COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

HELGA ALLEN,
Appellant

v.

D1-13-86

TAUNTON PUBLIC SCHOOLS,
Respondent

Appearance for Appellant:

Joseph J. McArdle
Mass. Laborers Union
7 Laborers Way
Hopkinton, MA 01748

Appearance for Respondent:

Marguerite M. Mitchell, Esq.
Taunton Public Schools
215 Harris Street
Taunton, MA 02780

Commissioner:

Christopher C. Bowman

DECISION ON RESPONDENT'S MOTION TO DISMISS

On March 26, 2013, Helga Allen (Ms. Allen) filed an appeal with the Civil Service Commission (Commission) pursuant to G.L. c. 31, §§ 42 and 43 to: 1) contest whether the Taunton Public Schools (School Department) had just cause to terminate her from her civil service position of part-time cafeteria helper (Section 43 "just cause" appeal); and 2) contest whether the School Department followed the requirements of G.L. c. 31, § 41 in terminating her (Section 42 "procedural" appeal).

A pre-hearing was held at the UMASS School of Law in North Dartmouth on May 10, 2013. On June 26, 2013, the School Department filed a Motion to Dismiss, alleging that the appeal to

the Commission was not filed within ten days after Ms. Allen received written notice of the School Department's decision to terminate her employment and, as a result, is untimely under G.L. c. 31, §§ 42 and 43. A motion hearing, which was digitally recorded, was held at the same location as the pre-hearing on June 28, 2013. I heard oral argument from counsel for the School Department and Ms. Allen's union representative.

Based on the Motion to Dismiss, the parties' oral argument, taking administrative notice of all matters filed in the case, I find the following for the purposes of ruling on the Respondent's Motion to Dismiss:

1. Ms. Allen was employed by the School Department from 1997 until her termination on July 25, 2012. At the time of her termination, Ms. Allen was a permanent, tenured civil service employee in the position of part-time cafeteria helper. (Stipulated Fact)
2. On June 12, 2012, Ms. Allen, while on duty, held up a piece of burnt chicken and referred to it as a "n----r" chicken, which even Ms. Allen acknowledged was inappropriate. (Statement of Ms. Allen)
3. Sometime between June 12, 2012 and June 18, 2012, Ms. Allen received a phone call from her union representative telling her that there would be a meeting with Karen Pappa, Director of Food Services, to discuss the June 12, 2012 incident. (Statement of Ms. Allen)
4. Ms. Allen never received a written notice regarding the June 18, 2012 meeting, thus she was never informed in writing of the charges against her, that the School Department was considering whether to terminate her nor was she provided with a copy of G.L. c. 31, §§ 41-45. (Statement of Ms. Allen)[1]

[1] The School Department submitted an affidavit from the Director of Personnel and Student Services stating that it was his normal practice to send such notice. However, he also stated that he had no specific memory of the

5. During the June 18, 2012 meeting, Ms. Allen, who was accompanied by union representatives, admitted that she made the inappropriate remark and apologized. She was told by Ms. Pappa that she was going to be terminated. (Statement of Ms. Allen)
6. On July 25, 2012, Ms. Pappa and her union representatives had a meeting with then-Director of Personnel-Student Services Michael J. Ferrari to discuss a possible settlement in lieu of termination. (Statement of Union Representative Joe McArdle and letter dated July 25, 2012 from Mr. Ferrari)[2]
7. Either on or within one week of July 25, 2012, Ms. Allen received a letter from Mr. Ferrari stating that she had been terminated, effective June 19, 2012. (Statement of Ms. Allen)
8. The Superintendent of Schools is Ms. Allen's Appointing Authority. (Statement of counsel for School Department; G.L.c.71,59B)
9. Ms. Allen filed the instant appeal with the Commission on March 26, 2013, approximately eight (8) months after she received the termination notice. (Stipulated Fact)

Standard for Consideration of a Motion to Dismiss

The United States Supreme Court has held that in order to survive a motion to dismiss, the non-moving party must plead only enough facts to state a claim to relief that is plausible on its face. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547 (2007). Thus, the non-moving party must plead enough facts to raise a reasonable expectation that discovery will reveal evidence in support of the allegations. See id. at 545. Similarly, the Massachusetts Supreme

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documentation sent to Ms. Allen. The School Department, after searching its records, was unable to produce any such documentation. For these reasons, and because what is currently before the Commission is the Respondent's Motion to Dismiss, I have accepted, for the purposes of deciding this motion, that Ms. Allen did not receive any written notification about the June 18, 2012 meeting.

[2] Mr. McArdle was not one of the union representatives present at the July 25, 2012 meeting.

