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COMMONWEALTH OF MASSACHUSETTS

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SEAN WILBANKS

vs.

MASSACHUSETTS CIVIL SERVICE COMMISSION & others¹

**SUPERIOR COURT
CIVIL ACTION
NO. 2016-0356**

COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

2017 AUG 6 PM 2 19

PROCESSED

**MEMORANDUM OF DECISION AND ORDER ON
PARTIES' CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS**

The plaintiff Sean Wilbanks (the "plaintiff") filed this appeal pursuant to G. L. c. 30A, § 14 and G. L. c. 31, § 44. He seeks judicial review of a portion of a decision by Civil Service Commission (the "Commission") dismissing his appeal, by which he sought review by the Massachusetts Human Resources Division ("HRD") of his responses to the oral component of the Boston Police Department Captain Promotion Examination. This matter is now before the court on the parties' cross-motions for judgment on the pleadings. For the reasons that follow, the plaintiff's motion for judgment on the pleadings is **DENIED**, and the decision of the Civil Service Commission is **AFFIRMED**.

BACKGROUND

In April 2013, the Boston Police Department ("BPD") and HRD entered into a delegation agreement for the purpose of designing and administering police promotional examinations for the positions of sergeant, lieutenant, and captain. Pursuant to this agreement, BPD retained, with HRD's approval, a consultant to design and administer the examinations for each above listed position.

¹ Human Resources Division of the Commonwealth of Massachusetts and City of Boston

The examination developed by the consultant was comprised of three components in two phases. Relevant here, Phase II was an "Ability Based Assessment" consisting of an "In-Basket Test" and an "Oral Board Test." The "Oral Board Test" is described by the parties as follows: candidates were given a certain amount of time to review a packet of written materials. After reviewing the materials, each individual candidate was brought before a panel of three "assessors." Each candidate was asked to explain, orally, how he or she would respond to the problems and issues raised by the written materials. Each candidate was given a score based upon this portion of the exam. The oral presentations to the panel were not recorded.

The In-Basket Test is a one-day, open-book style examination in which candidates were asked to assume the role of a captain and provide "written, essay-style responses to a variety of job situations" The written responses were then scored by two assessors. The scoring on both the In-Basket Test and the Oral Board Test were completed on a 1-9 scale, with 9 being the highest possible score.

The plaintiff is a lieutenant with the BPD. He took, and passed, the promotional examination in 2014. As a result, the plaintiff's name appeared on a March 2015 list for promotion to captain of the BPD in the ninth position, tied with seven other applicants.

Believing his score on the In-Basket Test and the Oral Board Test to be, "too low and not reflective of his actual examination performance," the plaintiff filed an appeal with BPD on December 16, 2014. On March 9, 2015, BPD informed the plaintiff that the consultant had "verified that each exam component was scored as intended," but informed the plaintiff that he could appeal to the Commission for further review.

The plaintiff filed an appeal with the Commission on March 20, 2015 pursuant to G. L. c. 31, § 24. BPD filed a motion to dismiss, arguing that the Commission lacked jurisdiction to

review the In-Basket and Oral Board components of the examination. On July 22, 2015, the Commission held a hearing on the matter. On January 7, 2016, the Commission issued a decision dismissing the plaintiff's appeal, in part, and allowing his appeal, in part. The Commission determined that it did not have jurisdiction to review the Oral Board Test because the language of the governing statute, G. L. c. 31, § 22, only authorizes review of markings of multiple choice questions and answers to essay questions. In reaching its decision, the Commission reasoned that the plaintiff's responses to the Oral Board Test did not qualify as answers to essay questions as that term is defined by statute and used in the relevant personnel rule. However, the Commission concluded that the statute did confer jurisdiction over the In-Basket Test. Thus, the Commission ordered HRD to review the In-Basket component of the examination, after which the plaintiff could reopen his appeal if necessary.²

The Commission's analysis of its jurisdiction to review the plaintiff's unrecorded oral answers includes the following:

"an applicant is entitled to . . . review of the answers to 'essay' questions . . . 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 other categorically wrong, the In-Basket Test plainly qualifies as an 'essay' test, where that Oral Board Test plainly does not."

The plaintiff filed suit in this court on February 2, 2016, arguing that the Commission erred in dismissing his appeal and declining to review his responses on the Oral Board Test. The plaintiff moved for judgment on the pleadings on January 23, 2017. The court heard oral argument from the parties on July 18, 2017.

DISCUSSION

² According to the plaintiff, his challenge to the scoring of the In-Basket portion of his examination is currently before the Commission and is not part of the administrative appeal currently before this court.

Pursuant to G. L. c. 30A, § 14, this court may set aside or modify the Commission's decision if the court concludes that "the substantial rights of any party may have been prejudiced" by a decision that is based on an error of law, unsupported by substantial evidence, or otherwise not in accordance with the law. G. L. c. 30A, § 14(7); see *Police Dep't of Boston v. Kavaleski*, 463 Mass. 680, 689 (2012). "An administrative agency has considerable leeway in interpreting a statute it is charged with enforcing." *Student No. 9 v. Board of Educ.*, 440 Mass. 752, 753 (2004). Further, the party appealing from a Commission decision "bears the burden of establishing that the decision is invalid." *Police Dep't of Boston*, 463 Mass. at 689.

