

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108

MATTHEW SANCES,
Appellant

v.

B1-08-290

HUMAN RESOURCES DIVISION,
Respondent

Appellant's Attorney:

Pro Se
Matthew Sances
[REDACTED]

Respondent's Attorney:

Suzanne L. Faigel, Esq.
Human Resources Division
One Ashburton Place: Room 211
Boston, MA 02108

Commissioner:

Christopher C. Bowman

**DECISION ON HRD'S MOTION TO DISMISS AND
APPELLANT'S UNDERLYING APPEAL**

The Appellant, Matthew Sances (hereinafter "Appellant" or "Sances") filed an appeal with the Civil Service Commission (hereinafter "Commission") on November 25, 2008 against the state's Human Resources Division (hereinafter "HRD") in regard to the scoring of the Physical Abilities Test (hereinafter "PAT") portion of the entry-level civil service firefighter examination.

A pre-hearing conference was held at the offices of the Commission on December 18, 2008 and HRD subsequently filed a Motion to Dismiss the Appellant's appeal on January

22, 2009. A motion hearing was held on March 9, 2009 at which time I heard oral argument from both parties.

The following facts appear to be undisputed:

1. In 2008, mainly in response to a federal court case, HRD incorporated the PAT into the entry-level firefighter civil service examination. All candidates are now required to take a two-part examination that consists of: 1) the traditional written, multiple choice examination; and, for those who pass the written examination; and 2) a PAT. These two portions of the examination are then weighted by HRD and the candidate is given a final score / ranking.
2. On April 26, 2008, the Appellant took and passed the first phase of the firefighter entry-level examination, the written examination. He scored well enough to be ranked in the top score band of those who took the written examination.
3. On July 15, 2008, the Appellant participated in the second phase of the firefighter entry-level examination, the PAT.
4. To pass the PAT phase of the examination, an applicant must pass at least two of the seven PAT events.
5. On November 14, 2008, the Appellant received a letter from HRD stating that he had passed 6 out of 7 PAT events, thus failing one. As a result of his PAT score, which was weighted with the written examination score, the Appellant's rank was reduced to the second highest score band, band 14 (97 – 98).
6. On November 17, 2008, the Appellant emailed HRD requesting his PAT times for each event.

7. On November 19, 2008, the Appellant sent a letter to HRD also requesting his PAT time for each event.
8. On November 25, 2008, the Appellant filed an appeal with the Civil Service Commission. Attached to that appeal is a letter addressed to HRD which stated in part:
 - “I am writing this letter to appeal the score I received on the [PAT] portion of the ..exam.”
 - “...I feel I ... passed all 7 out of 7 tests according to the passing times stated on the HRD website, and somehow an error in the grading process occurred.”
 - “The result of what I deem is an incorrect scoring of my PAT has scoring of my PAT has cost me the opportunity I think I have rightfully and fairly earned, and that is to receive an optimal score of band 15.”
 - “... [O]n Monday November 17th, I sent a confirmed email to [HRD] requesting my PAT times. As of the time of this letter, I have not received my times and therefore cannot address the failed event specifically.”
9. It is not known whether the Appellant also sent the letter, which was attached to his appeal and addressed to HRD, directly to HRD, or simply attached it to his appeal filed with the Commission on November 25, 2008.
10. In regard to appeals such as this, it is the Commission’s standard practice, to forward an acknowledgement form and notice of pre-hearing conference to all parties. When, as here, HRD, is one of the parties, the Commission’s standard practice is to attach the Appellant’s appeal to the acknowledgment form which is sent to HRD.
11. On December 4, 2008, the Commission forwarded the acknowledgment form, with the Appellant’s appeal, and a notice of pre-hearing conference, to HRD. The acknowledgment form, without the appeal, and the notice of pre-hearing conference, were also sent to the Appellant the same day.

