

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108

STACY BORJESON, PATRICK BARON,
JASON BURNS, and BRIAN ALBERT,
Appellants

v.

B2-18-033-036

HUMAN RESOURCES DIVISION,

Respondent

Appearance for Appellants:

Leah Marie Barrault, Esq.
Patrick Bryant, Esq.
Pyle Rome Ehrenberg, PC
2 Liberty Square, 10th Floor
Boston, MA 02109

Appearance for Respondent:

Mark Detwiler, Esq.
Human Resources Division
One Ashburton Place, Rm 211
Boston, MA 02108

Commissioner:

Christopher C. Bowman

INTERIM DECISION

The Appellants, Stacy Borjeson, Patrick Baron, Jason Burns, and Brian Albert (Appellants), acting pursuant to G.L. c. 31, §§ 2(b) and 22, appealed to the Civil Service Commission (Commission) from the decision of the state's Human Resources Division (HRD) denying their request to include certain time served in a higher grade when calculating each Appellant's Education and Experience (E&E) score on the 2017 Fire Promotional Series Examination. On March 12, 2018, I held a pre-hearing conference at the offices of the Commission, which was

followed by a full hearing at the same location on May 4, 2018 and June 1, 2018.¹ The full hearing was digitally recorded and both parties received a CD of the proceeding.² On July 10, 2018, the parties submitted post-hearing briefs in the form of proposed decisions.

FINDINGS OF FACT:

Based on the documents submitted and the testimony of the following witnesses:

Called by HRD:

- Adele Jean, Exam Developer for the Human Resources Division;
- Regina Caggiano, Civil Service Director for the Human Resources Division;

Called by the Appellants:

- Brian Albert, Fire Lieutenant, Cambridge Fire Department;
- James McDonald, Retired Fire Chief, Lynn Fire Department;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, and reasonable inferences from the evidence, a preponderance of evidence establishes the following findings of fact:

1. HRD is responsible for the major human resources functions of the state. HRD is responsible for a number of functions, including overseeing and administering the state's civil service laws through the civil service unit. The civil service unit is further broken down into two smaller units, the test development and test administration unit. (Jean Testimony)
2. HRD is responsible for the development and administration of civil service examinations for public safety positions. This includes the administration of examinations for fire service positions. (Jean Testimony)

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

² If there is a judicial appeal of this decision, the Plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

3. Adele Jean is employed by HRD as an Exam Developer with the test developmental unit. She has been with HRD since 2004, serving first as an intern and next as a Program Coordinator I in the test administration unit. As an Exam Developer, Ms. Jean is responsible for creating and validating examinations to ensure that they are accurately testing the appropriate topics. In addition to the written portion of the exam, Ms. Jean also creates and validates the Education and Experience portions of the exams. (Jean Testimony)
4. Regina Caggiano was at all relevant times related to these appeals employed as the Deputy Director of Civil Service for HRD. In this role she oversees the civil service unit, including both test development and test administration, and provides guidance and direction to all the various civil service appointing authorities throughout the Commonwealth, including the 107 fire departments in the civil service system. (Caggiano Testimony)
5. Appellant Stacy Borjeson holds the rank of Firefighter for the City of Lynn Fire Department. She took and passed the promotional examination for Fire Lieutenant administered by HRD on November 18, 2017. (Exhibit 5)
6. Appellant Patrick Baron holds the rank of Firefighter for the City of Worcester Fire Department. He took and passed the promotional examination for Fire Lieutenant administered by HRD on November 18, 2017. (Exhibit 5)
7. Appellant Jason Burns holds the rank of Firefighter for the City of Fall River Fire Department. He took and passed the promotional examination for Fire Lieutenant administered by HRD on November 18, 2017. (Exhibit 5)
8. Appellant Brian Albert holds the rank of Lieutenant for the City of Cambridge Fire Department. He took and passed the promotional examination for Fire Captain administered by HRD on November 18, 2017. (Mr. Albert and Exhibit 5)

