

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900

SHANA HICKS,

Appellant

v.

C-20-128

**EXECUTIVE OFFICE OF HEALTH
AND HUMAN SERVICES,**

Respondent

Appearance for Appellant:

Michael Manning, Esq.
NAGE
159 Burgin Parkway
Quincy, MA 02169

Appearance for Respondent:

David A. Markowitz, Esq.
Deputy General Counsel
Massachusetts Department of Health
250 Washington Street
Boston, MA 02108

Commissioner:

Paul M. Stein

DECISION

The Appellant, Shana Hicks, is an employee of the Massachusetts Department of Health (DPH), an agency within the Executive Office of Health and Human Services (EOHHS). Since at least 2011, Ms. Hicks has been assigned to the Ambulatory Care Center (ACC) at Lemuel Shattuck Hospital where she holds the classification title of Clerk III and the functional title of ACC Clerical Assistant. (*Resp Exhs.19 through 22; App.Exhs.21 & 30*)

In 2012, Ms. Hicks requested a reclassification of her title from Clerk III to Administrative Assistant II (the “2012 Request”). (*App.Exh.30*) For reasons that are disputed, EOHHS never approved or denied the 2012 Request. On August 19, 2020, purportedly acting pursuant to

G.L.c.30, §49,¹ Ms. Hicks brought this appeal to the Commission. Her claim of appeal stated, in part:

“Please accept this as a formal request motion for summary judgement to enforce the onset approval for Administrative Secretary II Position Classification Appeal Form and Appeals Procedure based upon the finalized review, analysis, and reconsiderations on or about March 28, 2014, by Employment Services Manager/HR Director, EHS Health Cluster, Lisa T. Bacon JD – in accordance to including but not limited to Massachusetts General Laws Chapter 30, Section 49, EOHHS Human Resources Form ES-28 Position Classification Appeal Form and Appeal Procedures, and Unit One Collective Bargaining Contract.”

“That my position is reclassified and funded to an Administrative Secretary II, effective July 17, 2012, and will be made whole.”

(Claim of Appeal) (sic)

On September 11, 2020, the Respondent presented a Motion to Dismiss the appeal for lack of jurisdiction. The Commission held a prehearing on September 15, 2020 via remote videoconference (Webex). After two Procedural Orders were issued to address the jurisdictional issues presented by the appeal, the Appellant processed a new reclassification request (the 2020 Request) that was denied by EOHHS on December 4, 2020 and denied, after review by the Massachusetts Human Resources Division (HRD) on March 1, 2021. (*Resp.Exhs. 3 through 10 & 22; App.Exh.21*)

A Full Hearing of the appeal commenced via remote videoconference (Webex) on April 16, 2021, which was audio/video recorded with a link to the recording provided to the parties.² The Appellant introduced thirty (30) Exhibits (*App.1 – App. 30*) and the Respondent introduced twenty-two exhibits (*Resp. 1 – Resp. 22*). Prior to the introduction of testimony, however, the Appellant stipulated that she did not contest the decision of EOHHS and HRD denying the 2020 Request and

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with and conflicting provisions of G.L. c.30,§49, or Commission rules, taking precedence.

² If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use this recording to supply the court with the written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

intended to proceed solely to challenge the failure of the EOHHS to approve her 2012 Request. The Respondent asserted that the only request properly before the Commission was the 2020 Request and that Appellant never received a decision from EOHHS or HRD on the 2012 Request, which is a prerequisite to the Appellant's right to appeal to the Commission under G.L.c.30,§49. The Respondent also asserts that it was not required to defend and was not prepared to defend the merits of the 2012 Request or the EOHHS's failure to issue a final decision on that request. The Appellant contends that her Claim of Appeal to the Commission did, indeed, include the 2012 Request and the Respondent should not be allowed to complain about its own alleged lack of due diligence in processing that request. The Appellant sought a continuance of any evidentiary hearing on the merits of the 2012 Request on the grounds that EOHHS had only recently located the original 2012 Request file and just provided her counsel with that file the previous day.

I conclude that the Appellant's appeal must be denied as moot, as to the 2020 Request, in view of the Appellant's stipulation that she now does not dispute the EOHHS and HRD decisions to deny that request. I also conclude that, for administrative efficiency, in lieu of addressing the disputed issues regarding the Commission's jurisdiction over the 2012 Request at this time, an order of dismissal nisi would be appropriate so as to first afford the Appellant the opportunity to obtain a resolution of the merits of the 2012 Request through EOHHS and/or HRD and, thereby, avoid further need to adjudicate the disputed issues of the Commission's jurisdiction and/or the merits of that matter.

