

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK,SS.

CIVIL SERVICE COMMISSION

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

BOSTON POLICE SUPERIOR OFFICERS
FEDERATION et al,
Appellants

v.

Dockets Nos.: (See Below)

BOSTON POLICE DEPARTMENT and
HUMAN RESOURCES DIVISION,
Respondents

<u>CSC Case No.</u>	<u>Appellant</u>	<u>Potentially in "Remedial Class"?¹</u>
B-02-476	Stephen Cawley	Yes
B-02-477	Bernard Greene	Yes
B-02-478	Robert Sheets	No; Promoted on 9/5/06
B-02-479	Paul Cuddy	No; does not meet criteria
B-02-480	Joseph Toomey	Yes
B-02-481	Gerard Bailey	Yes
B-02-482	Joseph Canney	No; Promoted on 9/5/06
B-02-483	Kenneth MacMaster	Yes
B-02-484	Michael Locke	Yes
B-02-485	Mark Parolin	No; does not meet criteria
B-02-486	Trent Holland	No; Promoted on 9/5/06
B-02-487	Herbert White	No; does not meet criteria
B-02-488	George Juliano	No; Promoted on 4/8/05

Related Cases:

<u>CSC Case No.</u>	<u>Appellant</u>
I-02-606	Boston Police Superior Officers Federation
I-02-845	Arthur Stratford
I-02-846	Michael Fish
I-03-113	Clayton Gifford (deceased)

Other persons who have corresponded with Civil Service Commission regarding these appeals:

- Paul Joseph,, Thomas Lema, Keith Dalrymple; Martin Brooks; Terry Thomas; Kevin McGoldrick.

¹ Based on initial information provided to the Commission and all parties by the state's Human Resources Division (HRD).

DECISION ON MOTION FOR RECONSIDERATION FILED BY CERTAIN
APPELLANTS AND CLARIFICATION OF DECISION

Recent Procedural Background

On February 4, 2008, the Civil Service Commission issued a decision regarding the above-referenced appeals. (See Attached Decision) The underlying issue regards whether or not a 2002 promotional examination for the positions of lieutenant and captain in the Boston Police Department constituted a fair test. The six-year time period between the filing of these appeals and the final decision was primarily a result of unsuccessful attempts by the parties to reach a settlement agreement. Within that 6-year time period, twenty-five (25) of the 178 total 2002 test-takers were promoted to the position of lieutenant based on the results of that 2002 promotional exam and an additional fourteen (14) 2002 test-takers were promoted to the position of lieutenant as a result of scores obtained on a subsequent promotional examination administered in 2005.

February 4, 2008 Civil Service Commission Decision

As part of its February 4, 2008 decision, the Commission concluded that the Appellants were prejudiced by the fact that 2 questions included in the videotaped oral section of the exam referenced a subject matter related to a “Rule 200” after being told prior to the examination that this subject matter would not be included in the examination.

As a result, the Commission ordered the relief stated below, which was limited to those Appellants who had a pending appeal before the Commission with a CSC docket number beginning with “B” (as opposed to “I”). The distinction between the docket numbers, in regard to these appeals, is that all Appellants with a “B” prefix had previously filed an appeal with the state’s Human Resources Division (HRD), and were appealing HRD’s decision that the examination in question was a fair test, pursuant to G.L. c. 31, §§ 22 – 24.

There is no evidence that those Appellants assigned an “I” prefix met the statutory requirement to first file a “fair test appeal” with HRD. Rather, it appears that these “I” Appellants filed an appeal directly with the Commission.

RELIEF ORDERED BY COMMISSION AS PART OF 2/4/08 DECISION

Pursuant to the powers inherent in Chapter 534 of the Acts of 1976, as amended by Chapter 310 of the Acts and Resolves of 1993, the Commission hereby grants equitable relief to those Appellants *who actually filed examination appeals to the Commission pursuant to G.L. c. 31, § 2(b) whose appeals are so noted by Docket Numbers beginning with the letter “B” herein*, by instructing that any Appellant who so requests may have his or her examination rescored with the exclusion of the disputed video scenarios and a new score calculated. If, based upon this rescoring, an Appellant would have received a score that equals or is greater than the score of anyone who was promoted based upon that 2002 examination, then such Appellant, if not yet promoted, shall be granted Chapter 310 relief, so called, and have his or her name placed at the top of the current promotional list until such time as his or her name has been reached for consideration for a vacant position.

