

September 16, 2019

Austin Faison, Town Manager
Winthrop Town Hall
Metcalf Square
Winthrop, MA 02152

Re: Ferruccio Romeo v. Human Resources Division
Civil Service Docket No.: B2-19-082

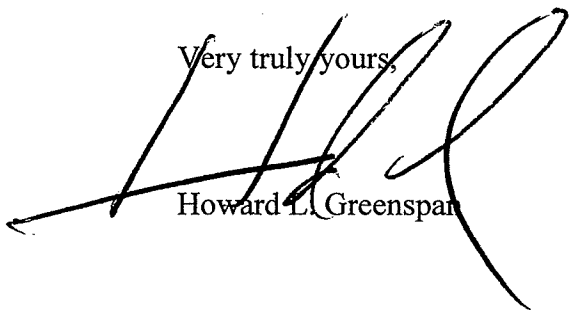
Dear Mr. Faison:

Enclosed please find a Decision of the Civil Service Commission **dismissing** Ferruccio Romeo's appeal regarding a promotional examination for Police Sergeant. Romeo filed an appeal with the Human Resources Division on November 30, 2018 challenging the scoring on the promotional examination assessment center which was held on October 25, 2018. Human Resources Division denied his appeal on April 29, 2019 and the Civil Service Commission held a hearing on Romeo's appeal on August 13, 2019.

Chairman Bowman of the Commission after review of all the evidence and also an "in camera" review of all the essay question responses has concluded that HRD's review was reasonably thorough and impartial and its decision to affirm the grade that Ryan Associates assigned to Mr. Romeo's essay was neither arbitrary or devoid of logic. Chairman Bowman also concluded that the HRD's conclusion was supported by a preponderance of the evidence. Therefore, Bowman denied Mr. Romeo's appeal.

I will keep you informed as to the status of this matter. Please contact me if you have any questions.

Very truly yours,


Howard L. Greenspan

✓ HLG/dc

cc: Chief Terence Delehanty

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108

FERRUCCIO ROMEO,
Appellant

v.

B2-19-082

HUMAN RESOURCES DIVISION,
Respondent

Appearance for Appellant:

Pro Se
Ferruccio Romeo

Appearance for Respondent:

Mark Detwiler, Esq.
Human Resources Division
100 Cambridge Street: Ste. 600
Boston, MA 02114

Commissioner:

Christopher C. Bowman

DECISION

On April 3, 2019, the Appellant, Ferruccio Romeo (Mr. Romeo), pursuant to G.L. c. 31, § 24, filed this appeal with the Civil Service Commission (Commission) regarding a promotional examination for Police Sergeant. I held a pre-hearing conference on June 30, 2019 at the offices of the Commission and I held a full hearing at the same location on August 13, 2019.¹ The hearing was digitally recorded.²

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) 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 substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

FINDINGS OF FACT:

Fifteen (15) exhibits (Respondent Exhibits 1-13 and Appellant Exhibits 1-2) were entered into evidence at the hearing. Based on those exhibits, the stipulated facts, the testimony of:

Called by Human Resources Division (HRD):

- Brianna Ward, Director of Test Development (HRD);

Called by the Appellant:

- Ferruccio Romeo, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, policies, and reasonable inferences from the credible evidence, I make the following findings of fact:

1. On April 3, 2019, Mr. Romeo, a police officer in the Town of Winthrop (Town)'s Police Department, WPD, filed an appeal with the Commission.
2. Mr. Romeo's appeal stated: "On October 25, 2018, I participated in a make-up Sole Assessment Center Examination for Promotion to Sergeant in the Winthrop Police Department. On November 14, 2018, I received notice from Ryan Strategies Group, LLC that I had passed the examination. On November 30, 2018, I filed a timely request for review pursuant to M.G.L. c. 31, s. 22 with HRD via email at civilservice@state.ma.us. On April 1, 2019, Police Chief Terence M. Delehenty issued a department wide email which states 'At the request of HRD I am posting electronically the Sergeant's Promotional List that is attached to this email.' To date, I have not received a response from HRD regarding my Request for Review which was evidently never completed."

