

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

MICHAEL CUTLER	C-17-105
BRIAN HARNEY	C-17-106
CHERYL LYNCH	C-17-107
HEATHER CATHERWOOD	C-17-111
KIMBERLY LESTER	C-17-112
DANIEL BIAGIOTTI	C-17-113
JEREMY BOHN	C-17-114
ANNA RUDGE	C-17-115
DAVID LY	C-17-116
EDWARD WANG	C-17-121
JOHN WHELAN	C-17-122

Appellants

v.

EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES /
DEPARTMENT OF TRANSITIONAL ASSISTANCE,

Respondent

Appearance for Appellants:

Michael Cutler
Cheryl Lynch
Jeremy Bohn

Appearance for Respondent:

Donna Morin
Director of Labor Relations
EOHHS-Children, Youth & Families
600 Washington Street: 7th Floor
Boston, MA 02111

Commissioner:

Christopher C. Bowman

DECISION

Filing of the Appeals / Pre-Hearing

Pursuant to the provisions of G.L. c. 30, s. 49, the Appellants, all of whom are classified as Review Examiner IIs (RE IIs) at the Department of Transitional Assistance

(DTA), an agency within the Executive Office of Health and Human Services (HHS), filed timely appeals with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) to affirm DTA's decision to deny the Appellants' requests for reclassification to the higher title of Counsel II.

I held a pre-hearing conference regarding all of these appeals at the offices of the Commission on July 18, 2017, at which time it was agreed that these appeals would be heard concurrently and that three of the Appellants (Cutler, Lynch and Bohn) would appear on behalf of the Appellants at the full hearing.

Motions to Dismiss

Prior to the full hearing, DTA submitted motions to dismiss seven (7) of the appeals as follows:

- Appellants Lynch, Catherwood, Lester, Rudge, Whelan

DTA argues that these Appellants do not meet the minimum entrance requirements (MERs) of Counsel II, based on not having "at least three years of full-time, or equivalent part-time experience in the practice of law." Each of these Appellants filed an opposition to the motions. While some of the Appellants cited legal experience unique to them, all of them also argued that they have been engaged in the "practice of law" as a RE II, which they argue should count toward the three (3)-year requirement referenced above.

- Appellant Wong

DTA argues that this Appellant does not meet the MERs of Counsel II, as his current bar status, as of the date of the motion, was on in an "Administrative Suspension for Non-Registration" by the Board of Bar Overseers (BBO). The Appellant filed an opposition

stating that he had initiated the process for “Registration Reinstatement” with the BBO, which will allow him to meet the MERs of the Counsel II classification.

▪ Appellant Ly

DTA argues that this Appellant does not meet the MERs of the Counsel II, as he does not possess a Juris Doctor degree and is not a member of the Massachusetts Bar. At the commencement of the full hearing, Mr. Bohn stated that Appellant Ly was not contesting this Motion to Dismiss.

With the exception of the motion related to Mr. Ly (which is allowed without objection), I took the motions to dismiss under advisement and proceeded with the full hearing.

Full Hearing

As referenced above, Appellants Cutler, Lynch and Bohn appeared on behalf of all eleven (11) Appellants at the full hearing, which was held at the offices of the Commission on September 6, 2017. Donna Morin, Director of Labor Relations, for Children, Youth and Families (CYF) within HHS, appeared on behalf of DTA. Melanie Gurliaccio, who served as Employment and Staffing Manager for HHS, supporting CYF agencies and reviewed all of the classification requests relevant to these appeals, was called to testified for DTA as was Colin Connor, the Director of the Division of Hearings within DTA. Mr. Cutler was called to testify for the Appellants.

The parties entered nine (9) exhibits (Exhibits 1-9). Also included in the record are: copies of current resumes submitted by each Appellant; the “interview guides” specific to each of the Appellants; and the stipulated facts sheets prepared and signed by each Appellant and DTA at the pre-hearing.

Based on the exhibits, the testimony, the stipulated facts and taking administrative notice of all matters filed in the case, pertinent statutes, regulations, policies, and reasonable inferences I have drawn from the credible evidence, a preponderance of the evidence establishes the findings of fact referenced below.

