COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108

HELENA CONWAY,
Appellant

v.

D-10-165

OFFICE OF MEDICAID / EOHHS,
Respondent

Appellant's Representative: *Pro Se*
Helena Conway

Respondent's Representative: Lauren A. Cleary, Esq.
Assistant General Counsel
EOHHS
One Ashburton Place: 11th Floor
Boston, MA 02108

Commissioner: Christopher C. Bowman

DECISION ON RESPONDENT'S MOTION TO DISMISS

The Appellant, Helena Conway (hereinafter "Conway" or "Appellant"), pursuant to G.L. c. 31, § 35, filed an appeal with the Civil Service Commission (hereinafter "Commission") on July 28, 2010, claiming that she was improperly transferred by her employer, the Office of Medicaid, which falls under the Executive Office of Health and Human Services (hereinafter "Appointing Authority" or "EOHHS"). In the alternative, the Appellant states that the actions of EOHHS: 1) violate the provisions of G.L. c. 31, § 39 (regarding layoffs); and 2) violate the tenets of basic merit principles as defined in G.L. c. 31, § 1.

On August 3, 2010, a pre-hearing conference was conducted at the offices of the Commission. On September 1, 2010, EOHHS filed a Motion to Dismiss. In response, the Appellant filed over sixty (60) emails with the Commission.. Although some of the emails appear to be irrelevant, I have reviewed each of them in their entirety.

At the request of the Appellant, a motion hearing, which was scheduled in order to hear oral argument, was canceled. Thus, I relied on the Appointing Authority's brief and the Appellant's emailed replies in making this decision.

Applicable Standard on Dispositive Motion

The party moving for summary disposition of an appeal before the Commission pursuant to 801 C.M.R. 7.00(7)(g)(3) or (h) is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, i.e., "viewing the evidence in the light most favorable to the non-moving party", i.e., EOHHS has presented substantial and credible evidence that the opponent has "no reasonable expectation" of prevailing on at least one "essential element of the case", and that Ms. Conway has not produced sufficient "specific facts" to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008) Specifically, a motion to dismiss for lack of standing must allowed when the appellant fails to raise "above the speculative level" sufficient facts "plausibly suggesting" that Ms. Conway would have the standing necessary to find her "aggrieved" within the meaning of G.L.c.31, §2(b) to pursue this appeal. See Iannacchino v. Ford Motor Company, 451 Mass. 623, 635-36, (2008) (discussing standard for deciding

motions to dismiss); cf. R.J.A. v. K.A.V., 406 Mass. 698, 550 (1990) (factual issues bearing on plaintiff's standing required denial of motion to dismiss)

Applicable Statute

G.L. c. 31, § 35 states in relevant part:

> "Subject to the provisions of section forty-one governing the transfer of persons who have served as tenured employees since prior to October fourteen, nineteen hundred and sixty-eight, a tenured employee may be transferred to a similar position in the same or in another departmental unit after request in writing for approval of such transfer made to the administrator by the appointing authority or authorities for such unit or units and with the approval of the administrator, provided such request includes reasons which, in the opinion of the administrator, are sound and sufficient to show that the transfer will be for the public good and will not impose unreasonable hardship on such employee. A position shall not be considered similar if it has a title higher than that of the position from which the transfer is to be made or if the requirements for appointment to such positions are substantially different.
>
> A person who is aggrieved by a transfer, other than an emergency transfer or assignment, made pursuant to this section but who is not subject to the provisions of section forty-one with respect to such transfer, may appeal to the commission pursuant to the provisions of section forty-three and shall be entitled to a hearing and a decision by the commission in the same manner as if such appeal were taken from a decision of the appointing authority made, after hearing, under the provisions of section forty-one."

Prior Commission Decisions Regarding Transfers v. Reassignments

In Appellant v. Department of Revenue, 1 MCSR 28, 29 (1985), the Commission dismissed the Appellant's appeal on the grounds that the action being appealed was a reassignment as opposed to a transfer. In that case, the employee's position in the Worcester office was eliminated and he was reassigned to the Cambridge office. The employee claimed that this change in duty was effectively a transfer. The Commission found that the distances to Cambridge or to Worcester from the employee's home were approximately equal. It further found that that the reassignment did not affect the employee's job title, duties, grade or salary.

