

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

DAVID CATALDO,
Appellant

v.

HUMAN RESOURCES DIVISION,
Respondents

CASE NO: B2-09-181

Appellant's Attorney:

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Assonet, MA 02702

HRD's Attorney::

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Commissioner:

Paul M. Stein

DECISION ON MOTION FOR SUMMARY DECISION

The Appellant, David Cataldo, acting pursuant to G.L.c.31, §2(b), duly appealed to the Civil Service Commission (Commission) asserting that the Respondent, the Massachusetts Human Resources Division (HRD) had incorrectly calculated his training and experience (E&E) score and work experience credits for the October 2008 Boston Police Sergeant Examination. HRD filed a Motion for Summary Disposition on the grounds that HRD had correctly determined all credits and that the Appellant was not aggrieved because, even if he had received all of the credits he claims, the additional points would not have changed his final whole number score. Oral argument was held on the motions at a hearing in the Commission's offices on August 3, 2009.

FINDINGS OF FACT

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

1. The Appellant is a sworn officer of the Boston Police Department (BPD) who has served in that position from November 24, 1986 to the present. He was promoted from Patrolman to Detective on July 2, 2008. (*HRD Motion; Appellant's Motion*)

2. Prior to his appointment to the BPD, the Appellant held the following law enforcement positions:

- (a) Patrol Officer – Franklin, New Hampshire Police Department – July 19, 1981 to December 5, 1982
- (b) Patrol Officer – Merrimack New Hampshire Police Department – June 13, 1983 to July 24, 1985
- (c) Municipal Police Officer – Boston Property and Construction Management Department, also sometimes formerly known as the Boston Municipal Police Department (BMPD) – January 15, 1986 to November 20, 1986

(*HRD Motion; Appellant's Opposition*)

3. According to the Appellant, his service with each of the law enforcement departments described in Paragraph 3 represent experience as a full-time police officer in a regular police force, which HRD does not dispute. (*Appellant's Motion; HRD Motion*)

4. On October 18, 2008, the Appellant sat for the BPD promotional examination for Police Sergeant, Announcement No. 5677 (*HRD Motion, Exhibit A*)

5. Under civil service law and rules promulgated by HRD, the written exam score counts for 80% of the applicant's total promotional exam score; applicants also receive credit for "training and experience" (also called "education and experience" credit, or "E&E), based on a schedule approved by the personnel administrator (HRD), which

counts for 20% of the total promotional exam score. In addition, applicants who are veterans, or who served as “a member of a regular police force . . . for twenty-five years” are entitled to have two points added to their total promotional exam score, as determined above. (HRD Motion. See also G.L.c.31, §3, §22, §26, §59; PAR.06, PAR.14)

6. As part of the examination process, applicants fill out a standardized rating sheet which self-identifies his or her own education, training and work experience. The seven page “Education and Experience Rating Sheet Instructions” for the October 18, 2008 promotional examination contains, among other things the following instructions:

“Complete your rating sheet on your own to the best of your ability. Accurate completion of the education and experience rating sheet is considered part of the examination. In order to ensure that no one receives any type of unfair advantage in the rating process, be advised that we are unable to provide individualized assistance to any applicant in filling out the rating sheet. . . Police Sergeant classifications require the ability to read and understand instructions and take necessary steps to remember and implement them. . . .

. . . .
III. WORK EXPERIENCE . . .

Categories 1-6 include experience in the specified department only.

. . . .
Category 6. Experience in the **specified department** in a permanent full-time Police Officer position or higher which occurred **prior to October 18, 1996** . . .

Category 7: Experience **outside** the specified department in a recognized federal, state, or municipal police department in a supervisory capacity (e.g., as a Police Chief, Deputy Police Chief, Captain, Lieutenant, Sergeant or as a supervisor of employees in jobs described in Category 8, below). . . .

Category 8. Experience **outside** the specified department in a recognized federal, state, or municipal police department in a non-supervisory capacity which involved full police powers such as Police Officer, Sheriff, Court Officer, Federal Marshall, Campus Police Officer, Military Police Officer, or as a special agent employed by a branch of the United States government such as the Federal Bureau of Investigation, U.S. Customs Service, U.S. Secret Service, Internal Revenue Service, Drug Enforcement Agency, or the Bureau of Alcohol, Tobacco, and Firearms. . . .

