

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

DONNA M. McMAHON,
Appellant

v.

Docket No. G2-04-278

**DEPARTMENT OF PUBLIC HEALTH and
HUMAN RESOURCES DIVISION,**
Respondents

Appellant's Representative:

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Respondents' Representatives:

Marianne Dill
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Commissioner:

John J. Guerin, Jr.

DECISION

(ON THE RESPONDENT'S MOTION TO DISMISS THE APPEAL)

Procedural and Factual Background

Pursuant to G.L. c. 31, § 2 (b), the Appellant, Donna McMahon (hereafter “Appellant”), filed this appeal on June 9, 2004 with the Civil Service Commission (hereafter “CSC”) claiming she had been bypassed by the Respondent, Department of Public Health (hereinafter “DPH”)¹, as Appointing Authority, for promotion to five (5) Registered Nurse positions at Tewksbury State Hospital (hereinafter “Tewksbury”)² since January 22, 2001, the most recent notification of which she received on May 27, 2004. The appeal was, in part, timely filed. The Human Resources Division was added as a party, presumably at the CSC’s Pre-Hearing Conference held in this matter on September 29, 2004. Specifically, the Appellant asserted in her appeal that selections for these several Registered Nurse (hereinafter “RN”) positions “were impermissibly made based upon age and a flawed selection process was used.” *Bypass Appeal Form* (June 9, 2004).

The Appellant states in an affidavit submitted with her appeal that she had applied for but was not selected by Tewksbury to the following positions (with date of posting in parentheses): RN III (December 5, 2000), RN III (January 2001), RN IV (February 2001), RN IV (April 6, 2003) and RN IV (August 26, 2003). The Appellant argues that for each of these posted positions, a younger and less qualified individual than her was selected.

On November 2, 2004, pursuant to 801 CMR 1.01 7(g), the Human Resources Division (hereafter “HRD”) filed a *Motion to Dismiss* the appeal on behalf of the Respondents on the

¹ Although the DPH is one of the Respondents in this matter, it does not appear that any motions or filings have been made on its behalf.

² Tewksbury State Hospital is operated by the Commonwealth under the auspices of the Department of Public Health.

grounds that the Commission lacked jurisdiction to hear the appeal. On November 15, 2004, the Appellant filed an *Opposition to Respondents' Motion to Dismiss*. On April 5, 2007, the Commission held a hearing on the Motion to Dismiss. At this hearing, five (5) exhibits were submitted by the Appellant and accepted into evidence by the Commission over the objections of the HRD. One audio tape was made of the hearing. Following the hearing, this Commissioner invited the parties to submit rebuttal briefs. On May 4, 2007, the HRD submitted a *Response to Appellant's Opposition to the Motion to Dismiss*. On June 4, 2007, the Appellant submitted its *Rebuttal to Respondent's Response to Appellant's Opposition to Respondents' Motion to Dismiss*.

Respondent HRD's Grounds for Dismissal of the Appeal

In support of its *Motion to Dismiss*, the HRD asserts that the RN positions for which the Appellant was not selected are not subject to the provisions of civil service law or rules as they are expressly exempt in accordance with G.L. c. 31, § 48. Therefore, according to the HRD, the “Appellant lacks standing to appeal her promotional bypasses to the Commission because she does not hold permanency in a civil service position, nor did she apply for promotions to positions within the civil service.” The HRD further argues that the Appellant is not, then, a “person aggrieved” who has suffered actual harm to his or her employment status as required to file an appeal under G.L. c. 31, § 2(b). As such, the Commission has no jurisdiction to hear the appeal and the case must be dismissed.

