COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

SEAN M. WILBANKS,
Appellant
v.
HUMAN RESOURCES DIVISION and
BOSTON POLICE DEPARTMENT
Respondents

B2-15-57

Appearance for Appellant:

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Commissioner:

Paul M. Stein[1]

DECISION ON RESPONDENTS' MOTION TO DISMISS

The Appellant, Sean M. Wilbanks, currently a Police Lieutenant 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 scores he received on the "In Basket" Test and "Oral Board" components of the 2014 promotional examination for Police Captain administered by the BPD under delegation from the Massachusetts Human Resources

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

Division (HRD). A pre-hearing conference was held at the Commission on April 14, 2015. On June 12, 2015, BPD filed a Motion to Dismiss on the grounds that the Commission lacked jurisdiction to review the marking of an In-Basket Test or an Oral Board Test, which the Appellant opposed. On July 22, 2015, the Commission held a hearing on these Motions to Dismiss, together with a hearing on Motions to Dismiss filed in two other related appeals (Sean Wayne Clarke v. Boston Police Department, et al, CSC No. B2-15-58 ["Clarke Appeal"] and Kenneth Sousa v. Boston Police Department, et al., CSC No. B2-15-86) ["Sousa Appeal"]. 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 or Oral Board Test appeal.[2]

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

[2] Lt. Wilbanks objected to HRD's Motion for Summary Decision (filed in all three appeals) as untimely and beyond the scope of what the Commission requested by way of post-hearing submissions. I find no prejudice to any of the Appellants by the HRD submission and have considered the merits of its arguments along with the evidence and other submissions of all parties.

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 Captain Candidates over the course of three days, September 24 through 26, 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 Captain and to provide "written, essay-style responses to a variety of job situations typical of those a Captain 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 overall component scores, EB Jacobs "standardized" the raw component scores using an unspecified statistical method meant to account for unusual deviations from the average scores for any particular component. In addition, EB Jacobs staff compared the 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 40% weight to the

Technical Knowledge Written Test, 24% weight to the In-Basket Test, and 36% 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*)

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*) [4]
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)*

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, Exh. 1; Administrative Notice [Sousa Appeal, BPD Motion, Exh. 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. Lt. Wilbanks duly registered for, took and passed the 2014 promotional examination for BPD Police Captain. His name appears on the BPD Police Captain eligible list established in March 2015 in 9th position, out of 33 candidates who passed the examination, tied with 7 others in the 6th tie group (meaning that 8 candidates received higher scores).[5] (*Undisputed Facts; Administrative Notice [BPD Captain Eligible List Established March 2015*])

17. On December 16, 2014, Lt. Wilbanks submitted a four-page letter to BPD HR Director Devin Taylor, in which he requests a "review related to my Overall Examination Score", the

[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 six (6) promotions before it was required to consider Lt. Wilbanks and his tie group for promotion.

"Oral Board Incident Command" exercise and the "Oral Board Group" exercise, stating for each scoring component the reasons he disputed the score he received. (*Claim of Appeal [Dec. 16, 2015 Letter*)

18. On December 17, 2014, Lt. Wilbanks submitted a three-page letter to BPD HR Director Devin Taylor, in which he requests a "review of my Boston Police Department 2014 Captain promotion in-basket score(s), stating for each scoring component the reasons he disputed the score he received. In support of this request, Lt. Wilbanks referred to what he characterized as inconsistencies between the component scores and the "feedback report" he received. (*Claim of Appeal [Dec. 16, 2015 Letter]*)

19. 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]*)

20. On March 20, 2015, Lt. Wilbanks filed this appeal with the Commission. (*Claim of Appeal*)

SUMMARY OF CONCLUSION

Lt. Wilbanks's appeal is allowed in part. As to the denial of his request for review of the scoring of his In-Basket Test, he never received a review of that "essay" question examination 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. Nothing within civil service law and rules, however, requires that HRD conduct a review of an Oral Board exercise or authorizes appeal to the Commission from the scoring of an Oral Board examination. Therefore, the appeal must be denied as to Lt. Wilbanks's challenge to the results of his Oral Board exercise.

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*) The examination review 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 no 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.