9. There are three ways to fill a promotional vacancy under the civil service law. These are permanent promotion, temporary after certification promotion, and provisional promotion. (Caggiano Testimony).
10. A temporary after certification appointment is used to fill a temporary vacancy when an eligible list exists for a title. The appointing authority may select one individual from the top three on the list, and this appointment can last for the duration of a vacancy. (Caggiano Testimony).
11. A provisional appointment is a method used to fill a temporary vacancy when no eligible list exists. Using this process, an individual who is permanent in the next lower title may be appointed for the duration of the vacancy. (Caggiano Testimony).
12. Both of these processes are detailed on the HRD website . In addition, each process was explained to every appointing authority in 2009 during the delegation process. (Caggiano Testimony).
13. Acting appointments are not specifically recognized in Massachusetts General Law Chapter 31 (Civil Service Statute) and are generally a contractual term used to describe appointments made to fill vacancies in an officer rank with employees in the next highest rank for short periods of time. Examples of when a Department would appoint an employee to work in an acting capacity can include when an officer is out on sick leave, short-term injury leave, vacation leave, etc. (Caggiano and McDonald Testimony)
14. The Fire Promotional Service Examination is made up of a written component, which accounts for 80% of an applicant's score, and an education and experience (E&E) component, which accounts for 20% of an applicant's score. (Exhibit 5)

15. In 2009, HRD delegated authority to make promotional appointments to the appointing authority. Since such delegation, when an appointing authority makes a promotion they do not have to submit any documents to HRD, rather they are only required to keep promotional documents on file. (Caggiano Testimony)
16. An applicant's E&E calculation is impacted by, among other things, the time an applicant served in a higher rank either as a provisional, temporary after certification, or, at least prior to the 2017 exam, acting appointment. (Caggiano and McDonald Testimony; Exhibit 5)
17. Applicants are required to submit an employment verification form to HRD along with their application that listed their total time served in a higher rank and under what designation (provisional, or temporary after certification, acting) the applicant was serving. Prior to the 2017 exam, the application listed time served in a higher rank as: permanent, temporary or *acting*. Appointing authorities are required to verify the time the applicant claimed to be serving in the higher rank by signing the employment verification form. Other than the appointing authorities' signature on the employment verification form, HRD takes no additional steps to verify that an applicant has actually served in the position listed on the form. (Caggiano Testimony)
18. Since at least 1997, and presumably for decades before then, HRD included the time served as an "acting" appointment when calculating an applicant's E&E score. (Caggiano and McDonald Testimony)
19. When a firefighter serves in an acting position they are expected to perform the same duties as a provisional, temporary or permanent employee serving in that rank. Retired Fire Chief James McDonald of the Lynn Fire Department testified to the job descriptions for Lieutenants and Captains in the Lynn Fire Department and explained that when an individual

is serving in an acting Lieutenant or acting Captain capacity the person performs the same exact duties as the permanent, provisional and temporary firefighters promoted to those ranks from certification lists for Lieutenants and Captains. (McDonald Testimony)

20. Appellant Albert explained similar circumstances to Lynn exist in Cambridge, where he works; when a firefighter served in an acting capacity he or she performed the same duties as the employee holding that permanent rank. For example, a Lieutenant is responsible for performing certain administrative duties each day, including supervising roll call, entering information into a computer system, etc. In Appellant Albert's experience, when he was a firefighter serving as an acting Lieutenant, he performed all of the duties performed by a permanent Lieutenant. When responding to a fire call as an acting Lieutenant, Appellant Albert performed the same duties he currently performs as a permanent Lieutenant, such as taking down all the information regarding the call, serving as a point of contact, and acting as an incident commander during the fire call (assigning tasks to firefighters on suppressing a fire). Similarly, in Appellant Albert's experience as an acting Captain, he performed the same duties as a permanent Captain. (Albert Testimony)
21. In Cambridge, unless there is a permanent vacancy, the City fills all open positions through acting appointments; it has not previously filled positions with provisional or temporary from certification lists. (Albert testimony)
22. The parties stipulated that like Appellant Albert, each of the remaining Appellants would testify that when working in an acting capacity they perform the same duties as an employee in a permanent, provisional, or temporary from a certification list. Each Appellant also would testify that appointments to acting positions or in acting capacities are governed by their respective collective bargaining agreements. (Stipulated Fact)

