

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

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

ABBYMAEL RODRIGUEZ,  
Appellant

v.

G1-18-065

HUMAN RESOURCES DIVISION &  
BOSTON FIRE DEPARTMENT,  
Respondents

Appearance for Appellant:

*Pro Se*  
Abbymael Rodriguez

Appearance for Human Resources Division:

Patrick Butler, Esq.  
Human Resources Division  
One Ashburton Place  
Boston, MA 02108

Appearance for Boston Fire Department:

Jordana Westerman, Esq.  
City of Boston  
Office of Labor Relations  
1 City Hall Square  
Boston, MA 02204

Commissioner:

Christopher C. Bowman

**DECISION ON CROSS MOTIONS FOR SUMMARY DECISION**

1. On April 10, 2018, the Appellant, Abbymael Rodriguez (Mr. Rodriguez or Appellant), an Hispanic, Spanish-speaking male, filed an appeal with the Civil Service Commission (Commission), contesting his non-appointment as firefighter to the Boston Fire Department (BFD).
2. On May 15, 2018, I held a pre-hearing conference at the offices of the Commission which was attended by Mr. Rodriguez, counsel for the BFD and representatives from the BFD.
3. Based on information provided by the parties at the pre-hearing conference, as well as information provided by the state's Human Resources Division (HRD), it appeared that the following was undisputed:

- A. On March 30, 2016, Mr. Rodriguez took the entry-level physical abilities test portion of the civil service examination for firefighter.
  - B. Days *before* March 30<sup>th</sup>, Mr. Rodriguez turned 32.<sup>1</sup>
  - C. On April 14, 2016, Mr. Rodriguez took the written portion of the civil service examination for firefighter.
  - D. On November 1, 2016, Mr. Rodriguez's name appeared on an eligible list of firefighter candidates.
  - E. On August 30, 2017, HRD sent Certification No. 04837 to the BFD.
  - F. Mr. Rodriguez's name appeared tied for 19<sup>th</sup> (last) on Certification No. 04837.
  - G. The BFD held a lottery among those tied for 19<sup>th</sup> to determine who would be considered.
  - H. Mr. Rodriguez's name appeared high enough in the lottery to be among those who would be considered.
  - I. Based solely on the fact that Mr. Rodriguez had reached his 32<sup>nd</sup> birthday days before the written portion of the examination, the BFD did not consider Mr. Rodriguez for appointment.
  - J. The BFD notified Mr. Rodriguez that he had been "bypassed" for appointment based solely on his age.
  - K. But for his age, Mr. Rodriguez would have been considered for appointment.
4. G.L. c. 31, s. 58A states in part: "Notwithstanding the provisions of any general or special law to the contrary, in any city, town or district that accepts this section, no person shall be eligible to have his name certified for original appointment to the position of firefighter or police officer if such person has reached his thirty-second birthday **on the date of the entrance examination.**" (emphasis added)
  5. Mr. Rodriguez argued that, since he initiated the exam process on March 30, 2016, when he took the ELPAT portion of the entrance examination, days before his 32<sup>nd</sup> birthday, he is not disqualified for consideration under Section 58A.
  6. The BFD relies on HRD regarding how Section 58 is applied / interpreted.
  7. HRD did not attend the pre-hearing conference.

Based on the above, I issued a Procedural Order on May 15<sup>th</sup>, joining HRD as a party, and allowing HRD and the Appellant to submit cross motions for summary decision, which have been received.

*Applicable Civil Service Law*

G.L. c. 31, § 1 states that:

"Basic merit principles", shall mean (a) recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified

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<sup>1</sup> To protect the Appellant's privacy, I have not included his exact date of birth, which is not disputed.

applicants for initial appointment; (b) providing of equitable and adequate compensation for all employees; (c) providing of training and development for employees, as needed, to assure the advancement and high quality performance of such employees; (d) retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected; (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens, and; (f) assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions. (emphasis added)

G.L. c. 31, § 2(b) addresses appeals to the Commission regarding persons aggrieved by:

“... any decision, action or failure to act by the administrator, except as limited by the provisions of section twenty-four relating to the grading of examinations ....” It provides, inter alia, “No decision of the administrator involving the application of standards established by law or rule to a fact situation shall be reversed by the commission except upon a finding that such decision was not based upon a preponderance of evidence in the record.”

