidate’s final examination score was to calculate a weighted total of the average score on each examination component, giving 45% weight to the

Technical Knowledge Written Test, 25% weight to the In-Basket Test, and 30% weight to the combined score on the two exercises in the Oral Board Test. The cumulative total of these weighted scores counted 80% toward the candidate's final grade. (*BPD Motion & Exh. 1*)⁴

10. After completing their ratings, the assessors consulted and completed a consensus "Feedback Report", including a narrative description of the assessors' collective impressions of a candidate's strengths and areas of needed improvement displayed during each examination component. The feedback discussion is not part of the examination process. No ratings are allowed to be modified once the feedback discussion begins. (*BPD Motion & Exh. 1*)
11. The remaining 20% of the candidate's final grade consisted of Education and Experience (E&E) Points, calculated from information provided to BPD on an Employment Verification and Education and Experience Rating Sheet through which candidates self-reported his/her academic and employment record and supplied all supporting documentation, due within a week after the June 28, 2014 Phase I Written Technical Knowledge examination. HRD retained final approval of the calculation of E&E points. (*BPD Motion & Exh.1; Clarke Appeal, HRD Motion & Exh. 3*)
12. The final scores for all candidates who passed the promotional examination were placed on the eligible list in rank order according to their scores. Upon publication of the eligible list, each candidate received an individual report showing the candidate's total examination scores as well as a breakdown of those scores by examination component, breakdown of their ability ratings overall and within the In-Basket and Oral Board Components, a breakdown of the E&E points they received and the assessors' "Feedback Report". (*BPD Motion & Exh. 1; Clarke Appeal, HRD Motion*)

⁴ The record does not indicate how additional preference points under G.L.c.31, §59 (25 years of service) or veteran's preference points under G.L.c.31, §26 & PAR14(2) were awarded. I infer that HRD handled that function.

13. Candidates received extensive materials to explain the examination process and enable candidates to prepare for the examination. These materials included a February 18, 2014 promotional Examination Announcement, an examination reading list and Preparation Guide focused on the Written Technical Knowledge Test and a similar Preparation Guide for the In-Basket and Oral Board Tests and an Education and Experience Rating Sheet Instructions. Candidates were advised: “The Boston Police Department’s Human Resources Division is completely committed to assisting all of our Officers with this process.” (*BPD Motion, Exh.1; Clarke Appeal, HRD Motion & Exh. 3*)

14. The materials that BPD distributed to candidates contained the following information about the process for appealing examination results:

- The Lieutenant’s Examination Preparation Guide stated:

“Appeals for either the In-Basket or the Oral Board Exercises must be submitted within one week of the completion of the administration component being appealed. Candidates are permitted to appeal for one of two reasons:

 1. A Procedural Appeal: If a candidate believes that the proper administrative procedures (i.e., time allotted for a specific activity, etc.) were not followed when he/she tested.
 2. A Computational Appeal: If a candidate believes that his/her test scores were not combined properly (i.e., a mathematical error was made) to create his/her overall examination score.

Appeals shall be submitted to Devin Taylor, Director of Human Resources in the Boston Police Department. The specific steps to follow in submitting an appeal will be outlined in a separate document.”

- In an e-mail from Devin Taylor to all candidates, dated August 6, 2014, entitled “Phase II update”, candidates were advised:

“At the time of issuance [of the Preparation Guides] some details were not finalized. The purpose of this e-mail is to provide that information.”
- As to the “Appeal Process”, the e-mail stated:

“The appeal process is outlined in your prep guide.

Procedural appeals must be made within 7 days from the date of the exam.
Captain/Lieutenant – procedural appeal deadline is 9/13/14
Sergeant – procedural appeal deadline is 9/16/2014.
Computational Appeals must be made within 7 days of receiving your score.

All appeals should be submitted on a Departmental Form 26 to the attention of Devin Taylor. Appeals must be submitted in-hand and will not be accepted after 5 p.m. on the deadline indicated.”

