

*In the Matter of Anthony Davis, Project Manager, Transportation (PS5800T),  
Department of Transportation  
CSC Docket No. 2013-2195  
(Civil Service Commission, decided July 17, 2013)*

Anthony Davis appeals the test mode for the promotional examination for Project Manager, Transportation (PS5800T), Department of Transportation (DOT).

The announcement for the subject examination indicated that the examination may be tested via the Supervisory Test Battery (STB), a computer-administered exam (see attached). The announcement also referred applicants to the Civil Service Commission (Commission) website for information regarding the STB. The record indicates that the subject examination was administered as an STB on February 27, 2013. The record also indicates that the subject eligible list was issued on May 1, 2013 and promulgated on May 9, 2013. There were 39 applicants for the subject examination with 23 eligibles on the employment roster. Appellant received a raw score of 57.4 with a final average of 79.280 and ranked number 18 on the eligible list based on his score and seniority. It is noted that appellant received the maximum score for his seniority. Certification PS130768 was issued on May 9, 2013 containing the names of 18 eligibles and has a disposition due date of August 9, 2013.

On appeal, Mr. Davis states that he was “surprised and distressed” to receive a notice scheduling him for the STB because he has been serving in the subject title for over eight years, particularly since he was already examined and certified for this title. Therefore, he requests that this test be administered as an evaluation of his education and experience (E&E) rather than an STB. Specifically, he states that he previously sat for an STB for the subject title on December 10, 2003. He also states that he did not complete and pass the test due to computer problems. Therefore, he appealed to the former Merit System Board<sup>1</sup> and his appeal was granted in part, allowing him to re-take questions 101 to 120, and this score was added to his original examination score for questions 1 through 100. *See In the Matter of Anthony Davis* (MSB, decided July 14, 2004) (*Davis*). As a result, his name was added to the second certification of the eligible list issued on September 2, 2004 (PS042161) with a rank of three on the certification. However, during the pendency of his appeal, the eligible list was certified on February 10, 2004 (PS040331) and the appointing authority appointed someone else to the position that appellant was serving in provisionally. He states that he received a temporary appointment to another position as a Project Manager, Transportation, rather than a provisional appointment since the incumbent was on an extended medical leave. He also states that, when the incumbent severed ties with DOT, he inquired whether he could be permanently appointed to the subject title from the

---

<sup>1</sup> Now the Civil Service Commission.

certification and was informed that there was a hiring and promotional freeze. He argues that he could not understand why a permanent appointment could not take place since it would not have changed his title or salary. He also argues that eight years of success in the same job, in some places, is considered tenure, not temporary. In addition, he argues that the regulations state that no individual should serve in a temporary appointment for more than one year. Therefore, he argues that requiring him to take the STB would be an egregious affront to fairness and the civil service process.

The record indicates that appellant was filling in for Peter Kenny, a provisional Manager 2, DOT, Systems Planning (position number 059497), who was on a leave of absence. Mr. Kenny was returned to his permanent title of Supervising Engineer 2, Surface Design, on November 13, 2004 and retired on February 1, 2008.

The record also indicates that Jody Barankin, a veteran, ranked number four and Mr. Davis ranked number 6A on the prior promotional eligible list for Project Manager, Transportation. As noted earlier, two certifications were issued. Three appointments were made from the first certification (PS040331) for the eligibles ranked one, two, and three. One permanent appointment for Ms. Barankin (position number 926909, provisionally held by appellant), who ranked number one on the second certification (PS042161), and one interim appointment (position number 022729, a vacant position), for Mr. Davis, who ranked number three on the second certification, were made from the second certification effective November 27, 2004. However, this interim appointment for appellant is reflected as a temporary appointment in the Personnel and Management Information System (PMIS) since Mr. Kenny's title was not the same as appellant's title. Therefore, appellant was placed in a vacant position and an interim appointment would not be appropriate based on *N.J.A.C.* 4A:4-1.6(b).

Official records also indicate that appellant was provisionally appointed to the title of Project Manager, Transportation (position number 050919), on March 22, 2003; received a temporary appointment to the title of Project Manager, Transportation (position number 926909), on May 29, 2004; received a temporary appointment to the title of Project Manager, Transportation (position number 022729), on November 27, 2004; and served in that temporary position until he was provisionally appointed to the title of Project Manager, Transportation (the same position number 022729), on July 2, 2011. Thus, the appellant served in a temporary appointment as a Project Manager, Transportation, from May 2004 to July 2011, a period of over seven years.

## CONCLUSION

Initially, *N.J.A.C.* 4A:4-2.2(a), Types of Examinations, grants discretion to the Commission in determining the type of examinations for appointment in the competitive division of the career service, which may include any one or more of the following: written tests; oral tests; performance tests; physical performance test; evaluation of education, training or experience; assessment exercises; and other appropriate measures of knowledge, skills and abilities.

