

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place – Room 503
Boston, MA 02108
(617) 727-2293

RUSS OLIVERA,
Appellant

v.

D-14-218

MASS HEALTH / EXECUTIVE OFFICE OF
HEALTH AND HUMAN SERVICES,
Respondent

Appearance for Appellant:

Gerard S. McAuliffe, Esq.
43 Quincy Avenue
Quincy, MA 02169

Appearance for Respondent:

Julie Heller, Esq.
EOHHS
600 Washington Street, 7th Floor
Boston, MA 02111

Commissioner:

Christopher C. Bowman

DECISION ON RESPONDENT’S MOTION TO DISMISS

On September 10, 2014, Russ Olivera (Mr. Olivera) filed an appeal with the Civil Service Commission (Commission) pursuant to G.L. c. 31, §§ 42 and 43 to: 1) contest whether Mass Health / Executive Office of Health and Human Services (EOHHS) had just cause to suspend him from his permanent civil service position of Benefits Eligibility and Referral Social Worker C (BERS C) (Section 43 “just cause” appeal); and 2) contest whether EOHHS followed the requirements of G.L. c. 31, § 41 in suspending him (Section 42 “procedural” appeal).

A pre-hearing was held at the offices of the Commission on October 14, 2014 which was attended by Mr. Olivera, his counsel, and counsel for EOHHS. On October 21, 2014, EOHHS

filed a Motion to Dismiss, alleging that the appeal to the Commission was not filed within ten (10) days after Mr. Olivera received written notice of EOHHS's decision to suspend him and, as a result, is untimely under G.L. c. 31, §§ 42 and 43. On October 31, 2014, Mr. Olivera filed a reply, arguing that his appeal was timely, as it was filed within ten (10) business days from the time he became aware of his right to file an appeal with the Commission.

Based on the Motion to Dismiss, Mr. Olivera's reply, the parties' statements at the pre-hearing and taking administrative notice of all matters filed in the case, I find the following for the purposes of ruling on the Respondent's Motion to Dismiss:

1. Mr. Olivera has been employed by EOHHS since 1980. He is currently a permanent, tenured civil service employee in the position of BERS C.
2. On June 25, 2014 and July 29, 2014, EOHHS management met with Mr. Olivera to discuss his job performance.
3. On Friday, August 22, 2014, EOHHS hand-delivered a memorandum to Mr. Olivera informing him that he was being suspended for five (5) days with the suspension to be served on the following days: Monday, August 25th; Tuesday, August 26th; Wednesday, August 27th; Thursday, August 28th; and Wednesday, September 3rd. Mr. Olivera was required to work on Friday, August 29th; and Tuesday, September 2nd. (Monday, September 1st was a holiday.)
4. Prior to receiving this memorandum, EOHHS did not provide Mr. Olivera with a hearing; a notice of hearing; and/or a copy of his civil service appeal rights under G.L. c. 31, §§ 41-45.
5. On Monday, August 25, 2014, Mr. Olivera began serving his suspension.
6. Also on Monday, August 25, 2014, Mr. Olivera contacted his union representative.

7. On Tuesday, August 26, 2014, Mr. Olivera received a pre-populated “Grievance Report” from his union representative for his signature. In addition to a signature section requesting the grievance, there is another signature section in which the “grievant” waives his right to file an appeal with the Civil Service Commission.
8. Mr. Olivera acknowledges that, at least as early as Tuesday, August 26th, upon receiving his “Grievance Report”, he was aware of his right to file an appeal with the Commission.
9. On September 10, 2014, Mr. Olivera filed an appeal with the Commission.

Standard for Consideration of a Motion to Dismiss

The United States Supreme Court has held that in order to survive a motion to dismiss, the non-moving party must plead only enough facts to state a claim to relief that is plausible on its face. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547 (2007). Thus, the non-moving party must plead enough facts to raise a reasonable expectation that discovery will reveal evidence in support of the allegations. See id. at 545. Similarly, the Massachusetts Supreme Judicial Court has held that an adjudicator cannot grant a motion to dismiss if the non-moving party’s factual allegations are enough to raise a right to relief above the speculative level based on the assumption that all the allegations in the appeal are true, even if doubtful in fact. See Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008). The Standard Adjudicatory Rules of Practice and Procedure (hereinafter “Rules”) govern administrative adjudication. 801 CMR 1.01, *et seq.* However, Commission policy provides that when such rules conflict with G.L. c. 31, the latter shall prevail; there appears to be no such conflict here. The Rules indicate that the Commission may dismiss an appeal for lack of jurisdiction or in the event the appeal fails to state a claim upon which relief can be granted. 801 CMR 1.01(7)(g)(3).

Applicable Civil Service Law

G.L. c. 31, § 41 states in relevant part:

“Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed, ***suspended for a period of more than five days***, . . . Before such action is taken, such employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action and a copy of sections forty-one through forty-five, and shall be given a full hearing concerning such reason or reasons before the appointing authority or a hearing officer designated by the appointing authority. (***emphasis added***)

“A period of five days” “ must be read . . . to describe a single, continuous, period covering five twenty-four hour days [not counting Saturdays, Sundays and legal holidays] . . . not an amount of time encompassed by a series of nonconsecutive calendar days calculated without regard to the total amount of time that elapses from the first to the last suspension day.”

