

In the Matter of Patrick Mullan, Department of Law and Public Safety
CSC Docket No. 2013-1602
(Civil Service Commission, decided December 18, 2013)

Patrick Mullan, represented by Ken McNamara, President, CWA Local 1037, appeals his return from the title of Supervising Investigator, Law and Public Safety, to Investigator 1, Law and Public Safety.

By way of background, personnel records indicate that the appellant received a regular appointment in the noncompetitive title of Supervising Investigator, Law and Public Safety, effective February 25, 2012, with the corresponding increase in pay. He then returned to his previous permanent title of Investigator 1, Law and Public Safety, effective October 20, 2012.

On appeal to the Civil Service Commission (Commission), the appellant explains that on November 27, 2012, he received a letter, dated November 23, 2012, from the Deputy Director of the Division of Consumer Affairs advising him that his “request for a voluntary demotion . . . has been processed.” He notes that he met with the Deputy Director on November 20, 2012, at which time, he was informed that he would be demoted retroactive to October 20, 2012. The Deputy Director based the demotion on a memorandum that the appellant wrote on June 11, 2012, stating that he no longer wished to be a Supervising Investigator, Law and Public Safety, due to the “hostile and abusive actions” of his former supervisor, an Assistant Deputy of Enforcement. In that regard, he alleged that the hostile work environment necessitated his request for reassignment. Thus, the appellant contends that his demotion “certainly was not voluntary.” Rather, he argues that his request to resign his position was made under duress or coercion. Although he acknowledges in an e-mail, dated June 4, 2012, and in the June 11, 2012 memorandum that he requested to “step down,” he reasons that his request for a “duty reassignment” must be viewed within the context of his complaint of hostile work environment and request for management intervention. The appellant claims that the “belittling,” “bullying,” and “vindictive” action on the part of his supervisor and the stress of that relationship left him with “no choice” but to step down. He asserts that the appointing authority did not investigate his complaints, but instead, focused only on his stated desire to be relieved from his supervisor’s supervision.

Furthermore, the appellant submits that on July 31, 2012, his supervisor announced her resignation, and as a result, the appellant requested meetings regarding his position. On August 14, 2012, he met with the Deputy Director and spoke with the Director of Human Resources, at which time he contends that he withdrew his request to step down from his position. He was informed that he would continue as a supervisor. There was also a discussion about the possibility of

a new or extended working test period, but that issue was left undetermined. The appellant notes that on several occasions subsequent to his June 11, 2012 memorandum, he also rescinded his request to resign, which the appointing authority accepted. Moreover, he indicates that the appointing authority's November 23, 2012 letter states that he was serving in a "provisional" title. However, he states that he was appointed on February 25, 2012 and informed that he would serve his working test period as a Supervising Investigator, Law and Public Safety, from May 5, 2012 to September 5, 2012. In this regard, he was first notified, by letter dated May 10, 2012, that he would serve a working test period from February 25, 2012 to June 25, 2012. The dates were later amended from May 5, 2012 to September 5, 2012. In addition, the appellant indicates that he was appointed as an "acting" Supervising Investigator, Law and Public Safety, on December 19, 2011. Therefore, the appellant maintains that since he received no further documentation, such as a notice of an extension or failure regarding his working test period, he became permanent and cannot be removed without just cause.

In addition, the appellant notes that on November 20, 2012, he responded as interested to a posting for a promotional opportunity to Supervising Investigator, Law and Public Safety. Additionally, he indicates that he was hospitalized on May 6, 2012 due to stress-related complications and returned to work on May 15, 2012. He contends that the appointing authority was aware of his hospitalization, as well as similar complaints that were made against his supervisor by other subordinates. However, no action was taken. Moreover, the appellant emphasizes that an inordinate amount of time transpired between his June 11, 2012 memorandum and the date that he was informed that he was demoted from his position. He maintains that given the agreement by management for him to continue in his supervisory title and changes to supervision with the resignation of his supervisor, it was reasonable for him to believe that his requests from June 2012 "were no longer timely and would not be acted upon by the Appointing Authority." As for a remedy, the appellant seeks a return to his former title of Supervising Investigator, Law and Public Safety, and for his record to reflect continuous service in that title since February 25, 2012. He also requests "all back pay representing full salary he would have received had the Appointing Authority not taken action to remove him from the title of Supervising Investigator." Thus, he urges the Commission to take action either by a review of the written record or order a hearing in this matter.