V. COLLATERAL SKILLS:

VA. For each category, indicate the number of courses you taught in a recognized college, university, police academy, or non-degree granting school above the high school level

Category 1: Business administration, management, public administration, political science, law, criminal justice, criminology, sociology, human services, psychology, education, or computer science.

Category 2: All other fields.

(HRD Motion, Exhibit A)

7. On October 18, 2008, the Appellant duly submitted documentation to support his claim for work experience credits and E&E credits, which included, in part relevant to this appeal:

- (a) Claim for Section III, Category 6 credits worth an additional 0.40 points to his E&E score for the time served as a Police Officer with the BMPD;
- (b) Claim for Section V¹, additional 0.20 points to his E&E score for work as a firearms instructor; and
- (c) Two preference points to the total score for completing 25 years of service as a full-time police officer.

(HRD Motion, Exhibit B; Appellant's Opposition)

8. On February 13, 2009, HRD mailed the Appellant his score, which included a 77.50 score on the written examination, an E&E score of 88.00, and no preference points, resulting in a weighted average total score of 79.60. The Appellant's E&E score did not include any Category 6 points for his service with the BMPB or Collateral Skills credit for his work as a firearms instructor. *(HRD Motion, Exhibits C & D)*

9. On or about February 20, 2009, the Appellant, through counsel, duly requested that HRD review the marking of his training and experience scores, and included certain additional information and documentation in support of his claims. The Appellant supplemented his request for review by mailing HRD additional documents on or about March 3, 2009. *(HRD Motion ¶¶9-11, Exhibits D & E)*²

¹ The Appellant references this claim for credit under "Category 1 of Section IV" which the Commission infers is a misnomer, as Section IV relates to education, whereas Section V is the section pertaining to teaching experience. *(HRD Motion, Exhibit A)*

² HRD contends that the Appellant's March 3, 2009 supplement was untimely as it was sent more than 17 days after the applicant's score was mailed to him, which was the statutory deadline for requesting a review of his E&E score. HRD states it did not consider the late-filed documents in its review, but does address them in its motion before the Commission. HRD provides no authority for the proposition that it may summarily disregard relevant documents filed prior to its decision of an otherwise timely request for review, and the Commission questions the rationale for that policy, but the Commission's decision does not turn on this procedural issue. *(See HRD Motion, ¶11; pp. 4-5)*

10. On March 28, 2009, HRD informed the Appellant that, after review, it determined his E&E score and denial of 25-year work experience credit points was correct. This appeal duly ensued. (*HRD Motion, ¶12; Appellant's Claim of Appeal*)

CONCLUSION

Under Massachusetts civil service law and rules, HRD is vested with broad authority to determine the requirements for competitive civil service examinations, including the type and weight given as “credit for such training and experience as of the time designated by [HRD].” G.L.c.22, ¶1. See also PAR.06(1)(b) (“The grading of the subject of training and experience as a part of a promotional examination shall be based on a schedule approved by the administrator [HRD] which shall include credits for elements of training and experience related to the position for which the examination is held.”); PAR.14 (“If training and experience is a component of the promotional ranking process, a schedule of training and experience shall include as experience all relevant work experience whether within or outside the department [for which the examination is held] . . . Nothing in this rule shall be deemed to limit the authority of the administrator [HRD] to determine the weight and scope of examinations, as provided by law.”)

In addition, G.L.c. 31, §59 provides, in relevant part:

“Notwithstanding the provisions of any law or rule to the contrary, a member of a regular police force or fire force who has served as such for twenty-five years and who passes an examination for promotional appointment in such force shall have preference in promotion equal to that provided to veterans under the civil service rules.”

As previously noted, such individuals are granted a preference of two points added to their total average mark. See PAR.14(2). The Commission has determined that this statute does not mean that the applicant must have served 25 years within the same

department for which the promotional examination was given, but may include service with any “regular” police or fire force (as opposed to service in a “special” police force, such as a campus police officer). DeFrancesco v. Human Resources Division, 21 MCSR 662 (2008); Lopes v. Human Resources Division, 13 MCSR 49 (2000).³ Moreover, it is not necessary, however, that the police department in which the service was performed be one that is covered by Massachusetts civil service law. DeFrancesco v. Human Resources Division, 21 MCSR 662 (2008)

In compiling an “eligible list” of applicants who have passed the required examination, which appointing authorities must use to make promotional appointments, applicants are ranked according to their total score, rounded to the nearest whole number. PAR.07(4).