Post-Decision Motions and Correspondence

Subsequent to the issuance of the decision on February 4, 2008, the Commission has received various motions and other correspondence from Appellants with a “B” prefix appeal, one Appellant with an “I” prefix appeal; other test-takers who never filed an appeal with the Commission; other individuals who are already at the top or near the top of the existing promotional list and would be impacted by any names placed ahead of them; as well as the Boston Superior Officers Federation. The Commission conducted a status conference at the offices of the Commission on May 14, 2008 to hear oral argument and/or accept comments from the above-referenced parties and other individuals. A summary of their respective motions, correspondence, oral argument and comments is as follows:

Appellants who were granted relief

It has been initially determined by HRD that up to six (6) Appellants are potentially eligible for the relief outlined by the Commission in its decision issued on February 4, 2008. (See Page 1 of this decision for a list of the six (6) Appellants.) Four (4) of these Appellants are represented by Attorney James Lamond; (1) of these Appellants is represented by attorney Joseph Donnellan and two (2) of these Appellants are currently pro se. All six (6) of these Appellants, however, are asking the Commission to issue a revised remedy.

In support, these six (6) Appellants state that the Appointing Authority has represented that the relief as ordered by the Commission would be a practical impossibility to implement, would place an undue financial burden on the City and would delay for months promotions that are now pending with the department causing undue confusion, delay and uncertainty throughout the department. Specifically, as stated by Dr. Morris, the individual who designed the promotional examination in question, the assessment center exercises in question were “graded as a whole: that is, each situational exercise was reviewed by a panel of assessors who gave an overall score to each candidate. The exercises were not graded separately or averaged together. Thus, it is not possible to exclude the two situational exercises from the overall center score...”. (See Affidavit of Dr. David Morris dated May 13, 2008.)

The replacement remedy being sought by the Appellants is as follows:

Pursuant to the powers inherent in Chapter 534 of the Acts of 1976, as amended by Chapter 310 of the Acts and Resolves of 1993, the Commission hereby grants equitable relief to those Appellants *who actually filed examination appeals to the Commission pursuant to G.L. c. 31, § 2(b) whose appeals are so noted by Docket Numbers beginning with the letter “B” herein*, by instructing that any Appellant who so requests may have his or her examination rescored with the exclusion of the ~~disputed video scenarios~~ assessment center and a new score ~~calculated~~.

derived solely from the results of the written and training and experience portions of the examination, with such new score calculated as follows: the appellant's score or mark on the written portion of the examination will be added to his or her score or mark on the training and experience portion of the exam, and that sum will be multiplied by 2. If, based upon this rescoring, an Appellant would have received a score that equals or is greater than the score of anyone who was promoted based upon that 2002 examination, then such Appellant, if not yet promoted, shall be granted Chapter 310 relief, so called, and have his or her name placed at the top of the current promotional list until such time as his or her name has been reached for consideration for a vacant position.

Neither HRD or the City of Boston oppose this replacement remedy.

Boston Police Superior Officers Federation & Individuals at the top of current list

The only participant in the underlying case that opposes the proposed replacement remedy is the BPSOF, which had earlier in the case adopted and pursued the claim (advanced first by the individual Appellants) that the promotional exam was legally flawed because the video component included two exercises involving Rule 200. The Federation has now informed the Commission that “it opposes any such modification to the Commission’s decision and order on the grounds that [in] modifying its order, the Commission imperils promotions of Federation members on the [current] 2005 active list.” Terry Thomas, Keith Dalrymple, Martin Brooks and Kevin McGoldrick have all individually sent correspondence to the Commission stating that they are at or near the top of the current eligibility list for promotional appointment to lieutenant and would be negatively impacted by any decision to place the Appellants in question at the top the current list. Terry Thomas, offering a suggested clarification that would undoubtedly be supported by Dalrymple, Brooks and McGoldrick, asks that the Commission modify its order by placing any aggrieved Appellants at the top the next certification list issued based on an eligibility list which will be developed as a result of the upcoming October 2008

promotional examination (as opposed to putting them at the top of the current active list for which Thomas, Dalrymple, Brooks and others are at or near the top). Thomas argues that, “with only months remaining on the current eligibility list”, it would not unduly harm the Appellants by effectively staying their relief until 2009.