23. Each year the members of HRD's Test Development Team meet with "Subject Matter Experts" to review the essential functions of each position, to make sure that the information on the exam accurately reflects the duties of the position being tested, and make changes as necessary. (Caggiano Testimony)
24. In 2014, HRD hired a new Director of Test Development and the agency began a comprehensive review of the entire test development process. (Caggiano Testimony)
25. In June 2017, HRD began considering changes to the E&E portion of the police promotional exams specifically with regards to the inclusion of acting time in the E&E calculation. (Jean Testimony)
26. In July 2017, officials from HRD's Test Development Team met with Subject Matter Experts regarding the police promotional exam. At this meeting, HRD raised concerns with including time served as an acting appointment in the E&E calculation; HRD's concerns were based primarily around the circumstances involved in the Revere case and the understanding that acting appointments are not a recognized category under the Civil Service Statute. (Caggiano and Jean Testimony)
27. HRD also had concerns over the idea that it was unable to verify whether an individual in an acting capacity is actually performing the duties of the higher rank; however, representatives from HRD also noted that it is unable to verify whether an individual in a provisional or temporary after certification capacity is actually performing the duties of the higher rank. HRD does not go to any Fire or Police Departments to assess whether applicants are performing any of the duties of the rank they claim to be appointed to, whether in a provisional, temporary, acting, or permanent capacity. (Caggiano and Jean Testimony)

28. HRD decided that acting time would no longer be included in calculating E&E scores and did not include acting time for the 2017 Police Promotional Examination, which took place in September 2017. (Caggiano and Jean Testimony)
29. In September 2017, HRD met with the Subject Matter Experts for the fire promotional exam. The Subject Matter Experts included Chiefs and Deputy Chiefs from undisclosed Departments. At this meeting there was a similar discussion as with the police Subject Matter Experts regarding the removal of acting time from the E&E calculation. It was decided that since acting time would no longer be counted for the police examination and based on HRD's concerns with verifying acting time, acting time would not be included in calculating E&E scores for the 2017 Fire Promotional Series Examination. (Jean Testimony)
30. In HRD's discussions with the Subject Matter Experts for police and fire, it was never expressed to the Subject Matter Experts that the elimination of acting time could have an impact on the rank of an applicant on a certified Civil Service list. (Jean Testimony)
31. HRD did not reach out to representatives of firefighters who would be sitting for exams, such as Professional Firefighters of Massachusetts, about its proposal to change experience calculations. (Caggiano and Jean Testimony)
32. Acting time was not considered in the E&E calculation for the 2017 Fire Promotional Series Examination. (Exhibit 7)
33. The only notice HRD provided to test takers that acting time would no longer be counted as part of the E&E calculation came in the instructions for the exam, which provided that only temporary after certification and provisional time would be counted in calculating an applicant's E&E score and to "Please note that acting time is not 'temporary after certification' or 'provisional' service." (Exhibit 7 and Jean Testimony)