3. On April 30, 2019, I held a pre-hearing conference at the offices of the Commission which was attended by Mr. Romeo, counsel for HRD, counsel for the Town and the Town's Police Chief.
4. At the pre-hearing conference, HRD stated that an administrative oversight was the reason for the delay in processing Mr. Romeo's appeal. The appeal was reviewed and denied the day prior to the pre-hearing.
5. The parties agreed to the following, unless otherwise noted:
 - A. Mr. Romeo took the make-up promotional examination for sergeant in Winthrop on October 25, 2018.
 - B. The examination was an assessment center examination, which was delegated to Winthrop by HRD, with the exception of hearing appeals.
 - C. Only "in-title" experience was allowed for all candidates (i.e. – permanent, temporary, provisional or "acting" time as sergeant), as opposed to the traditional education and experience that is granted in written examinations administered by HRD.
 - D. On November 14, 2018, Mr. Romeo received a score of 78, resulting in a rank of third on an eligible list that was updated on 4/1/18.
 - E. Mr. Romeo filed the following appeals with HRD on 11/30/18: E/E appeal; Essay Question review; Fair Test; Multiple Choice.
 - F. As referenced above, HRD denied these appeals on 4/29/19.
6. The Commission does not have jurisdiction over appeals related to the scoring of multiple choice questions on a civil service examination. See G.L. c. 31, ss.22-24 and 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.

7. In regard to the “in-title” appeal, HRD denied the appeal because it referenced “officer in charge” time. At the pre-hearing conference, the Police Chief indicated that, in Winthrop, “officer in charge” is the same as Acting Sergeant. Based on this information, I asked HRD to determine whether, if given credit for in-title experience for these officer in charge hours, Mr. Romeo’s score and/or rank on the eligible list would change.
8. In regard to the essay question appeal, HRD conducted the same review it conducted in Wilbanks v. HRD, 30 MCSR 316 (2017), in which HRD’s review was upheld.
9. For all of the above reasons, I ordered HRD, via a May 2, 2019 Procedural Order, to determine whether, if given credit for in-title experience for these officer in charge hours, Mr. Romeo’s score and/or rank on the eligible list would change.
10. On May 6, 2019, HRD informed the Commission, with a copy to Mr. Romeo, that, if given credit for his 387 hours of time as “officer in charge”, it would not change his overall score and/or rank on the eligible list.
11. On May 15, 2019, Mr. Romeo notified the Commission that he wished to proceed with his appeal and, per my request, submitted a More Definite Statement.
12. After receiving clarifying information from Mr. Romeo and reviewing Mr. Romeo’s initial appeal to HRD, I issued a ruling on June 20, 2019 that the sole remaining issue upon which the Commission had jurisdiction was the marking of Mr. Romeo’s written essay.
13. On August 13, 2019, I held a full hearing regarding the marking of Mr. Romeo’s written essay. Breanna Ward, HRD’s Director of Test Development, testified for HRD.

14. Ms. Ward conducted a review of the marking of Mr. Romeo's essay question.
15. Ms. Ward contacted Ryan Associates, the vendor that conducted the assessment center, to better understand the essay question and how it was graded by Ryan Associates.
16. Ms. Ward learned that four (4) reviewers graded Mr. Romeo's essay question and gave him the following scores: 85, 86, 86 and 86.
17. Ms. Ward inquired about any written guidelines that reviewers used in regard to grading essays. She was told there were no written guidelines.
18. Ms. Ward was provided, verbally, with the qualities that distinguish an essay receiving a grade in the "70s" and an essay receiving a grade in the "90s".
19. Ms. Ward asked for but did not receive a copy of the essays completed by the exam applicants.
20. Ms. Ward was told that, in order for an essay to receive a grade in the "90s", the reviewers would be looking for the applicant to provide a high level goal, timeframes, next steps and a conclusion in their response.
21. Ms. Ward reviewed the essay of Mr. Romeo. She found that Mr. Romeo's essay did not meet all of the above-referenced criteria and that the reviewers' scores in the mid-80s were appropriate.
22. I left the record open for Ryan Associates, via the Town, to submit the essays for all applicants who took the promotional examination in order for me to conduct an in camera review of them. I received the essays on August 23, 2019.
23. Only one (1) applicant scored higher than Mr. Romeo on the essay, receiving an average score of 90. That essay appeared to be slightly better than the essay completed by Mr. Romeo, who received an average score of 85.75. Specifically, the higher-scored essay

included a coherent introductory paragraph and quantifiable benchmarks to measure success, both of which were not included in Mr. Romeo's essay.