G.L. c. 31, s. 58A states in part:

“Notwithstanding the provisions of any general or special law to the contrary, in any city, town or district that accepts this section, no person shall be eligible to have his name certified for original appointment to the position of firefighter or police officer if such person has reached his thirty-second birthday on the date of the entrance examination.” (emphasis added)

### *Analysis*

As referenced above, the Appellant argues that since he commenced the ELPAT portion of the firefighter examination prior to his 32<sup>nd</sup> birthday, he is eligible to have his name certified for original appointment. In his brief, the Appellant provided the following scenario in an attempt to show the arbitrary and capricious nature of HRD’s practice:

Person A:

Takes the written portion of the exam before his 32<sup>nd</sup> birthday but takes the ELPAT portion of the exam after his 32<sup>nd</sup> birthday. Under HRD’s interpretation of Section 58, Person A is eligible for appointment as a firefighter.

Person B:

Takes the ELPAT portion of the exam before his 32<sup>nd</sup> birthday, but takes the written portion of the exam after his 32<sup>nd</sup> birthday. Under HRD's interpretation of Section 58, Person B is not eligible for appointment as a firefighter.

HRD argues that its longstanding practice has always been that the original scheduled date for the written portion of the examination is the only date to consider when determining age, residency and a number of other issues related to entry level appointment. Further, HRD argues that its practice creates stability for HRD in determining whether candidates have met the age requirements for entry level appointment, as the date of the written examination is the same for all candidates, and that accepting the Appellant's argument would lead to chaotic and confusing practices if followed and would create a class of individuals who, but for the date of their ELPAT, which is given at different times, would not be eligible to sit for the exam.

It is likely that the legislature never anticipated that the words "on the date of the examination" would require interpretation by HRD. However, since "entrance examination" is not defined in Chapter 31 and because the firefighter examination is given in two (2) parts, on different dates, such an interpretation is required. Both components of the examination are given equal weight by HRD.

It is undisputed that the Appellant commenced one part of the examination, the ELPAT, on a date prior to his 32<sup>nd</sup> birthday. To me, it is arbitrary and capricious for HRD to determine that only the written portion of the examination satisfies the statutory requirement referencing "the entrance examination", particularly when both components are given equal weight. HRD's argument that using a date other than the date of the written examination will result in chaos is not persuasive. To ensure uniformity, HRD could just as easily consider the first date upon which an ELPAT is given as the date used to determine eligibility based on age. Such an

interpretation is more reasonable, would not put any additional burden on HRD and would result in an interpretation that minimizes the number of candidates excluded based on their age, an outcome more consistent with basic merit principles.

For these reasons, the Appellant's appeal under Docket No. G1-18-065 is hereby *allowed*. To ensure that the Appellant receives the consideration he was denied in this hiring cycle, the Commission, pursuant to its authority under Chapter 310 of the Acts of 1993 hereby orders the following:

1. HRD shall place the name of Abbymael Rodriguez at the top of any current or future Certification for Boston firefighter and his name shall remain there until such time as he is appointed or bypassed.
2. If and when the Appellant is appointed, he shall receive a retroactive seniority date, for civil service purposes only, the same as those appointed from Certification No. 04837. This retroactive date is not intended to provide the Appellant with any additional pay or benefits, including creditable time toward retirement.

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 July 5, 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:

Abbymael Rodriguez (Appellant)

Patrick Butler, Esq. (for HRD)

Jordana Westerman, Esq. (for Boston Fire Department)