(Thornton v. Civ. Serv. Comm’n & another, 80 Mass. App. Ct. 441 (2011))

G.L. c. 31, § 42, provides in pertinent part: “Any person who alleges that an appointing authority has failed to follow the requirements of section forty-one in taking ***action*** which has affected his employment or compensation may file a complaint with the commission. Such complaint must be filed within ten days, exclusive of Saturdays, Sundays, and legal holidays, after ***said action*** has been taken, or after such person first knew or had reason to know of ***said action***, and shall set forth specifically in what manner the appointing authority has failed to follow such requirements. If the commission finds that the appointing authority has failed to follow said requirements and that the rights of said person have been prejudiced thereby, the commission shall order the appointing authority to restore said person to his employment immediately without loss of compensation or other rights.” (***emphasis added***)

G.L. c. 31, § 43 provides, in pertinent part: “If a person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days¹ after receiving written notice of such decision, appeal in writing to the commission, he shall be given a hearing before a member of the commission”

EOHHS’s Argument

EOHHS argues that Mr. Olivera’s appeal with the Commission is untimely, as it was filed on September 10, 2014, twelve (12) days (not counting Saturdays, Sundays and holidays) after being notified of his suspension, which, according to EOHHS, is beyond the ten (10) day requirements referenced in Sections 42 and 43. As a result, EOHHS argues that Mr. Olivera’s appeal should be dismissed.

Mr. Olivera’s Argument

Mr. Olivera argues that, as a result of EOHHS’s failure to provide him with copies of Sections 41-45, he was unaware of the ten-day filing requirement until August 26, 2014, when he received correspondence from his union representative that referenced the Civil Service Commission. He argues that the ten-day period for filing an appeal did not begin until Tuesday, August 26th. If applied here, his appeal with the Commission would have been filed on the tenth business day after August 26th (September 10th).

Analysis

Since the amount of time that elapsed between the first day of Mr. Olivera’s suspension (Monday, August 25th) and the last day of his suspension (Wednesday, September 3rd), not counting Saturday, Sunday and the legal Monday (Labor Day) holiday, amounted to seven (7)

¹ “Saturdays, Sundays and legal holidays shall not be counted in the computation of any period of time specified in this section.” G.L. c. 31, § 43.

continuous days (See Thornton), EOHHS was required to follow certain procedural requirements *prior* to issuing the suspension including:

- Giving Mr. Olivera written notice of the contemplated action with specific reasons for such action;
- Attaching a copy of Sections 41-45 of the civil service law to the written notice;
- Providing Mr. Olivera with a full hearing before the Appointing Authority or a designated hearing officer.

EOHHS did not follow any of these procedural requirements. It is undisputed, however, that Mr. Olivera received his suspension notice and, as such, became aware of his suspension, on Friday August 22nd. Sections 42 and 43 require that Mr. Olivera's appeal be filed with the Commission within ten (10) days (excluding Saturdays, Sundays and holidays) after receiving the suspension notice (Section 43) or when he first became aware of *said action* (the suspension) (Section 42). Applied here, Mr. Olivera was required to file his appeal(s) with the Commission no later than Monday, September 8th. His appeal to the Commission was filed on Wednesday, September 10th. Thus, his appeal (under both sections) is untimely by two (2) days. Neither Section 42 or 43 allows the Commission to toll this statutory time-period based on the Appointing Authority's failure to follow the requirements of Section 41 (i.e. – hearing notice with Sections 41-45 attached; a local civil service hearing, etc.) Rather, in order for the Commission to have jurisdiction to rule on such issues, the plain language of the statute requires the Appellant to file an appeal with the Commission within the ten-day filing deadline referenced above.

In making this decision, I considered that even Mr. Olivera acknowledges that he became aware of his right to file an appeal with the Commission before the ten-day filing deadline expired, and still failed to do so.

Had that not been the case, I may have evaluated whether the language in Section 42 pertaining to filing deadlines has an illogical result (i.e. - The Appellant is unaware of the filing deadline because the Appointing Authority failed to provide them with Sections 41-45, as required. However, the Appellant is then barred from filing an appeal with the Commission as a result of the Appointing Authority's failure to provide them with Sections 41-45, which contains the filing deadlines.)

Conclusion

Based on the facts and the law provided herein, the appeal is untimely. Therefore, EOHHS's Motion to Dismiss is hereby allowed and the appeal is *dismissed*.

Civil Service Commission

/s/ Christopher Bowman

Christopher C. Bowman

Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman and Stein, Commissioners [McDowell-Not Participating]) on January 8, 2015.

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)(l), 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 this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice:

Gerard McAuliffe, Esq. (for Appellant)

Julie Heller, Esq. (for Respondent)