In response, the appointing authority, represented by Karen Jordan, Deputy Attorney General, states that the appellant requested a voluntary demotion from his "provisional title" of Supervising Investigator, Law and Public Safety, in June

2012, less than a month after the start of his working test period in May 2012.¹ On June 12, 2012, he was reassigned to a position in his previous permanent title, Investigator 1, Law and Public Safety. Thus, the appointing authority maintains that the appellant did not complete his working test period in his supervisory position and was not rated in that title. The appointing authority acknowledges that although the appellant returned to working as an Investigator 1, Law and Public Safety, he continued receiving the higher salary of the supervisory title. It also emphasizes that the appellant's demotion was neither a disciplinary demotion nor a resignation.

Moreover, as background to what occurred, the appointing authority offers that it assigned the appellant duties of a unit supervisor, effective December 19, 2011, and eventually appointed him to the title of Supervising Investigator, Law and Public Safety, with a working test period to commence on May 5, 2012 and ending September 5, 2012. It acknowledges that there were meetings between the appellant and the Deputy Director. However, it contends that it did not accept the appellant's request to rescind his voluntary demotion. Rather, it states that the Deputy Director encouraged the appellant to reconsider a verbal request he had made on May 29, 2012 to his supervisor to step down and told him that promotional opportunities in the Division were difficult to obtain. Nonetheless, the appellant submitted the June 4, 2012 e-mail and June 11, 2012 memorandum confirming his decision to voluntarily step down from his position. Thereafter, his supervisor reassigned him to another unit effective June 12, 2012. Additionally, the appointing authority notes that the appellant had asked for a "transfer." However, he was advised on July 3, 2012 that no positions were available. On August 31, 2012, the appellant met with the Deputy Director. The Director of Human Resources participated in the meeting by telephone. The appointing authority maintains that at no time during the meeting did the Deputy Director or Director agree to a rescission of the appellant's request for a voluntary demotion, which it already had implemented by reassigning the appellant to a non-supervisory position in another unit on June 12, 2012.

Additionally, the appointing authority argues that Civil Service rules on voluntary demotions do not authorize an employee to rescind a request for a voluntary demotion, nor do they require an appointing authority to accept the rescission. It reiterates that contrary to the appellant's assertion, he was not removed from his supervisory position. Thus, his separation was a not a disciplinary demotion. The appointing authority adds that the appellant was not released at the end of the working test period due to unsatisfactory performance. It contends that he failed to complete the working test period due to his request to be

¹ It is noted that a provisional appointment means employment in the competitive division of the career service pending the appointment of a person from an eligible list. *See N.J.A.C. 4A:1-1.3.* Thus, there cannot be a provisional appointment to a noncompetitive title.

reassigned. In addition, the appointing authority disputes that the appellant's claimed resignation was the result of duress and coercion. It observes that while the appellant refers to a hostile work environment, his claim does not describe discriminatory conduct.

Furthermore, the appointing authority indicates that although the appellant had been reassigned on June 12, 2012, it was an administrative error on its part not to have informed this agency of the voluntary demotion at that time. The appointing authority presents a memorandum, dated October 15, 2012, to the Director of the Division of Classification and Personnel Management, explaining it had promoted the appellant to Supervising Investigator, Law and Public Safety, "effective May 5, 2012," and he was to serve a working test period to September 5, 2012. It further conveyed the appellant's request for a voluntary demotion and advised that it never entered the demotion in the Personnel and Management Information System (PMIS). Thus, it indicated that [s]ince this error was at no fault of Mr. Mullan, we are requesting approval to demote Mr. Mullan . . . with a current effective date of October 20, 2012." It maintains that it requested an effective date of October 20, 2012 so that the appellant would not have to repay the higher salary he had been receiving from June 12, 2012 to October 20, 2012.

