

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

MARK C. THOMAS,
Appellant

v.

**TOWN OF SALISBURY &
HUMAN RESOURCES DIVISION,**
Respondents

B2-13-247

Appearances for Appellant:

Anthony L. Papoulias, Jr., Esq.
29 Londonderry Way
Uxbridge, MA 01569

Richard W. Kendall, Esq.
348 Park Street, Suite 203
North Reading, MA 01864

Appearance for Respondent:

Darren R. Klein, Esq.
Kopelman and Paige, P.C.
101 Arch Street, 12th Floor
Boston, MA 02110

Appearance for HRD:

Ernest Law, Esq.¹
Labor Counsel
Human Resources Division
One Ashburton Place
Boston, MA 02108

Commissioner:

Cynthia Ittleman

DECISION ON MOTION TO DISMISS

On November 18, 2013, Mark C. Thomas (Mr. Thomas or Appellant) filed an appeal with the Civil Service Commission (Commission) pursuant to G.L. c. 31, § 22 alleging that the Town’s promotional examination violated civil service law and the decision of the state’s Human Resources Division (HRD) to deny his appeal of his examination appeal was erroneous. The

¹ Attorney Law is no longer at HRD. A copy of this decision is being sent to John Marra, General Counsel for HRD.

Appellant filed the instant appeal on November 18, 2013, which filing included an August 29, 2013 Document entitled “Promotional Examination Appeal”. The Appellant subsequently filed a December 3, 2013 Document entitled “Amended Exam Appeal” with Attorney Kendall’s Notice of Appearance. The Respondent filed a Motion to Dismiss (Motion) the appeal on or about December 9, 2013 and filed an Amended Motion to Dismiss (Amended Motion) on December 10, 2013 alleging that the appeal was untimely but also averring that even if it were timely, the appeal should be dismissed on the merits as the Town and its consultant acted appropriately at all pertinent times. The Commission held a Pre-Hearing conference on December 10, 2013 and the Respondent filed a Pre-Hearing Memorandum. On December 16, 2013, HRD filed a letter in support of the Amended Motion (Support of Amended Motion) regarding the issue of timeliness. The Appellant filed an Opposition to the Amended Motion (Opposition) on December 26, 2013. HRD filed a Response to the Opposition (HRD Response to Opposition) on December 27, 2013. On December 30, 2013, the Respondent filed a Reply to the Opposition (Reply). A hearing was held on the Amended Motion on March 19, 2014.² In response to my request for specific information, on April 8, 2014, HRD produced the affidavit of Bruce Howard, HRD Director of Operations, and on March 31, 2014, Attorney Papoulias submitted his affidavit regarding his filings prior to November 18, 2013. The hearing was digitally recorded and copies of the recording were sent to the parties.³ On April 10, 2014, the Town submitted an email message responding to documents adduced. For the reasons stated herein, the appeal is dismissed.

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudicatory hearings before the Commission with G.L. c. 31 or any Commission rules taking precedence.

³ 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 and capricious, or an abuse of discretion. In such cases, this recording should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript, as indicated in the notice sent to the parties with a copy of the digital recording.

FINDINGS OF FACT

Having given full consideration to the arguments of the parties at Commission proceedings in this case, giving appropriate weight to all of the documents submitted by the parties and the inferences reasonably drawn therefrom, and taking administrative notice of all non-privileged matters and work product in the file, I find the following material facts to be undisputed unless stated otherwise:

1. At all pertinent times, the Appellant has been and is an officer in the Salisbury Police Department (SPD). On August 22 and 23, 2013, the Appellant was one (1) of five (5) candidates who took the examination for promotion to the position of Sergeant. Following the exam, one (1) candidate would be selected from the top three (3) scorers. (Motion; Amended Motion, Opposition; Respondent's Pre-Hearing Memorandum)
2. On or about March 22, 2013, the Town and HRD entered into a delegation agreement for the Promotional Police Sergeant Examination. (Motion (Exs. 1, 2)) This delegation agreement provided, in part,

In accordance with the provisions of MGL Chapter 31, section 5(1), this agreement between the Human Resources Division (HRD) and the Salisbury Police Department is for the purpose of delineating the responsibilities of the parties in the delegation of certain duties and powers of HRD to the Town pertaining to the selection process for Police Sergeant, Salisbury Police Department.