12. On December 9, 2008, HRD sent a letter to the Appellant stating in relevant part:

“Materials related to the Civil Service Exams, including scoring sheets, are not public record and are not released upon demand. As such, the Human Resources Division will not provide you with a copy of your scoring sheet.”
13. On December 18, 2008, I conducted a pre-hearing conference which was attended by counsel for HRD and the Appellant.
14. On December 20, 2008, as part of his appeal to the Commission, the Appellant made a written document request to HRD requesting the release of his times for all seven events of the PAT.
15. On January 12, 2009, the Appellant sent an email to counsel for HRD asking for a status update regarding his December 20th document request. Counsel for HRD responded via email the same day stating that the document request was premature as it had now decided to file a Motion to Dismiss his appeal based on timeliness. As such, HRD informed the Appellant that they would not respond to his document request until the Commission had ruled on its Motion to Dismiss.
16. On January 13, 2009, I forwarded an email to counsel for HRD ordering HRD to respond to the Appellant’s document request.
17. On January 20, 2009, HRD responded to the Appellant’s December 20, 2008 document request by refusing to release the requested documents based on two grounds. First, it restated its position that the documents are not a public record and are not released. Second, HRD stated that, since the Appellant failed to file a timely appeal pursuant to G.L. c. 31, § 22, the documents requested are not appropriate for discovery under the Commission’s rules.

18. On January 22, 2009, HRD filed the instant Motion to Dismiss the Appellant's appeal based on timeliness. A motion hearing, which was digitally recorded, was held on March 9, 2009.

19. On September 1, 2009, the Appellant sent an email to the Commission indicating that the Secretary of State had denied his request to have HRD produce the documents through a request made under the public records law.

HRD's Argument

HRD argues that the Commission lacks jurisdiction to hear this appeal because the Appellant failed to first file this "fair test" appeal with HRD under G.L. c. 31, § 22. Instead, the Appellant filed a direct appeal with the Commission on November 25, 2008. According to HRD, the Appellant waited to appeal the fairness of the test until after he was notified that he had failed one event in the examination. HRD argues that, from the lack of a timely appeal, it can be inferred that the Appellant believed he was treated fairly when examined.

Appellant's Argument

The Appellant argues that he does not know if his appeal constitutes a "fair test" appeal, under Sections 22 - 24. Rather, his appeal at this point is limited to obtaining information from HRD regarding which PAT event he failed, and by how much.

Conclusion

As a threshold matter, the Commission must determine if the instant appeal is a "fair test appeal" as referenced in Sections 22 – 24 or whether the appeal falls under other exam-related appeal provisions of Sections 22 – 24 or other sections of the civil service law.

Section 22 states:

“The administrator shall determine the passing requirements of examinations. In any competitive examination, an applicant shall be given credit for employment or experience in the position for which the examination is held. In any examination, the applicant shall be allowed seven days after the date of such examination to file with the administrator a training and experience sheet and to receive credit for such training and experience as of the time designated by the administrator.

Except as otherwise provided by sections sixteen and seventeen, an applicant may request the administrator to conduct one or more of the following reviews relating to an examination: (1) a review of the marking of the applicant’s answers to essay and multiple choice questions; (2) a review of the marking of the applicant’s training and experience; (3) a review of a finding by the administrator that the applicant did not meet the entrance requirements for the examination; provided, however, that the administrator may deny such request in the case of a competitive examination for original appointment if, at the time such request is made, the administrator is currently accepting applications for a subsequent examination of the same type for the same position.

Such request for review of the marking of the applicant’s answers to essay questions, of the marking of the applicant’s training and experience, or of a finding that the applicant did not meet the entrance requirements for appointment to the position shall be filed with the administrator no later than seventeen days after the date of mailing by the administrator of the notice to the applicant of his mark on the examination or his failure to meet the entrance requirements for appointment to the position.

An applicant may request the administrator to conduct a review of whether an examination taken by such applicant was a *fair test* of the applicant’s fitness actually to perform the primary or dominant duties of the position for which the examination was held, provided that such request shall be filed with the administrator no later than seven days after the date of such examination.