In support of its position in this matter, the HRD provides specific reasons in sections 5 – 8 of its motion that the Appellant's claim should be dismissed. The HRD also submitted an

affidavit from Ms. Sally McNeely, Director of the Organizational Development Group of the HRD. Sections 5 – 8 of the Motion state as follows:

“5. Specifically, the registered nurse positions for which the Appellant applied and was denied promotion were as follows:

- RN III – Infection Control/Performance Improvement Nurse
- RN III – Clinics Department
- RN IV – Evening Supervisor
- RN IV – Nurse Manager, Unit C-3
- RN IV – Nurse Manager, Unit C-3

6. Massachusetts General Laws c. 31, § 48 states that “[a]ll offices and positions in the official service of the commonwealth shall be subject to the civil service law and rules unless expressly exempted by this chapter or other law.” (*Emphasis added.*)

7. Chapter 31, § 48 of the General Laws further states that “[t]he following shall be exempt from the civil service law and rules, unless expressly made subject thereto by statute: . . . Physicians, registered nurses, graduate nurses, licensed practical nurses and student nurses in institutions and hospitals unless federal standards for a merit system for personnel administration apply.” (*Emphasis added.*)

8. In accordance with the express exemption provided under M.G.L. c. 31, § 48, none of the registered nurse positions listed in Paragraph 4 (sic) above are positions in the civil service system. See McNeely Affidavit, ¶ 2.”

(Respondent HRD’s Motion to Dismiss at page 2.)

In Paragraph 2 of Ms. McNeely’s affidavit, she states, “Pursuant to Massachusetts General Laws c. 31, § 48, the registered nurse positions in the Tewksbury State Hospital are exempt from the civil service laws and rules.”

Appellant’s Arguments in Opposition to the Motion to Dismiss

The Appellant argues that her position as a registered nurse at Tewksbury is a civil service position. Since Tewksbury receives federal Medicaid money under 42 C.F.R. § 430.2(a), the Appellant suggests her position is subject to a “merit system of personnel administration.”

Id. According to the Appellant, “[t]he receiving of federal grants by the Department of Public Health for Tewksbury State Hospital is conditioned on the existence of a merit system comparable to the federal merit system. The Commonwealth of Massachusetts civil service system is a comparable merit system to the federal merit system. Therefore, the Appellant Donna McMahon is subject to the civil service law and rules, pursuant to M.G.L. c. 31, § 48.”
Appellant’s Opposition to Respondents’ Motion to Dismiss, 2.

The Appellant’s second theory is that registered nurses are considered part of labor service, which is covered under civil service law. According to G.L. c. 31, § 1, labor service is defined as “the composite of all civil service positions whose duties are such that a suitable selection for such positions may be made based upon registration pursuant to section twenty-eight, rather than by competitive examination.” G.L. c. 31, § 28 states the process that an individual must follow to apply for employment in labor service. The Appellant believes that since she has been registered in Massachusetts as a nurse since 1992, it qualifies her as part of labor service, which is under civil service laws.

Conclusion

The Appellant’s argument that registered nurses are covered under civil service laws must fail for multiple reasons.

RN positions are not labor service jobs as the Appellant argues. According to G.L. c. 31, § 1, labor service is defined as “the composite of all *civil service positions* whose duties are such that a suitable selection for such positions may be made based upon registration pursuant to

section twenty-eight, rather than by competitive examination.” *Id.* (emphasis added). According to G.L. c. 31, § 48, however, registered nurses are specifically exempted from civil service laws, thus not qualifying for labor service: “The following shall be exempt from the civil service law and rules, unless expressly made subject thereto by statute. . . Physicians, registered nurses, graduate nurses, licensed practical nurses and student nurses in institutions and hospitals unless federal standards for a merit system of personnel administration apply.” *Id.* Unless federal standards for a merit system of personnel administration apply, registered nurses are specifically exempted from civil service.