The Town has agreed to hire a consultant to develop, construct, validate, administer and score a Police Sergeant assessment center and to pay all attendant costs associated with same. With the exception of additional points as required by statute or rule, including credit for employment or experience in the Police Sergeant title, this delegation selection process for Police Sergeant will be used as the **sole basis** for scoring and ranking candidates on an eligible list. ... Nothing in this delegation agreement precludes the use of a written examination component developed by the consultant as part of the overall assessment center activities.

Upon the Town's submission to HRD of the credentials and references of the proposed consultant and the approval of HRD regarding the selection of the

consultant, HRD will work with and approve the actions of the consultant in, but not limited to, the following areas:

1. Determination of the knowledges (sic), skills, abilities and personal characteristics (KSAP's (sic)) that are supported by job analysis data that will be evaluated during the assessment center exercises.
2. The development of the departmental promotional examination announcement to be used to solicit applications including a description of duties; the required knowledges (sic), skills, abilities and personal characteristics as supported by job analysis data which will be measured by the delegated selection activities; a description of the testing process to be used including any reading lists and preparation guides; testing date(s); deadline for filing applications; salary for the position; and any applicable fees. HRD will, upon request, provide sample language for the announcement, consistent with statutory requirements, regarding eligibility for the selection process and statutory preferences ...
3. Discussions relative to the job-related, content valid questions/activities that will be used during the assessment center.
4. The security plan that will be utilized to ensure the integrity of the assessment center.
5. Any training materials or sessions that will be distributed to/conducted for applicants prior to the administration of the assessment center ...
6. The review of any validation materials which support the assessment center activities.
7. The composition and selection of the assessors for the assessment center exercises.
8. The training of the assessors in the use of the rating schedules and administration of the exercises.
9. The review and approval of the rating schedules to be used.
10. The [HRD's] (sic) and Town's representation as observers only for the assessment center components.
11. *Reviews permitted pursuant to Section 22 of Chapter 31 shall be the responsibility of the consultant, with the approval of HRD.*
12. The determination of a passing point for the assessment center.

It is agreed that: ...

II. Primary responsibility for the administration of all delegated civil service functions ... for the Town will be assigned to Neil J. Harrington, who will serve as Delegation Administrator. He, or his designee, will be responsible for all matters relative to this delegation agreement.

III. The Delegation Administrator shall be responsible for the following:

A. All notifications to all eligible candidates, acceptance and processing of examination applications, verification of examination eligibility, and security of the administration and scoring of the selection process that results in the establishment of an eligible list for Police Sergeant ...

XI. Changes in approved procedures for the administration of delegated functions may not be made without the review and approval of both parties. No duties may be assumed by the Delegation Administrator which have not been authorized by this agreement or subsequent attachment. ...

XIV. If at any time after this initial agreement either the Town or HRD determines that delegation authority should be discontinued, reversion of the authority for all delegated functions to the Town may be effected through 30 days' written notice ...

(Id. (Ex. 1))(**bold** emphasis in original; *italic* emphasis added)

3. The March 22, 2013 cover letter to the delegation agreement, addressed to Town Manager Harrington, states, in part, “this letter is also to inform you of the [HRD]’s approval of the Town’s selection of BadgeQuest⁴ as the consultant to administer the Sole Assessment Center Examination for the town of Salisbury Promotion to Police Sergeant.” (Motion (Ex. 1)) BadgeQuest hired Hanrahan Consulting, led by Watertown Police Lieutenant Hanrahan, to draft the multiple choice questions for the written portion of the assessment center exam. (Respondent’s Pre-Hearing Memorandum; Motion; Amended Motion; Opposition)
4. The Town administered an Assessment Center for the 2013 civil service police promotional exam pursuant to the delegation agreement instead of an entirely written examination administered by HRD on one day. The assessment center was comprised of a written exam on August 22, 2013 involving fifty (50) multiple-choice questions and an oral exam conducted by a panel of assessors on August 23, 2013. (Opposition (Ex. A); Motion, (Ex. 1))
5. After the Commission received the appropriate filing fee in this case on November 18, 2013, Attorney Papoulias sent the Commission a copy of a letter, dated October 1, 2013, that he had sent to Town Manager Harrington. The October 1, 2013 letter