*N.J.A.C.* 4A: 4A:4-1.6(b) provides in pertinent part that, when an appointing authority makes an appointment to a specific position in State service, an interim appointment shall be made where the position is held by a permanent employee who:

1. Is on a leave of absence;
2. Is on indefinite suspension;
3. Has been removed or demoted for disciplinary reasons and is awaiting final administrative action by the Merit System Board on appeal; or
4. Has accepted an interim appointment.

*N.J.A.C.* 4A:4-1.7(a) provides that the [Commission] may approve temporary appointments to positions in which the job assignment is for an aggregate period of not more than six months in a 12-month period. A temporary appointment for a maximum of 12 months may be approved by the [Commission] to a position established as a result of a short-term grant.

Regarding appellant's argument that he was already examined and certified for the subject title, official records indicate that appellant sat for the Project Manager, Transportation (PS8731T), Department of Transportation, test on December 10, 2003, and his name was added to the eligible list in August 2004. As previously noted, the appellant's name was on certification PS042161 and it was disposed of indicating that he received an interim appointment effective November 27, 2004. However, the appointing authority advised the appellant by letter dated November 17, 2004 that he was recommended for a temporary appointment to the subject title for the period of November 27, 2004 through April 29, 2005. The fact that his name had been certified and he competed in a previous examination does not establish that he was permanently appointed or that he should be exempted from the promotional examination process. In this regard, the eligible list for PS8731T has long since expired and the appellant is required to compete in a new examination for the subject title.

Although appellant argues that he has been serving in the subject title for over eight years and, therefore, should be considered permanent, he was required to take the STB for the subject examination. In this regard, the Division of Selection Services and Recruitment (Selection Services) determines the type of testing for civil service examinations. State job titles covered by the STB are located on the Commission website under job announcements and testing information. Selection Services determined that examinations for the subject title would be administered as the STB, not E&E evaluations. In this matter, appellant was determined eligible to take the subject examination based on his education and experience. However, he was required to take the STB examination to determine his score for the subject examination. The scores for the STB are valid for two years. Therefore, since he previously took the STB in 2003, he was required to take the STB again for the subject examination. Moreover, his long-term service in the title on a non-permanent basis did not entitle him to a permanent appointment absent his appointment via the examination process. In this regard, appellant is required to take and pass an examination as determined by Selection Services, be appointed from a certification list, and complete a working test period in order to become permanent in the subject title. In this instance, Selection Services determined that an STB examination was appropriate, which is a valid method of selection.

Regarding appellant's argument that the regulations state that no individual should serve in a temporary appointment for more than one year, this argument is misplaced since appellant is no longer serving in a temporary position. However, the appointing authority should have returned appellant to his permanent title after serving in the temporary position for more than six months in a 12-month period. In this regard, the appellant was formally notified that his temporary appointment was scheduled to end on April 29, 2005. Nevertheless, if appellant had an objection to his continued temporary appointment, he could have raised this objection and been removed from the temporary appointment in the title of Project Manager, DOT, (salary range R31) and returned to his permanent title of Supervisor, Office of Contract Compliance/Civil Rights (salary range M28). Regardless, these procedural errors by the DOT do not entitle the appellant to a permanent appointment. In this regard, a review of the record indicates that appellant was appointed to the subject title *provisionally* on March 22, 2003 and served through May 29, 2004, when he was removed from his provisional position, and was again appointed to the subject title *provisionally* on July 2, 2011. It is noted that a provisional appointee can be removed at any time and does not have a vested property interest in the provisional title. In other words, a provisional employee has no automatic right or expectation of achieving permanent appointment to the position to which he or she is occupying. *See O'Malley v. Department of Energy*, 109 N.J. 309 (1987). In the present matter, the fact that the appellant was inappropriately serving as a temporary appointee for over seven years does not equitably estop the appointing authority from removing him even

though he occupied the position longer than the statutory limit for temporary appointment. *See N.J.S.A. 11A:4-13(c)*.

Nevertheless, the Commission has serious concerns regarding the length of appellant's temporary appointment. Appellant was in temporary appointments in the title under test from May 29, 2004 until it was changed to a provisional appointment, pending promotional examination procedures, on July 2, 2011, a period of seven years and three months. There is nothing in appellant's personnel records reflecting that the appointing authority sought an extension of his temporary appointment beyond the six-month maximum. While this is inappropriate and the appointing authority should take steps to ensure that this does not happen in the future, such procedural errors, as stated previously, do not entitle the appellant to any relief. However, the DOT is warned that such actions in the future may subject the DOT to fines or other penalties pursuant to *N.J.S.A. 11A:10-3* and *N.J.A.C. 4A:10-2.1(a)2*.

One additional matter warrants comment. In the event that the appellant is not permanently appointed to the subject title from the current certification, the appointing authority is directed to remove him from his provisional position.

A thorough review of all material presented indicates that the appellant has failed to support his burden of proof in this matter.

### **ORDER**

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.