Findings of Fact

1. HHS is the largest secretariat in state government and is comprised of 12 agencies, in addition to 2 soldiers' homes and the MassHealth program. (www.mass.gov/eohhs)
2. DTA, an agency within HHS, assists and empowers low-income individuals and families to meet their basic needs, improve their quality of life, and achieve long term economic self-sufficiency. DTA serves one in eight residents of the Commonwealth with direct economic assistance (cash benefits) and food assistance (SNAP benefits), as well as workforce training opportunities. (www.mass.gov/dta)
3. G.L. c. 18, § 16 states:

“There shall be within the office of the deputy commissioner [of DTA] a division of hearings for the purpose of holding the hearings referred to herein and rendering decisions. Said division shall be under the supervision of a director appointed by the commissioner and shall be independent of all other divisions and personnel of the department.

Any person aggrieved by the failure of the department to render adequate aid or assistance under any program of aid or assistance administered by the department or to approve or reject an application for aid or assistance thereunder within forty-five days after receiving such application, or aggrieved by the withdrawal of such aid or assistance, or by coercive or otherwise improper conduct on the part of his social worker, shall have a right to a hearing, after due notice, upon appeal to the commissioner.

A person whose benefits have been expunged under clause (m) or (n) of section 2 shall, upon request of the person, be afforded a full and fair hearing to determine whether there exists a legitimate reason for the person to maintain a balance in excess of \$2,500 or for not accessing the person's benefits for more than 270 days. Upon a finding by the commissioner that a legitimate reason exists, the commissioner shall reinstate the expunged benefits.

A hearing held pursuant to this section shall be conducted by a referee designated by the director at a location convenient to the person appealing and shall be conducted as an adjudicatory proceeding under chapter thirty A. The director of the division of hearings shall be responsible for the fair and efficient operation of the division in conformity with state and federal laws and regulations and for the training of referees, scheduling of hearings and the compilation of decisions. Neither he nor any other employee of the department shall review, interfere with, change or attempt to influence any hearing decision by a referee. A referee may subpoena witnesses, administer oaths, take testimony and secure the production of such books, papers, records and documents as may be relevant to such hearing. The person appealing shall have the opportunity to confront and cross-examine all adverse witnesses and to question or refute any testimony, evidence, materials, or legal arguments. The referee shall base his decision solely on the testimony, evidence, materials and legal rules adduced at the hearing. The referee may reopen a hearing for the purpose of considering further testimony, evidence, materials or legal rules before rendering his decision and shall, if he reopens the hearing, send seven days' written notice to all parties of the reopening and his reasons therefor, including the date, time and place of the resumed hearing, which shall be held at a location convenient to the person appealing. The decision of the referee shall be the decision of the department.

A referee shall render and issue his decision within ninety days after the date of the filing of the aggrieved person's appeal, except that when an aggrieved person appeals the rejection of his application for aid or assistance, or the failure to act on said application, or the failure of the department to render assistance to meet an emergency or hardship situation, the referee shall render and issue his decision within forty-five days after the date of filing of said appeal. The decision of the department shall be subject to review in accordance with the provisions of chapter thirty A.

When a timely request for a hearing is made because of a termination or reduction of assistance, involving an issue of fact, or of judgment relating to an individual case, between the agency and the appellant, assistance shall be continued during the period of the appeal. If the decision is adverse to the appellant, assistance shall be terminated immediately. If assistance has been terminated prior to a timely request for a hearing, assistance shall be reinstated.”

4. Colin Connor has been the Director of DTA’s Division of Hearings since 2014. He has been employed by DTA since 1992 and previously served as a RE II (13 years) and Assistant Director (4 years). (Testimony of Mr. Connor)
5. In addition to Mr. Connor, the Division of Hearings includes an Assistant Director; six (6) Program Coordinator II (PC II)s who coordinate the administrative aspects of

the Division of Hearings; and sixteen (16) hearing officers who report directly to Mr. Connor. (Testimony of Mr. Connor and Exhibit 5)

6. All sixteen (16) hearing officers are classified as RE IIs. (Testimony of Mr. Connor and Exhibit 5)
7. In order to be classified as a Counsel II, the classification being sought by the Appellants here, applicants “must have a juris doctor (JD) degree, admission to the Massachusetts Bar and (A) at least three years of full-time, or equivalent part-time, professional experience in the practice of law.” (Exhibit 1)
8. Mr. Connor interviews and hires all of the hearing officer candidates for DTA’s Division of Hearings. (Testimony of Mr. Connor)
9. When reviewing candidates for the position of hearing officer, Mr. Connor looks for candidates that can communicate effectively, have strong analytical skills, have the ability to hear both sides of an argument, have the ability to exert the type of authority needed to conduct a hearing and have some type of past experience either as a hearing officer or in some capacity where legal analysis or related writing was required. (Testimony of Mr. Connor)
10. Mr. Connor considers both attorneys and non-attorneys for the position of hearing officer, as some qualified candidates are not necessarily attorneys, including some hearing officers currently employed by the Division of Hearings. Mr. Connor considers being an attorney a “desired trait” for the position of hearing officer, as that implies the ability to effectively write and communicate and analyze some of the legal issues that arise. However, whether or not a candidate is an attorney is not dispositive of whether he/she is hired as a hearing officer. (Testimony of Mr. Connor)