⁴ BadgeQuest is headed by former Waltham Police Chief Stephen Unsworth. (Respondent’s Pre-Hearing Memorandum, December 9, 2013)

states, in full, as follows, “[p]lease be advised that I have been retained by Mr. Mark Thomas with regard to the matter of his Appeal of the recent Police Promotional Examination conducted on August 23, 2013. A copy of my Notice of Appearance and Mr. Thomas’ Appeal is enclosed.” (Opposition (Ex. D)) This letter to the Town Manager copied the Appellant and each of the Town Selectmen, not the Commission, and was delivered to the Town Manager “IN HAND THIS DATE”.⁵ (Id.) Attached to the letter to the Town Manager is a document signed by Mr. Thomas as “Appellant/Officer/Attorney Mark C. Thomas”, entitled, “PROMOTIONAL EXAMINATION APPEAL”, addressed “To Whom It may Concern”, dated August 29, 2013, date-stamped by HRD on August 30, 2013, and the salutation thereon includes,

“Case Number: [blank]

Attention: Massachusetts Civil Service Commission
Massachusetts Human Resources Division
1 Ashburton Place
Boston, MA. 02108”

(Opposition (Ex. A))(emphasis in original)

The Appellant’s August 29, 2013 Document signed by Mr. Thomas is not date-stamped as received by the Commission prior to the filing of the appeal in this case on November 18, 2013. (Opposition (Ex. A)) The Appellant’s August 29, 2013 Document states, in part,

“Please consider this a formal appeal, under Mass. Gen. Laws Ch. 31 § 22, of the Town of Salisbury Police Promotional Written Examination, which was held on August 22, 2013 and the Oral Board, which was held on August 23, 2013. ...”

⁵ It is unknown if this “in hand” delivery statement indicates that the Selectmen also received the letter and enclosure by hand delivery on October 1, 2013.

(Opposition (Ex. A))

In support of the Appellant's August 29, 2013 Document, the Appellant alleges, for example, that the SPD Police Chief Fowler inappropriately wrote questions for the exam, that the process for developing the exam content contained other improprieties⁶, that officers on one shift inappropriately were provided information relating to the exam that was not provided to officers on other shifts, that the Appellant was not given the complete exam reading list, that the Town excluded the candidates' education from consideration, and that the exam assessors were biased because most of them were from Connecticut Police Departments like SPD Police Chief Fowler. The Appellant's August 29, 2013 Document concludes by requesting that,

“This examination should be thrown out; a new test given that is written by HRD based on an acceptable reading list, and a full investigation conducted by HRD, the Civil service Commission, and any other State Agency tasked with conducting this type of investigation.”

(Id.)

6. By letter dated September 27, 2013, Mr. Unsworth, President of BadgeQuest, wrote to Ms. Loren Fitzgibbons, the HRD Examination Administration and Development Supervisor, providing a “[r]esponse to appeal of Officer Mark C. Thomas”.

(Opposition (Ex. B); Amended Motion (Ex. 4)) Ms. Fitzgibbons had been present on both dates of the August exam to monitor it.⁷ (Amended Motion; Affidavit of Bruce

⁶ The Appellant also avers that an SPD officer was permitted to take the sergeant promotional exam even though that person resided in New Hampshire. This matter was addressed in response to Mr. Thomas' earlier request for an investigation, Tracking Number I-14-71.

⁷ Ms. Fitzgibbons is no longer employed by HRD. During her tenure, Ms. Fitzgibbons was supervised by Bruce Howard, HRD Director of Operations. Ms. Fitzgibbons “was to ... observe the administration of the exam” and “was expected to inform the candidates of their right to request a review of whether the exam was a fair test under G.L. c. 31, § 22, have them sign an ‘appeal notification’ form in regard to those rights, and instruct candidates on how to obtain credit for their employment and experience (i.e. E&E). ...” (HRD Affidavit of Bruce Howard, HRD

Howard) Mr. Unsworth's letter states, in part, that SPD Police Chief Fowler "had absolutely no input regarding any questions in the multiple choice exam", that this "was confirmed by Lieutenant Hanrahan" and that he had "no input" in selecting the oral exam assessors. (Opposition (Ex. B); Amended Motion (Ex. 4)) Lt. Hanrahan "was the sole author of the multiple choice exam and Chief Fowler had no input into the questions", and the allegation that some officers knew questions prior to the exam is "baseless". (Id.) "Chief Fowler did make recommendations regarding the reading list", which was consistent with the duties of a sergeant and with the knowledge skills and abilities needed for the position. (Id.) The reading list was approved by HRD. (Id.) The BadgeQuest letter said further,

"The Chief of Police did not eliminate the education component ... the promotion process ... is governed by rules established by the [HRD], not by Chief Fowler or BadgeQuest.

