

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS

February 13, 2017

Suffolk, ss.

Docket No. CR-15-322

KATHLEEN A. HOWARD, Petitioner

v.

STATE BOARD OF RETIREMENT, Respondent

ORDER OF DISMISSAL

Appearance for Petitioner:

Kathleen Howard, *pro se*
306 Seacoast Shores Blvd.
East Falmouth, MA 02536

Appearance for Respondent:

Candace L. Hodge, Esq.
Associate Board Counsel
State Board of Retirement
1 Winter St., 8th floor
Boston, MA 02108-1607

Administrative Magistrate:

Mark L. Silverstein, Esq.

Summary of Decision

Petitioner's appeal challenging her classification by the State Board of Retirement in Group 2 for retirement purposes, which made her ineligible to participate in the Commonwealth's Early Retirement Incentive Program, is dismissed for lack of prosecution after (1) the Board filed a prehearing memorandum with hearing exhibits, (2) the petitioner did not appear for the scheduled hearing, (3) in lieu of issuing an order to show cause to the petitioner, the appeal was ordered decided upon the written submissions if the petitioner did not file an objection to the dismissal of her appeal, together with her prehearing memorandum and hearing exhibits, and (4) the petitioner filed a statement of her intent not to move forward with her appeal.

Petitioner Kathleen A. Howard, a "Clinical Social Worker C" employed by the Massachusetts Department of Mental Health, appealed, pursuant to M.G.L. c. 32, § 16(4), the June 18, 2015 decision of respondent State Board of Retirement classifying her in Group 2 for retirement purposes, which made her ineligible to participate in the Commonwealth's Early Retirement Incentive Program (ERIP) established by St. 2015, c. 19. Ms. Howard filed a timely appeal challenging the State Board's decision on June 29, 2015. She claimed that Department of Mental Health employees who held the position of Clinical Social Worker C were "traditionally" considered to be Group 1 employees for retirement purposes, and could not become Group 2 employees unless they applied for reclassification and the application was granted.

The Division of Administrative Law Appeals (DALA) issued a written Notice of Hearing to the parties on November 3, 2016. It scheduled a hearing in this appeal for 1:30 p.m. on January 24, 2017, and ordered each of the parties to file, at least ten days before the hearing date, its proposed hearing exhibits and a memorandum including proposed findings of fact, any stipulations of fact to which the parties agreed, and an identification of its intended hearing witnesses. The Board filed a prehearing memorandum with nine proposed hearing exhibits on January 10, 2017. It argued that

Ms. Howard's Clinical Social Worker C position was classified properly in Group 2 for retirement purposes because her regular and major duties did not require her to have the care, custody, instruction or other supervision of persons who are mentally ill, and that the Group 2 classification made Ms. Howard ineligible to participate in ERIP. Ms. Howard did not file a prehearing memorandum or hearing exhibits.

The Board appeared for the scheduled hearing on January 24, 2017. Ms. Howard did not appear. She had telephoned the DALA Docket Clerk the day before and stated that she would not appear for the hearing, but she did not file, or serve upon the Board, a withdrawal of her appeal. She was advised to state her intention in writing, file it with DALA, and send a copy to the Board. However, neither DALA nor the Board had received anything from Ms. Howard by the time of the scheduled hearing.

I did not proceed with the hearing in Ms. Howard's absence. I also decided, as a matter of discretion, not to issue an order to show cause why I should not dismiss her appeal for lack of prosecution. Instead, I suggested, and the Board agreed, that I would issue an order stating my intention to decide this appeal upon the written submissions through January 24, 2017, pursuant to 801 C.M.R. § 1.01(10)(c),¹ unless Ms. Howard filed an objection, together with a prehearing

¹/ 801 C.M.R. § 1.01(10)(c), entitled "Submission Without a Hearing," is a subsection of the Standard Adjudicatory Rules of Practice and Procedure that govern appeals before DALA such as this one. It provides that:

Any party may elect to waive a hearing and submit his case upon written submissions. Submission of a case without a hearing does not relieve the Parties from the necessity of proving the facts supporting their allegations or defenses on which a Party has the burden of proof.

memorandum and her exhibits (if any), or withdrew her appeal, within ten calendar days from the date of the order. The order, which I issued on January 24, 2017, also gave Ms. Howard the option of agreeing to have her appeal decided upon the written submissions.²

On January 25, 2017, Ms. Howard filed a letter that stated in pertinent part:

As recommended by your office on 1/23/17, I am writing this letter to notify you that I will not be moving forward with my appeal of the DMH (Department of Mental Health) group Classification status.

It may have been that my January 24, 2017 order crossed in the mail with Ms. Howard's letter. For that reason, and to give Ms. Howard an opportunity to exercise any of the options the order gave her if she chose to do so, I deferred closing this matter until the ten-day period to respond to the order expired, which it did at the close of business on February 3, 2017. As DALA has received nothing further from her, I regard her January 25, 2017 letter as stating her intent not to proceed with her appeal, regardless of the January 24, 2017 order.

²/ The written submissions included:

- (1) The State Board of Retirement's letter notifying Ms. Howard that it was classifying her position as Clinical Social Worker C in Group 2 for retirement purposes, making her ineligible to participate in ERIP, dated June 18, 2015;
- (2) Ms. Howard's appeal, dated June 22, 2015;
- (3) The Board's nine exhibits, which I have admitted into evidence as Exhibits 1-9, in the order in which the Board marked them;
- (4) The Board's prehearing memorandum, dated January 10, 2017; and
- (5) A printout of the job description of a Clinical Social Worker C from the "MassCareers Job Opportunities" website that was posted by the Department of Mental Health at that site on June 29, 2016, which I marked as Exhibit 10 in evidence.

In view of the history recited above, including the January 24, 2017 order and Ms. Howard's stated intent not to prosecute this appeal further, I now dismiss this appeal for lack of prosecution, pursuant to 801 C.M.R. § 1.01(7)(g)2. As a result of this dismissal, the Board's June 18, 2015 decision classifying Ms. Howard in Group 2 for retirement purposes, which made her ineligible to participate in the Commonwealth's Early Retirement Incentive Program (ERIP), is 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.

In an appeal such as this one, which the Contributory Retirement Appeals Board (CRAB) assigned to DALA, an appeal to CRAB 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.³

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

³/ 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.)

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

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.⁴ 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

⁴/ 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/](http://www.mass.gov/anf/hearings-and-appeals/admin-appeals-proc/practice-and-procedures/proc-before-contrib-ret-appeal-brd/)

or, at www.mass.gov/anf :

- (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.

date of the DALA decision, the appellant (the party who filed the Notice of Objection to the DALA 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: February 13, 2017