34. Despite the instructions, each Appellant included acting time in their employment verification forms, just as they had each done for every promotional exam they took prior to 2017. Appellants' applications also included records produced by the respective appointing authority detailing the amount of acting time each Appellant had on record. The respective appointing authority signed each of the Appellants' employment verification forms, verifying that each Appellant worked in an acting capacity for the amount of time claimed. (Exhibit 5 and Albert Testimony)
35. On or around January 18, 2018, Appellants received their scores for the 2017 Fire Promotional Series Examination via electronic mail. In the e-mail, each Appellant received notice that their E&E score had been adjusted to reflect HRD's new position that time served in an acting capacity would not be considered in calculating an applicant's E&E. The e-mail received by each Appellant included a recalculation of their E&E score along with the statement "Acting time not creditable, must be provisional." (Exhibit 5).
36. On February 1, 2018, through their attorneys, Appellants filed a timely request for review with HRD regarding the recalculation of their E&E score. (Exhibit 5)
37. On February 23, 2018, HRD informed Appellants that, after review, the agency determined it would not adjust any of the Appellants' E&E scores. (Exhibit 7)
38. On or around March 2, 2018, Appellants filed an appeal with the Commission. (Stipulated Fact)

Legal Standard

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The Commission is charged with ensuring that the system operates on "[b]asic merit principles." Mass. Assn. of

Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001), citing City of Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. 300, 304 (1997). “Basic merit principles,” means, among other things, “assuring fair treatment of all applicants and employees in all aspects of personnel administration . . .” and protecting employees from “arbitrary and capricious actions.” G.L. c. 31, § 1. “A decision is arbitrary and capricious when it lacks any rational explanation that reasonable persons might support.” Cambridge, 43 Mass. App. Ct. at 303 (internal citations omitted).

Pursuant to G.L. c. 31, § 22, HRD “determine[s] the passing requirements of examinations.” That section of the statute also states that “[i]n any competitive examination, an applicant **shall** be given credit for **employment or experience in the position for which the examination is held.**” Id. (emphasis added). G.L. c. 31, § 3 directs that HRD shall make rules which include provisions for “open competitive and other examinations to test the practical fitness of applicants.” According to the Personnel Administration Rules (PAR) promulgated by HRD, “[t]he 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 .06(1)(b) (emphasis added).

The Commission has consistently deferred to HRD’s discretion in designing and administering competitive civil service examinations. As stated in Carroll v. Human Resources Div., 27 MCSR 157 (2014):

There can be little doubt that the cited [civil service] statutes reflect a Legislative intent to endow HRD with considerable discretion in crafting, administering and scoring examinations, as well as crediting education as part thereof.”

Id. 27 MCSR at 161-162 and cases cited. See also Merced v. Human Resources Div, 28 MCSR 396 (2015) (affirming HRD’s requirement that university teaching credit required faculty status of adjunct professor or higher); Cataldo v. Human Resources Div, 23 MCSR 617 (2010) (noting HRD’s broad authority to determine the “type and weight” given to training and experience). While HRD’s discretion is not unfettered, so long as the rule has been clearly established, it is reasonable and firmly grounded in common sense, and HRD has uniformly applied it, the Commission will not disturb HRD’s rational judgment in matters that directly involve its technical expertise in the administration of examinations. E.g., Clarke v. Boston Police Dep’t., CSSC No. B2-15-58, 29 MCSR 1 (2016); Merced v. Human resources Division, 28 MCSR 396 (2015).

Analysis

To provide context for the issues related to these appeals, a brief overview of the civil service promotional process and the practice of civil service employees serving in a higher grade for a limited period of time is warranted.

In order to appear on an “eligible list” of candidates who are eligible for a permanent or temporary promotional appointment, a civil service employee takes and passes a promotional examination. Once that occurs, her name would appear on the eligible list (i.e. – Fire Lieutenant) for a set period of time, which is often two (2) years. If, during the life of that eligible list, a civil service community seeks to make a permanent or temporary promotional appointment, that community must create a certification of names from the eligible list, and then promote someone from within the top three (3) ranked candidates willing to accept the promotional appointment. If there is no eligible list in place, or the list contains less than three (3) names, which is known

as a “short list”, the community may make a “provisional” promotional appointment, which ends upon the establishment of a new eligible list.

For decades, civil service communities have also relied on provisions in local collective bargaining agreements (CBAs) to have employees working in a higher grade for a limited period of time.

