

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS**

November 15, 2019

Middlesex, ss.

Docket No. CR-16-65

DENISE FORTIN, Petitioner

v.

STATE BOARD OF RETIREMENT, Respondent

FINAL DECISION – ORDER OF DISMISSAL

Appearance for Petitioner:

Denise Fortin, *pro se*
1473 Lakeview Ave.
Dracut, MA 01826

Appearance for Respondent:

Melinda E. Troy, Esq.
Associate Board Counsel
State Board of Retirement
1 Winter St., 8th floor
Boston, MA 02108-4747

Administrative Magistrate:

Mark L. Silverstein, Esq.

*Summary of Decision***Retirement - Group Classification for Retirement Purposes - Licensed Practical Nurse (LPN II) - Reclassification From Group 1 to Group 2 Denied - Dismissal of Appeal - Mootness or Lack of Prosecution.**

Following the petitioner's failure to appear for the scheduled hearing or respond to a subsequent order to show cause as to dismissal, and notification by the retirement board that the petitioner had filed an application for superannuation retirement and intended to withdraw her appeal challenging denial of her group reclassification request, the appeal is dismissed for mootness, based upon the reasonable presumption, absent any contrary assertion, that the petitioner has proceeded with the superannuation retirement application and has not rescinded her intent to withdraw this appeal; and, of that is not the case, for lack of prosecution.

In this appeal pursuant to M.G.L. c. 32, § 16(4), petitioner Denise Fortin, a licensed practical nurse who has been employed by the Commonwealth at Tewksbury Hospital (currently, as an "LPN II") for more than 39 years, challenged respondent State Board of Retirement's January 29, 2016 decision denying her request to be reclassified for retirement purposes from Group 1 to Group 2.¹

On June 21, 2018, the Board filed its prehearing memorandum and seven proposed exhibits. On February 7, 2019, the Division of Administrative Law Appeals (DALA) notified the parties in

¹/ Ms. Fortin claimed that her regular and major duties have, for more than ten years, required that she have the care, custody, instruction or other supervision of mentally ill persons, including persons with traumatic brain injury or advanced Huntington's disease, Level III sex offenders, and patients with psychiatric diagnoses including bipolar depression, anxiety, post-traumatic stress disorder, schizophrenia, and addictive behaviors that also meet the definition of a mental illness or mental disorder provided by the *Diagnostic and Statistical Manual of Mental Disorders*. She also claimed that many of her patients have exhibited assaultive behavior, both verbal and physical, and that she has been at the receiving end of such behavior although not at the level of a major, career-ending attack. The Board countered that Ms. Fortin's regular duties and responsibilities involve treating medical conditions with which hospital patients present, including osteomyelitis, endocarditis, cellulitis or bacteremia, rather than treating their psychiatric conditions, which shows that, in her case, caring for mental illness was incidental to caring for a medically diverse patient population.

writing that it would hold a hearing in this appeal on May 22, 2019 at DALA in Malden, Massachusetts starting at 2:00 p.m. The Board appeared for the hearing; Ms. Fortin did not appear, and no one appeared on her behalf. Neither DALA nor the Board had received any request by Ms. Fortin to continue the hearing. Board counsel advised that Ms. Fortin might be eligible to retire for superannuation, based upon her 39 years of service and her age; in that case, her monthly retirement benefit as a member of Group 1 would not differ significantly in amount from what it would be if she were reclassified in Group 2. Board counsel offered to discuss this with Ms. Fortin and determine whether she would be willing to file a superannuation retirement application and withdraw her appeal.

After waiting for more than 30 minutes, I adjourned the hearing and informed Board counsel that I would issue an order directing Ms. Fortin to show cause why I should not issue a decision dismissing her appeal and making final the Board's denial of her group reclassification request.

I issued the order to show cause on May 23, 2019. It noted that, generally, failure to appear for a scheduled hearing results in the appeal's dismissal for lack of prosecution, following a show cause order that allows the petitioner an opportunity to explain why she did not appear and why the appeal should not be dismissed and the appealed decision made final without a hearing. In the circumstances presented, however, the order to show cause offered two alternatives to outright dismissal for lack of prosecution. One of them was for the parties to agree to have the appeal decided upon the papers they had already submitted. *See* 701 C.M.R. § 1.01(10)(b). The other was for Ms. Fortin to file a superannuation retirement application and withdraw her appeal, in which case I would dismiss the appeal for mootness. Accordingly, the order directed that by June 21, 2019, Ms.

Fortin do either of the following:

(1) Call Board counsel to discuss her monthly retirement benefit if she retired for superannuation, and whether, and to what extent, the retirement amount would differ if she retired as a member of Group 1 or Group 2, and then decide whether she would withdraw this appeal in writing and then file a superannuation retirement application with the Board when she was ready to retire. If Ms. Fortin agreed to withdraw her appeal, the parties were to file a status report so advising me. If a signed withdrawal was not filed with the status report, the report was to state when a written withdrawal of the appeal would be filed with DALA; or

(2) If Ms. Fortin did not wish to withdraw her appeal, she was to file, by June 21, 2019, a response to the order to show cause stating (a) why she did not appear for the scheduled hearing on May 22, 2019 and why I should not dismiss her appeal for lack of prosecution and make the Board's denial of her group reclassification request final; and (b) whether she wished to have her appeal decided upon the papers the parties had filed. The Board would have seven days after receiving Ms. Fortin's response to state whether it agreed to have the appeal decided on the papers. If Ms. Fortin did not request a decision based upon the papers, or the Board did not agree to proceed in that manner, I would reschedule the hearing if Ms. Fortin had shown good cause to hold one.

The order to show cause also stated that if Ms. Fortin's response did not show good cause for a hearing, and she did not agree to have her appeal decided upon the papers filed, I would dismiss her appeal and make the Board's denial final, without further notice.