11. Since 2012, only one (1) person hired as a hearing officer (Mr. Ly) was not an attorney, which Mr. Connor attributes to the fact that a large percentage of the candidates were attorneys and that he considers being an attorney a desired, although not required, trait, as referenced above. (Testimony of Mr. Connor)
12. Although Mr. Connor is an attorney, he is not required to be an attorney to serve as Director and neither of his two (2) predecessors in that position was an attorney. (Testimony of Mr. Connor)
13. Although many appeals are dismissed without requiring a hearing (i.e. – lack of prosecution), the Division of Hearings receives approximately twelve hundred (1200) appeals per month. The appeals are divided up among the sixteen (16) hearing officers, typically by geographical assignment (i.e. – four (4) hearing officers stationed in Western Massachusetts who hear cases from that region of the state.) (Testimony of Mr. Connor)
14. The hearing officers at the Division of Hearings at DTA perform all five (5) of the following “duties common to all levels” in the Review Examiner Series:
 1. “Conduct hearings on appeals of claims for agency services of benefits including explaining issues, advising participants of their rights, interpreting applicable rules and regulations and determining the admissibility of evidence and testimony presented in order to gather information and render decisions based upon evidence submitted.
 2. Verifies information obtained in order to establish accuracy and authenticity of facts and evidence relative to claims submitted.
 3. Prepares reports, including decisions on hearings conducted, in order to provide information and make appropriate recommendations and to notify appellants and other appropriate parties of appeals decisions.
 4. Confers with agency staff in order to exchange information and to resolve problems concerning claims for agency services or benefits.

5. Reviews data to determine compliance with applicable laws, rules and regulations, to determine course of action and to make appropriate recommendations.”

(Testimony of Mr. Connor and Exhibit 2)

15. The hearing officers also perform all three (3) of the following level-distinguishing duties of a RE II:

1. “Review reports for accuracy, completeness and content and to take appropriate action to resolve problems.
2. Oversee and monitor assigned unit activities in order to ensure effective operations and compliance with applicable laws, rules and regulations.
3. Confer with management staff and other agency personnel in order to provide information and resolve problems.”

(Testimony of Mr. Connor and Exhibit 2)

16. “There are three levels of work in the Counsel series. Incumbents of classification in this series represent the interests of assigned agencies in dispute resolution and legal proceedings; collect facts and evidence; perform legal research and analysis; prepare and manage cases for review by a tribunal; provide guidance, advice and recommendations to agency staff and others on legal matters; draft administrative and legal documents; and provide customer service and information to the public on agency functions, rules and regulations. The basic purpose of this work is to provide legal representation and support to the agency and to help it fulfill its mission and meet its legal obligations.” (Exhibit 2)

17. At the Counsel II level, incumbents are “expected to perform the duties described for Level I, but generally will have more experience and expertise handle more complex cases and collaborate and interact with others outside the agency more often.”

(Exhibit 2)

18. The hearing officers at DTA’s Division of Hearings perform only two (2) of the eight (8) “Level I” duties in the Counsel Series. The two, “Level 1” duties that they perform are: 1) Drafting decisions; and 2) Managing and monitoring individual cases. The DTA hearing officers typically spend 60% of their time drafting decisions. (Testimony of Mr. Connor)
19. The specifications for Counsel II state that a Counsel II “may perform” the following three (3) “additional functions”:
 1. “Communication with other representatives of other agencies, including the Legislature and collaborate with cross-functional or cross-agency teams and stakeholders to share information, resolve issues and develop or implement new programs.
 2. Draft new polices and regulations or amendments to existing policies and regulations, based on legal research and agency needs, to streamline agency practices, support operational efficiencies and ensure agency compliance with laws.
 3. Present memoranda supporting or opposing legislation affecting agency operations.” (Exhibit 1)
20. The hearing officers at DTA’s Division of Hearings do not perform any of the three (3) above-referenced “additional functions”. (Testimony of Mr. Connor)
21. The specifications for Counsel II list “additional key accountabilities” which state that Counsel IIs have the decision-making authority to:
 1. Allocate cases and assignments to supervisees most appropriately.