The Salisbury Police Chief had absolutely nothing to do with the selection of the BadgeQuest assessors. All assessors are current Massachusetts chiefs of police. All of the assessors have previously participated in numerous BadgeQuest assessment centers. All have been approved by HRD as assessors. Two of the assessors had previously been Connecticut police chiefs. One of these individuals, who is also an attorney, has been a Massachusetts chief of police for approximately nine years, the other for approximately six years. The coordinator of the process is a retired Massachusetts chief of police and an attorney. The written exam was developed by a current Massachusetts police lieutenant. The assessment

Director of Operations, April 8, 2014) Given the wording of Mr. Howard's affidavit, I understand it to mean that he was identifying the tasks that Ms. Fitzgibbons was to perform but not that he could state or recall if she performed them in this case although he does not appear to doubt that she performed these tasks. I note, however, that an HRD "Appeal Notification" memorandum is addressed to exam candidates taking the exam on August 22 and 23, 2013 and states that appeals "must be filed with the Administrator no later than seven days after the date of the examination (**August 30, 2013**), and must detail the allegations on which it is based. The request must also include specific references to books or other publications relied upon to support the allegations. See M.G.L. Chapter 31, Section 22 for the specific requirements for filing such a request. ..." (Id., Attachment)(emphasis added) The Appellant submitted a document dated **August 29, 2013** to HRD requesting its review and/or appeal of the exam he had taken on August 22 and 23, 2013. Therefore, it appears to be more likely than not that the Appellant, and the other exam takers received such notice of appeal.

center, exclusive of the written exam, was developed by a retired Massachusetts police chief.

The allegations in Officer Thomas's appeal are baseless. The appeal is without merit and is denied."

(Id.)

7. By letter dated October 4, 2013 sent to Mr. Thomas, by Ms. Fitzgibbons at HRD wrote, in full,

"We are in receipt of your letter dated August 29, 2013, regarding the Salisbury Police department's Promotional Police Sergeant Assessment Center Examination held on August 22 & 23, 2013. In response to your request for review, we are providing the following information based on the responses from BadgeQuest, Inc., which developed and administered the above reference examination. Please find the approved response of BadgeQuest. Inc., to follow.

We trust that the concerns cited in your correspondence dated 8/29/13 have been addressed. Please be advised that this is our final response to test items for review."

(Opposition (Ex. C); Amended Motion (Ex. 4))⁸

8. On October 31, 2013, Attorney Darren Klein sent an email message with the subject: "Officer Mark Thomas and Town of Salisbury" to Ms. Diaz at the Commission, stating, in full,

"Dear Ms. Diaz,

Please accept this email as my notice of appearance in the above-captioned matter and please send all future correspondence to my attention. On or about October 1, 2013, Officer Thomas apparently filed the attached appeal. To date, the Town has not received any notice of the case being docketed or any other related correspondence or notices. As such, could you please advise me as to the status of this matter? Thank you."

(Administrative Notice (October 31, 2013 email message of Attorney Klein to Commission))

⁸ The Town states that it only learned at the December 10, 2013 Commission Pre-Hearing conference that HRD had approved BadgeQuest's findings in its (HRD's) letter of October 4, 2013.

9. On October 31, 2013, Ms. Diaz responded to Attorney Klein as follows, in full,

“Hello,
The Commission has not yet received this appeal.”

(Administrative Notice (October 31, 2013 email response from
Commission to Attorney Klein))

10. Attorney Papoulias states that he filed an appearance form at the Commission on behalf of Mr. Thomas on or about October 1, 2013. (Opposition (Ex. D); Affidavit of Attorney Papoulias, March 28, 2014) This appearance form is not date-stamped as having been received by the Commission prior to November 18, 2013, it is not accompanied by a Commission appeal form, nor the required filing fee, and it does not indicate the case number to which the appearance purportedly applies.

