

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

ERIC NUGENT,
Appellant

v.

B2-17-260

HUMAN RESOURCES DIVISION,
Respondent

Appearance for Appellant:

Neil Rossman, Esq.
Rossman & Rossman
8 Essex Center Drive
Peabody, MA 01960

Appearance for Respondent:

Michael Downey, Esq.
Human Resources Division
One Ashburton Place: Room 211
Boston, MA 02108

Commissioner:

Christopher C. Bowman

ORDER OF DISMISSAL

1. On December 20, 2017, the Appellant, Eric Nugent (Mr. Nugent), a Fire Lieutenant with the Cambridge Fire Department, filed an examination appeal with the Civil Service Commission (Commission) stating: “I am requesting an appeal of the decision of my Fair Test Item Review for the Fire Captain promotional examination. I am also requesting a copy of my Fair Test Item Review as part of my appeal pursuant to MGL Chapter 31.”
2. On January 23, 2018, I held a pre-hearing conference which was attended by Mr. Nugent, his counsel and counsel for the state’s Human Resources Division (HRD).
3. As part of the pre-hearing conference, the parties agreed that: a) Mr. Nugent took a promotional examination for Fire Captain on November 18, 2017; and b) Mr. Nugent filed an appeal, via the online “NEOGOV” application, with HRD on November 22, 2017; and c) HRD sent a reply to Mr. Nugent on December 13, 2017. HRD subsequently confirmed that examination scores were sent to applicants (including Mr. Nugent) on January 18, 2018.
4. According to HRD, the online program has a “drop-down box” that requires the applicant to select, from a list, what type of appeal (i.e. – multiple choice, fair test) he/she is filing with

HRD.

5. According to HRD, the applicant may not check multiple boxes (i.e. multiple choice AND fair test), but, rather, if he/she wishes to file more than one type of appeal, must attempt to go back into the online system and file two separate appeals.
6. Both parties agree that Mr. Nugent, in his appeal to HRD, checked the “multiple choice” selection and did not go back into the online application and file a separate “fair test” appeal.
7. HRD produced a document that Mr. Nugent attached (uploaded) to his online appeal to HRD which states in part: “RE: 2017 Fire Capt promotional exam test question review.”
8. The above-referenced document references six (6) separate questions from the November 18, 2017 Fire Captain examination arguing that the questions were either invalid or that there could be more than one correct answer.
9. HRD acknowledges that, in prior years, when such appeals were received, HRD would respond with an itemized list that referenced the questions and a determination for each questions regarding whether more than one correct answer was being accepted, as argued by an applicant.
10. HRD acknowledges that, in this examination cycle, HRD no longer provides an itemized response, but, rather, acknowledges receipt of the appeal and informs the applicant that HRD has “taken [the] information provided in your request for review into account when grading the examination.”
11. HRD stated that the reasons for this change in practice include the need to protect the confidentiality of the examination process and issues related to limited resources.
12. HRD argues that, since Mr. Nugent never filed a fair test review with HRD, the Commission has no jurisdiction to hear the instant appeal, and even if such a review had been filed, there is no basis for the Commission to allow such an appeal.
13. Via a Procedural Order issued January 25, 2018, I advised Mr. Nugent that should he wish to pursue his appeal, he would need to file a More Definite Statement with the Commission, providing more detail regarding the basis of his appeal.
14. On February 6, 2018, Mr. Nugent submitted the More Definite Statement referenced above.
15. I subsequently inquired with HRD regarding whether applicants who took this promotional examination could request a “fair test” review online with HRD within seven (7) days *after the examination results were sent to applicants*. HRD replied stating: “In accordance with Section 22 of Chapter 31, which allows candidates *no later than 7 days after the date of the exam* to submit a fair test appeal, the line to file such a claim on NEOGOV system closes out, or disappears, upon the expiration of the 7-day period.” (emphasis added)

Analysis

The record here clearly establishes that, subsequent to taking the promotional examination on November 18, 2017, Mr. Nugent filed a timely request with HRD seeking a review “of the applicant’s answers to multiple choice questions” as permitted under G.L. c. 31, § 22. Specifically, he asked HRD to review six (6) multiple choice questions.

Under Section 22, applicants are permitted to request that HRD conduct such a review, but HRD’s determination regarding the review of multiple choice questions is not reviewable by the Commission. See Hickey v. Civ. Serv. Comm’n & Human Resources Div., 60 Mass.App.Ct. 1104, 799 (2003) (Unpublished Decision), upholding a Superior Court Decision in which the Superior Court affirmed a Commission decision dismissing a multiple choice-related appeal based on a lack of jurisdiction.)

The appeal filed with HRD by Mr. Nugent on November 22, 2017 was not a “fair test” appeal.