Section III, Category 6 Credit for Service with BMPD

The Appellant contends that his 10 months of service as a Municipal Police Officer with the BMPD should be included as part of his time served with the BPD, relying on prior decisions of this Commission that remarked on the similarities between the duties of a BMPD officer and a BPD officer. E.g., Twenty Seven Former Boston Municipal Police Officers, Sergeants & Lieutenants v. City of Boston, 20 MCSR 235 (2007); Boston Police Patrolman’s Association (BPPA) v. City of Boston, 20 MCSR 174 (2007) Certain Boston Municipal Police Officers & Sergeants v. City of Boston, 19 MCSR 352 (2006). This prior line of BMPD cases arose from disputes concerning the civil service status of the BPMD and the transfer of a number of former BMPD officers to the BPD

³ In this regard, the 25-year work experience credit under Section 59 is more restrictive and distinguished from the Section III, Category 7 & Category 8 E&E experience credit requirements, in which service in any “recognized federal state or municipal police department . . . which involved full police powers . . . “ is counted. (HRD Motion, Exhibit A). See, e.g., Figueiredo v. Human Resources Division, 14 MCSR 174 (2001)

following the abolishment of the armed component of the BMPD. Id. Nothing in these decisions, nor anything else that the Commission has been apprised, impugns HRD's point that the BPD and former BMPD are, and always have been, completely separate departmental units of the City of Boston, with distinctly different appointing authorities. Since Category 6 credits are allowed solely for service in the "specified department" for which the examination is given (i.e., the BPD), HRD correctly rejected the Appellant's claim for credit for service with the now abolished armed component of the BMPD, which is not, and never was, part of the applicable "specified department", i.e., the BPD.

Section VA Credit for Work as a Firearms Instructor

The E&E rating sheet instructions clearly limit credit for teaching experience to "courses taught in a recognized college, university, police academy, or non-degree granting school above the high school level . . ." The Appellant has not established that any of his teaching experience qualifies under this requirement. Rather, the evidence proffered by the Appellant establishes simply that he received training as a firearms instructor from the State of New Hampshire in 1982, received various other certificates for completing courses in "firearms training", and may have provided instruction to other officers while employed as a Special Police Officer with the Loudon, New Hampshire Police Department in the early 1980s. On this record, HRD was reasonably justified to conclude that the Appellant's experience as a firearms instructor failed to qualify as the type of academic teaching experience that the E&E rating sheet clearly prescribed.

Section 59 "Twenty-Five Year" Experience Preference

HRD rejected the Appellant's claim to a Section 59 preference based on its interpretation that the language of the statute – i.e., "regular police or fire force" – refers

“exclusively to the regular police and fire forces of the Commonwealth” and “its provisions do not apply to positions held in . . . police forces of other states which are governed by an entirely different set of civil and criminal laws.”

The Appellant relies on the definition of the Category 8 credit for work experience outside the BPD that allows credit for time worked in any “recognized federal, state, or municipal police department in a non-supervisory capacity which involved full police powers such as Police Officer, Sheriff, Court Officer, Federal Marshall, Campus Police Officer, Military Police Officer, or as a special agent employed by a branch of the United States government such as the Federal Bureau of Investigation, U.S. Customs Service, U.S. Secret Service, Internal Revenue Service, Drug Enforcement Agency, or the Bureau of Alcohol, Tobacco, and Firearms. . . .” Under this definition, HRD clearly allows E&E credit for time worked in many law enforcement settings, and is not restricted to a Massachusetts police department or a civil service police department. The Appellant also notes that the statute does not expressly require that the department be a civil service police force of the Commonwealth, but only a “regular police force” and there is no substantial evidence that the Merrimack and Franklin police departments are not “regular police forces” as that term would be commonly understood. The Appellant also makes a constitutional argument that denying him the two-point work experience preference under Section 59 deprives him of a property right secured by the Fourteenth Amendment to the United States Constitution and Article 1 of the Massachusetts Declaration of Rights.

