

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

DONALD BOURGEOIS,
Appellant

v.

E-10-354

HUMAN RESOURCES DIVISION,
Respondent.

Appellant's Attorney:

Pro Se
Donald B. Bourgeois

Respondent's Attorney:

Martha O'Connor, Esq.
Human Resources Division
One Ashburton Place: Room 211
Boston, MA 02108

Commissioner:

Christopher C. Bowman

DECISION

The Appellant, Donald Bourgeois (hereinafter "Bourgeois" or "Appellant"), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (hereinafter "Commission"), claiming that the state's Human Resources Division (hereinafter "HRD") erroneously removed his name from an eligible list of police officer candidates on November 1, 2010.

The appeal was filed with the Commission on December 24, 2010. A pre-hearing conference was held on January 18, 2011, at which time I heard oral arguments from the Appellant and counsel for HRD. HRD filed a Motion for Summary Decision on January 24, 2011. The Appellant did not submit a reply.

Based on the documents submitted, including the Motion for Summary Decision (hereinafter, the “HRD Brief”), the attachments thereto, each party’s statement at the Pre-Hearing Conference, documentation submitted at the Pre-Hearing Conference and Appellant’s written statement attached to his original appeal, I find the following:

FINDINGS OF FACT:

1. On May 19, 2007, the Appellant took and passed an open Competitive Examination for Police Officer, Announcement #8580 and earned a score of Band 8 (90-93).¹ (HRD Brief: Exhibits A & B).
2. On June 28, 2008, the Appellant took and passed an open Competitive Examination for Police Officer, Announcement #8027, with a score of Band 10, 99.² (HRD Brief: Exhibit C).
3. On November 1, 2008, HRD established a new eligible list for Police Officer by merging the names of those who passed the 2007 examination with the new eligible list from the 2008 examination. (HRD Brief: p. 2, paragraph 5 and M.G.L. c. 31§25).
4. The Appellant’s eligibility on the 2008 Police Officer eligible list was determined by his score on the 2008 examination (99), his most recent score, in accordance with the provisions of M.G.L. c. 31§25. (See M.G.L. c. 31§25).
5. On April 25, 2009, HRD held an open competitive examination for: 1) Police Officer and State Trooper, Announcement #8434; 2) just Police Officer, Announcement #8265, and 3) just State Trooper, Announcement #8373. (HRD Brief: Exhibit D).

¹ Examination scores from the 2007 Police Officer examination were initially issued as bands.

² Examination scores for the 2008 Police Officer Examination were initially issued as bands and were subsequently unbanded.

6. The examination poster informed applicants that if they passed the 2008 Police Officer examination but chose not to take the 2009 Police Officer examination, their eligibility would expire in October 2010. (HRD Brief: Exhibit D).
7. Specifically, the examination poster stated, “**Q:** I took the 2008 Police Officer test and I do not want to be a State Trooper, do I need to take the 2009 test to remain on the Police Officer list. **A:** No, if you took the 2008 test you may opt not to take the 2009 exam, since your eligibility from the 2008 exam will continue until October 2010 on the Police Officer eligible list.” (emphasis added). (HRD Brief: Exhibit D).
8. Applicants were also informed that if they took “both the 2008 and 2009 Police Officer exams, your 2009 exam result will replace your 2008 exam result on the Police Officer list when the exam result 2009 list becomes active...” (HRD Brief: Exhibit D).
9. Appellant did not take the 2009 Police Officer examination. (HRD Brief: p.3, paragraph 11).
10. On March 16, 2010, HRD established a new eligible list for Police Officer appointments. The results from the 2008 Police Officer examination were merged with the 2009 Police Officer examination results in accordance with the provisions of M.G.L. c. 31§25. (HRD Brief: p.5 M.G.L. c. 31§25).
11. The eligibility of those individuals who only took the 2008 Police Officer examination expired on October 31, 2010, pursuant to the provisions of M.G.L. c. 31 § 25. (HRD Brief: p.5).