The following are two (2) examples:

Example 1 – “Acting, out-of-grade appointments”

A Fire Lieutenant is out injured for six (6) months. At the time of his/her injury, there is an eligible list in place with at least three (3) names of firefighters seeking promotion to Lieutenant. Instead of making a “temporary promotional appointment” and having one of the top three candidates certified from the eligible list perform the duties and responsibilities of the Fire Lieutenant position for six (6) months, the community, relying on provisions in the CBA, has the “senior person” in a group or station perform the duties and responsibilities of the Fire Lieutenant, regardless of whether he/she is one of the top three candidates on a civil service eligible list or Certification. In short, while this “senior person” does perform the duties and responsibilities of the higher position for the six (6)-month period, the civil service law states that the community should have had a different person, someone who is on the “top three” on the eligible list or Certification, perform those duties after receiving a temporary promotional appointment for a six (6)-month period.

Quite often, there is agreement among management and the employees that the provisions in the CBA are a better practice for filling short-term vacancies such as this, and the practice is never challenged via an appeal to the Civil Service Commission. When the practice is challenged, however, the Commission, consistent with precedent-setting judicial decisions, has

ruled that these “acting, out-of-grade appointments” are not consistent with civil service law and orders the community to adhere to the civil service law, as opposed to the CBA provisions. The Commission has never, however, ruled that the persons serving via the CBA provisions (i.e. – the “senior person” in the group or fire station) was not performing the duties and responsibilities of the higher positions. Rather, the net effect of the Commission’s orders has typically meant that, on a going forward basis, a different person (i.e. – one of the “top three” on the eligible list / Certification) should perform the duties and responsibilities of that higher position.

Example 2 – Routine coverage

A Fire Lieutenant is on vacation for two (2) weeks. Relying on provisions in the CBA, the civil service community has the “senior person” (i.e. – senior firefighter) in a group or station perform the duties and responsibilities of the Fire Lieutenant for this two (2)-week period.

The Commission has found that the provisions in the CBA regarding this routine coverage does not conflict with the civil service law as there is no actual vacancy which requires a civil service appointment. Again, however, the Commission has never questioned that the “senior person” (firefighter) was indeed performing the duties and responsibilities of the Fire Lieutenant while he/she was on vacation.

For decades, HRD has provided applicants on promotional examinations with E&E credit in both of the above-referenced examples, effectively grouping them both into a category of acting promotional appointments. During this most recent promotional examination process, HRD abruptly ended this practice, effectively telling candidates that HRD would no longer recognize the work performed in a higher grade unless it was classified as a permanent, temporary or provisional appointment under the civil service law. While HRD’s actions may have been a well-intentioned attempt to encourage appointing authorities to end the practice of “acting, out-

of-grade appointments”, the end result, as described in more detail below, was to erroneously deprive the exam applicants (i.e. – firefighters) of the E&E credit they should receive for time actually served performing the duties and responsibilities in a higher grade.

I carefully reviewed and considered the parties’ arguments, including those offered by HRD regarding why these appeals should be denied.

First, HRD argues that the Commission “has resolutely condemned the use of acting time”, presumably in an effort to show that HRD’s decision to end a decades-long practice of recognizing acting time for E&E purposes is justified. There are multiple problems with that argument including the following. Generally, as referenced above, the Commission has long held that *appointing authorities* run afoul of the civil service law when they fill vacancies, generally defined by the Commission as positions not filled by the incumbent for thirty or more days. In response, the Commission has generally required the *appointing authority* to take remedial action to end the practice of these “acting, out-of-grade appointments on a *going-forward* basis. Here, HRD, by its actions, has penalized the *employees* who work for these appointing authorities and done so in a rather draconian manner that *retroactively* eliminates credit for *years* of acting time already served by these employees prior to the change. HRD’s actions here, arguably, could have been more defensible had they determined that, on a going-forward basis, time served in an “acting, out-of-grade” capacity on or after 2017 would no longer be counted toward E&E in promotional examinations. Instead, HRD, based on a limited review, as discussed in more detail below, effectively erased years of service performed by firefighters in a higher grade. That is precisely the type of arbitrary and capricious action that the Commission is here to guard against. Further, as referenced above, the Commission does not consider time

served in a higher title for reasons related to “routine coverage” to be a violation of civil service law and the time served should be credited.