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

Lt. Wilbanks's appeal requests Commission review and rescoring of his marks on the "In-Basket" Test and Oral Board Test components of the assessment center.[6] Lt. Wilbanks mounts a challenge to the way his responses were evaluated, producing lower scores than he deserved. He asserts that, by treating his request for review solely as a "computational appeal", BPD and HRD violated his civil service right to a substantive review of his test responses to which he claims he is entitled. Both HRD and BPD contend that a candidate has no right to such a substantive review, but on a "computational appeal", i.e., whether the final score was mathematically correct, and that the Commission lacks jurisdiction to hear an appeal that challenges the scoring of the answers to an In-Basket Test or an Oral Board Test on any substantive grounds.

Lt. Wilbanks'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,

[6] The same issue as to the In-Basket Test also is presented in the Sousa Appeal and in the Clarke Appeal.

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 a claim that the examination included questions that were not a proper subject for examination because they were improperly framed or applicants did not have sufficient notice that the subject would be covered by the 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, Lt. Wilbanks's appeal invokes G.L.c.31,§22 through §24 which provides, in 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*)

[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.

The application of these provisions of civil service law to HRD review and Commission appeals regarding the In-Basket Test and Oral Board 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" in a further appeal under Section 24 of G.L.c.31 of HRD's decision rendered after making such a "review"? The proper resolution of these questions requires a careful reading of the current version of the applicable civil service statutes as well as attention to the lengthy and somewhat convoluted legislative history that produced them.

Legislative History of Examination Reviews and Appeals

From its inception in 1884, competitive examinations have been a crucial component of the Massachusetts civil service system intended to ensure merit-based hiring and promotion of public employees. Originally, along with all other policy-making and administrative functions under the civil service law, complete responsibility for examinations was vested in the commissioner of civil service, two associate commissioners and the employees under their direct supervision and control. See, e.g., St. 1884, c. 319; St. 1916 c. 297; R.L.c.19,§1.

In a 1919 reorganization of the executive branch, the legislature reconstituted the "civil service commission" as part of the "department of civil service and registration", which combined a "division of civil service", under the supervision and control of the commissioner of civil service and the two associate commissioners with a second "division of registration", under a "director of registration", with responsibility over the various boards of registration (medicine,

nurses, pharmacy, embalming, electricians, etc. St. 1919, c.350, §63 et seq.[8] The 1919 law introduced the concept of appellate jurisdiction, providing, as to the civil service, that:

> "*The commissioner and associate commissioners shall constitute a board which shall* prepare all rules and regulations, *hear and decide all appeals* taken by an applicant, eligible person, or appointee *from any decision of the commissioner* . . .select special examiners *and determine the scope and weight of all examinations*. . . . *The commissioner shall be the executive and administrative head of the division* . . . . He shall have charge of the administrative and enforcement of all laws, rules and regulations which it is the duty of the department to administer and enforce, *and shall direct all examinations and investigations which the department is authorized to conduct*."

St. 1919, §65, §66 (*emphasis added*) The Commissioner of Civil Service sought an opinion from the Attorney General as to whether, under the 1919 law "I, as Commissioner, have any authority . . . to revise examination papers . . . if in my opinion the applicants are qualified to pass them; or does this come solely within the jurisdiction of the Board?" Op.Atty.Gen., Jan. 18, 1939, p.27. In an opinion that set principles that still resonate, the Attorney General opined:

> ". . . *[Y]ou as Commissioner of Civil Service, are vested, as executive and administrative head of the division, with the direct and immediate supervision and control* . . . in the first instance solely in you . . . *over the work of the examiners* as you have indicated in your letter you have exercised."
>
> "Such *supervision and control are only to be exercised indirectly by the "board" in so far as it may be necessarily be connected with the hearing and decision of appeals taken . . . in accordance with the appellate jurisdiction vested in the board* [citation]."
>
> "*In this connection it is to be noted that [the law then in effect] provides, in part; - 'Examinations shall be conducted under the direction of the commissioner.*"
>
> "*The conduct of the examinations includes the functions of marking them* . . . by the examiners . . . subject to the supervision and control of the Commissioner. *The authority given to the "board" by the last sentence of this section in the words: 'The board shall determine the scope and weight of the examinations,' does not relate to supervision and control of the examiners in marking the examination papers nor to the marks as such, but rather to a determination as to the character of the various examinations which are to be held and the importance which is to be attached to them or to their different parts in relation to other required qualifications*. . . ."