2002 Test-Takers that never filed an appeal with the Commission

As stated above, approximately 178 individuals took and passed the 2002 promotional examination in question. Based on the Commission’s February 4, 2008 decision, which limits any relief to those Appellants who filed an appeal (with a “B” prefix) with the Commission, there appear to be a maximum of six (6) 2002 test-takers who may be entitled to relief. Other 2002 test-takers who never filed any appeal with the Commission, are now asking the Commission to provide them with the same relief. Among those 2002 test-takers seeking such relief are Thomas Lema and Paul Joseph. (Mr. Joseph is now represented by Attorney Galen Gilbert.) In response to a request for information from the Commission, HRD has determined that up to 43 additional 2002 test-takers (for a total of 50) would potentially qualify for relief ordered by the Commission if it is not limited to those individuals who filed a timely appeal with the Commission. Effectively, if the Commission granted the request of Lema, Joseph and the other “non-Appellant” 2002 test-takers, up to 50 individuals would be placed at the top of the current eligibility list and remain there until such time as they receive at least one consideration for promotion to lieutenant. As a point of reference, a total of 25 individuals were promoted over a 2-year period based on the rankings from the 2002 exam. Therefore, expanding the list of those receiving relief to 50 would impact any promotional appointments to the position of lieutenant in the Boston Police Department for the next four years.

One (1) "I" Appellant

Michael Fish, whose appeal was docketed with the prefix "I", was not granted relief. Claiming that he filed a timely appeal with the Commission and attended some initial hearings before the Commission, Mr. Fish asked to be included among those individuals granted relief.

Attorney Joseph Donnellan, who represents one of the Appellants that is potentially eligible for relief under the Commission's decision, filed a letter with the Commission regarding Mr. Fish's request, stating in part, "My understanding is that Sgt. Fish did not request a review with the personnel administrator, as required prior to filing with the Commission. This, I understand, resulted in his appeal being filed under "I" and not "B". In short, if Sgt. Fish did file first with the personnel administrator he should be included in the remedial class and if he did not, he should be excluded".

Conclusion

After careful review and consideration of all the motions, correspondence, oral argument, comments and additional information requested from the state's Human Resources Division, the Commission issues the following clarifications regarding its decision issued on February 4, 2008:

1. The Commission hereby revises the remedy ordered in the decision issued on February 4, 2008 as follows with deletions and additions noted accordingly:

Pursuant to the powers inherent in Chapter 534 of the Acts of 1976, as amended by Chapter 310 of the Acts and Resolves of 1993, the Commission hereby grants equitable relief to those Appellants *who actually filed examination appeals to the Commission pursuant to G.L. c. 31, § 2(b) whose appeals are so noted by Docket Numbers beginning with the letter "B" herein*, by instructing that any Appellant who so requests may have his or her examination rescored with the exclusion of ~~the disputed video scenarios~~ assessment center and a new score ~~calculated~~.

derived solely from the results of the written and training and experience portions of the examination, with such new score calculated as follows: the appellant's score or mark on the written portion of the examination will be added to his or her score or mark on the training and experience portion of the exam, and that sum will be multiplied by 2. If, based upon this rescoring, an Appellant would have received a score that equals or is greater than the score of anyone who was promoted based upon that 2002 examination, then such Appellant, if not yet promoted, shall be granted Chapter 310 relief, so called, and have his or her name placed at the top of the ~~current promotional list~~ 2009 promotional list for lieutenant in the Boston Police Department (which will be based on the upcoming October 2008 promotional examination) until such time as his or her name has been reached for consideration for a vacant position.

2. All requests to expand the relief to individuals beyond those who actually filed individual appeals with the Commission in a timely manner are denied.
3. Michael Fish, and any other Appellant with an "I" docket number, will be added to those individuals entitled to potential relief only if he or she is able to provide the Commission with documentation that, pursuant to G.L. c. 31, §§ 22 – 24, he or she first filed his fair test appeal with the state's Human Resources Division.
4. No Appellants granted relief will be entitled to a retroactive seniority date.

Christopher C. Bowman
Chairman

By a 4-1 vote of the Civil Service Commission (Bowman, Chairman – Yes; Marquis, Commissioner – Yes; Stein, Commissioner – Yes; Taylor, Commissioner – Yes; Henderson, Commissioner – No) on June 12, 2008.

A True copy. Attest:

Commissioner

Pursuant to MGL c. 31 s. 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under MGL c. 30A s. 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.

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