Second, HRD, to support its decision here, points to the Personnel Administration Rules, which state in relevant part that: “ ... time spent by an employee ‘acting’ in a position is not recognized unless such employee was temporarily appointed to the position.” That language was actually added to the PARs on March 15, 2010. Given that seven (7) years elapsed between the insertion of that language and HRD’s decision here, I infer that HRD never intended that PAR change to alter how it calculated E&E for promotional examinations.

Third, HRD argues that the Appellant cannot prove that HRD “has acted unlawfully”. G.L. c. 31, s. 2(b) actually states in relevant part that:

“No person shall be deemed to be aggrieved under the provisions of this section unless such person has made specific allegations in writing that a decision, action, or failure to act on the part of the administrator was in violation of this chapter, the rules or basic merit principles promulgated thereunder and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status.” (emphasis added)

G.L. c. 31, s. 1 defines basic merit principles as:

... (a) recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified 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.

In short, the Commission need not determine that HRD acted unlawfully in order to overturn a decision by HRD. Rather, if the Commission determines that a decision by HRD was not consistent with basic merit principles (i.e. – the decision did not result in the advancement of

employees on the basis of their relative ability, knowledge and skills and/or the decision was arbitrary and capricious), then relief by the Commission would be warranted.

Fourth, HRD argues that “... the unrefuted facts on the record make clear that HRD took a thorough and thoughtful process before enacting a change to E&E ...”. Notwithstanding the high integrity and professionalism of HRD’s witnesses, including the now-director of the civil service unit, HRD has *not* shown, by a preponderance of the evidence, that the review process here was “thorough and thoughtful.” Rather, based on a review (and re-review) of all of the testimony provided, there appears to have been some real confusion regarding what information was presented to the subject matter experts (discussed in more detail below); and whether the SMEs were ever briefed on and/or understood that they were being asked to weigh in on a decision to retroactively eliminate credit for years of acting out of grade experience in the context of E&E. There appears to be no record of what actually occurred at these meetings, including such things as an agenda, minutes, etc. Further, HRD acknowledges that the “presentation” to the SMEs was done verbally. All of this detracts from HRD’s argument that the review done here was thorough and/or thoughtful. Rather, based on a review of the testimony, I reach the inescapable conclusion that HRD, although not intentionally, implemented a sweeping change to the promotional examination process without fully grasping the enormous implications to the career ladders of thousands of public safety employees working in civil service communities across the Commonwealth.

Finally HRD argues that the testimony provided by Mr. Albert shows that HRD’s “concerns” here are valid, as Mr. Albert testified that, when serving in a higher title in an acting capacity, he cannot issue discipline. Ironically, this Appellant’s testimony is the only evidence HRD relies on to support its conclusion that E&E credit should not be given for those serving in an acting

capacity. That argument is not persuasive or logical. First, it is ironic that HRD must rely on testimony from one of the Appellants to validate its concerns about providing E&E to those serving in acting capacity. HRD, through its documents or witness testimony, was unable to provide any credible evidence showing that it had reviewed examples that showed distinctions between those serving in an acting capacity as opposed to temporary or provisional. Further, HRD's argument is based on the premise that, had Mr. Albert been appointed in a "temporary" or "provisional" capacity (for which HRD would provide E&E credit) for the exact same time period, he would have been authorized to impose discipline. Commonsense suggests that is not the case. More importantly, however, there is no evidence that HRD even addressed or reviewed this basic question before making its far-reaching decision here.