Id. (*emphasis added*)

[8] Eventually, the division of registration was reassigned as a separate agency within the newly established Executive Office of Consumer Affairs, while the division of civil service was placed within the Executive Office for Administration and Finance. St. 1969, c. 704, c.704, §3,§8; St. 1962, c. 757.

In 1939, on the recommendations of a special legislative commission, the division of civil service was placed under the supervision and control of a professional "director of civil service", who "shall be a person familiar with the principles and experienced in the methods and practices of personnel administration" and "shall be the executive and administrative head of the division", to be appointed by, and removable for cause, by the civil service commission, which was expanded to five members and assigned primarily appellate and investigatory oversight, as well as rule-making authority. G.L.(Ter.Ed.), c.13 & c.31, as amended by St. 1939, c.238; St. 1939, c. 498. The administration of competitive examinations became the province of the director:

> ". . . *Examinations shall be conducted under the direction of the director, who shall determine the form, method and subject matter thereof; provided that they shall relate to matters which will fairly test the fitness of the applicants* actually to perform the duties of the positions for which they apply. . . . *The director shall determine the scope and weight of examinations; provided, that oral interviews whenever held shall not have a weight in the examination*." [9]

G.L. (Ter.Ed.), c.31,§10, as amended by St.1939,c.498,§2 (*emphasis added*) See also G.L. (Ter.Ed.), c.31,§2A(c), inserted by St.1939, c.238,§11 The Commission had the duty to:

> "*Hear and decide all appeals from any decision of the director* upon application of a person aggrieved by such decision. Any *appeals from a decision determining the results of an examination* shall be in writing on forms approved by the commission and shall contain a brief statement of the facts upon which such appeal is based; provided, that *no decision of the director shall be reversed unless the commission finds that it was made through error, fraud or mistake or in bad faith* and in each case of a reversal of a decision the specific reasons therefor shall be stated . . . ."

G.L.c. (Ter.Ed.), c.31,§2(b), as amended by St.1939,c.238,§10. (*emphasis added*)

In 1945, the legislature enacted specific procedures for review and appeal by applicants from the results of an examination, inserting a new paragraph in Chapter 31, Section 2A granting the director the authority to: "(*l*) Decide in the first instance all reviews of markings on examination papers requested by applicants" and inserting a new Section 12A (the precursor of

[9] St.1945, c. 703, §10, later inserted at end of (former) G.L.c.31, §10 the sentence: "Practical tests shall not be deemed to be oral examinations."

Sections 22 through 24 in the current law) that provided, in relevant part:

> ". . .[A]fter the giving of notice of the results of a written examination, an applicant may file with the director, *a request for review of the markings on his examination paper*, in the form prescribed by the director, *setting forth specifically in what particulars the results of the examination were incorrect*.
>
> "In such case, *the director or his authorized representative* shall . . . *hold a hearing,*[10] *cause such examination paper and the markings thereon to be reviewed*, and transmit a copy of his decision to the applicant. . . .[A]fter . . . notice of such decision *the applicant may appeal to the commission* . . . . *.[T]he commission shall hold a hearing*, render a decision, and transmit a copy of such decision to the applicant. . . ."

St. 1945, c.704, §2. (*emphasis added*)

Concomitant with these new provisions, Chapter 31, Section 2(b) was amended to provide, in relevant part, that the Commission shall:

> "Hear and decide all appeals from any decision or action of, or failure to act by, the director, upon application of a person aggrieved thereby . . . . *Except on appeals from markings on examination papers, hearings on all appeals may be held before less than a majority of the commission.*[11] . . . *An appeal from a decision determining the results of an examination shall be in writing* in the form approved by the commission, and shall contain a brief statement of the facts upon which such appeal is based; *provided, that no decision of the director relating to an examination mark shall be reversed and no such mark changed unless the commission finds that it was through error, fraud, mistake or in bad faith, and in each case of reversal of such decision or change in marking the specific reasons therefor shall be stated* . . . .St. 1945, c. 725, §1 (emphasis added).

In 1965, a technical amendment to Section 12A authorized the director to require, as a condition to granting an examination review, that an applicant submit the authority relied upon, to allow the director to refuse to make a review if the applicant's written score was more than twenty points below the established passing requirement, and to specify that no appeals to the commission shall be accepted and "*no hearing shall be held* or other action taken relative thereto *other than on an appeal from a decision of the director*." St. 1965, c. 261 (*emphasis added*) The Civil Service Commissioner sought clarification from the Attorney General as to the effect of

[10] St. 1948, c.297 eliminated the requirement that the director hold a "hearing" prior to an examination "review".