(Administrative Notice)

11. By letter dated November 11, 2013 to the Commission from Appellant’s attorney Mr. Papoulias, wrote, in full,

“It has come to my attention that the Civil Service Commission had not received my Appearance and the Appeal of my client Mark Thomas. I am therefore refileing. Enclosed is a copy of my Appearance and Appeal of my client with certificate of Service on the Town of Salisbury. If you have any questions, please contact above numbers.”

(Opposition (Ex. E); Amended Motion (Ex. 6))(emphasis in original)

This November 11, 2013 letter is stamped with the Commission’s stamp (not a date-stamp), pursuant to Commission practice regarding incomplete appeals, in effect then and now, that states,

“CIVIL SERVICE COMMISSION
Incomplete Appeal
NO FEE INCLUDED
Received ... 11/15/13 by: MD
Date/Time CSC called Appellant regarding
lack of fee: 11/15/13 11:28am”

(Id.)

Handwritten below this Commission stamp is the following note by Commission staff,

“Sending check by mail today.”

(Id.)

The check sent to the Commission by the Appellant was in an envelope post-marked November 18, 2013⁹, which was forty-five (45) days after HRD sent the Appellant a letter dated October 4, 2013 informing him that his appeal was denied. The Commission received no previous filing fee from the Appellant. (Administrative Notice)

12. On November 22, 2013, the Commission sent the parties its customary notice that the instant appeal had been filed on November 18, 2013. (Motion (Ex. 4)/Administrative Notice)

13. The affidavit of Attorney Papoulias, dated March 28, 2014 (following the hearing on the Amended Motion), states, in part,

2. That prior to October 1, 2013 Appellant did provide me with a check to file his Appeal in the above matter.
3. That, I completed my Civil Service Commission Notice of Appearance on October 1, 2013.
4. That, I prepared copies of the Appeal for mailing on October 1, 2013.
...”

(Affidavit of Attorney Papoulias, March 28, 2014)

14. Attorney Kendall filed a Notice of Appearance “as Co-Counsel” for the Appellant via a document dated December 3, 2013 and received by the Commission on December

⁹ The Commission’s policy is that a completed appeal is deemed to have been filed on the date it was postmarked. See Falmouth v. Civil Service Commission & another, 447 Mass. 814, 819-821 (2006).

6, 2013. (Administrative Notice, Attorney Kendall’s Appearance) Attached thereto is the Appellant’s December 3, 2013 “AMENDED EXAM APPEAL”, signed by Mr. Marcus, Attorney Kendall and Attorney Papoulias, with assertions similar to those asserted in Mr. Thomas’ August 29, 2013 Document (entitled “PROMOTIONAL EXAMINATION APPEAL”). (Opposition (Ex. A); Administrative Notice (Attorney Kendall December 3, 2013 letter to Commission, Attachment)

Applicable Law

An appeal before the Commission may be adjudicated summarily, in whole or in part, pursuant to 801 C.M.R. 1.01(7)(g) and 801 C.M.R.1.01(7)(h). These motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., “viewing the evidence in the light most favorable to the non-moving party”, the undisputed material facts affirmatively demonstrate that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case”. *See, e.g., Milliken & Co., v. Duro Textiles LLC*, 451 Mass. 547, 550 n.6, (2008); *Maimonides School v. Coles*, 71 Mass.App.Ct. 240, 249 (2008); *Lydon v. Massachusetts Parole Board*, 18 MCSR 216 (2005).

Applicable Civil Service Law

Under G.L. c. 31, § 5, the duties and powers of the Personnel Administrator (currently the Chief Human Resources Officer) include “(e) [t]o conduct examinations for purposes of establishing eligible lists” *Id.* Under section 5(l), the Personnel Administrator is also authorized, “[t]o delegate the administrative functions of the civil service system, so far as practicable, to the various state agencies and cities and towns of the commonwealth” *Id.*

Section 22 of G.L. c. 31 provides that “[t]he administrator shall determine the passing requirements of examinations” and that applicants “shall be given credit for employment or

experience in the position for which the examination is held. ...” Id. Section 22 further provides for certain appeals,

“ ... [e]xcept 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; ...

