

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

ROSE DELLO RUSSO,
Appellant

v.

D-01-1150¹

BOSTON SCHOOL DEPARTMENT,
Respondent

Appellant's Attorney:

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Malden, MA 02148

Respondent's Attorney:

Virginia Casey Gosciniak, Esq.
Office of Labor Relations
Boston Public Schools
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Commissioner:

John J. Guerin, Jr.

DECISION ON RESPONDENT'S MOTION FOR SUMMARY DECISION

Procedural Background

On June 27, 2001, the Appellant, Rose Dello Russo (hereafter "Appellant" or "Dello Russo"), filed the present appeal alleging that she was bypassed for original

¹ This appeal was assigned as a "D" case ostensibly because it was filed to enforce a previous Commission decision.

appointment by the Respondent, Boston School Department (“Department” or “Respondent”) as Appointing Authority, and requesting that the Commission enforce its earlier decision on the Appellant’s 1991 bypass. The Appellant seeks damages for lost wages, retirement and medical benefits, future wages and retirement benefits, compensatory damages and attorneys’ fees and costs. On March 16, 2006, the Department filed a Motion for Summary Decision. A Hearing on the Department’s Motion for Summary Decision was held at the offices of the Civil Service Commission on April 20, 2006. One tape was made of the hearing. Post hearing briefs were submitted by the parties, as instructed.

Factual Background

The Appellant was employed at East Boston High School as an Attendance Monitor from 1983 until 1989. In 1988, the Appellant sat for and passed a civil service examination for the positions of Clerk/Typist and Senior Clerk/ Typist. In November 1989, she began working as a provisional Senior Clerk/Typist and became permanent six months later. The Appellant subsequently applied for a Clerk/Typist position at the Department and was not selected. She appealed her non-selection to the Civil Service Commission. On March 26, 1996, the Respondent requested a certification from the HRD to fill vacancies for “fifty (50) Perm Fulltime Clerk/Typists” and HRD issued Certification No. 960159. Also on March 26, 1996, the Department requested a certification from the HRD to fill vacancies for “50 Perm Intermittent Clerk/Typists” and the HRD issued Certification No. 960160. The Appellant’s name did not appear on either

certification. On May 8, 1996, the Respondent requested a certification from the HRD to fill vacancies for “3 Permanent Fulltime Senior Clerk/Typists” and the HRD issued Certification No. 960550. The Appellant’s name did not appear on this certification.

In Rose Dello Russo v Boston School Department, G-2399 (1996), the Commission found that in 1991 the Department had bypassed the Appellant for the Clerk/Typist position and directed that the Massachusetts Department of Personnel Administration² place Dello Russo’s name at the top of the next certification for Clerk/Typist within the Department. The Commission strongly urged that the Appellant be given every possible consideration in the next selection process. On July 12, 1996, the Department advised the Commission that the Appellant’s “prospects are precarious at best” due to implementation of a reorganization plan. The Respondent appealed the Commission’s decision to the Superior Court. On May 1, 1997, the Court dismissed the case because of the Respondent’s failure to join the Appellant as an essential party (defendant) despite being ordered to do so by the Court.

On July 18, 1997, the first request by the Department for a certification from the HRD for “50 Perm Fulltime Clerk/Typists” following the Court’s upholding the Appellant’s appeal was made and the HRD issued Certification No. 970757. The Appellant’s name did not appear on the certification. A September 24, 1997 letter from the Superintendent of the Boston Public Schools advised the HRD of the Commission’s 1996 decision being upheld and requested that the HRD give the Appellant “every

² The Massachusetts Department of Personnel Administration is now the Human Resources Division (“HRD”).

possible consideration” in the selection process and to “make every effort immediately to provide a permanent Civil Service opportunity for which Rose Dello Russo can be considered.” On March 28, 2001, the Respondent requested a certification from the HRD to fill vacancies for “25 Fulltime Clerk/Typists and the HRD issued Certification No. 210145. The Appellant’s name was not on this certification.

On September 19, 2005, the Respondent invited the Appellant to take a typing test on September 27, 2005 in order to be considered for a Clerk/Typist position. The Appellant declined.

Respondent’s Motion for Summary Decision

The Respondent argues that it is entitled to summary decision for a number of reasons: the Appellant failed to commence the bypass appeal within the time limitations prescribed by the Commission; the Appellant did not comply with the residency requirement for a Clerk/Typist position as she does not reside in Boston; the Respondent must hire from the certification list and the Appellant’s name was absent from certifications sent by the HRD and thus the Respondent could not “give her every possible consideration”; persons on an eligible list shall not be eligible for certification for a non-public safety position for more than five years³; and, even if the Appellant’s name had appeared on the certification list, she had no vested rights in an original appointment for a Clerk/Typist position. Additionally, the Department asserts that, even

³ Regina Caggiano, Assistant Director of the HRD’s Civil Service Unit, stated at a January 18, 2006 deposition that it is the HRD’s policy for the Personnel Administrator to use his or her discretion in determining when non-public safety certification lists have been exhausted. Ms. Caggiano testified that, “For non-public safety we either go by the three-year revocation or a five-year.”

if the Commission determines it erred in not considering the Appellant for a Clerk/Typist position, the Commission cannot award back pay.