Tewksbury receives federal Medicaid money through MassHealth. Contingent on receiving this money, state Medicaid programs must comply with the federal regulations on standards for a merit system of *personnel administration*. 42 C.F.R. 430.2(a), 5 C.F.R. part 900(F). However, the federal regulations do not specifically state that registered nurses working in hospitals that receive Medicaid money are subject to the merit personnel system. Instead, the federal regulations under 5 C.F.R. 900.601(b), state that “personnel engaged in administration of the grant-aided program” are subject to the merit personnel system. *Id.* The Massachusetts office responsible for the administration of the Medicaid program is MassHealth. According to M.G.L. c. 118E, § 1, “The executive office for health and human services shall be the single state agency responsible for the administration of programs of medical assistance and medical benefits established pursuant to this chapter.” *Id.* Under G.L. c. 118E, § 9, Medicaid falls under the control of MassHealth. Thus, it is the employees of MassHealth who actually administer the Medicaid program in Massachusetts who are the ones who should be subject to a merit system, and not registered nurses such as the Appellant. It is important to note that if the Appellant’s

argument succeeded, all physicians, registered nurses, and all other employees listed in the exemption in G. L. c. 31, § 48 who are employed by hospitals or institutions receiving Medicaid funding, would be covered by civil service laws and rules, which would defeat the purpose of the express exemption of G.L. c. 31, § 48.

The Appellant states that “[t]he receiving of federal grants by the Department of Public Health for Tewksbury State Hospital is conditioned on the existence of a merit system comparable to the federal merit system. The Commonwealth of Massachusetts civil service system is a comparable merit system to the federal merit system. Therefore, the Appellant Donna McMahon is subject to the civil service law and rules, pursuant to M.G.L. c. 31, § 48.” *Appellant’s Opposition to Respondents’ Motion to Dismiss*, 2. The Appellant has made an untenable argument, because although the CSC is comparable to the federal merit system, federal regulations only require a system that satisfies federal standards, which is accomplished through other outlets besides the CSC (precisely because the nurses are exempt under civil service law). These outlets include the Massachusetts Nurses Association collective bargaining agreement, Tewksbury Hospital’s own grievance process, and the licensing process. Simply stated, there has to be a merit system, not necessarily the Massachusetts civil service, in place as the Appellant suggests.

It is also important to note the timeliness of the Appellant’s appeal. Although not raised by HRD, pursuant to 801 CMR § 1.01(7)(g)(3), the Commission can raise the issue of timeliness as a basis for a motion to dismiss *sua sponte*. The Appellant states in her affidavit that she received five bypasses, the non-selection letters dated: January 22, 2001; March 29, 2001; two

letters on May 27, 2004; and one bypass where the Appellant applied for a position approximately April of 2003 but did not receive a non-selection letter for that bypass. According to the CSC's *Bypass Rule of Limitations*, the Appellant must have filed her complaint within sixty (60) days of her bypass for promotion in order for her complaint to be timely. As her appeal was received at the Civil Service Commission on June 9, 2004, only two of the bypasses, those with letters dating May 27, 2004, are timely.

Finally, although the Appellant's position as registered nurse is expressly exempt from Massachusetts civil service law and rules, she does have other avenues to explore her claim. Since the Appellant is alleging age discrimination, she has rights under state and federal anti-discrimination laws. In addition, the Appellant can pursue her claim through the collective bargaining agreement that exists between the state and the Massachusetts Nurses Association. According to the Respondent, the Appellant has already filed similar claims with the Massachusetts Commission Against Discrimination and through the grievance arbitration procedures stated in the collective bargaining agreement, apparently to no avail. *Response to Appellant's Opposition to the Motion to Dismiss*, 9.

The Appellant lacks standing to appeal her promotional bypasses to the Civil Service Commission because she does not have tenure in a civil service position, nor did she apply for promotions within the civil service. Thus, the Appellant is not a person aggrieved whose "rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status" under G.L. c. 31, § 2(b).

For the above reasons, the Respondent's Motion to Dismiss the appeal is allowed and, therefore, the Appellant's appeal filed under Docket No. G2-04-278 is hereby *dismissed*.

Civil Service Commission

John J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Guerin and Taylor, Commissioners) on February 7, 2008.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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.

Notice:
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