Although not expressly articulated by HRD, the Commission is cognizant that counting time worked in law enforcement in other states would seem to expand by a considerable order of magnitude the number of organizations that would qualify an

applicant for training and experience credits. This certainly raises a question as to whether the resources of HRD could absorb the additional oversight obligations that this would require. Nevertheless, the Commission cannot wholly disregard the fact that the E&E rating sheet instructions prepared by HRD already unequivocally state that Category 8 qualifying experience in another department is not limited to “regular forces of the Commonwealth”, but may include work outside the department in any “recognized Federal, state or municipal police department . . . which involved full police powers”. Thus, as an initial matter, at least for E&E credits, whatever practical implications might flow from adopting the Appellant’s interpretation of Section 59, that Pandora’s Box was already opened by HRD, at least for purposes of the 2008 examination.

On the record before the Commission, it does appear that, through no fault of his own, the Appellant was denied even a Category 8 E&E credit for his prior service as a full-time police officer with the Franklin and Merrimack Police Departments. Based on the express definitions in HRD’s rating sheet instructions, the Appellant should have been given, at least, such credit for that service and, if the resulting increase in his weighted E&E score due to those additional credits would have changed the total rounded whole number score used to rank him on an future eligible list, he is entitled to equitable relief to require HRD to adjust his score accordingly. Although the Appellant did not specifically couch his appeal in terms of a credit for out-of-state service under the 20% weighted E&E examination component, the Commission is satisfied that, having made a good faith attempt to raise the basic underlying problem through a timely appeal of substantially the same issue under Section 59, under the particular circumstances of this case, the equities warrant granting him equitable relief in the form of additional E&E

weighted credit for all service with the two New Hampshire municipalities, which are expressly covered by the Category 8 Work Experience definition of a “recognized . . . state or municipal police force . . . which involved full police powers.”⁴

The more difficult question remains: whether or not the same definition of a “recognized Federal, state or municipal police department . . . which involved full police powers”, which does include out-of-state experience, should also be read into the somewhat different statutory phrase “regular police or fire force” in Section 59 for purposes of applying the two point 25-year work experience preference.

As previously noted, the kind of “recognized” law enforcement experience that HRD may deem to qualify for E&E credits for purposes of the grading of the training and experience component of a promotional examination (over which HRD has considerable discretion) is not necessarily required to be identical to the scope of experience that qualifies for the statutory preference, as to which HRD must hew, first and foremost, to the statutory intent of the Legislature. Compare DeFrancesco v. Human Resources Division, 21 MCSR 662 (2008) (Section 59 credit disallowed for work on MIT police force) with Figueiredo v. Human Resources Division, 14 MCSR 174 (2001) (E&E credit allowed for MIT police work).

There are three factors that the Commission has considered in attempting to discern the Legislative intent of Section 59.

First, the statutory authority granted to HRD to establish test standards, including the type and weight given for training and experience credits, allows for some discretion to

⁴HRD also accepts service in the BMPD as eligible for E&E credit, but, for some unstated reason, apparently only for service after October 18, 1996. (*HRD Motion, Exhibit F*). The record does not explain the rationale for the cut-off or whether the same cut-off is, or properly should be applied to a Section 59 claim. The parties did not specifically address this point below or on this appeal and, in the absence of a sufficient record, the Commission expresses no opinion on this subject.

make and revise the applicable criteria that qualify for E&E credits. Thus, HRD is able to exercise that discretion in adopting such broad or a more narrow criteria as appears to be appropriate from time to time and as applicable to the particular examination involved. Although the Commission finds that the 2008 examination instructions do provide that E&E credit should have been given to the Appellant for his New Hampshire law enforcement experience, HRD is empowered, in the exercise of sound discretion, to revisit and revise its criteria in the future. Section 59, however, is not discretionary. In enacting Section 59, the Legislature provided that the 25-year work experience credit is mandatory and the scope of the prior service to which the Legislature meant for it to be applied is entirely a creature of statute.