In Sullivan v. Department of Transitional Assistance (11 MCSR 80, 82 (1998)), the Commission determined that it lacked jurisdiction to hear the appeal in that the action taken did not constitute a transfer, but, rather, a reassignment. The Commission restated its definition of a "transfer" as "a change of employment under the same appointing authority from a position in one class to a similar position in the same or another class or a change of employ in the same position, under the same appointing authority, from one geographical location to a different geographical location, provided that a different geographical location shall be one which is both more than a commuting distance from the employee's residence than its prior location and more distant from the employee's residence than his prior location." In Sullivan, the Appellant's job title, duties and rate of compensation remained the same. The only distinction between his employment prior to the action taken and his new employment was the physical location of his office, which was actually closer to his home. The Commission also ruled that it lacked jurisdiction to hear the Appellant's appeal in Sullivan as the Appellant did not commence employment with the Department of Public Welfare until June of 1978 and as such did not qualify for the statutory protections afforded to transferees under the provisions of G.L. c. 31, § 41. That statute grants procedural protections to employees who have been transferred without their written consent if they have "served as tenured employees since prior to October fourteen, nineteen hundred and sixty-eight (October 14, 1968)."

In McLaughlin v. Registry of Motor Vehicles (CSC Case No. G-01-1461 (2004)), the Commission determined that it lacked jurisdiction to hear the appeal in that the action taken did not constitute a transfer, but a reassignment. In McLaughlin, the Appellant was

not transferred to a different position, but merely relocated to a different branch office while keeping the same job title, duties and pay.

In Sands v. City of Salem, 21 MCSR 502, 504 (2008)), the Commission, citing Sullivan, determined that it lacked jurisdiction to hear the appeal in that the action taken did not constitute a transfer, but, rather, a reassignment. In Sands, the Appellant, a Hoisting Equipment Operator, was no longer able to perform some of the essential duties in his previously held position. Therefore, in order to make reasonable accommodations for his medically documented permanent disability, he was reassigned to perform cemetery-related duties in the Cemetery Department. Although his distance of travel from his residence was greater than previously, the Commission concluded that the change in travel did not impose an unreasonable hardship on the employee.

In McQueen v. Boston Public Schools (21 MCSR 548, 551 (2008)), the Commission determined that it lacked jurisdiction to hear the appeal in that the action taken did not constitute a transfer, but, rather, a reassignment. In McQueen, the Appellant was reassigned from one elementary school to another. In dismissing his appeal, the Commission considered that the Appellant retained the same position of junior custodian and retained the same rate of pay in his new position.

Undisputed Facts Regarding Instant Appeal

1. The Appellant is a permanent civil service employee in the Office of Medicaid, which falls under EOHHS. She has been employed there since June of 1974 and currently holds the title of Program Coordinator II. Her annual salary is approximately $60,000.

2. Various EOHHS agencies, including the Office of Medicaid, were located at 600 Washington Street in Downtown Boston.
3. The Appellant lives in Salem and commuted to her work location in Downtown Boston via public transportation.
4. Multiple EOHHS leases at 600 Washington Street were due to expire in the Fall of 2010.
5. On February 5, 2010, EOHHS notified employees that various EOHHS agencies, including the Office of Medicaid, would be relocating to Harbor South Tower, 100 Hancock Street, in Quincy.
6. The February 5, 2010 memorandum to EOHHS employees stated that the reason for the relocation was a 10-year cost savings of $8 million.
7. The relocation was completed in early October 2010.
8. Harbor South Tower, the new work location, is located less than a 5-minute walk from the North Quincy MBTA station, which is four stops from the South Station MBTA station in Downtown Boston. EOHHS provides a shuttle bus from the North Quincy T stop to Harbor South Tower.