Judicial Court has held that an adjudicator cannot grant a motion to dismiss if the non-moving party's factual allegations are enough to raise a right to relief above the speculative level based on the assumption that all the allegations in the appeal are true, even if doubtful in fact. See Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008). The Standard Adjudicatory Rules of Practice and Procedure (hereinafter "Rules") govern administrative adjudication. 801 CMR 1.01, *et seq*. However, Commission policy provides that when such rules conflict with G.L. c. 31, the latter shall prevail; there appears to be no such conflict here. The Rules indicate that the Commission may dismiss an appeal for lack of jurisdiction or in the event the appeal fails to state a claim upon which relief can be granted. 801 CMR 1.01(7)(g)(3).

Applicable Civil Service Statutes

G.L. c. 31, § 41 sets forth the mandatory procedures that must be followed when discharging a tenured employee for just cause. Pursuant to G.L. c. 31, § 41, prior to taking any action against such an employee, the appointing authority must provide a written notice to said employee, stating the action contemplated, the specific reason(s) for such action, along with a copy of G.L. c. 31, §§ 41-45, and shall provide the employee a full hearing concerning such reason(s) before the appointing authority. With few exceptions, such an employee must be given at least three days' notice of the time and place of such a hearing. G.L. c. 31, § 41. Following a hearing, if it is the decision of the appointing authority that there was just cause for an action taken against a person, such person may appeal to the Commission as provided in G.L. c. 31, § 43. G.L. c. 31, § 41.

G.L. c. 31, § 42, provides in pertinent part: "Any person who alleges that an appointing authority has failed to follow the requirements of section forty-one in taking ***action*** which has affected his employment or compensation may file a complaint with the commission. Such

complaint must be filed within ten days, exclusive of Saturdays, Sundays, and legal holidays, after ***said action*** has been taken, or after such person first knew or had reason to know of ***said action***, and shall set forth specifically in what manner the appointing authority has failed to follow such requirements. If the commission finds that the appointing authority has failed to follow said requirements and that the rights of said person have been prejudiced thereby, the commission shall order the appointing authority to restore said person to his employment immediately without loss of compensation or other rights." (emphasis added)

G.L. c. 31, § 43 provides, in pertinent part: "If a person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days[3] after receiving written notice of such decision, appeal in writing to the commission, he shall be given a hearing before a member of the commission . . . ."

The Respondent's Argument

The School Department argues that Ms. Allen's appeal with the Commission is untimely, as it was filed on March 26, 2013, several months after the ten day requirements referenced in Sections 42 and 43, and, as a result, the appeal should be dismissed.

Appellant's Argument

Ms. Allen argues that, as a result of the School Department's failure to provide her with copies of Sections 41-45, which should have been attached to a letter, which was never sent, regarding a local hearing, she was unaware of the ten-day filing requirement.

Analysis

It is undisputed that Ms. Allen received her termination notice and, as such, became aware of her termination, no later than one (1) week after July 25, 2012. Sections 42 and 43 require that

[3] "Saturdays, Sundays and legal holidays shall not be counted in the computation of any period of time specified in this section." G.L. c. 31, § 43.

Ms. Allen's appeal be filed within ten (10) [business] days after receiving the termination notice (Section 43) or when she first became aware of ***said action*** (the termination) (Section 42). Even accepting Ms. Allen's statement that she may not have received the notice for up to one (1) week after July 25, 2012, her appeal is still untimely by several months. Further, neither Section 42 or 43 allows the Commission to toll this statutory time-period based on the Appointing Authority's failure to follow the requirements of Section 41 (i.e. – hearing notice with Sections 41-45 attached; a local civil service hearing, etc.) Rather, in order for the Commission to have jurisdiction to rule on such issues, the plain language of the statute requires the Appellant to file an appeal with the Commission within the ten-day filing deadline referenced above.[4]

In making this decision, I considered that Ms. Allen, at every step in this process, was represented by union representatives who should have been aware of the deadline for filing an appeal with the Civil Service Commission. Had that not been the case, I may have evaluated whether the language in Section 42 pertaining to filing deadlines has an illogical result (i.e. - The Appellant is unaware of the filing deadline because the Appointing Authority failed to provide them with Sections 41-45, as required. However, the Appellant is then barred from filing an appeal with the Commission as a result of the Appointing Authority's failure to provide them with Sections 41-45, which contains the filing deadlines.)

Conclusion

Based on the facts and the law provided herein, the appeal is untimely. Therefore, the School Department's Motion to Dismiss is hereby allowed and the appeal is ***dismissed.***

[4] The same holds true regarding the Appellant's belated argument, prompted by questions I raised at the motion hearing, that Mr. Ferrari may not have been authorized to issue the termination notice as he is not the Appointing Authority.

Civil Service Commission

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Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell, and Stein, Commissioners) on August 22, 2013.

A true record. Attest:

_____
Commissioner

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.

Notice:
Joseph McArdle (for Appellant)
Marguerite M. Mitchell, Esq. (for Respondent)