

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108

MATTHEW WESTON,
Appellant

v.

E-09-49

HUMAN RESOURCES DIVISION,
Respondent

Appellant's Attorney:

Pro Se
Matthew Weston



Respondent's Attorney:

Lidia Rincon, Esq.
Human Resources Division
One Ashburton Place: Room 211
Boston, MA 02108

Commissioner:

Christopher C. Bowman

DECISION ON HRD'S MOTION TO DISMISS

The Appellant, Matthew Weston, pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (hereinafter "Commission") on February 7, 2009 claiming that he was aggrieved by a decision of the state's Human Resources Division (hereinafter "HRD") to remove his name from the eligible list for the position of firefighter.

A pre-hearing conference was conducted at the offices of the Commission on April 29, 2009 at which time the parties stipulated to most of the facts involved in this appeal. I subsequently issued a "Procedural Order" to the parties outlining the various issues to be addressed. As part of HRD's May 14, 2009 response to the Procedural Order, HRD

moved to dismiss the Appellant's appeal. The Appellant filed a response on May 26, 2009. The Commission also received correspondence from the Town of Bourne's Deputy Fire Chief regarding this appeal on May 18, 2009, a copy of which was provided to all parties.

The following facts appear to be undisputed:

1. On July 10, 2008, the Town of Bourne (hereinafter "Town") submitted to HRD a Civil Service Requisition (Form 13) requesting a certification for 1 Temporary Full-Time Firefighter-Paramedic vacancy.
2. HRD generated Certification No. 280688 from an eligible list based on a 2006 civil service examination which was issued to the Town on July 23, 2008 to fill the above-referenced vacancy.
3. The Appellant was selected from that certification to fill the temporary vacancy and was required to pass a Physical Abilities Test (PAT) as part of his conditional offer of employment.
4. The Appellant successfully completed the above-referenced PAT on September 23, 2008 and was appointed as a Temporary Firefighter-Paramedic effective October 20, 2008.
5. On February 13, 2009, HRD received an "Absence and Termination Notice / Form 56" from the Town indicating that the Appellant was being terminated due to the expiration of his temporary employment. The vacancy expired on February 20, 2009.
6. During the pre-hearing conference, the Appellant stated that his termination was related to budgetary problems confronting the Town.

7. All of the above-referenced events were based on the Appellant having taken the 2006 civil service examination for the position of firefighter-paramedic. In 2006, the PAT was not included as part of the overall examination score. Rather, candidates were only required to take and pass the PAT after being offered a conditional offer of employment by a civil service community.
8. In 2008, mainly in response to a federal court case, HRD incorporated the PAT into the entry-level firefighter examination. Hence, all candidates were required to take a two-part examination that consisted of: 1) a written examination; and for those who passed the written examination, 2) a PAT. These two portions of the examination were then weighted by HRD and the candidate was given a final score / ranking.
9. In April 2008, the Appellant took and passed the written component of the 2008 entry-level firefighter examination.
10. On August 13, 2008, the Appellant submitted his application and payment to participate in the PAT component of the examination.
11. On August 15, 2008, the Appellant received an email from the PAT Administrator informing him that he was scheduled to take the PAT component on August 26, 2008.
12. The Appellant did not take the PAT component of the examination on August 26, 2008.
13. On November 13, 2008, the Appellant was notified that he did not pass the 2008 entry-level firefighter examination because he did not take the PAT component of the examination. As a result, the Appellant's name was not included on the new eligible list for the position of firefighter that was based on the 2008 examination. (Eligible lists stay in effect for approximately two years.)

14. When the Appellant was laid off from the Town on February 13, 2009, his name was not included on the Town's reinstatement list, pursuant to G.L. c. 31, § 39, or the statewide re-employment list, pursuant to G.L. c. 31, § 40, because he was not a permanent employee who was separated from his position due to a lack of money, lack of work or abolition of position.
15. Therefore, the Appellant can not be appointed to the position of firefighter and/or firefighter / paramedic in a civil service community for at least two years assuming that he takes and passes both portions of the entry level examination that will likely be given in 2010.

Appellant's Argument

The Appellant argued in his response that he did not take the August 26, 2008 PAT because he planned to take the PAT for the temporary firefighter / paramedic position that would be offered to him by the Town of Bourne. He stated that he mistakenly thought that this would also fulfill the requirements of the 2008 examination as well.

He further argues that his successful completion of the September 23, 2008 should be used by HRD to calculate his score for the two-part 2008 examination. In support of this argument, the Appellant states that he believes that both PATs are virtually the same, with both examinations requiring applicants to complete seven different "stations".