Upon receiving HRD’s “reply” to his multiple choice appeal on December 13, 2017, Mr. Nugent filed an appeal with the Commission on December 20, 2017, seeking to retroactively define his November 22nd appeal with HRD as a fair test appeal, stating: “I am requesting an appeal of the decision of my Fair Test Item Review ...”

Based on the statements of the parties at the pre-hearing conference, the More Definite Statement and the documents submitted, it is clear to me that what Mr. Nugent is seeking here is for HRD to produce the same type of detailed response (*to the multiple choice review*) that HRD provided in the past. Specifically, instead of simply providing an “acknowledgment” of the applicant’s request for review, Mr. Nugent want to know what decision HRD reached on each of the six (6) specific questions he brought to the attention, the same type of information he and others have received from HRD in the past.

Setting aside, for the moment, the merits of his argument, the question remains regarding whether the Commission has jurisdiction to hear his appeal. As referenced above, the Appeals Court, in an unpublished decision, upheld a Superior Court decision, affirming a Commission decision dismissing a multiple choice-related appeal based on a lack of jurisdiction. The underlying facts of Hickey reinforce that the Commission lacks jurisdiction to hear Mr. Nugent’s appeal here.

In Hickey, the applicant requested an answer sheet review of his multiple choice questions and HRD conducted the review within six (6) weeks. However, HRD failed to render a decision on his appeal and send a copy of a decision to Mr. Hickey. Years later, Mr. Hickey filed an appeal with the Commission, arguing, among other things, that HRD failed to conduct a meaningful review and failed to record the results of the review in violation of Section 22. Although the Commission, in Hickey, bemoaned the “bureaucratic run-around” that Mr. Hickey had received, it dismissed his appeal based on a lack of jurisdiction to hear multiple choice-related appeal. In upholding the Commission’s dismissal, the Appeals Court stated in part: “ ... even if the written decision was not rendered and delivered to Hickey as required by statute,

Hickey had no right to appeal the decision based on the lack of adjustments to his multiple choice score.”

The point here is this: In Hickey, the Court affirmed the Commission’s lack of jurisdiction over multiple-choice related appeals even when it was undisputed that HRD failed to provide any decision to Mr. Hickey. Here, Mr. Nugent is filing an appeal with the Commission contesting the type of decision (i.e. – insufficient details) that he received from HRD regarding his multiple choice appeal. When viewed in this context, it simply cannot be argued that the Commission has jurisdiction to hear the instant appeal.

While Mr. Nugent’s appeal must be dismissed based on jurisdictional grounds, I am (again) troubled by certain aspects of HRD’s review process here.

First, more than eight (8) years ago, the Superior Court, in O’Neill v. Civ. Serv. Comm’n & Human Resources Division, Middlesex Sup. Ct. No. 09-0391 ruled that: “This Court does not agree that the seven day filing limit [for fair test reviews] begins running from the date of the exam in the present situation, because the applicant could not know the number of faulty questions until he receives his answer key. In that situation, due process would seem to impose a discovery rule, in which the time limit begins at the time the applicant knew or should have known of the facts giving rise to his fair test challenge. Thus, O’Neill would be required to file his fair test review request within seven days of [receiving the examination results].” In a 1:28 Decision, the Appeals Court upheld the Superior Court’s decision. (See O’Neill v. Civ. Serv. Comm’n and Human Resources Division, 10-P-384 (2011) (1:28 Decision). The Commission has adopted the Court’s interpretation of this filing deadline and consistently cited and relied upon it in multiple decisions (see e.g. Swan v. Human Resources Division, 28 MCSR 631 (2015)). HRD has effectively ignored these judicial and Commission decisions and implemented an online appeal option where the option to file a fair test appeal “disappears” seven (7) days after the date of the examination. HRD should rectify his error forthwith.

Second, while the Commission has consistently affirmed HRD’s “broad authority” over the administration of examinations, this appears to be another case in which an action by HRD has had the unintended consequence of creating a process that potentially lacks the type of transparency that instills confidence in the examination process. Specifically, the decision by HRD to stop its longstanding practice of providing applicants with a detailed reply to multiple choice appeals, including whether the appeals related to individual questions was approved or denied, appears to be more related to a purported lack of resources, as opposed to a new-found decision that providing such details would jeopardize the integrity of the examination process. While the Commission is not unsympathetic to the issue of scarce resources, this change in procedure warrants a second look by HRD.

Based on the Commission lack of jurisdiction to hear this appeal, Mr. Nugent’s appeal under Docket No. B2-17-260 is hereby *dismissed*.

Civil Service Commission

/s/ Christopher Bowman

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 15, 2018.

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. 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:

Neil Rossman, Esq. (for Appellant)

Michael Downey, Esq. (for Respondent)