The appointing authority also asserts that it was not reasonable for the appellant to believe that no action would be taken on his June 11, 2012 request to step down from his position, given that he was moved to a different unit on the next day and was performing duties of his former non-supervisory title. It reiterates that the October 20, 2012 effective date of the voluntary demotion was to minimize the financial harm that could have possibly been suffered by the appellant for its failure to advise this agency of the voluntary demotion. Therefore, the appointing authority maintains that the appellant is entitled to no additional relief and his appeal should be denied.

CONCLUSION

Initially, as set forth more fully below, the appellant's separation from his supervisory title was not a disciplinary demotion nor a release at the end of the working test period. Thus, this matter is considered an administrative appeal, which is generally treated as a review of the written record. *See N.J.S.A. 11A:2-6(b).* Hearings are granted in those limited instances where the Commission determines that a material and controlling dispute of fact exists which can only be resolved through a hearing. *See N.J.A.C. 4A:2-1.1(d).* No material issue of disputed fact has been presented which would require a hearing. *See Belleville v. Department of Civil Service*, 155 N.J. Super. 517 (App. Div. 1978). Accordingly, the appellant's request for a hearing is denied.

Regarding the appellant's working test period as a Supervising Investigator, Law and Public Safety, a review of the record indicates that the appellant failed to complete the working test period. *N.J.A.C.* 4A:4-5.2(a) provides that the working test period shall not include any time served by an employee under provisional, temporary, interim or emergency appointment. The working test period shall begin on the date of regular appointment, which is defined in relevant part as employment of a person to a position in the noncompetitive division of the career service. *See N.J.A.C.* 4A:1-1.3. The length of the working test period in State service is a period of four months of active service, which may be extended on request of an appointing authority for an additional two months. *See N.J.A.C.* 4A:4-5.2(b)2. First, the appellant did not commence his working test period on December 10, 2011, when he was appointed as an "acting" Supervising Investigator, Law and Public Safety, since commencement begins on the date of regular appointment.² Moreover, considering either the February 25, 2012 or May 5, 2012 date as the appellant's date of regular appointment, the appellant did not complete his working test period as a result of his reassignment. The appellant was reassigned to a different unit with non-supervisory duties on June 12, 2012, less than the required four months to complete the working test period based on either the February or May 2012 date. It is emphasized that the length of the working test period in State service is a period of four months of *active* service. *See N.J.A.C.* 4A:4-5.2(b)2. The appellant was not actively serving as a Supervising Investigator, Law and Public Safety, as of June 12, 2012. In his own words, the appellant acknowledges a discussion about the possibility of a new or extended working test period, but that issue was left undetermined. Therefore, the appellant's claim that he became permanent is without merit. Nonetheless, since there is no dispute that the appellant was performing the duties of a Supervising Investigator, Law and Public Safety, as of February 25, 2012, and receiving commensurate salary, his regular appointment date shall be set on that date. Accordingly, the appellant's PMIS records shall remain unchanged in that regard.

Additionally, a review of the record does not evidence that the appellant's separation was a disciplinary demotion or a release at the end of the working test period. Rather, as determined above, the appellant did not complete his working test period. Moreover, it is clear that the appellant requested to step down from his supervisory position. There is also no evidence that his separation was due to disciplinary reasons or unsatisfactory performance. Thus, the arguments of the parties in this regard merit no further discussion.