2. Prioritize and manage personal assigned workloads and caseloads as well as the workloads and caseloads of direct reports.
3. Issue recommendations for final decision or resolution of cases, and for some cases, to issue or agree to final resolution without further review.”

(Exhibit 1)

22. The hearing officers at DTA’s Division of Hearing do not have any direct reports.

Thus, they do not allocate cases to supervisees nor do they prioritize and manage the caseloads of direct reports. They do manage their own caseloads and issue decisions.

(Testimony of Mr. Connor)

23. Mr. Connor does not consider any of the hearing officers, including those who are attorneys, to be engaging in the “practice of law” because they are not representing clients and some of the attorneys employed at DTA’s Division of Hearings have “inactive” law licenses. (Testimony of Mr. Connor)

24. Sometime in the early 1990s, a reorganization occurred which resulted in the creation of what is now the separate “Division of Medical Assistance” (DMA) within HHS. Many of the functions now performed by DMA were previously performed by what is now DTA. As part of that reorganization, a separate “board of hearings” was established within DMA. Some of the DTA hearing officers stayed with DTA and some took positions at the DMA Board of Hearings. (Testimony of Mr. Connor)

25. Mr. Connor, who was employed by DTA at that time, stayed with DTA as a hearing officer. He and others were initially classified as RE Is and subsequently reclassified to RE IIs. (Testimony of Mr. Connor)

26. The statute that allows for the DMA “Board of Hearings” (G.L. c. 118E, § 48) effectively mirrors the enabling statute for the DTA “Division of Hearings.” Neither statute requires that the hearing officer be an attorney. (Administrative Notice)
27. Hearing officers employed by the DMA Board of Hearings are classified as “Counsel IIs”. A minimum entrance requirement for hearing officers at the DMA Board of Hearings, as stated in the agency-created “Form 30 Position Description” is that “applicants must have at least one (1) year of full-time, or equivalent part-time, professional experience in the practice of law of which major duties include administrative law practice, health law practice or claims practice, or in a position requiring membership in the Bar.” (Exhibit 4)
28. Mr. Cutler, one (1) of the Appellants here who is now employed as a DTA hearing officer and is classified as a RE II, previously worked as a hearing officer for DMA from 2002 to 2005 and was classified as a Counsel II. He has not found “anything fundamentally different” between the two (2) jobs. (Testimony of Mr. Cutler)
29. Two (2) of the following duties included on the Form 30 Position Description for DMA Hearing Officer are not included on the Form 30 Position Description or DTA Hearing Officer: “1) In the event of a request for mediation of a dispute preside as mediator pursuant to 130 CRM 610.051; and 2) Advise hearings staff through ‘hearing officer’ presentation of hearing matters by presenting topics, legal research, regulations and hearing outcome ...” (Exhibits 3 and 4)
30. A growing number of appeals at DMA “involve claims for eligibility and/or reimbursement of an elderly MassHealth / Medicaid applicant who is seeking reimbursement for long-term care services. These ‘elder law’ cases require a more

complex inquiry into the applicant’s assets, in addition to income, with special rules about how assets are counted in determining if a person qualifies for Medicaid/MassHealth benefits, such as a ‘look back’ period for assets transferred within the past five years, assets placed in trust or held by family members. These cases require an understanding of both the Medicaid/MassHealth law and regulations as well as an understanding of the developing body of ‘elder law’. Due to the high-stakes nature of these cases and the unsettled nature of the interface between Medicaid/MassHealth law regulations and the developing body of ‘elder law’, appellants in long-term care appeals almost always retain counsel and have been the subject of considerable dispute, both within the [DMA] Board of Hearings and in judicial appeals.” (Administrative Notice: Kallianidis v. EOHHS / Division of Medicaid / Board of Hearings, CSC Case No. C-17-028 (March 15, 2018)).

Legal Standard

“Any manager or employee of the commonwealth objecting to any provision of the classification affecting his office or position may appeal in writing to the personnel administrator and shall be entitled to a hearing upon such appeal Any manager or employee or group of employees further aggrieved after appeal to the personnel administrator may appeal to the civil service commission. Said commission shall hear all appeals as if said appeals were originally entered before it.” M.G.L. c. 30, § 49.