12. HRD removed Appellant's name from the eligible list for Police Officer on November 1, 2010, pursuant to M.G. L. Chapter 31 § 25. (HRD Brief: p. 6).
13. One thousand fifty-nine (1,059) applicants who had already passed the 2008 Police Officer examination took the 2009 examination, even though they might obtain a lower score, in order to gain two new years of eligibility, and as a result had their 2009 score apply to the position of Police Officer. (HRD Brief: p. 3, paragraph #12).

Appellant's Argument

The Appellant argues that he is a person aggrieved by an act of HRD, specifically the removal of his name from the eligible list for Police Officer on November 1, 2010. Appellant contends that HRD did not conduct an examination in 2010 and as a result, the expiration of his eligibility should be extended until HRD conducts its next examination and certifies a new eligibility list from said examination.

HRD's Argument

HRD argues that the Appellant was not denied any eligibility rights under civil service law or rules. The Appellant took and passed the 2007 examination for Police Officer, receiving a score of Band 8 (90-93) and the 2008 examination for Police Officer with a score of Band 10 (99). On November 1, 2008, HRD established a new eligible list for Police Officer by merging the names of those persons who passed the 2007 and 2008 examinations. As required by statute, the Appellant's most recent score (99) becomes immediately effective on the newly merged and certified list. HRD then offered another examination in 2009, which the Appellant did not take. HRD contends that by choosing not to take the 2009 examination, the Appellant affirmatively chose to have his guaranteed score of 99 carried forward through the expiration of the two year eligibility

period, i.e., October 31, 2010, rather than take the risk of having an unknown and possibly lower score that would provide him a new eligibility period of two years starting on March 16, 2010. Based on the Appellant's decision not to take the 2009 examination for Police Officer, HRD argues that it properly granted Appellant two years of eligibility from November 1, 2008 through October 31, 2010, and, as a result, this appeal should be dismissed.

Conclusion

Most of the relevant facts are not in dispute here. The Appellant aspires to be a police officer in his home town of Dracut, a community where such appointments are subject to the civil service law. Thus, candidates such as the Appellant must first take and pass a competitive civil service examination and have their names placed on an "eligible list", created by HRD in rank order based on the Appellant's exam score, veteran's status and residency.

In this case, the Appellant took and passed a civil service examination for police officer in 2007 and 2008. When the eligible list was certified on November 1, 2008 the Appellant was eligible for appointment pursuant to that list for two (2) years, up to and including October 31, 2010. This eligibility was based upon his 2008 score of 99, his more recent and fortunately for Appellant, his higher score. Its two year duration was based upon and in accordance with the provisions of M.G.L. c.31§25.

When HRD offered the 2009 examination for Police Officer, the Appellant and hundreds of others who also took the 2008 examination and were already on the eligibility list, had a choice at the time: 1) take the 2009 examination for police officer

and risk receiving a lower score that would replace the 2008 score on a merged list; or 2) *don't* take the 2009 examination for police officer and preserve the 2008 score.

For Appellant and the other individuals who chose option 2, their eligibility for appointment as a police officer expired on October 31, 2010, exactly two years after the creation of an eligible list from the 2008 examination. Over one thousand (1,000) applicants who passed the 2008 Police Officer examination chose option 1, taking the examination and hoping for an extended eligibility period of two years from the date of the new certified list. Those individuals subsequently had their eligibility and ranking determined by their 2009 examination score, for better or worse. While the November 1, 2010 expiration of Appellant's eligibility was unfortunate, the Appellant received the full two years of eligibility as outlined in the legislative scheme and is not aggrieved by the expiration.

G.L. c. 31, § 25 is clear on how long a candidate's name can remain on an eligible list of candidates stating:

“The administrator [HRD] shall establish, maintain and revise eligible lists of persons who have passed each examination for appointment to a position in the official service. The names of such persons shall be arranged on each such list, subject to the provisions of section twenty-six, where applicable, in the order of their marks on the examination based upon which the list is established.