Analysis

G.L.c.30, §49 provides:

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[HRD]. . . 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. If said commission finds that the office or position of the person appealing warrants a different position reallocation . . . it shall be effective as of the date of appeal . . . (*emphasis added*)

G.L.c.30, §57 states:

The decision of the civil service commission shall be final and binding on all agents and agencies of the commonwealth; provided, however, that any such decision may have retroactive effect pursuant to the applicable provisions of section forty-nine and also pursuant to rules made under the provisions of section fifty-three; and, provided further, that no such decision shall require any payment to be made as of any date before the beginning of the fiscal year in which such decision shall be rendered, except to the extent such payment is permitted pursuant to the provisions of said section forty-nine *and subject to appropriation for the purposes thereof*. If such decision shall require the payment of money to any employee of the commonwealth, the civil service commission shall notify the appointing authority, the personnel administrator, the budget director, and the comptroller of the amount or amounts thereof, and such amount or amounts shall be paid from available appropriations if in accordance with law. (*emphasis added*)

“The determining factor of a reclassification is the distribution of time that an individual spends performing the function of a job classification.” Roscoe v. Department of Environmental Protection, 15 MCSR 47 (2002). In order to justify a reclassification, an employee must establish that she is performing distinguishing duties encompassed within the higher-level position the majority (i.e., at least 50% or more) of the time. See, e.g., Pellegrino v. Department of State Police, 18 MCSR 261 (2005) (at least 51%); Morawski v. Department of Revenue, 14 MCSR 188 (2001) (more than 50%); Madison v. Department of Public Health, 12 MCSR 49 (1999) (at least 50%); Kennedy v. Holyoke Community College, 11 MCSR 302 (1998) (at least 50%). What must be shown is that the employee performs the “distinguishing duties” of the higher position at least 50% of the time and, in making this calculation, duties which fall within both the higher and lower title do not count as “distinguishing duties.” See Lannigan v Department of Developmental Services, 30 MCSR 494 (2017)

Similarly, when an employee agrees to work overtime or temporarily works “out-of-grade”, he or she may have some other claim (such as under a collective bargaining agreement) to receive

a pay-differential for the time spent working in that capacity, but temporary, voluntary or overtime assignments are not, as a general rule, meant to be transformed into permanent promotions through the reclassification statute. See, e.g., Hartnett v. Department of Revenue, 30 MCSR 398 (2017); Baran v. Department of Conservation & Recreation, 18 MCSR 355 (2005). See generally, Boston Police Dep't v. Jones, 98 Mass.App.Ct. 762 (2020) (in general, voluntary overtime and detail pay are not part of the regular compensation of a tenured civil servant)

Based on the stipulation of the parties, insofar as the Appellant's 2020 Request for reclassification is concerned, Ms. Hicks does not dispute that, as of the date she filed the 2020 Request, she is unable to prove that, as of the date of that request, she performed the duties of an Administrative Secretary II at least 50% of the time. She continues to claim, however, that, for some period of time in and after 2012, she did perform the duties of an Administrative Secretary II (or, perhaps the duties of another higher title) and deserves to be reclassified from a Clerk III as of 2012. It remains uncertain that Ms. Hicks can prove by a preponderance of the evidence, which is her burden, that she was performing at the level of an Administrative Secretary II, especially, given the passage of time, but, under the unique circumstances, both the Appellant and the Respondent shall be allowed an additional period to consider the options for expeditious resolution of the 2012 Request by EOHHS and/or HRD prior to further action by the Commission, if any, on that aspect of her claim.

Conclusion

Accordingly, it is hereby ORDERED:

1. The Appellant's appeal in Case No. C-20-128. is hereby **denied, in part**, insofar as it claims a reclassification from Clerk III to any higher title, effective in 2020, as asserted in the 2020 Request.

2. The Appellant's appeal in Case No. C-20-128 is dismissed nisi, in part, to become effective July 31, 2021, insofar as it seeks a reclassification from Clerk III to any higher title effective prior to 2020 pursuant to the 2012 Request. If, however, prior to July 31, 2021, the Appellant receives a denial of the 2012 Request from the EOHSS and HRD, the Commission will entertain a Motion to Revoke the Dismissal Nisi and reinstate the Appellant's appeal under Docket Number C-20-128, on such terms and for such further consideration of the issues presented by the 2012 Request as the parties may agree or the Commission may order. No additional filing fee will be required.

3. The denial of this appeal insofar as it claims a reclassification from Clerk III to any higher title pursuant to the 2020 Request is final as of the date hereof.

4. In the absence of a timely-filed Motion to Revoke, the dismissal nisi of this appeal shall become final for all purposes of G.L.c.31,§44, on July 31, 2021.

Civil Service Commission

/s/ Paul M. Stein
Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on May 6, 2021.

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)(1), 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 a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 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. 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:

Michael Manning, Esq. (for Appellant)

David A. Markowitz, Esq. (for Respondent)