- The Education and Experience Rating Sheet Instructions contain the following:

“SUMMARY OF EXAMINATION PROCESS:

For this examination the Commonwealth of Massachusetts Human Resources Division has delegated the responsibility for the Education & Experience component to the Boston Police Department. The Department’s Human Resources Division (BPD/HRD) will be managing this process.

Once you receive your examination score, you will have seventeen calendar days from the mailing of your score to file an appeal of the scoring of your Education and Experience points.”

(BPD Motion, Exhs. 1 & 2; Clarke Appeal, HRD Motion, Exh. 3)

15. Each candidate who registered to take a promotional examination was randomly assigned a Candidate ID number that was different from his/her BPD identification or badge number. Devin Taylor, BPD’s Human Resources Division Director, was the only person involved in the examination process who had a master list of the candidate names and Candidate ID numbers. *(BPD Motion, Exh. 1)*
16. Sgt. Sousa duly registered for, took and passed the 2014 promotional examination for BPD Police Lieutenant. His name appears on the BPD Police Lieutenant eligible list established in March 2015 in 61st position, out of 111 candidates who passed the examination, in the 13th tie group (meaning that 60 candidates received higher scores).⁵ *(Undisputed Facts; Administrative Notice [BPD Lieutenant Eligible List Established March 2015])*
17. Sgt. Sousa requested a review of his examination results. Although the specific nature of his request was not documented, I infer from the response he received, as indicated below, that his request was treated as a “computational appeal” of the Written Technical Knowledge

⁵ HRD does not publish the actual scores of candidates. I take administrative notice that, in general, except as modified by statutory preferences (such as veteran’s status), each tie group on the eligible list would have scored one point higher than the tie group just below that group. Thus, it is reasonable to infer that, in his present position on the eligible list, and under the 2n+1 formula, over the life of the eligible list (typically two or three years), BPD would need to make more than 30 Lieutenant promotions before it was required to consider Sgt. Sousa for promotion.

Test, the In-Basket Test and the Oral Board Test, and referred to EB Jacobs, but did not include a review of his Education and Experience scores, which would have been made by HRD. (*Claim of Appeal [BPD Memo 3/9/2015 re: Computational Appeal]*)

18. On March 9, 2014, Devin Taylor, BPD Director of Human Resources, wrote to Lt. Wilbanks:

“The State Human Resources Division and EB Jacobs have completed their reviews of computational appeals. The State was responsible for all appeals filed relative to the Education & Experience section, and EB Jacobs was responsible for all computational appeals relative to other exam components.

The appeal you submitted has been denied. Therefore, no changes have been made to the data provided to you in your score report. The notes below were given in response to your appeal:

EB Jacobs hand scored your results, and verified that each exam component was scored as intended.

If you are dissatisfied with the outcome of your examination appeal you may forward an additional appeal to the Massachusetts Civil Service Commission. You have 17 days from today to submit this appeal.”

(*Claim of Appeal [BPD Memo 3/9/2015 re: Computational Appeal]*)

19. On March 11, 2015, Sgt. Sousa completed the Commission’s “Examination Appeal Form” required to initiate an appeal concerning a civil service examination. Sgt. Sousa stated that the allegations he had presented to HRD for review: “I was given a lower score than I thought I deserved, based on the answers that I provided during the 4 part examination.”

(*Claim of Appeal*)

20. The Commission’s “Examination Appeal Form sets forth, in part, the following:

REQUIRED NEXT STEPS BY APPELLANT

1. Attach a check or money order in the amount of . . . \$75.00 (for promotional appointment examination made payable to: Civil Service Commission.
2. Attach a copy of the written decision from the state’s Human Resources Division (HRD)
3. Mail or hand-deliver this appeal form to the Civil Service Commission at One Ashburton Place: Room 503, Boston, MA 02108 within seventeen calendar days after the date of the mailing of the decision by HRD. . . .
4. Mail or hand-deliver a copy of this examination form to HRD at: Human Resources Division; One Ashburton Place, Room 301, Boston MA 02108.