The plaintiff argues that the Commission "underestimated its legal authority to review [his scores on the Oral Board Test], and thus committed reversible error within the meaning of G. L. c. 30A." Specifically, the plaintiff contends that the Commission erred when it determined that plaintiff's responses to the Oral Board Test were not answers to "essay questions" pursuant to G. L. c. 31, §§ 22-24.

Massachusetts General Laws c. 31, § 22 provides in relevant part, "an applicant may request the administrator to conduct . . . a review of the marking of the applicant's answers to essay and multiple choice questions . . ." G. L. c. 31, § 22. Massachusetts General Law c. 31, § 24 states in relevant part, "[a]n applicant may appeal to the commission from a decision of the administrator made pursuant to section twenty-three relative to . . . the marking of the applicant's answers to essay questions . . ." G. L. c. 31, § 24. "Essay question" is defined in the statute as, "a question in an examination requiring an applicant to compose a written response of one or more sentences or requiring other than a limited response or short answer." G. L. c. 31, § 1. Further, Personnel Administrator Rule .02 defines 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.”

PAR Rule .02.³

The plaintiff contends that the dominant purpose of G. L. c. 31, §§ 22-24 is to allow for review of portions of examinations in which subjective grading is involved. Here, he claims that the Commission misapplied the statutory definition of “essay question.” Plaintiff argues that the statute contemplates *two* response categories: one, a question “requiring an applicant to compose a written response of one or more sentences,” and two, a question “requiring other than a limited response or short answer.” See G. L. c. 31, § 1. The second type, according to the plaintiff, does not require a written response and can properly be read to include the Oral Board component of the examination. Based upon this reasoning, the plaintiff argues that the Commission erred as a matter of law in its construction of the statute.

The court disagrees and discerns no error in the Commission’s dismissal of the plaintiff’s appeal to the Commission. The statutory provisions at issue here are straightforward. Plainly read, G. L. c. 31, §§ 22-24 allows for review of answers to “essay questions”, a term defined in the statute, consistent with common usage, as “requiring an applicant to compose a written response of one or more sentences or requiring other than a limited response or short answer.” G. L. c. 31, § 1 & §§ 22-24. The court finds no error in the Commission’s determination that the answers to the Oral Board Test fall squarely outside of the purview of the relevant statutory provisions. The court does not accept the plaintiff’s interpretation of the second half of the

³ The plaintiff contends that the Commission applied the definition of “essay question” appearing in PAR .02, rather than the definition supplied by G. L. c. 31, § 1. Defendants CSC and HRD contend that the Commission properly looked at both definitions, although in its decision, the Commission “cited the statute but focused its analysis on the PAR.” Concluding that the rule need not be construed as inconsistent with the statute, the court rules that the result is the same under both definitions.

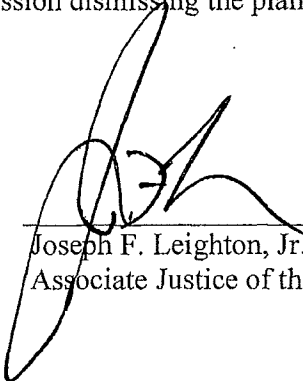
defining sentence – “or requiring other than a limited response or short answer”- as an authorization for the review of oral answers. Rather, plainly read, that language simply distinguishes essay questions from questions seeking other forms of written answers, such as multiple choice or fill-in-the-blank questions. The Commission’s decision was not arbitrary or capricious, and was not based on an error of law. Consequently, the court declines to disturb the Commission’s decision to dismiss the plaintiff’s appeal.

While it is true that the statute does not explicitly exclude oral responses from review, and that the evaluation of such responses may be, like the evaluation of essay answers, subjective in nature, see *Lavash v. Kountze*, 604 F.2d 103, 104 (1st Cir. 1979) (noting that the “the subjective process of grading [essay examinations] is much more susceptible to error”), it is also clear that unrecorded oral presentations are sufficiently distinct from written essays to warrant different treatment under the statute and regulation. The court declines to read meaning into the statute that is neither stated nor necessary by implication.

The Commission’s decision dismissing the plaintiff’s appeal was not arbitrary or capricious or otherwise based on an error of law. Accordingly, the plaintiff’s motion for judgment on the pleadings must be denied, and the Commission’s decision must be affirmed.

ORDER

For the foregoing reasons, the plaintiff’s motion for judgment on the pleadings is **DENIED**, and the decision of the Civil Service Commission dismissing the plaintiff’s appeal is **AFFIRMED**.



Joseph F. Leighton, Jr.
Associate Justice of the Superior Court

July 24 2017