The administrator shall determine the form of a request for review. Each such request shall state the specific allegations on which it is based and the books or other publications relied upon to support the allegations. References to books or other publications shall include the title, author, edition, chapter and page number. Such reference shall also be accompanied by a complete quotation of that portion of the book or other publication which is being relied upon by the applicant. The administrator may require applicants to submit copies of such books or publications, or portions thereof, for his review.”

(emphasis added)

Section 23 states:

Within six weeks after receipt of a request pursuant to section twenty-two, the administrator shall, subject to the provisions of this section, conduct such review, render a decision, and send a copy of such decision to the applicant. If the administrator finds that an error was made in the marking of the applicant’s answer to an essay question, or

in the marking of the applicant's training and experience, or in the finding that the applicant did not meet the entrance requirements for appointment to the position, the administrator shall make any necessary adjustment to correct such error.

The administrator may refuse to conduct a review pursuant to this section where the grade of the applicant in any subject of the written examination is less than fifty per cent or the applicant has failed to file the request for review within the required time or in the required form" (emphasis added)

Section 24 states:

"An applicant may appeal to the commission from a decision of the administrator made pursuant to section twenty-three relative to (a) the marking of the applicant's answers to essay questions; (b) a finding that the applicant did not meet the entrance requirements for appointment to the position; or (c) a finding that the examination taken by such applicant was a fair test of the applicant's fitness to actually perform the primary or dominant duties of the position for which the examination was held. Such appeal shall be filed no later than seventeen days after the date of mailing of the decision of the administrator. The commission shall determine the form of the petition for appeal, provided that the petition shall include a brief statement of the allegations presented to the administrator for review. After acceptance of such an appeal, the commission shall conduct a hearing and, within thirty days, render a decision, and send a copy of such decision to the applicant and the administrator.

The commission shall refuse to accept any petition for appeal unless the request for appeal, which was the basis for such petition, was filed in the required time and form and unless a decision on such request for review has been rendered by the administrator. In deciding an appeal pursuant to this section, the commission shall not allow credit for training or experience unless such training or experience was fully stated in the training and experience sheet filed by the applicant at the time designated by the administrator." (emphasis added)

The PAT was not included as part of the score for entry-level civil service examinations until 2008. Prior to 2008, the entry-level examination was limited to a written, multiple choice examination. Under section 22, an applicant may request that HRD conduct a review of the applicant's answers to essay and multiple choice questions. After HRD's review, the applicant may appeal HRD's decision regarding an essay question to the Commission, but may not appeal an HRD ruling regarding a multiple choice question. (See Hickey v. Human Resources Division and Civil Service Commission, SUV No. 99-0120 (2000)).

While the PAT is neither a multiple choice or essay question, it is unfathomable that the legislature intended for applicants such as the Appellant to have no recourse whatsoever if they disagree that they failed a portion of the PAT. Practically speaking, the traditional multiple choice examination was expanded to include a PAT, but the statute was not updated to reflect this change in practice. For this reason, I conclude that the Appellant should be granted the same review rights that are allowed to applicants contesting a multiple choice question.

The record show that within five days of receiving his overall PAT score from HRD on November 14, 2008, the Appellant sent written correspondence to HRD on November 19, 2008 requesting the release of his times for all 7 PAT events. He also filed an appeal with the Commission on November 25, 2008, within 15 days of receiving the overall PAT score from HRD and attached a letter to HRD, whose offices are located within the same building as the Civil Service Commission.

The Appellant's November 14, 2008 correspondence to HRD and the subsequent letter addressed to HRD which the Commission received on November 25, 2008, shall be deemed a timely request for review by the Appellant under G.L. c. 31, § 22. The standard of review shall be consistent with that which would be applied to an applicant filing an appeal related to a multiple choice question.