HRD's Argument

HRD argues that the September 23, 2008 PAT which the Appellant completed was not the same exam that was administered as part of the overall 2008 examination on August 26, 2008. First, according to HRD, the August 26, 2008 PAT was one of two components that comprise the 2008 entry-level firefighter examination and that the two

parts are not severable. Second, the August and September 2008 PATs could not be the same because the conditions were different. When the PAT component was being administered in August 2008, the cut score for each event had not yet been determined. Applicants were advised to do their very best. When the September 2008 PAT was administered, the cut score had been established. The candidates knew exactly how well they had to do in order to pass before actually taking the test. Finally, HRD argues that the two PATs are different because each test yields a different result. While the PAT component is a competitive test used to determine the order in which the candidates' names will appear on the firefighter eligible list, the PAT that is offered as part of the municipality's conditional offer of employment is a pass / fail test used simply to determine whether a candidate has the physical ability to full the duties of the job he is being offered.

Regardless of whether or not the August 2008 PAT and the September 2008 PAT are similar, HRD argues that the Appellant should not be allowed to use his score from the latter test to calculate his overall score on the 2008 examination. According to HRD, it is not up to the Appellant to choose which PAT should be used to calculate his overall score. HRD argues that the application process to become a firefighter requires that all applicants pass the entry level examination exactly as administered by HRD and that the Commission should not now change the process and allow the Appellant to use a score obtained by a different PAT (when 5,044 other applicants were successful in following the rules and complying with the requirements).

Conclusion

G.L. c. 31, § 2(b) states in relevant part:

“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.”

Chapter 310 of the Acts of 1993 provides:

“If the rights of any person acquired under the provision of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of their own, the civil service commission may take such action as will restore or protect such rights, notwithstanding the failure of any person to comply with any requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration of such rights.” (emphasis added)

The party moving for summary disposition of an appeal before the Commission pursuant to 801 C.M.R. 7.00(7)(g)(3) or (h) is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, i.e., “viewing the evidence in the light most favorable to the non-moving party”, the movant has presented substantial and credible evidence that the opponent has “no reasonable expectation” of prevailing on at least one “essential element of the case”, and that the non-moving party has not produced sufficient “specific facts” to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, 887 N.E.2d 244, 250 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, 881 N.E.2d 778, 786-87 (2008).

During the pre-hearing conference held regarding this appeal, the Appellant stated that he did not take the August 2008 PAT because he “forgot about it”. In his written submission to the Commission, he stated that he mistakenly thought that the September 2008 PAT would suffice.

In viewing all of the evidence in the light most favorable to the Appellant, he would still not be entitled to the relief being sought for the following reasons. First, there is no evidence, nor is it even alleged, that HRD violated any civil service law or rule or basic merit principles. (G.L. c. 31, § 2(b)). Second, even if the Appellant assumed that he did not need to take the August 2008 PAT as part of the two-part examination, he never sought to verify this assumption and/or notify HRD that he would not be attending the PAT for which he was registered to take. At best, his own faulty assumptions and his failure to follow HRD procedures resulted in his failure of the 2008 examination. HRD properly notified the Appellant that he had failed the examination (and thus his name would not appear on the eligible list created from that exam). The Appellant cannot show that these events occurred through no fault of his own.

As part of the Appellant's appeal, the parties were also asked to address whether the Appellant's name, as a result of his layoff as a temporary firefighter, should appear on the Town's reinstatement list or the statewide reemployment list. However, G.L. c. 31, §§ 39-40, respectively, limit this benefit to permanent civil service employees who are laid off due to a lack of funds, lack of work or abolishment of the position. Since the Appellant was a temporary firefighter, his name should not appear on either list.

While the Appellant is not entitled to the relief being sought here, it is my hope that Mr. Weston is not dissuaded from pursuing his career goals. Throughout these proceedings, he presented himself well and impressed me as someone that would serve any town well as a firefighter / paramedic. He would be well advised to prepare now for the next entry-level examination for firefighter / paramedic in 2010 so that he can score high enough to be considered for appointment to a permanent position.

For all of the above reasons, HRD's Motion to Dismiss is allowed and the Appellant's appeal under Docket No. E-09-49 is hereby *dismissed*.

Christopher C. Bowman
Chairman

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman - Yes; Henderson, Commissioner – No; Marquis, Commissioner – Yes; Stein, Commissioner – Yes; and Taylor, Commissioner – No) on July 2, 2009.

A true Copy. Attest:

Commissioner
Civil Service Commission

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(I), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 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.

Notice to:
Matthew Weston (Appellant)
Lidia Rincon, Esq. (for HRD)
Thomas Guerino (Town of Bourne)