WHAT HAPPENS AFTER THE COMMISSION RECEIVES YOUR APPEAL FORM?

1. Within ten (10) days, you and HRD will receive an Acknowledgement Form from the Commission along with a “Notice of Pre-Hearing Conference”. The pre-hearing conference is usually held within thirty (30) days from the time the Commission receives your appeal.

(*Claim of Appeal*)

21. Sgt. Sousa brought his completed “Examination Appeal Form” and a check for \$75 to HRD, not to the Commission. An HRD employee took his form, date stamped it, and returned the check. After hearing nothing further, Sgt. Sousa made inquiry of the Commission and learned that the Commission had no record of his appeal. Eventually, on May 6, 2015, Sgt. Sousa filed the “Examination Appeal Form” with the Commission along with a new check for the filing fee. (*Claim of Appeal*)

SUMMARY OF CONCLUSION

In the unique circumstances of this case, Sgt. Sousa appeal is not untimely. Indeed, it could be considered premature. Although his failure to follow the instructions on the Commission’s appeal form might, in other circumstances, be compelling reason to bar his claim, here, he never received a review of his examination scores by HRD to which he is entitled as a matter of law. HRD must be ordered to conduct that review forthwith and the Commission will retain jurisdiction to reopen this appeal for further proceedings with respect to that review if necessary.

STANDARD OF REVIEW

An appeal before the Commission may be adjudicated summarily, in whole or in part, pursuant to 801 C.M.R. 1.01(7)(g) and 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

Applicable Civil Service Law

The process for HRD review and appeal to the Commission to challenge the results of a civil service examination are currently contained in G.L.c.31, Sections 22 through 24 and follow a distinctly different statutory path from other forms of civil service appeals from HRD actions (or inactions). See, e.g., G.L.c.31, §2(b) (Commission is granted power and duty “[t]o hear 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*”) (*emphasis added*) These statutes provide, in relevant part:

§22. Passing requirements of examinations; credits; requests for review. The administrator shall determine the passing requirements of examinations. In any examination, the applicant shall be allowed seven days after the date of such examination to file with the administrator a training and experience sheet and to receive credit for such training and experience as of the time designated by the administrator.

Except as otherwise provided by sections sixteen and seventeen, an applicant may request the administrator to conduct one of 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; (3) a review of a finding that by the administrator that the applicant did not meet the entrance requirements for the examination;

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 . . . 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 in the examination

An applicant may require the administrator to conduct a review of whether an examination taken by such an applicant was a fair test of the applicant’s fitness actually 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.

The administrator shall determine the form of a request for review. Each such request shall state the specific allegations on which it is based and the books or other publications relied upon to support the allegations. References to books or other publications shall include the title, author, edition, chapter and page number. Such

references shall also be accompanied by a complete quotation of that portion of the book or other publication which is being relied upon by the applicant. The administrator may require applicants to submit copies of such books or publications, or portions thereof, for his review.

§23. Review of examination papers; errors. 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 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 or in the finding that the applicant did not meet the entrance requirements. . . . the administrator shall make any necessary adjustment to correct such error.

The administrator may refuse to conduct a review pursuant to this section where . . . the applicant has failed to file the request for review within the required time or in the required form.

§24. Appeals; petitions. 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 . . . ; or (c) a finding that the examination taken by such applicant was a fair test Such appeal shall be filed no later than seventeen days after the date of mailing of the decision of the administrator. The commission shall determine the form of the petition for appeal, provided that the petition shall include a brief statement of the allegations presented to the administrator for review. . . . [T]he commission shall conduct a hearing and . . . render a decision, and send a copy of such decision to the applicant and 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.