Persons on an eligible list shall be eligible for certification from such list for such period as the administrator shall determine, but in any event not to exceed two years, unless one of the following exceptions applies: (1) such eligibility is extended by law because such persons are in the military or naval service; (2) the administrator is temporarily enjoined by a court order from certifying names from an eligible list, in which case eligibility of persons on such list shall be extended for a period equal to the duration of such order; or (3) no new list is established, in which case eligibility of all persons on such list shall be extended until a new list is established for the same position for which the original list was established; provided, however, that the administrator may revoke the eligibility of the entire list or of any persons on such list subsequent to said two-year period if he shall determine that the effective maintenance of the merit system so requires such revocation and, provided further,

that a written notice and explanation for said revocation is sent to the clerks of the senate and house of representatives.” (emphasis added)

None of the statutory exceptions are applicable to the present matter. Specifically, the Appellant was not in military or naval service; HRD was not temporarily enjoined by a court order from certifying names from an eligible list; and a new list was established on March 16, 2010 pursuant to Section 25. If the Legislature had intended that an individual’s eligibility could be extended for a reason other than those provided, it would have so stated. The Legislature, however, did not state this. Therefore, the Commission may “not add words to a statute that the Legislature did [or did] not put there, either by inadvertent omission or by design.” Commonwealth v. Callahan, 440 Mass. 436, 443, 799 N.E.2d 113 (2003), quoting Commonwealth v. McLeod, 437 Mass. 286, 294, 771 N.E.2d 142 (2002), and cases cited.

When drafting Section 25, the Legislature contemplated that a new eligibility list may be created during the active life of an older list. See id. (providing that most recent examination results for an individual determine ranking on merged eligible list). “Applicants are able to protect their interests in remaining eligible by taking the later examinations.” Callanan v. Personnel Administrator, 400 Mass. 597, 602 (1987).

The Supreme Judicial Court and the Commission have held that individuals who fail to take a later examination and lose their eligibility are not entitled to relief. See Callanan supra at 601 (“The system the Legislature created, in which eligibility lists expire and are replaced by new lists, involves the risk that position might become available immediately after the expiration of an old list or immediately before the establishment of a new list. The overall pattern of the statute does not justify expectations

that certain positions will become available during the period of a single list.”); Saunders v. Haverhill, 21 MCSR 337 (2008)(no relief granted to appellant who chose not to take the most recent examination and was, thus, not on the eligible list for certification).

Here, the Appellant simply did not take the actions necessary to maintain his eligibility for appointment as a police officer and is not entitled to relief. The Appellant did not take and pass the 2009 examination. Instead, he relied on his 2008 score of 99 and “rolled the dice” that he would be appointed to a position on or before October 31, 2010.

The examination poster for the 2009 examination informed applicants that if they passed the 2008 Police Officer examination but chose not to take the 2009 Police Officer examination, their eligibility would expire in October 2010. (See HRD Brief: Exhibit D). Put simply, the Appellant voluntarily chose not to take the examination for Police Officer in 2009 and to “roll the dice” that he would receive an appointment before his removal from eligibility.

Despite HRD’s notice and directive, the Appellant now asks the Commission to extend the expiration of his eligibility from the 2008 Police Officer examination in violation of the statutory provisions of M.G.L. Chapter 31 § 25. I do not doubt the Appellant’s sincere desire to become a Dracut police officer. However, permitting the Appellant to extend his eligibility on the Police Officer eligible list would violate M.G.L. Chapter 31 § 25 and basic merit principles by infringing on the rights of other candidates who chose to, or not to, take the 2009 examination and who are currently living with the consequences.

For all of the above reasons, the Appellant's appeal under E-10-354 is hereby

dismissed.

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman, Henderson, Marquis, McDowell and Stein, Commissioners) on September 8, 2011.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice:
Donald Bourgeois (Appellant)
Martha O'Connor, Esq. (for HRD)