The burden of proof lies with the Appellants to show that they are improperly classified and to do so, they must show that they performs the duties of the Counsel II title more than 50% of the time. See Gaffey v. Dept. of Revenue, C-11-126 (July 18, 2011); see also Bhandari v. Exec. Office of Admin. and Finance, 28 MCSR 9 (2015)

(finding that “in order to justify a reclassification, an employee must establish that he is performing duties encompassed within the higher level position the majority of the time....”); Haque v. Dept. of Environmental Protection, 27 MCSR 585 (2014) (opining that the appellant “has the burden of proof to show by a preponderance of the evidence that she is currently routinely performing the specific duties of [the title sought] for at least 51% of the time”); Cascio v. Dept. of State Police, 26 MCSR 6 (2013) (finding that where the appellant “ha[d] not shown that she perform[ed] the[] duties,” she “therefore ha[d] not met her burden of proof”).

Analysis

The job duties and responsibilities of the Appellants here fall squarely within the job specifications of a Review Examiner II. In fact, this is one of the rare cases in which job specifications drafted approximately three (3) decades ago so clearly align with the current duties of the incumbent employees.

RE IIs are required to conduct hearings regarding administrative appeals, write decisions and manage their own caseload. That is precisely what the Appellants do as hearing officers on a daily basis at DTA’s Division of Hearings. Although the facts are largely undisputed here, I gave significant weight to the testimony of the Director of the Division of Hearings. Mr. Connor offered straightforward, credible testimony that was grounded in years of experience, including many years in which he served as a hearing officer. Further, regarding an issue that is important to these appeals, Mr. Connor confirmed that individuals serving as hearing officers at DTA are not required to be an attorney, an MER of the Counsel II job title. In fact, one of the hearing officers hired as recently as 2012 (Mr. Ly) is not an attorney. In short, while attorneys may be well-suited

for these positions, non-attorneys with strong communication, writing and analytical skills have been shown to perform the job equally well. In fact, it is noteworthy that two (2) of the previous Directors in charge of *supervising* the hearing officers at DTA were not attorneys.

Although two (2) of the duties listed in the Counsel Series (drafting decisions, managing caseloads) overlap with the Review Examiner Series, the Appellants perform none of the level-distinguishing duties of a Counsel II.

The genesis of these appeals appears to be rooted in the fact that hearing officers at the Board of Hearings at DMA, another HHS agency, are classified as Counsel IIs. The Commission has consistently upheld that “when reviewing reclassification appeals, the [Appointing Authority] only looks at the duties of the Appellant.” McBride v. Department of Industrial Accidents, 28 MCSR 242 (2015) (citing Palmieri v. Department of Revenue, 26 MCSR 180 (2013) (internal citations omitted)). In considering the implications of this standard, the Commission notes that even if another employee is misclassified, “[i]f one employee's misclassification could or should lead to other employees' misclassification, then one misclassification error could undo all or most of the civil service system: One employee's misclassification could become the basis for a second employee's misclassification and, so on.” Id. (citing Palmieri v. Department of Revenue, 26 MCSR 180 (2013) (internal citations omitted)).

Even, however, if the Commission were to consider this argument, it is not clear that the Appellants would prevail. While Mr. Cutler credibly testified that the duties and responsibilities of the hearing officers at DMA and DTA (where he worked at both) were fundamentally the same, he did allude to certain long-term care provider cases that

possibly distinguish the two (2) positions. Further, the Form 30 position descriptions for the hearing officer positions at DMA and DTA do appear to be somewhat distinguishable, with the DMA description referencing the ability to conduct mediation when necessary and to conduct training-like sessions for other hearing officers. Finally, as noted in Kallianidis, a recent Commission decision involving a Counsel II at DMA seeking to be reclassified to Counsel III, there does appear to be a certain degree of legal skills required to handle the long-term care appeals that may not be the case regarding the appeals heard by DTA hearing officers.

For all of the above reasons, the Appellants' appeals are hereby *denied*.¹ Nothing in this denial, however, should be construed as a negative reflection on the Appellants or the valuable work they perform for the Commonwealth. Rather, their ability to provide *thousands* of Appellants, including those citizens who depend on public assistance, with a timely and accurate decision is a credit to the knowledge and professionalism displayed by each of the Appellants during these proceedings.

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 May 10, 2018.

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)(I), 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.

¹ In addition to the substantive reasons for denying the appeals here, the appeal of Mr. Ty is dismissed based the fact that he is not an attorney, a requirement of the Counsel job series. Further, given the denial of the appeals here, I need not address the issue, raised in the Motions to Dismiss, regarding whether the Appellants here have been engaged in the "practice of law" and for how long.

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 to:

Appellants

Donna Morin (for Respondent)