Timeliness

The Commission strictly complies with the requirements for timely filing of appeals from actions (or inactions) by HRD, in general, and, in particular, as to examination appeals. See Aquino v. Human Resources Div., 28 MCSR 335 (2015) (examination appeal); Healey v. Human Resources Div., 27 MCSR 610 (2014) (same); Corwin v. Boston Fire. Dep't, 16 MCSR 6 (2003) (same); Annis v. Human Resources Div., 13 MCSR 156 (2000) (same)

In Sgt. Sousa's situation, he clearly intended to file a timely appeal, but his effort went awry because he did not appreciate the functional difference between HRD's "Civil Service Unit" and the Commission, a quasi-judicial appellate agency independent of HRD. To be sure, the distinction is not obvious to those unfamiliar with the Massachusetts civil service system and Mr. Sousa is not alone in his mistake. The Commission routinely, and with some frequency, reroutes members of the public who come to the Commission with inquiry that is properly within the purview of HRD. It might behoove HRD to ensure that its staff are equally alert to redirect visitors who come to HRD with business that clearly belongs at the Commission.

That said, however, the Commission's appeals forms, and the information provided on the Commission's website (www.mass.gov/csc) to those seeking to appeal a decision by HRD to the Commission, are crystal clear. As a general rule, the Commission should not be inclined to excuse the filing of an appeal with HRD that should have been filed with the Commission, due to failure to read, or a misunderstanding of, these requirements. Sgt. Sousa's situation, however, comes with mitigating circumstances that justify rejecting BPD's contention that his appeal should be dismissed as untimely. First, due to the atypical circumstances of the "delegation" of the examination and appeal functions, the BPD's instructions to the examination candidates as to when and where appeals were to be filed, was, itself, less than transparent. Second, for the reasons set forth below in the discussion of the merits of this appeal, Mr. Sousa's appeal to the Commission was actually premature, as no HRD review had been made and no HRD decision rendered as required by law. Thus, by bringing his appeal form to HRD, and not to the Commission, Sgt. Sousa was, inadvertently, pursuing the proper course of action under civil service law. Sgt. Sousa's appeal rights to the Commission are not triggered until HRD has reviewed his claim and "rendered a decision", neither of which have yet occurred. Thus, in the

unusual circumstances here, Mr. Sousa's claim to a proper review is not untimely and his request comes within the Commission's plenary appellate jurisdiction to order appropriate relief.

Appellant's Request for Review of In-Basket Test Results

The substantive dispute among the parties relates to Sgt. Sousa's request to review and rescore his marks on the "In-Basket" Test component of the assessment center.⁶ Sgt. Sousa mounts a challenge to the way his In-Basket Test responses were evaluated, claiming his scores were lower than he deserved. He asserts that, by treating his request for review solely as a "computational appeal", the BPD and HRD violated his civil service right to a substantive review of the marking of his responses to which he claims he is entitled. Both HRD and BPD contend that a candidate has no right to a review of the responses to an In-Basket Test, save for a "computational appeal", i.e., whether the final score was mathematically calculated correctly, and that the Commission lacks jurisdiction to hear an appeal that challenges the scoring of the answers to an In-Basket Test on any substantive grounds.

Sgt. Sousa's present appeal is to be distinguished from a "fair test" appeal that is separately authorized by G.L.c.31, Sections 22 through 24, which is not the type of appeal presented here. In a "fair test" appeal, a candidate is permitted to request a review by HRD and, thereafter, take appeal to the Commission, to challenge any civil service examination on the grounds that it violates the statutory requirement that the examination must constitute "a fair test of the applicant's fitness actually to perform the primary or dominant duties of the position for which the examination is held" G.L.c.31, §22,¶4; G.L.c.31, §24(b). A fair test appeal may involve, for example, claims that the examination included questions that were erroneously framed or as to which applicants did not have notice that the subject would be covered by the

⁶ The same issue also is presented in the Clarke Appeal and in the Wilbanks Appeal.