Rather, the evidence supports the following arguments put forth by the Appellants showing that HRD's actions here were not consistent with basic merit principles, were arbitrary and capricious and resulted in harm to the Appellants.

G.L. c. 31, § 22 provides that "[i]n any competitive examination, an applicant **shall** be given credit for employment or experience in the position for which the examination is held." Id. (emphasis added). The applicable statute establishes an obligation on HRD to give credit for *any* experience that the applicant has in the position sought. Likewise, PAR .06(1)(B), which is a rule adopted by HRD applicable to promotional examinations, tracks the statute and provides that an applicant's training and experience score "shall include credits for elements of employment or experience related to the title for which the examination is held." Id.

The evidence at hearing established that time served in a higher grade is time during which an applicant gains experience in the actual position for which the relevant examination is being held for the same Department. When a Firefighter, e.g., serves as an acting Lieutenant, that individual

is gaining experience in that position. As a result, the Civil Service statute compels HRD to account for this time when that Firefighter goes on to take the Lieutenant exam.

It is undisputed that since at least 1997 and presumably for years before then, firefighters' time served in a higher grade, including time served in an acting, out-of grade capacity, or for "coverage" purposes, was included in the calculation of an applicant's E&E score in the same way that time served as a provisional or temporary after certification appointment was included. Likewise, it is undisputed that the time served under each designation was verified by HRD in the same exact manner; a firefighter submits their employment verification form listing the amount of time served in a position, whether acting, provisional, or temporary, and the appointing authority, usually a Chief of the Fire Department, would verify whether the amount of time listed was accurate. HRD does not take any additional steps to verify whether an applicant serving in a temporary or provisional appointment is actually performing the duties associated with that position rather HRD relies solely on the appointing authorities' verification.

I am not persuaded by HRD's argument that there is a distinction between the ability to verify time in an acting position and time in a provisional or temporary position. As already noted, the same methods of verification are undertaken by HRD for time claimed in a provisional or temporary position as time claimed in an acting position. The only distinction between the categories is that provisional and temporary after certification time are referenced in the Civil Service statute whereas acting time is not. There are two issues with HRD's argument. First, despite temporary after certification and provisional appointments being referenced in the Civil Service Statute, HRD could not produce any reason that this fact alone made those appointments easier to verify than acting appointments. HRD does not go into its own records to verify whether paperwork was submitted for a provisional or temporary after certification promotion,

like with acting time, HRD merely relies on the appointing authority's verification. The Commission has previously found that the verification form itself "should suffice as a reliable basis for such confirmation" that the applicant performed the duties of a higher rank. Baston v. Human Resources Div, 29 MCSR 62, 64-65 (2016). Thus, HRD's reliance on the concept that it could not verify acting time as the reason for discontinuing its inclusion of such time in E&E calculations is unreasonable and not grounded in common sense because HRD relies on the exact same information when verifying provisional and temporary time as it did for acting time.

Also, HRD's argument that only temporary after certification and provisional titles are referenced in the statute and therefore the only titles in which a Firefighter can gain creditable experience for exam purposes is wrong because the Civil Service statute, in fact, contemplates other types of appointments, i.e., G.L. c. 31, § 31, emergency appointments. Under § 31, an appointing authority may make an emergency appointment to any civil service position for not more than thirty (30) working days during a sixty (60) day period without complying with the other provisions of a civil service law. Id. Meaning, an appointing authority may appoint an individual to act in a higher rank pursuant to Civil Service law without designating that individual as a temporary or provisional appointment. Under HRD's new rule regarding acting time, it would appear that if an individual served in an emergency appointment and was therefore not a provisional or temporary appointment, that individual would not receive credit for time served in the position despite being appointed pursuant to the Civil Service Statute. Such a result is unreasonable and inconsistent with the Law. Moreover, as detailed above, G.L. c. 31, Section 22 does not permit HRD to exclude actual bonafide experience based upon title alone.