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.”

Id.

A decision of the Personnel Administrator under G.L. c. 31, § 22 in response to an applicant's request for appeal relating to pertinent parts of an exam may be appealed to the Commission under section 24. Specifically, an applicant can appeal,

“ ... (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.** ...

(Id.)(emphasis added)

However, section 24 expressly precludes the Commission from accepting a 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. ...” Id.

As noted above, Commission proceedings are conducted in accordance with 801 C.M.R.

§ 1.00, et seq. Section (4)(d) thereof, regarding computation of time, provides, in pertinent part,

“Unless otherwise specifically provided by 801 CMR 1.00 or by other applicable law, computation of any time period referred to in 801 CMR 1.00 shall begin with the first day following the act which initiates the running of the time period. The last day of the time period is included unless it is a Saturday, Sunday, or legal holiday or any other day on which the office of the Agency is closed, when the period shall run until the end of the next following business day. ...”

(Id.)

The Massachusetts Administrative Procedures Act, G.L. c. 30A, addresses a number of administrative agency actions. Section 11(8) thereof provides, *inter alia*, that, “[p]arties to the proceeding shall be notified in person or by mail of the decision; of their rights to review or appeal the decision within the agency or before the courts, as the case may be; and of the time limits on their rights to review or appeal.” Id. Section 1 of Chapter 30A defines “agencies”, specifically providing that the definition, “...does not include the following: the legislative and judicial departments; the governor and council; military or naval boards, commissions or officials; the department of correction; the department of youth services; the parole board; the division of dispute resolution of the division of industrial accidents; the **personnel administrator**; the **civil service commission**; and the appellate tax board. G.L. c. 30A, § 1(a)(emphasis added).

Analysis

The Respondent has established by a preponderance of the evidence that the instant appeal is untimely and that the appeal must be dismissed. In the spring of 2013, the Town and HRD entered into a detailed delegation agreement for the administration of a sergeant’s exam to be prepared by BadgeQuest and approved by HRD. The exam was administered on August 22 and 23, 2013. Mr. Thomas and other candidates took the promotional exam. At the exam, which was observed by HRD, the candidates were informed that if they wished to challenge certain

aspects of the exam, they must do so, pursuant to G.L. c. 31, § 22 within seven (7) days. By a document dated August 29, 2013, which HRD received on August 30, 2013, Mr. Thomas challenged the August 22 and 23, 2013 test. The August 29, 2013 document suggests that it was sent not only to HRD but also to the Commission. However, the Commission did not receive the August 29, 2013 document until the Appellant filed an appeal with the required filing fee at the Commission on November 18, 2013.

Pursuant to the delegation agreement between the Town and HRD, BadgeQuest responded to Mr. Thomas' challenge, looked into Mr. Thomas' specific allegations and reported to HRD in detail what it found, denying Mr. Thomas' challenge. By letter dated October 4, 2013, HRD informed Mr. Thomas that it approved the response of Badgequest. Under G.L. c. 31, § 24, Mr. Thomas had seventeen (17) days within which to appeal HRD's decision to the Commission. Section 24 does not articulate the manner in which the seventeen (17) days is to be counted on the calendar.¹⁰ Therefore, Mr. Thomas' appeal of HRD's decision had to have been filed at the Commission by October 21, 2013. Applying the computation of time in 801 C.M.R. 1.01(4)(d), *supra*, yields the same result because the seventeenth day following the issuance of HRD's decision ends on the 21st, which is a Monday.

Attorney Papoulias, for Mr. Thomas, asserts that he sent appropriate documents to the Commission on or around October 1, 2013 in anticipation of HRD's denial of Mr. Thomas' appeal and because he expected to be out of the office for some period around that time. The Commission did not receive any documents dated October 1, 2013 until the Appellant filed his appeal on November 18, 2013. Indeed, the October 1, 2013 letter to which Attorney Papoulias refers is not dated-stamp as received by the Commission. Even if the Commission had received

¹⁰ With respect to disciplinary appeals filed at the Commission under G.L. c. 31, § 43, that section provides, in pertinent part, that "Saturdays, Sundays and legal holidays shall not be counted in the computation of any period of time specified in this section." *Id.* There is no similar provision in section 24.

such documents on or about October 1, 2013, it would be unavailing. Section 22 of G.L. c. 31 specifically “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*” and HRD did not issue its decision until October 4. In addition, Attorney Papoulias asserts that he filed a timely appeal because he received a check from Mr. Thomas at or around October 1, 2013, inferring that Mr. Thomas’ check was for the filing fee at the Commission, while not asserting and/or offering evidence that he submitted the filing fee prior to November 18, 2013. Moreover, the Commission did not receive a filing fee from the Appellant until November 18, 2013.