The appellant also argues that his request to resign his position was made under duress or coercion. Initially, it must be noted that the appellant's separation

² There is no such designation as an "acting" appointment under Civil Service rules. *N.J.S.A.* 11A:4-13 and *N.J.A.C.* 4A:4-1, *et seq.*, provide for regular, conditional, provisional, interim, temporary, and emergency appointments.

cannot be deemed a resignation. *N.J.A.C.* 4A:2-6.1(a) allows a permanent employee to resign in good standing by giving the appointing authority written or verbal notice. In this case, the appellant did not resign from his permanent position. In other words, he did not resign from State service. The appellant requested to be returned to his prior permanent title of Investigator 1, Law and Public Safety. Nonetheless, *N.J.A.C.* 4A:2-6.1(d) allows an employee to appeal a resignation in good standing if the resignation was the result of duress or coercion. Even characterizing the appellant's actions as a "resignation," the Commission does not find that the appellant's request to step down was a result of duress or coercion. Even assuming, *arguendo*, that the appellant's complaints about his former supervisor's actions were substantiated, there is no showing that the actions were designed to cause the appellant to step down. The appellant's reaction of stepping down was a personal choice. Therefore, the Commission finds that the appellant submitted his request voluntarily. *See e.g., In the Matter of Dean Fuller* (MSB, decided May 27, 1997).³

However, the main issues to be considered in this appeal are whether the appellant's separation from his supervisory position can be deemed a voluntary demotion⁴ and if it were timely effectuated. As indicated above, since the appellant did not complete his working test period, he was not permanent as a Supervising Investigator, Law and Public Safety, thus, his separation could not be deemed a voluntary demotion based on a strict reading of *N.J.A.C.* 4A:4-7.8(a). This rule provides in relevant part that a voluntary demotion in State service is the voluntary movement of a *permanent* employee from his or her *permanent* title to another title with a lower class code within the same organizational unit. Nonetheless, based on the analysis of the foregoing ancillary disputes, the Commission finds that the appellant's request to step down from his supervisory position was voluntary. Furthermore, the appellant's request was timely acted upon by the appointing authority. The appellant does not dispute that he was reassigned to another unit and was performing non-supervisory duties on June 12, 2012. The appointing authority was under no obligation to re-appoint him to a supervisory position. Therefore, regardless of the actual effective date of the action, the appellant's separation from his supervisory title was in accordance with Civil Service law and rules.

As to the effective date, it is emphasized that each position in the career and unclassified services shall be assigned a job title which describes the duties and responsibilities to be performed and the level of supervision exercised and received; establishes the minimum education and experience qualifications necessary for

³ Further, it is noted that once a resignation is accepted, the appointing authority is under no obligation to rescind the resignation. *See N.J.A.C.* 4A:2-6.1(c).

⁴ A demotion is defined in State service as a reduction in class code. The Supervising Investigator, Law and Public Safety, title is designated in class code 29 and the Investigator 1, Law and Public Safety, title is designated in class code 26.

successful performance; and, in State service, sets the level of compensation. *See N.J.A.C. 4A:3-3.1.* Consequently, since the appellant was performing the duties of an Investigator 1, Law and Public Safety, as of June 12, 2012, the Commission finds that there was a salary overpayment issue beginning on that date. However, the appointing authority acknowledges that it never formally entered the appellant's separation in PMIS nor changed his salary. Thus, it requested an effective date of October 20, 2012 so that the appellant would not have to repay the higher salary he had been receiving. Under these circumstances, the Commission finds that it is equitable to waive repayment of any salary overpayment that the appellant received.⁵ It is noted that this decision is based on the unique facts of this case and does not set a precedent for any other case. However, in order to avoid any misperception that the appellant completed his working test period and was permanent as a Supervising Investigator, Law and Public Safety, it is directed that his PMIS record reflect his return to Investigator 1, Law and Public Safety, effective June 12, 2012.

ORDER

Therefore, it is ordered that the appeal be denied. It is further ordered that the appellant's PMIS record reflect his return to Investigator 1, Law and Public Safety, effective June 12, 2012, but that a repayment of salary overpayment be deemed waived.

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

⁵ The salary overpayment is approximately \$2,350.