test, or that there were other irregularities in the test procedure that provided undue advantages or disadvantages to some applicants over others. See, e.g., DiRado v. Civil Service Comm’n, 352 Mass. 130 (1967) (applicants not given equal opportunity to use drawing aids required a new examination); Boston Police Super. Officers Federation v. Civil Service Comm’n, 35 Mass.App.Ct. 688 (1993) (video performance component, an essential part of the examination, was tainted by test administrator’s conflict of interest and required a re-test)⁷

Here, Sgt. Sousa’s appeal to the Commission invokes that part of G.L.c.31, §22 through §24 which provides, in relevant part:

“ . . . [A]n applicant may request the administrator [HRD] to conduct . . . a review of the marking of the applicant’s answers to essay and multiple choice questions” G.L.c.31, §22, ¶2 (*emphasis added*)

“Within six weeks after receipt of a request [for a §22 review], the administrator [HRD] . . . shall conduct such review, render a decision, and send a copy of such decision to the applicant. If [HRD] finds that an error was made in the marking of the applicant’s answer to an essay question . . . [HRD] shall make any necessary adjustment to correct such error.” G.L.c.31, §23 (*emphasis added*)

“An applicant may appeal to the commission from a decision of [HRD] . . . relative to (a) the marking of the applicant’s answers to essay questions no later than seventeen days after the mailing of the decision of [HRD]. . . . [T]he commission shall conduct a hearing . . . , render a decision, and send a copy of such decision to the applicant and [HRD]. . . .” (G.L.c.31, §24 (*emphasis added*))

The application of these provisions of civil service law to HRD review and Commission appeals regarding the In-Basket Test administered as part of the BPD’s 2014 promotional examinations, involve two principal disputed issues: (1) What are the statutory requirements imposed on HRD to “review” examination questions under Sections 22 and 23 of G.L.c.31; and (2) What are the permissible parameters of the Commission’s jurisdiction and “hearing”

⁷ The Commission now follows the ruling in O’Neill v. Civil Service Comm’n, MICV09-0391 (2009), aff’d, 78 Mass.App.Ct. 1127 (2011) (Rule 1:28) to the effect that the time to assert a G.L.c.31, §22, ¶4 “fair test” appeal commences after the examination results are published. See Swan v. Human Resources Div., CSC No. B2-15-182 (2015) Neither Sgt. Sousa’s request for review nor his appeal to the Commission raised a “fair test” issue.

in a further appeal under Section 24 of G.L.c.31, of HRD's decision rendered after such a "review"?

The proper resolution of these questions requires a careful reading of the applicable civil service statutes as well as attention to the long and somewhat tortuous legislative history that produced them. The Commission's Decision in the Wilbanks Appeal sets forth an extensive analysis of the legislative history and current interpretation of current civil service law regarding examination reviews and appeals. That analysis is incorporated by reference and is not repeated here.

In sum, the current provisions of civil service law, set forth in G.L.c.31, Sections 22 through 24, allow, in simple terms, for (1) "review" by HRD of an applicant's answers to essay and multiple choice questions and require HRD to correct any error in the "marking of the applicant's answers", and (2) a "fair test" review. These provisions, particularly when viewed through the lens of the legislative history that produced the present statutory scheme, must be interpreted, so "[t]he civil service law as a whole . . . 'ought, if possible, to be so construed as to make it an effectual piece of legislation in harmony with common sense and sound reason.' "

Younie v. Doyle, 306 Mass. 567, 571-72 (1940). See Comm. v. Welch, 444 Mass. 80, 85-86 (2005) and cases cited ("a statute is to be interpreted 'according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.' ")

First, Sections 22 through 24 make clear that an applicant now is entitled to appeal to the Commission from one of two forms of HRD review of the results of a civil service examination:

(a) review of the answers to “essay” questions and (b) a protest that the examination as a whole, was not a “fair test”, and, in this appeal, it is only the first form of review that was requested. Since an “essay” question is defined to mean a question on a written examination that requires a response composed by the applicant in the form of one or more sentences, and for which no single answer is correct and all others categorically wrong, the In-Basket Test plainly qualifies as an “essay” test, whereas the Oral Board Test plainly does not. See G.L.c.31, §1; PAR.02; St. 1975,c.358,§2. The legislative history further demonstrates that the legislature clearly distinguishes oral tests from written ones. See, e.g., G.L.c.31,§16, as recodified in St.1978, c.393, §11; St.1974,c.835,§78; St.1973,c.320,§1;St.1945, c.702, §4; St.1939, c.498, §2.

Second, the HRD “review” contemplated by Sections 22 and 23 is more than a ministerial or merely “computational” act and, therefore, the review must be performed by HRD and cannot be delegated to “cities and towns”, let alone to a private non-governmental entity, pursuant to G.L.c.31,§5(l).⁸ The legislature’s conscious choice of the term “review” (which initially also required that HRD conduct a “hearing” on every request, St. 1945, c.704, §2), coupled with the explicit requirement that the applicant submit the “authorities” that show how the examination answer was marked incorrectly, plainly indicate the statutory intent to require HRD to do more than provide for the simple computational exercise performed here. See G.L.c.31,§22,¶5; St.1971, c.235, §1; St.1965, c.261. See also Ferguson v. Civil Service Comm’n, 344 Mass. 484, 487 (1962), citing Barry v. Civil Service Comm’rs, 323 Mass. 431, 609-610 (1948) Indeed, when the legislature meant to limit an applicant’s right of review to merely requiring that “the computation of his general average mark be checked for error”, it used language that stated that distinction explicitly. St.1973,c.320,§2. Moreover, the fact that the legislature restored the

⁸ The Commission has previously decided that delegation of the decision to decide a protest that an examination was a “fair test” cannot be delegated by HRD to cities and towns. Kervin v. Boston Police Dep’t, 27 MCSR 507 (2014)

examination review and appeal process in 1975 for essay questions only, and multiple choice review only came more than a decade later (and without Commission appellate rights attached), is hard to reconcile with a supposed legislative intent all along that both essay questions and multiple choice questions were to be reviewed solely for computational error, as if they were, essentially prone to the same type of mistake, yet, only the essay question review warranted appeal to the Commission for one more purely mathematical check. In sum, the statutory language here distinguishes the present situation from that presented in the recent decision of the Supreme Judicial Court in Malloch v. Town of Hanover, 472 Mass. 783 (2015) in which HRD's duty to "receive" bypass reasons did not imply any intent that HRD make a substantive "review" and issue a "decision", such as provided here.

Third, the law makes clear that a request for a review, and a decision by HRD, is a pre-condition to any appeal to the Commission, either as to the "marking" of answers to essay question or as to a "fair test" protest. G.L.c.31,§24. The Commission is bound to apply these procedural requirements strictly as written. However, when, as here, HRD has failed to "act" to conduct the review it was required to make, the Commission does have the power, and is fully warranted, within the authority granted under G.L.c.31, §2(b) to order that HRD take such action as may be required to carry out its statutory responsibilities. See Lincoln v. Personnel Adm'r, 432 Mass. 2008 (2000); Op.Atty.Gen., Sept. 1, 1965, p.114.

Fourth, the Commission will not, and should not, presume, "what the personnel administrator [HRD] would have done had the personnel administrator been given an opportunity to carry out his or her statutory responsibilities" to review the Appellant's In-Basket Test. See Ahern-Stalcup v. Civil Service Comm'n, 79 Mass.App.Ct. 210, 216-17 (2011) Thus, before any further action may be taken by the Commission, HRD must conduct a review of the Appellant's In-

Basket Test that he has requested and “render a decision.” Depending on HRD’s decision, further proceeding in this appeal may, or may not, be warranted or necessary.