The Appellant further avers that if he missed the filing deadline at the Commission, it is the fault of HRD. Specifically, the Appellant states that HRD failed to alert him to the seventeen-day deadline, at least when it approved BadgeQuest’s report and denied his appeal. As the Commission has urged on other occasions, HRD should so inform examinees, at least when it denies an appeal. However, providing information about appeals of HRD decisions to the Commission is not required under G.L. c. 30A, § 8(11), contrary to the Appellant’s argument, since HRD is excluded from the provisions of that statute in section 1. Therefore, the provision of Chapter 30A, § 8, requiring appropriate “agencies” to provide such notice, is not applicable in this case. Further, at least as of October 1, 2013, three (3) days before HRD issued its decision, Mr. Thomas was represented by counsel who should have taken appropriate steps to ensure that the filing deadline was met.¹¹

¹¹ As noted herein, Mr. Thomas is also an attorney. However, he was represented by counsel at least as of October 1, 2013. (Administrative Notice)

In his Opposition, the Appellant asked the Commission to throw out the August 2013 exam, to require that a new test be prepared and administered by HRD and that the Commission conduct an investigation of the August 2013 exam.¹² G.L. c. 31, § 2 provides, in pertinent part,

“In addition to its other powers and duties, the commission shall have the following powers and duties:

(a) To conduct investigations at its discretion or upon the written request of the governor, the executive council, the general court or either of its branches, the administrator, an aggrieved person, or by ten persons registered to vote I the commonwealth.”

(Id.)

It has been established that the Commission has considerable discretion in exercising this authority. Specifically, “the Commission has complete discretion regarding whether and to what extent it investigates civil service employees and actions of appointing authorities. *See* G.L. c. 31, § 72. (‘The commission [...] may investigate all or part of the official and labor services, the work, duties, and compensation of the persons employed in such services, the number of persons employed in such services and the titles, ratings, and methods of promotion in such services.’)” Erikson v. Civil Service Commission and Town of Rockland, Suffolk Superior Court, C.A. No. 2013-00639-D (2014). *See also* Dennehy v. Civil Service Commission, Suffolk Superior Court, C.A. No. 2013-00540 (2014).

Generally, the Commission has chosen to exercise its discretion to initiate investigations on limited occasions and only when there has been a showing that there is a reasonable likelihood that a systemic violation of civil service law and rules has occurred resulting in prejudice of the civil service rights of others. In Re: Request for Investigation (Boston Police Sergeants’ Promotions), Tracking No. I-15-115. Given the lack of such evidence here and in

¹² The Appellant also requested an investigation and “any other State Agency tasked with conducting this type of investigation.” (Appellant’s August 29, 2013 Document) As HRD has already ruled on the Appellant’s appeal, and its decision is addressed herein, it is not clear that an investigation by HRD would be appropriate or warranted. The Commission can only address the matters within its jurisdiction and not matters that may be brought by agencies with other jurisdictions.

view of the adjudication of this appeal, the detailed delegation agreement between HRD and the Town, HRD's approval of BadgeQuest to prepare the August 2013 exam, the oversight of the August 2013 exam, the detailed response of BadgeQuest to the Appellant's appeal and HRD's approval of the BadgeQuest response, I see no reason for an investigation. Therefore, the Appellant's request for an investigation is denied.

Conclusion

For all the reasons stated above, the Appellant's appeal under Docket No. B2-13-247 is hereby *dismissed*.

Civil Service Commission

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 28, 2016.

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:

Anthony L. Papoulias, Jr., Esq. (for Appellant)
Richard W. Kendall, Esq. (for Appellant)
Darren Klein, Esq. (for Respondent)
John Marra, Esq. (HRD)