EOHHS Argument Regarding Instant Appeal

The Appellant is one of many employees whose agency has been relocated from 600 Washington Street in Boston to 100 Hancock Street in Quincy. She has retained her civil service title with no reduction in pay. The new work location in Quincy is only 6.38 miles from the previous location in Downtown Boston. It is within a short walking distance from the North Quincy MBTA station, which is only four blocks from the South Station MBTA station in Downtown Boston, both located on the Red Line. For those

employees who prefer not to make the 5-minute walk from the North Quincy T stop to the Harbor South Tower, EOHHS has provide a shuttle bus.

As such, the Appointing Authority argues that, consistent with prior Commission decisions, the Commission has no jurisdiction to hear an appeal regarding what amounts to, at most, a reassignment. EOHHS argues that the new location is only slightly further from Ms. Conway's residence in Salem and that that the additional commute is not unreasonable and she has not shown it to be a hardship.

Further, EOHHS argues that the procedural protections afforded to employees under Section 35 who have served as tenured employees since before October 14, 1968 doe not apply because Ms. Conway was not employed by the agency until June of 1974.

Finally, EOHHS argues that the Appellant's attempt to have her appeal considered under Section 39 is misplaced as she has not been laid off.

Appellant Argument Regarding Instant Appeal

The Appellant argues that she has been involuntary transferred. She states that her round-trip commute from Salem to Quincy will now require a total of seven (7) hours daily, as opposed to her current commute, which she estimates at five (5) hours each day. This seven (7)-hour commute, according to the Appellant, is a hardship given [redacted]. In a subsequent email, the Appellant stated that her actual commuting time, since the move was implemented, is actually 8 ½ hours. She seeks a work assignment at 600 Washington Street or, in the alternative, the option of telecommuting.

Further, the Appellant argues that the transfer represents a "constructive discharge" because she is unable to spend seven (7) hours each day commuting to work due to her medical conditions.

Finally, the Appellant argues that the transfer represents "unfair treatment" which is a violation of basic merit principles as defined in G.L. c. 31, § 1.

Conclusion

As in Sullivan, the Commission lacks jurisdiction to hear the Appellant's appeal as she was not employed by EOHHS until 1974. Thus, she does not qualify for the statutory protections afforded to transferees. G.L. c. 31, § 35 only grants procedural protections to employees who have been transferred without their written consent if they have "served as tenured employees since prior to October fourteen, nineteen hundred and sixty-eight (October 14, 1968)." (emphasis added)

Even if the Appellant had been a tenured employee prior to October 14, 1968, the Commission would still not have jurisdiction to hear her appeal. The Appellant has retained her permanent civil service title at all times relevant to this appeal, she has not faced any reduction in pay and her functional duties have not changed. Rather, her entire unit has been relocated to a location in Quincy, which is 6.38 miles from the former location in Downtown Boston. Even when viewing the facts most favorably to the Appellant, the relocation has resulted in a reassignment, not an involuntary transfer. The new location, like the former location, is accessible via public transportation. The North Quincy MBTA station, which is only a five-minute walk from the new Quincy location, is only four MBTA stops away on the Red Line from the South Station MBTA station in Downtown Boston. For those employees who do not wish to make the short walk from the North Quincy MBTA station to 100 Hancock Street, EOHHS has provided a free shuttle service. This does not constitute an unreasonable additional commute. The Appellant's statement that the relocation has resulted in up to 3 ½ hours of additional

commuting time is not supported by her reply or common sense. She has not shown, and would not be able to show at a full hearing, that the relocation could possibly constitute a hardship.

Finally, the Appellant's argument that she has been constructively discharged are misplaced. As stated above, she has retained her title, pay and job function. Similarly, the allegation that the relocation is a violation of basic merit principles can not be supported.

For these reasons, EOHHS's Motion to Dismiss is allowed and the Appellant's appeal under D-10-165, is hereby ***dismissed***.

_____
Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis and Stein, Commissioners [McDowell – not participating]) on November 4, 2010.

A true Copy. Attest:

_____
Commissioner
Civil Service Commission

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)(l), 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 to:
Helena Conway (Appellant)
Lauren A. Cleary, Esq. (for Appointing Authority)