Initially, the Department argues that the Appellant failed to commence the bypass appeal within the time limitations prescribed by the Commission, specifically claiming that the time for appeal began to run on May 1, 1997 when the Appellant's case was upheld by the Appeals Court and that her appeal, filed in July 2001, is not timely. In 2000, the Civil Service Commission adopted a sixty-day statute of limitations for bypass appeals, requiring Appellants to file their bypass appeal within sixty days of receiving notification of the bypass. However, as the Appellant's present appeal concerns enforcing a bypass decision already made, the Commission rule that requires bypass appeals to be filed within sixty (60) days of being informed of the bypass does not apply here.

Rather than alleging a bypass in her present appeal, the Appellant requests that the Commission prosecute the Department's failure to give her every consideration in the selection process pursuant to its earlier decision and order. Although the Department attacks the Appellant's appeal for being untimely, the Department is partially at fault because it failed to comply with the Commission's prior decision and order. An application of the 1996 Commission decision would have had the Appellant included on certifications issued in 1997 and 2001 and therefore eligible for a Clerk/Typist position. The Appellant had a favorable decision from this Commission, so it is reasonable that she should have been on a subsequent certification list. The Appellant's erroneous exclusion from the certification lists in 1997 and 2001 resulted in her repeatedly not being eligible for a

Clerk/Typist position and constituted an ongoing and actual harm to her employment status. See G.L. c. 31, §2(b) and Francis X. Noe v. Town of Stoughton, G1-03-168 (2005).

In this highly unusual circumstance, the Appellant's appeal may be considered timely. The above being said, the Appellant's claim that she is entitled to damages for lost wages, retirement and medical benefits, future wages and retirement benefits, compensatory damages and attorneys fees and costs, suffers from some insurmountable obstacles, as discussed below.

The Department's assertion that it must hire from the certification and, because the Appellant's name was absent from the certification sent by the HRD, the Respondent could not "give her every possible consideration" is correct. As stated above, subsequent certifications issued by the HRD did not contain the Appellant's name. The Respondent is only able to choose off certification lists from the HRD.

The evidence also shows that the Appellant's eligibility for certification expired. The Appellant stated in her deposition that she took the Civil Service examination for the position of Clerk/Typist and Senior Clerk/Typist in 1988 and has not taken an examination since that time. The list for non-public safety positions, which includes Clerk/Typists, is generally retired or revoked after three to five years. The last test for senior Clerk/Typists and Clerk/Typists was administered in late 1999. As of 2006, there was no current list for a Clerk/Typist.

Further, even if the Appellant's name had appeared on the eligibility list, she had no vested rights in an original appointment for a Clerk/Typist position. Individuals on an eligibility list for promotion do not have vested rights in their particular position on the eligibility list once it is established. Lizotte v City of New Bedford Police Department 12 MCSR 40 (1999). An Appellant's "expectation of selection based on his position on a civil service list does not rise to the level of a property list entitled to constitutional protection." Stuart v. Roache, 951 IF. 2d 446 (1st Cir. 1991). It is a limited preference to be considered for appointment rather than a right to be hired. Accordingly, even if the Appellant's name had appeared on the certifications sent to the Respondent, there is no guarantee that she would have been appointed to a clerk/typist position with the Department. Additionally, the Appellant's declining to take the 2005 typing test causes the strength of her claim to diminish. However, the Department's argument that the Appellant's not meeting the residency requirement is not persuasive; she could have moved back to Boston upon a job offer from the Department.

Finally, even if the Commission determined that the HRD erred in not placing the name of the Appellant on the various certification lists for a Clerk/Typist position, the Commission does not have the power to award the Appellant the relief she argues she is entitled to: to determine that she could have been an employee since May 1990 and award monetary relief following from that determination. St. 1993, c. 310 provides, "If the rights of any person acquired under the provision of chapter thirty-one of the General Laws or under any rule made there under have been prejudiced through no fault of their own, the civil service commission may take such action as will restore or protect such rights,

notwithstanding the failure of any person to comply with any requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration of such rights.” Although the Commission has broad authority provided under Chapter 310 of the Acts of 1993, it does not have the statutory authority to order back pay or the other monetary relief requested by the Appellant. The Commission may only provide the opportunity for an eligible person to be considered for a given position.

Apologies to the Appellant are in order. The Commission apologizes for the time taken to decide this case and to any addition its delay may have added to the Appellant’s already understandable frustration with a Department that, though it did not ultimately violate G.L. c. 31, treated her, intentionally or not, undeservedly. The HRD is also to blame here. The record shows communication between the Respondent and the HRD regarding enforcement of the Commission’s decision in D-01-1150 but no one took the initiative to make certain the Appellant’s name was placed on the appropriate lists.

Conclusion

Based on the above, the Appellant’s appeal filed under Docket No. D-01-1150 is hereby *dismissed*.

Civil Service Commission

John J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Bowman, Taylor, Guerin and Marquis, Commissioners) on June 14, 2007.

A True copy. Attest:

Commissioner

A motion for reconsideration may be filed by either party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with MGL c. 30A s. 14(1) for the purpose of tolling the time of appeal.

Pursuant to MGL c. 31 s. 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under MGL c. 30A s. 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:

Lewdorsey R. Williams, Esq.
Virginia Casey Goscinak, Esq.