[11] St. 1962, c.270 modified the requirement so that the full Commission need not hear appeals over whether an applicant met minimum entrance requirements.

this 1965 amendment on the Commission's general appellate jurisdiction under Section 2(b). The Attorney General opined that the specific laws on examination reviews and appeals control over the broad language of Section 2(b), so that there was no "repugnancy" between the different provisions. He further opined that the Commission "may hear only appeals from decision of the Director" and, without "a specific grant of discretionary powers to the Commission in this area . . . by the General Court, it is my opinion that the duty of the Commission to hear appeals from matters involving examination markings must be exercised in strict compliance with [the specific statutes on the subject]. Op.Atty.Gen., Sept. 1, 1965. p.114. See also Lincoln v. Personnel Administrator, 432 Mass. 208 (2000) (exhaustion of remedy of administrator's "expert" review remains a pre-condition to a Commission appeal)

The statutory construction of these earlier versions of the civil service law related to examination reviews and appeals received another careful analysis by the Attorney General when, in 1971, he was asked to opine whether, under the law then in effect, the Commission retained the authority to hear a so-called "fair test" appeal and, if so, whether the "error, fraud, mistake or bad faith" narrow standard of review specified in Section 12A applied to such an appeal. Op.Atty.Gen., Nov. 19, 1971, pp.68-72. The Attorney General drew a distinction between the Commission's plenary authority to hear challenges to the validity of an examination "in its entirely" – i.e., a "fair test" appeal – which "is both inferable from and consistent with the appellate authority broadly and absolutely granted to the commission in [G.L.c.31, §2(b)]", on the one hand, and the administrative, technical discretion over examinations granted to the Director from which there was a limited scope of appeal provided by Section 12A of the Director's review of the "marking" of an examination, on the other hand. "If the latter, then there must first be a finding by the Commission that such marking was arrived at by the Director,

'. . . through error, fraud, mistake or in bad faith . . .' and absent such a finding, the Commission may not reverse any examination mark assigned by the Director". Id., at pp. 70-71. The opinion cited Moore v. Civil Service Comm'n, 333 Mass. 430 (1956) in support of this distinction:

> "One of the subjects with which the special commissions and the Legislature were especially concerned was that relating to examinations. It is apparent from the recommendations of the commission and the statutes set forth above that *the making up and grading of examinations were to be primarily administrative functions to be performed by the director and that the appellant jurisdiction of the commission related to examination marks was to be more restricted than it was in other matters*."

Op.Atty.Gen., Nov. 19, 1971, citing 333 Mass. at 434 (*emphasis added*). The Attorney General also noted that the Supreme Judicial Court recognized that, in some cases, an appeal "in form, may have requested that the markings of a designated examination questions be reviewed", but, if "their purpose, in fact and substance, was to have the Commission review the manner in which the examination had been conducted" in its "entirety", the appeal could properly be treated as a "fair test" appeal governed by the Commission's broad plenary remedial powers. Id., at pp. 71-72, citing DiRado v. Civil Service Comm'n, 352 Mass. 130 (1967) (Commission authorized to set aside examination in which only some applicants had been allowed to use drawing aids to prepare answers to certain test exercises). Compare Boston Police Superior Officers Federation v. Civil Service Comm'n, 35 Mass.App.Ct. 688 (1993) (upheld Commission finding that 1987 BPD promotional examination was compromised by conflict of interest of test personnel after Commission conducted a "de novo" evidentiary hearing) with Ash v. Police Comm'r of Boston, 11 Mass.App.Ct. 650 (1980) (applying an "arbitrary or devoid of logic or reason" standard, upholding authority of personnel administrator to round off final test scores). See also, Lavash v. Kountze, 473 F.Supp. 868 (D.Mass.), aff'd, 604 F.2d 103 (1st Cir. 1979) (distinguishing under the "rational basis" due process standard between providing "sufficient safeguards" to protect against "clerical error" that came within due process requirements, and a challenge to "the

substantive validity of the exam or the selected answers" for which "judicial intrusion into this essentially academic area is not warranted") [12]

It also bears notice that Section 12A was further amended in 1971 to permit the director to "*reduce* the applicant's mark if . . . the markings of his examination paper indicates that an error was made in the credit granted for any of the answers in an examination" and, in such case, "also adjust the grade of any other applicant who also received credit for the same answer because of such error." St.1971,c.325. (*emphasis added*)

