

## **CLIENT ALERT: Massachusetts Civil Service Commission Upholds “Banding” Scoring Method For Civil Service Promotional Exams**

On March 13, 2009, the Massachusetts Civil Service Commission declined the requests from several police unions to investigate the recent practice of “banding” police promotional examination scores by the state’s Human Resources Division (“HRD”). As a result of the Commission’s decision, the 2009 eligibility lists for sergeant, lieutenant and captain promotions will be created utilizing banding as the scoring method. This new method of scoring civil service promotional examinations will have several effects on municipalities. In particular, there will now be a larger pool of candidates with tied scores, which will allow municipalities additional discretion in the selection of suitable candidates for promotion.

### **I. Massachusetts Civil Service Law**

The Massachusetts Civil Service Law governs the hiring and promotion of individuals for civil service positions such as police officers and firefighters. Under the law, individuals must take an examination in order to be eligible for hiring or promotion to these positions. HRD is the entity which is responsible for the administration and scoring of such examinations. Following the administration and scoring of examinations, HRD establishes an eligibility list of persons who have passed.

For promotional examinations, eligibility lists are arranged in order of individuals’ scores. For original appointment examinations, the names of persons who pass are placed on eligibility lists in the following order, each group in the order of their respective standings: (1) disabled veterans; (2) veterans; (3) widows or widowed mothers of veterans who were killed in action or died from a service connected disability incurred in wartime service; and (4) all others.

When a municipality has a vacancy to be filled, it must file a requisition with HRD, which in turn shall forward a “certification” containing a list of candidates for the position. HRD creates these certifications by taking names from the eligibility list of the individuals with the highest marks who otherwise meet the qualifications of the position sought to be filled. The certifications also list the individuals in order of their marks.

Where a certification contains at least three names, municipalities are bound to fill their position with an individual from the certification. Furthermore, municipalities are to fill their vacancy with the individual on the certification with the highest mark, unless they find that another candidate is better qualified for the position. If the municipality chooses not to hire the candidate with the highest mark, it is considered to have “bypassed” that individual and must provide a written statement supporting its decision to do so. Such bypasses are often subject to scrutiny and appealed to the Commission.

In circumstances where individuals have received the same score for an examination, municipalities are generally free to choose whichever of the tied candidates they desire, and such a choice is not

considered a bypass under the Civil Service Law. Furthermore, municipalities are free to use whatever selection criteria they see fit to choose between tied candidates as long as such criteria is not discriminatory, contrary to the objectives of the civil service law, or illegal in some other manner.

## **II. The Effect Of Banding On Examination Scores**

Under banding, individuals who would have been separated by a few points from their final score under the previous scoring methods will now be within the same band and therefore have the same score as all other individuals within that band. Therefore, the certifications received by municipalities will contain a much larger number of individuals with tied scores from whom the municipalities can select.

Under Massachusetts Civil Service law, HRD is responsible for the administration and scoring of civil service examinations within the Commonwealth. On October 18, 2008, HRD administered promotional police officer examinations for the ranks of sergeant, lieutenant, and captain.

Traditionally, HRD has scored such examinations so that test takers were given a numbered score between 1 and 100. However, HRD will use banding for the creation of the 2009 eligibility lists established in connection with the October 2008 test, marking the first use of banding in connection with promotional examinations. Previously, in 2008, HRD had employed the practice of banding for eligibility lists for the entry-level positions of police officer and firefighter. There was no challenge to the implementation of the practice at that time.

Through banding, HRD scores the examinations and places each applicant within a particular score band of one through six. This band acts as an individual's final score for hiring purposes. The effect of HRD's implementation of banding is to essentially create more tied scores between individuals, thereby providing municipalities with greater discretion in filling vacancies. As the Commission noted in its decision:

"[B]anding is a technique that combines candidates with close test scores into one unit from which the hiring authority may appoint any member. It removes statistically inappropriate barriers to appointing candidates who are best able to succeed, and enables government hiring officials to include modern workplace competencies in the selection analysis."

Test-takers of the October 2008 sergeant, lieutenant and captain promotional have received their preliminary score and a proposed band within which they may fall, but final scores were not issued while the matter was appealed before the Civil Service Commission, which has review authority over matters related to civil service examinations. Now that the Commission has effectively adopted banding, it is expected that a final eligibility list will be created within the next few weeks and no later than April 21, 2009.

## **III. Civil Service Commission Decision**

On March 3, 2009, the Commission held a pre-hearing conference to determine whether to open an

investigation into HRD's implementation of banding with regards to the promotional civil service examinations. The focus of the hearing was not on the merits of banding, but rather whether HRD properly implemented its use or whether it had improperly changed one of its rules.

The Civil Service Law provides HRD with the authority to "make and amend rules" in conjunction with the scoring of civil service examinations. Prior to making a rule change, HRD must comply with several different provisions including review by the Commission, provision of notice of the proposed rule, and hosting of a public hearing on the proposed rule at least 30 days prior to its implementation. It is uncontested that HRD did not partake in any of these activities prior to implementing banding for the promotional examinations. Therefore, the question at issue was whether in fact HRD's switch from the old scoring method to banding actually constituted a rule change. The rule under scrutiny with the implementation of banding was PAR.07(4), which states: "The examination marks shall be presented on eligible lists in whole numbers."

In its decision, the Commission adopted HRD's position that the use of banding is not in violation of HRD's current rules, as the banding method still provides individuals with their scores in "whole numbers" with those numbers currently being one through six. The Commission rejected the unions' counter-argument that banding is in direct conflict with PAR.07(4) by alleging the use of "whole numbers" implies the numbers 1 to 100.

#### **IV. Potential Effects on Municipalities**

The effect of banding to fill civil service positions puts heightened importance on municipalities' tie-breaking procedures. Where certifications for municipal positions will now contain more individuals with tied scores, municipalities are going to have greater discretion in choosing the individuals they desire to fulfill positions. If they have not already done so, municipalities should formulate a selection process for choosing between these individuals.

Given this significant departure from previous civil service hiring practice in Massachusetts, it is likely that public sector unions will demand to bargain over the creation of such procedures, and employees will test the validity of any procedures through future litigation. In fact, several unions have already stated their position that the creation of such procedures is a mandatory subject of bargaining.

Within its March 13, 2009 decision, the Commission acknowledged these potential impacts of banding, and stated that HRD should be actively encouraging adoption of best practices to ensure that such tie-breaking methods are consistent with, and applied in accordance with, basic merit principles and all other applicable laws. The Commission's decision also included the following warning to those making promotions:

"We will not stand idly by if presented with competent evidence that unlawful favoritism was the driving force behind a particular promotional appointment."

Accordingly, municipalities should make sure to devote the time and effort necessary to create a selection process which is fair, neutral and able to withstand future legal challenges.



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For any further information or assistance, please contact your MBJ attorney.

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