Legal Standard

In Wilbanks, the Commission stated:

The standard of review to be applied upon appeal from HRD's review of the markings of an essay question under the current version of Chapter 31, Sections 22 through 24, has not been definitively determined. Case law decided under prior versions of the civil service law holds that "the marking of an examination answer is a finding of fact" as to which the Director of Civil Service (a predecessor to HRD) is given "broad discretionary powers" to exercise "judgment as to . . . proper grading of . . . examinations" and that, on appeal the Commission is "vested with similar" fact-finding powers, which findings of fact should not be disturbed unless "clearly shown to be arbitrary or devoid of logic and reason." See Ferguson v. Civil Service Comm'n, 344 Mass. 484, 487-88 (1962)(upheld Commission's overturning Civil Service Director's decision to decline to increase the marking of an applicant's answer to an essay question "through mistake", finding that applicant "in his answer . . . stated the crucial fact that a sentence to state prison could not be imposed" and "should receive full credit for his answer"); Barry v. Civil Service Comm'rs, 323 Mass 431 (1948) (upheld Commission's decision to increase marks on certain answers by one applicant, finding that "the applicant submitted authority to substantiate the correctness of the answers", and declined to increase the marks of another applicant, rejecting his contention that different standards were used in the marking of the examination papers of the two applicants)

Civil service law then provided, as to examination appeals, that "no decision of the director [of civil service] relating to an examination mark shall be reversed and no such mark changed unless the commission finds that it was through error, fraud, mistake or in bad faith, and in each case of reversal of such decision or change in marking the specific reasons therefor shall be stated . . . St. 1945, c. 725, §1 (*emphasis added*). In 1971, the Attorney General noted this prior version of the examination review and appeal requirement in a 1971 opinion, citing Moore v. Civil Service Comm'n, 333 Mass. 430, 434 (1956):

"One of the subjects with which the special commissions and the Legislature were especially concerned was that relating to examinations. It is apparent . . . that the making up and grading of examinations were to be primarily administrative functions to be performed by the director and that the appellate jurisdiction of the commission related to examination marks was to be more restricted than it was in other matters." Op.Atty.Gen., Nov. 19, 1971, citing 333 Mass. at 434 (*emphasis added*).

Shortly thereafter, the legislature completely rewrote the examination review statutes, restricting review by the Director of Civil Service to requests that the "computation of [an applicant's] general average mark be checked for error" and completely eliminating all right of appeal to the Commission. St.1973, c.320, §§1 thorough 5.

Then, in 1974, the legislature enacted a major administrative restructuring of the civil service system. The division of civil service was severed from the Commission, abolished and replaced by the division of personnel administration (DPA), headed by a Personnel Administrator (the “administrator”) reporting to and appointed by the secretary of Administration and Finance. All technical, executive and administrative functions of the division of civil service were transferred to DPA and the administrator was substituted for the position of director of civil service in all respects set forth in Chapter 31. The Commission became an independent quasi-judicial agency that retained its investigatory and appellate authority, including rule-making approval, over the actions of the administrator (and otherwise) as provided by Chapter 31, but no longer exercised indirect supervision and control over the functions transferred to DPA. St. 1974, c.835.

A year later, the legislature restored the authority it had removed in 1973, enacting statutory language closer to the present version of Sections 22 through 24 that, among other things, restored authority to the Personnel Administrator (the successor to the Director of Civil Service) to review the marking of essay questions and restored the Commission’s authority to hear examination appeals from such “findings of the administrator relative to grading of answers to essay questions”. St. 1975, c. 358, §§3, 4.

In Lincoln v. Personnel Administrator, 432 Mass. 208 (2000), the Supreme Judicial Court addressed the question whether, under the restructured (current) civil service statutes, the plaintiffs (who challenged alleged changes in the way the scores on their 1996 firefighter examination had been determined) could appeal for a “hearing” directly to the Commission from the marking of his/her examination, or whether they were first required to seek a “review” of their scores by the Personnel Administrator of DPA (now HRD). The plaintiffs had argued, and the Superior Court had agreed, that, since the Personnel Administrator designed, administered and scored the examination in the first instance, to provide an “additional review after the examination” was futile, as it “would make him the judge of his own challenged unfairness, something that . . . the Legislature would not have intended without much more explicit language.” Id., 432 Mass. at 210. The SJC disagreed, and upheld the Commission’s dismissal of the petitions for failure to exhaust administrative remedies by first seeking the Personnel Administrator’s review, specifically rejecting the argument that such review was a futility. “Nor is this an instance in which exhaustion is excused as futile. . . . It is true that the statute does require the personnel administrator to review his own action in response to a petition from an applicant. However, as the personnel administrator designs, administers, and scores the examinations, he possesses expertise in regard to the grading and weighing of the examination. As the statute is designated, the initial review by the personnel administrator allows him to apply that expertise, determining whether there has been a mistake, or an issue has been overlooked, that can be easily corrected before an eligibility list is certified. Therefore, the personnel administrator is the most familiar with the examination and is best able to respond to applicants who have raised questions regarding the grading of the examination. . . .” Id., 432 Mass. at 212-13.