Second, as a mandatory preference, Section 59 represents an exception to the general rule that civil service appointments will be made based on the relative ranking of applicants on a civil service list according to their relative placement on the eligibility list, which creates a rank ordering based on their scores on the competitive qualifying examination administered by HRD for the position. See G.L.c. 31, §25 (containing the proviso for statutory preferences to veterans and others as exceptions to the general rule that eligible lists are arranged “in the order of their marks on the examination based upon which the list is established”); cf. Sabourin v. Town of Natick, 18 MCSR 79 (2005) (noting that a civil service test score (when available) is the primary baseline tool for determining relative ability, knowledge and skills under basic merit principles.)

Third, the Commission has considered the final sentence of Section 59, which creates the 25-year work experience preference, in the context of Section 59 as a whole, as well as the mosaic of Chapter 31 as a whole. While the phrase “regular police or fire force”

may be susceptible of more than one interpretation, the Commission must apply the meaning that best preserves the integrity and the fundamental purposes of the civil service law as enacted by the Legislature. In this regard, there is some force to HRD's argument that, considering the overall statutory scheme, in enacting Chapter 31, the Legislature's purpose was to provide a system of tenured civil service rights that would ensure the hiring, promotion and retention in public employment of qualified Massachusetts citizens; and any construction of the language in the statute that appears to grant equal, or greater rights and privileges to persons not holding that status is more inadvertent than intended. For example, taken to the extreme, a person who was born and raised in Ohio could serve 25 years as a police officer or firefighter in a suburb of Cleveland, could relocate to a small city or town in Massachusetts, be appointed to its police or fire force, and then could claim the two-point preference in any future promotional examination (including but not limited to a position of Police or Fire Chief), leapfrogging him or her above long-time career civil servants who served their Massachusetts communities for 20 years or more. Absent a clear expression to that effect, the Commission is reluctant to presume that the Legislature intended such a result. See generally, G.L.c.31, §1, §59, ¶2.

These factors lead the Commission to apply the established rules of statutory interpretation and construe the mandatory two-point preference created by Section 59 narrowly to be intended to apply only to service while as a member of a "regular police or fire force" within the Commonwealth. See generally, Halebian v. Berv, 457 Mass. 620, 628-630 (2010) (fundamental purpose of rules of statutory interpretation is to discern the reasonable and logical meaning intended by the Legislature); Baker

Transport, Inc. v. State Tax Comm'n, 371 Mass. 872, 877 (1977) (statutory exceptions and provisos to a general rule are to be construed narrowly); Lexington Educ. Ass'n v. Town of Lexington, 15 Mass.App.Ct. 749, 752-53, rev.den., 389 Mass. 1104 (1983) (same)

The Appellant's constitutional argument is not well-founded. Massachusetts civil service law confers no property rights on individuals by virtue of his or her name appearing at the top of the list, or from expectations built up from preferences or over years of long service, as each of these factors is subject to qualification by the statutory scheme and none guarantees any officer a promotion. See Bielawaki v. Personnel Adm'r, 422 Mass. 459 (1996); Burns v. Sullivan, 473 F.Supp. 626 (D.Mass.1979), aff'd, 619 F.2d 99, cert.den., 449 U.S. 893 (1980) Indeed, to suggest otherwise would be to raise serious doubt as to the constitutionality of the preference itself. See Hutchenson v. Director of Civil Service, 361 Mass. 480, 281 N.E.2d 53 (1972) (striking down, as unconstitutional, predecessor version of veteran's preference in Section 26, insofar as it had granted an "absolute" preference to disabled veterans). See generally, Personnel Administrator v. Feeney, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) (reviewing history of Massachusetts veteran's preference and insertion of the term "qualified" in response to constitutionality concerns)

RELIEF TO BE GRANTED

For the reasons stated above, the Appellant's appeal is *allowed, in part*. Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission directs HRD to recalculate the E&E component of the Appellant's examination score, giving appropriate Category 8 credit for his years of service with the Merrimack and Franklin

police departments and, if the weighted value of that recalculated E&E score, when combined with his written examination score, produces a rounded whole number greater than 80, HRD is directed to adjust the Appellant's ranking on the current eligible list and any current or future certification from that list accordingly. Except for the relief stated above, the Appellant's appeal is otherwise *denied*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell and Stein, Commissioners) on. October 21, 2010.

A True Record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of the Commission's 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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.

Notice to:

Patrick M. Rogers, Esq. (for Appellant)
Martha Lipchitz O'Connor, Esq. (for HRD)