Finally, although it is now not necessary to address the specific scope of HRD’s review or the standard of review of HRD’s decision upon appeal to the Commission, some comments may be helpful to guide further proceedings, if any, in this matter.

As to the scope of HRD’s review, although it cannot be limited to a computational exercise, how far the substantive review of the Applicant’s In-Basket Test answers must go to satisfy the statutory requirement is open to interpretation. The statutory Section 23 requirement for an adjustment (upward or downward) in the marking of any answer, is a finding “that an error was made” but there appears to be no definitive precedent, and the parties have pointed to none, that sheds much light on that standard. This statutory language, however, as well as the judicial decisions that address the meaning of an “error” under prior versions of the civil service law, do invite the conclusion that, in many cases, a “record” review of the papers can suffice, and HRD [as the successor to the Director of Civil Service] is vested with considerable discretion in “determining the accuracy of answers and the proper marks to be awarded” under the facts of any particular case. See Ferguson v. Civil Service Comm’n, 344 Mass. 484, 487 (1962) (Director had made a “mistake” when he failed to give applicant full credit for an answer which had sufficiently “showed that he understood the principal statutory considerations affecting the legal problem and the practical consequences of applying the statutes” which was the point of asking the question); Barry v. Civil Service Comm’n, 323 Mass. 431, 433-34 (1948) (“applicant submitted authority to substantiate the correctness of his answers”) Finally, at a minimum, there may well be some “computational” judgments that might warrant more than mere mathematical scrutiny. For example, if the Appellant’s scores on the In-Basket Test, or any sub-component or

criteria were adjusted through the “standardization” process used to equalize results across examination panels, the algorithms used for that exercise might bear HRD review.

Similarly, the standard to be applied by the Commission upon appeal from such a decision has not been definitively determined. Although some language appears in the two cases decided under prior law cited above (Ferguson and Barry) to the effect that the Commission’s powers of review are similar to those of HRD, I would not place considerable weight on those statements. They arose in a very different structural context (including, for example, at a time when the legislature required all commissioners to hear examination appeals *en banc* and the Director was supervised by and subordinate to the commissioners). In the current environment, HRD has become the independent, technical expert, with the discretion to design and administer fair, impartial and honest civil service examinations. See generally, Lincoln v. Personnel Admi’r, 432 Mass. 208 (2000) (“[T]he personnel administrator possesses expertise in regard to the grading and weighting of the examinations. As the statute is designed, the initial review . . . allows him to apply that expertise, determining whether there has been a mistake, or an issue that has been overlooked, that can be easily corrected before an eligibility list is certified.”) The primary function of the Commission has evolved to serve as the final arbiter and guardian of basic merit principles, charged to ensure that HRD (as well as all other players in the civil service community) adhere to those principles when challenged on a case-by-case basis. Thus, the practical implications of the current bifurcated system imply that, while the statutorily mandated review of examination “marks” by HRD, in the first instance, takes on even more importance as the main substantive protection against error, the Commission is not meant to substitute its judgment on the technical merits of such cases but may be asked to set aside HRD’s decision in

this area only it is “arbitrary or wholly devoid of reason.” Further consideration and refinement of these principles can be deferred until a future time.

RELIEF TO BE GRANTED

For the reasons stated, the BPD and HRD motions are allowed in part and denied in part.

The Appellant’s appeal is *allowed in part*, insofar as he seeks a review of his In-Basket Test, and HRD is ordered to conduct such a review in a manner consistent with this Decision and in accordance with Chapter 31, Sections 22 and 23. The Commission shall entertain a motion to reopen this appeal within seventeen (17) days following the mailing to the Appellant of a decision by HRD rendered after such a review as provided in G.L.c.31,§24.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein & Tivnan, Commissioners) on January 7, 2016.

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 a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission’s 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. Sousa (Appellant)
Nicole I. Taub, Esq. (for BPD)
Michael Downey Esq. (for HRD)
Melissa Thomson, Esq. (for HRD)