Finally, the Commission must be mindful of the reality that, in distinct contrast to the role that the Personnel Administrator historically played (noted in Lincoln) as the authority who “designs, administers and scores” all civil service examinations, more recently, as in the case of the 2014 BPD Captain’s examination, HRD plays a peripheral role in many examinations, delegating the

authority to design, administer and score the examinations to a private consultant selected by the municipality or state agency who requests the examination. Moreover, civil service examinations are now generally limited to public safety positions and are no longer given for most civil service titles.

Thus, while HRD remains, in theory, the technical expert in matters of civil service examinations, the institutional scope of that expertise, in fact, is not what it once was. Mr. Wilbanks correctly cites Boston Police Sup. Officers Fed'n v. Civil Service Comm'n, 35 Mass.App.Ct. 688 (1993) for the proposition that the Commission "hearing" is intended to be a more formal proceeding than the "review" conducted by HRD, and that "the Legislature intended the commission acting in its quasi-judicial capacity, and not the administrator, to be the fact-finder relative to the fairness of the examination." This opinion, however, must be read in light of the issue that was presented to the court, namely, a "fair test" appeal that challenged the fairness of the examination component that purportedly tested supervisory skills and the administrator's impartiality in designing that component. These principles that govern a fair test appeal certainly bear notice, but the scope of an appeal from the marking of specific examination questions, focuses mostly on the answers given, rather than the fairness of the questions posed, so the analogy of the "fair test" line of cases is not precisely apt.

I have carefully considered the relevant legislative history and case law described above, as well as the history of the examination process as it has evolved over time. I conclude that G.L.c.31, §24 does not mandate that the Commission conduct a "de novo" hearing to supersede HRD's "review" of the grading of an essay question. In particular, I do not agree with Lt. Wilbanks' contention that on appeal from HRD's review of the marks of a single candidate's answers to an examination question, the Commission's "fact-finding" authority should go so far as require the Commission to put on "assessors' hats" and fix and establish ourselves, ab initio, the most "accurate" scores for Lt. Wilbanks' In-Basket Test responses. As a general rule, I do not find that would be appropriate or consistent with the Commission's appellate role. Lt. Wilbanks' has a point that the difference in "expertise" at HRD and at the Commission in the particular circumstances of this case may seem, to some, more theoretical than real, especially in a case such as presented here, when HRD did not design or administer the test in question. However, the statutory distinction in the powers and duties of each body must take primacy over any such perceived shortcomings of the individual incumbent officials from time to time.

Thus, it suffices that, in an appeal from the review of marking of an examination question, the Commission hew to its traditional quasi-judicial appellate oversight of other HRD "actions or inactions", namely, to ensure that HRD's decision is based on the type of "impartial and reasonably thorough" review that has been required of the Commission when it reviews other HRD "actions or inactions" under G.L.c.31, Section 2(b), and to ensure that HRD's conclusions are neither "arbitrary" nor "devoid of logic", but, rather, supported by a preponderance of credible evidence.

...

This standard affords sufficient discretion to HRD to perform its duty to conduct the required first-level review, subject to appropriate evidentiary scrutiny by the Commission consistent with the Commission's well-defined core responsibilities, as developed in related case law, to serve as

an appellate check on HRD's compliance with all civil service law and rules, generally. See, G.L.c.31, §2(b) & §5(a). See generally, Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012) citing Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001); Brackett v. Civil Service Comm'n, 447 Mass. 233, 241 (2006) and cases cited; Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 187 (2010); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003). See also Mayor of Revere v. Civil Service Comm'n, 31 Mass.App.Ct. 315, 321 (1991); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928)."

I have applied the same standard here.

Based on my review, I have concluded that HRD's review was reasonably thorough and impartial and its decision to effectively affirm the grade that Ryan Associates assigned to Mr. Romeo's essay was neither arbitrary or devoid of logic. Rather, according to HRD's review, Mr. Romeo's essay did not contain all of the elements required to justify a higher score in the "90s" as opposed to his given score in the "80s."

While HRD's review would have been more thorough had it obtained the actual essays of the other applicants, my in camera review of those essays only confirms that HRD's conclusion here was logical and supported by a preponderance of the evidence.

In short, only one applicant scored higher than Mr. Romeo on the essay. Based on my review, the higher score was justified, as it contained elements that Mr. Romeo's essay did not: a coherent introductory paragraph and measurable benchmarks.

Conclusion

For these reasons, Mr. Romeo's appeal under Docket No. B2-19-082 is hereby *denied*.

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 September 12, 2019.

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:

Ferruccio Romeo (Appellant)

Mark Detwiler, Esq. (for Respondent)

Melinda Willis, Esq. (HRD)