Additionally, it should be noted that it appears that HRD first decided to reconsider the inclusion of acting time in calculating an applicant's E&E score after questions were raised in an

unrelated case regarding whether an exam applicant had allegedly listed “acting” time on the E&E portion of the exam which was not accurate. It is perplexing that HRD could take this one instance of an applicant allegedly providing incorrect information about acting time and assert that it justifies a conclusion that acting time cannot be verified. Based on HRD’s process for verifying provisional and temporary appointments, one could easily contemplate a situation where the circumstances underlying that unrelated case could occur in the context of someone falsely claiming he/she worked in a provisional or temporary capacity after certification. As is the case with acting time, the only verification that would be required by HRD is that the appointing authority verify that the individual worked in the position. I am therefore unpersuaded that the one instance HRD could point to, could support HRD’s decision to no longer credit acting time when calculating an applicant’s E&E score.

The addition of experience credits has real meaning to the career advancement potential of individuals taking promotional exams. HRD’s upending of its decades long practice has created conflict between management and employees.³ The Fire Departments who employ the Appellants in this case, with the exception of Lynn, have consistently used acting appointments to fill short and long-term vacancies. With this new policy by HRD, employees will be forced to challenge the length of acting appointments more often and ensure that appointing authorities are making provisional and temporary appointments the moment a vacancy occurs, no matter how short so as to not lose valuable creditable service.

³ Two cases recently filed with the Civil Service Commission involved communities that had historically used acting out of grade appointments to fill long and short-term vacancies. Using acting out of grade was not an issue for these communities in the past because such time would count towards an applicant’s E&E score. Now, with HRD’s rule, employees in those communities are asserting the need for their respective Departments to make either provisional or temporary promotions immediately once a position becomes vacant, even if only for a short period of time.

Conclusion

For all of the above reasons, the Appellants' appeals under Docket Nos. B2-18-033-036 are ***allowed.***

Relief

Chapter 310 of the Acts of 1993 authorizes the Commission to "take such action as will restore or protect" the rights "of any person" which have been prejudiced "through no fault of his own." (See Thomas v. Civ. Serv. Comm'n & others, 48 Mass. App. Ct. 446 (2000))

What action the Commission should take here in regard to relief is complicated. The most significant question in regard to relief is whether the Commission's remedy, based on the facts here, should apply only to the Appellants who filed an appeal to the Commission, or to all 2017 promotional examination applicants. HRD, citing the Commission's decision in Boston Police Superior Officers Federation et al v. Boston Police Department and HRD (21 MCSR 237 (2008)), argues that relief, if any, should only be granted to the Appellants who filed the instant appeals. The Appellants argue that the Commission's relief should apply to all exam applicants and that HRD should notify all exam takers; afford them the opportunity to submit evidence supporting their acting time, re-grade those examinations, and then establish new eligible lists, but with any changes having prospective effect only. This is similar to the relief granted by the Commission in Souza v. Human Resources Division, 28 MCSR 624 (2015). In Souza, the Commission concluded that, based on an inadequate review, HRD's decision not to provide E&E credit for a field training officer program was in error. The Commission, in Souza, ordered that HRD grant relief to all exam applicants through a re-scoring process.

After careful review and consideration, I have concluded that the circumstances here are most similar to the Souza case and that relief, in order to be fair and equitable, must be applied

across all promotional examinations, as opposed to only the Appellants. I do not underestimate the herculean task that may be required of HRD here, even though any score changes would have prospective effect only.

For that reason, I am providing the parties with thirty (30) days to provide the Commission with a form of proposed relief that, while granting relief to all exam applicants, may lessen the burden on HRD in implementing said relief. Should the parties fail to reach such an agreement, the parties should report this to the Commission at which time the Commission will issue a final decision granting the relief as requested by the Appellants.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on August 30, 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 to:
Leah Barrault, Esq. (for Appellant)
Mark Detwiler, Esq. (HRD)