On June 12, 2019, Board counsel filed a letter stating that (1) Ms. Fortin had left a voicemail message "to the effect that she will be withdrawing her appeal at DALA;" and (2) Ms. Fortin had

also filed a superannuation retirement application with the State Retirement Board, dated June 3, 2019, “with a stated effective date of August 31, 2019.” A copy of the first two pages of the retirement application accompanied Board counsel’s letter. On the first page, Ms. Fortin checked the box indicating that she was a member of retirement group 1.

Ms. Fortin has not filed a response to the order to show cause or a withdrawal of her appeal, but neither has she, or the Board, notified me that her superannuation retirement application has been withdrawn or denied, or that she no longer intends to withdraw this appeal.

In view of Ms. Fortin’s non-appearance at the scheduled hearing, Board counsel’s June 12, 2019 letter, Ms. Fortin’s failure to file a response to the order to show cause, and the absence of any further filings by either party, it is reasonable to presume that Ms. Fortin has elected to proceed with her superannuation retirement application in lieu of prosecuting this appeal further or pursuing her request for group reclassification for retirement purposes; and it is also reasonable to presume, absent any assertion to the contrary, that the Board has processed the retirement application. That justifies, in turn, a dismissal of this appeal for mootness. If that is not the case, however, the same circumstances would justify the dismissal of this appeal for lack of prosecution.

Accordingly, this appeal is dismissed on alternative grounds—for mootness, pursuant to 801 C.M.R. § 1.01(7)(g)3, based upon Ms. Fortin’s election to file a superannuation retirement application and its approval by the Board, if that is what happened or is happening, in which case there is no need to decide Ms. Fortin’s appeal, or resolve the underlying group reclassification denial, on the merits; otherwise, for lack of prosecution pursuant to 801 C.M.R. § 1.01(7)(g)2, in which case the Board’s denial of Ms. Fortin’s group reclassification request is affirmed and made final.

SO ORDERED.

Notice of Rights of Further Review and Appeal

This is the final Decision of the Division of Administrative Law Appeals (DALA) in this matter. It may be appealed to the Contributory Retirement Appeal Board (CRAB) no later than fifteen (15) days following the date of the DALA Decision. The procedure for appealing is as follows:

In an appeal such as this one, which CRAB assigned to DALA to decide, an appeal from a final DALA Decision is commenced by filing a written “Notice of Objection” with CRAB within 15 days following the date of the DALA Decision.²

A party objecting to the enclosed DALA Decision shall mail its Notice of Objection to:

Uyen M. Tran, Esq., Assistant Attorney General
Chair, Contributory Retirement Appeal Board
Office of Attorney General Maura Healy
One Ashburton Place, 18th floor
Boston, MA 02108.

²/ M.G.L. c. 32, § 16(4) provides in pertinent part that a retirement appeal decision such as this one:

shall be final and binding upon the board involved and upon all other parties, and shall be complied with by such board and by such parties, unless within **fifteen days** after such decision, (1) either party objects to such decision, in writing, to the contributory retirement appeal board, or (2) the contributory retirement appeal board orders, in writing, that said board shall review such decision

(Emphasis added.)

Copies of the Notice of Objection must be sent to the Division of Administrative Law Appeals, 1 Congress St., 11th floor, Boston, MA 02114, and to the other party or parties involved in the case.

Proceedings before CRAB are governed by CRAB Standing Orders, which may be found online.³ Pursuant to CRAB Standing Order 2008-1, para. 4.a(2), the Notice of Objection must include:

- (a) the date of this DALA Decision;
- (b) A copy of the DALA Decision; and
- (c) A statement of the part or parts of the DALA Decision to which objection is made.

THE NOTICE OF OBJECTION MUST BE POSTMARKED OR DELIVERED IN HAND TO CRAB NO LATER THAN FIFTEEN DAYS FOLLOWING THE DATE OF THE DALA DECISION. Electronic submissions are **NOT** permitted to satisfy this filing requirement.

Pursuant to CRAB Standing Order 2008-1, paragraph 4.a(3), within forty days following the date of the DALA decision, the appellant (the party who filed the Notice of Objection to the DALA

³/ Copies of CRAB Standing Orders may be found online, at:

<http://www.mass.gov/anf/hearings-and-appeals/admin-appeals-proc/practice-and-procedures/proc-before-contrib-ret-appeal-brd/>

They may also be found at www.mass.gov/anf and then doing the following:

- (1) Click on “Hearings and Appeals” (one of the boxes near the top of the page);
- (2) Then, at the Hearings & Appeals page, click on “Administrative Appeals Process”;
- (3) At the Administrative Appeals Process page, click on “Practice and Procedures”;
- (4) At the Practice and Procedures page, click on “Procedures Before the Contributory Retirement Appeals Board,” which should display the two Standing Orders governing practice before CRAB.

Decision) must supplement the Notice of Objection by filing with the Chair of CRAB three copies each, and by serving on each other party one copy, of:

- (a) All exhibits admitted into evidence before DALA, numbered as they were numbered on admission;
- (b) A memorandum of no more than twenty pages containing a clear and precise statement of the relief sought and the findings of fact, if any, and legal conclusions as to which objection is made, together with a clear and precise statement of the particular facts, with exact references to the record, and authorities specifically supporting each objection; and
- (c) If CRAB's passing on an objection may require a review of oral proceedings before DALA, the transcript of the relevant portion of those proceedings.

Do not send any such supplementary materials or exhibits to DALA.

Failure to follow CRAB's procedures could lead to sanctions, including dismissal of the appeal.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Mark L. Silverstein
Administrative Magistrate

Dated: November 15, 2019