In 1973, the legislature completely rewrote the examination review statutes to greatly diminish their scope. Section 2A(*l*), as revised, provided that the "director shall have full authority to make any corrections he may deem necessary", but that the scope of the Director's authority to review examination papers was limited to: "Decide in the first instance all reviews . . . of markings of training and experience or findings that requirements for admission were not met. . . ." St.1973,c..320,§2. Section 12A was changed to read, in relevant part:

> ". . .[*A]n applicant may file with the director a request for review of the marking of his training and experience*, . . . the finding by the director that he did not meet the requirements for admission to the examination . . . *or that the computation of his general average mark be checked for error*. . . *[T]he applicant may appeal to the commission*. . ."
>
> . . .
>
> "No request by an applicant for a review . . . shall be accepted by the commission, and *no hearing or other action shall be taken relative thereto other than on an appeal from a decision of the director*."

Id., §8 (emphasis added) In addition, certain examinations were excepted from the Section 12A review process entirely. St.1973, c.320,§§3, 4 & 5. The Commission's authority under Section

[12] Few cases, and none since the Attorney General issued his 1965 and 1971 opinions, have considered in any detail what constituted "error, fraud, mistake or bad faith" or what standard of review applied in a Commission appeal under Section 12A. See Sharkey v. Civil Service Comm'n, 357 Mass. 785 (1970) (rescript) (rejecting appeal from alleged ambiguous multiple choice question involving unsettled question of law); Ferguson v. Civil Service Comm'n, 344 Mass. 484 (1962) (upheld Commission's reversal of Director's "mistake" in failing to credit applicant's answer upon proof that answer "revealed practical understanding of the problem"); Barry v. Civil Service Comm'n, 323 Mass. 431 (1948) (upheld Commission findings of "error or mistake" to marking of certain answers was made because upon proof that "applicant submitted authority to substantiate the correctness of his answers" and no evidence that "different standards" were used in marking the examination papers of applicants)

2(b) was changed to eliminate the Commission's jurisdiction to hear appeals from any decision relative to grading of an examination, providing, in relevant part, authority to

> "Hear and decide appeals from decisions or actions of, or failure to act by, the director, *except in matters relating to findings of the director relative to the grading of written, oral, or practical tests in a competitive examination*. . ." Id., §1(*emphasis added*)

In response to a letter from the then Acting Director of Civil Service, the Attorney General opined that the "right to request a review of the markings of an examination", previously granted by Section 12A, was "purely procedural in nature" and could be changed or abolished without affecting "substantive rights." Op.Atty.Gen., August 9, 1973, p. 55, 57-58.

In 1974, the legislature enacted major reform to the administrative structure of the civil service system. The division of civil service was severed from the Commission, abolished and replaced by the division of personnel administration (DPA), headed by a personnel administrator (the "administrator") reporting to and appointed by the secretary of Administration and Finance, from a list of nominees provided by the Civil Service Commission, to a four-year term (coterminous with the Governor) unless sooner removed by 4/5 Commission vote. All technical, executive and administrative functions of the division of civil service were transferred to DPA and the administrator was substituted for the position of director of civil service in all respects set forth in Chapter 31. The Commission became an independent quasi-judicial agency that retained its investigatory and appellate authority, including rule-making approval, over the actions of the administrator (and otherwise) as provided by Chapter 31, but no longer exercised indirect supervision and control over the functions transferred to DPA. St. 1974, c.835.[13]

[13] The 1974 reform legislation contains one substantive amendment to Chapter 31 relative to the requirement that examinations must be designed to "fairly test" an applicant's qualifications. A sentence was inserted into (former) Section 10 which stated: "Any such examination may include a practical test, or written examination, or *oral examination* or any combination thereof, at the discretion of the administrator; provided that whenever an oral examination is given, it must be used in conjunction with a written examination or practical test; and provided further, that any *oral examination* shall be conducted by a board of not less than three persons chosen by the administrator." St. 1974, c. 835,§78 (*emphasis added*)

In 1975, the legislature restored the authority (removed in 1973) of the administrator under Section 12A to review examination papers and the Commission to hear examination appeals, but more narrowly than allowed under pre-1973 law and closer to the present version:

> ". . . [T]he applicant may file with the administrator a request for a *review* of . . . *his answers to essay questions*. . . ."
>
> ". . . [A]n applicant may file with the administrator *a protest that the examination did not fairly test applicant's fitness* to actually perform the primary or dominant duties of the position for which the examination was held. *The administrator shall review the examination and notify the applicant of his decision*."
>
> "*A request for review or a protest under this section shall set forth*, in the form prescribed by the administrator, *the particulars upon which the request or protest is based and the authorities relied upon to support the request or protest*. . . ."
>
> . . .
>
> ". . .[T]he administrator shall cause such finding or such paper and the markings thereon to be reviewed . . . . *If the administrator finds that an error was made* . . . *in failing to grant credit for an applicant's answer to an essay question* . . . *he shall make the necessary adjustment to correct such error* . . . . [including] an adjustment in an applicant's mark which will reduce the applicant's mark if . . . error was made in the credit granted for any of the answers to essay questions . . . ."
>
> ". . . .[T] applicant may appeal to the commission . . . ."
>
> "*No protest or request for review under this section shall be accepted by the commission, and no hearing shall be held or other action taken relative thereto other than on an appeal from a decision of the administrator*." Id., §6 (*emphasis added*)

Section 2A(*l*) was similarly revised to empower the administrator to:

> "(*l*) *Decide in the first instance all reviews . . . of marking of answers to essay questions,*[14] *and all protests by applicants that an examination did not fairly test applicants*' [punctuation in original] fitness to actually perform the primary or dominant duties of the position for which the examination was held . . . *the administrator shall have full authority to make any corrections he may deem necessary*". (*emphasis added*)

Finally, a proviso was added to the general prohibition against examination review appeals to the Commission: ". . .the matters herein excepted shall not include *findings of the administrator relative to grading of answers to essay questions*; . . ." St. 1975, c. 358, §§3, 4.

[14] G.L.c.31, §1 was amended to add a definition of an "essay question" as "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. Essay questions shall not include multiple choice, true or false, matching or short answer completion questions for which only one answer is correct*." St. 1975,c.358,§2 (*emphasis added*) This definition is now codified verbatim in the Personnel Administration Rules, PAR.02 ("essay question").

The final step leading to the current law relative to examination review and appeals was the 1978 omnibus "Act Recodifying the Civil Service Law". St.1978, c.393. The recodification rewrote and reorganized Chapter 31 into its currently numbered form, which must be construed to have intended no substantive changes on the subject of review of examinations by the administrator and subsequent appeals to the Commission. See Board of Selectmen of N. Attleboro v. Civil Service Comm'n, 16 Mass.App.Ct. 388, 392 (1983) ("the purpose of the recodification was to "rearrange c.31 'topically, as well as sequentially,' or otherwise put, to make "technical" rather than "substantive": amendments to c.31. . . . the rule of statutory construction applicable to recodification suggests that . . . . verbal changes in the revision of a statute do not alter its meaning, and are construed as a continuation of the previous law. [citations].")

After the 1978 recodification, the only further relevant change to the examination review and appeal statutes was a 1989 amendment that added a provision that permitted review by the personnel administrator (without further right of appeal to the Commission) from marking of answers to "multiple choice" questions as well as "essay questions." St.1989, c.269. Other noteworthy changes included removal of requirement that oral examinations could only be conducted by a board appointed by the administrator and only used in conjunction with a written or practical test (St. 1981, c. 767, §16) and a clarifying amendment to confirm the Commission's power to hear "fair test appeals" after review and decision by the administrator. (St.1981,c.787,§17). Finally, in 1996, the (then) department of personnel administration (DPA) became the human resources division (HRD), headed by a personnel administrator appointed by the Secretary of Administration and Finance, with approval of the Governor, and completely independent of any input from the Commission. (St.1996,c.151,§35).

Current Standards for Examination Reviews and Commission Appeals

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 that "[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 is entitled now to only one of two forms of administrative review of the results of a civil service examination: (a) review of the answers to "essay" questions and (b) a protest that the examination 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 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*).[15] 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 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

[15] 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)

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 ***dismissed in part***, insofar as he seeks a review of his Oral Board Test. 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:

James F. Lamond, Esq. (for Appellant)
Nicole I. Taub, Esq. (for BPD)
Michael Downey Esq. (for HRD)
Melissa Thomson, Esq. (for HRD)