As part of this review, HRD will need to address the issue of whether to provide the Appellant with the times associated with the individual PAT events. On this issue, HRD argues that such information is not deemed a "public record" under G.L. c. 4, § 7 (26) (l) which states that the following information is exempt:

"questions and answers, scoring keys and sheets and other materials used to develop, administer or score a test, examination or assessment

instrument; provided, however, that such materials are intended to be used for another test, examination or assessment instrument;”

HRD argues that the exam-related information being sought by the Appellant falls under the plain language of the exemption referenced above. Thus, according to HRD, it is not required to release the information to the Appellant and it will not do so. Further, HRD argues that it would be an administrative burden to provide this information to any test-taker who requests it.

The issue of public records is also addressed under the civil service law. G.L. c. 31, § 70 states in its entirety:

“The commission and the administrator shall maintain on file a record of their proceedings. Such records shall be open to public inspection pursuant to the rules of the commission. An appointing authority may inspect applications and references in connection with a certification of names; such applications and references shall be preserved for a period of two years and may then be destroyed. The question and answer sheets of examination papers, other than essay questions and answers, shall not be open for inspection and may be destroyed as determined by the administrator. The papers used by an applicant in an examination may be destroyed as determined by the administrator, except that they shall be preserved while a request for a review of a marking or finding in relation to such examination or an appeal from the decision of the administrator after such review is acceptable or pending pursuant to sections twenty-two, twenty-three and twenty-four.

Subject to the provisions of this paragraph, an applicant’s examination papers may be inspected only by such applicant or his designated representative upon presentation of a written authorization from the applicant. Such inspection may take place only while a request by such applicant for a review of a marking or finding in relation to such examination or an appeal from the decision of the administrator after such review is acceptable or pending pursuant to sections twenty-two, twenty-three and twenty-four. No inspection of any examination papers may be made in connection with a request for a review of whether the examination was a fair test of the applicant’s fitness to actually perform the primary or dominant duties of the position for which the examination was held, made under section twenty-two, or of examination papers to which sections twenty-two and twenty-three do not apply.

No question shall be copied except one on which the applicant received less than full credit in the marking of the examination. In such case, both the question and answer may be copied.”

The second paragraph of G.L. c. 31, § 70 clearly provides an applicant who is contesting the marking of his examination to conduct an inspection of said documents during the pendency of that review. Further, there is nothing in the public records law that would seem to prevent this inspection by the Appellant, while continuing to shield the information from anyone not authorized by the Appellant. Frankly, I concur with the Appellant that allowing such an inspection would be consistent with fairness and transparency.

For all of the above reasons, the Appellant's appeal under Docket No. B1-08-290 is ***allowed in part***. Pursuant to Chapter 310 of the Acts of 1993, HRD is ordered to comply with the rulings contained in this decision.

Christopher C. Bowman
Chairman

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman - Yes; Henderson, Commissioner – No; Stein, Commissioner – Yes; Marquis, Commissioner – Yes; and Taylor, Commissioner - No) on January 28, 2010.

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 Sances (Appellant)
Suzanne Faigel, Esq. (for HRD)

COMMONWEALTH OF MASSACHUSETTS

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

**MATTHEW SANCES,
Appellant,**

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v.

**HUMAN RESOURCES DIVISION,
Respondent.**

OPINION OF COMMISSIONER STEIN CONCURRING IN RESULT

I concur in the conclusion that Appellant should be entitled to an HRD review of the marking of his the PAT component of his entry-level civil service firefighter examination pursuant to G.L.c.31,§70 and that, pursuant to that review, as provided by Section 70, “the applicant’s examination papers [which include all of his PAT scores} may be inspected. . .by such applicant. . . “ I would expect that, in order to provide a good-faith and transparent review intended by Section 70, HRD would permit the appellant to examine his PAT scores and any other papers used by HRD in performing the review upon which it bases its decision at to whether any error had been made in the marking of any of his PAT test scores. While further review of that decision will not be entertained by the Commission, the Appellant may, if aggrieved by HRD’s decision, have recourse to the courts by action in the nature of certiorari, at which time such scores and other materials would clearly be necessary for meaningful judicial review.

Paul M. Stein

Commissioner

