



STATE OF NEW JERSEY

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

In the Matter of Edward McCabe,
Department of Human Services

Administrative Appeal

CSC Docket No. 2019-1015

ISSUED: APRIL 3, 2019

(SLK)

Edward McCabe, an unclassified Equal Employment Opportunity Officer (EEO), requests that the Department of Human Services return him to his permanent title, Affirmative Action Officer 2 (AAO2).

By way of background, on April 5, 2014¹, McCabe took a leave of absence from his permanent title of AAO2 to accept an unclassified appointment as an EEO. At that time, his salary as AAO2 was \$91,781.49 (Y28 salary range, salary step 10) and he accepted the EEO appointment at the same salary. Thereafter, McCabe took a leave of absence each subsequent year from his AAO2 title and he remained as an EEO at the \$91,782.49 salary. *See N.J.A.C. 4A:6-1.10(a).*

On appeal, McCabe submits a May 15, 2015 internal communication where he asked for a “voluntary demotion” from his unclassified position as EEO to his permanent title, AA02. It is noted that the record does not indicate if the appointing authority responded to this request. Additionally, he presents an October 1, 2018 e-mail indicating that the appointing authority denied his subsequent request for a “voluntary demotion” to his permanent title as it stated that this agency does not approve voluntary demotions for employees to obtain additional money. It further advised McCabe that he would need to apply and be demoted through the job posting process. McCabe describes the background that led to his appointment as the appointing authority’s EEO. Further, he presents the backlog of cases that existed at the time he started the position and how that

¹ On appeal, McCabe indicates that he began serving as “Acting EEO Director” in February 2012.

backlog was eliminated under his direction. McCabe indicates that, in addition to himself, his office consists of one AAO1, two AAO2s, a Legal Specialist, and a Clerk. He explains that the Legal Specialist investigates external and unusually complicated cases and prepares responses for Civil Service Commission (Commission) appeals. Additionally, McCabe indicates that he has trained the Legal Specialist on how to run the office when he is absent.

He indicates that this request is for economic and other reasons as he has accomplished all the goals that he set as an EEO and he has done so without receiving any additional salary. McCabe believes that the Legal Specialist is fully capable of replacing him as the EEO, and he states that he would assist with the transition. He contends that *N.J.A.C. 4A:3-4.10(e)*¹ provides for the demotion that he is seeking. McCabe argues that this section provides an exception to allow employees like himself, who move from a managerial position to a non-managerial title, to receive the normal salary adjustment inherent to that title. He asserts that, if his request is denied, he will be forced to continue as the EEO with no additional compensation and an overwhelming salary compression.

In response, the appointing authority asserts that *N.J.A.C. 4A:3-4.10(e)* is not applicable as this section only applies to those serving in titles with a salary range and McCabe is serving in a single range (no range) unclassified title. Instead, it indicates that *N.J.A.C. 4A:3-4.12* is the applicable section and believes that this section indicates that he would receive the same salary he currently receives even if he were returned to his permanent title. Further, the appointing authority presents that returning McCabe to his permanent title would be a hardship based on its operational needs. It indicates that it does not wish to voluntarily demote McCabe for the sole purpose of him obtaining a higher salary. The appointing authority states that it is not required to promote someone for his personal benefit and that the appointment of a new EEO would have to go through the posting and hiring process. Further, it indicates that promoting the Legal Specialist would create a vacancy in that title and McCabe is not qualified to fill it.

CONCLUSION

N.J.A.C. 4A:6-1.10(a) provides that in State service, an appointing authority may, with approval from the Chairperson or designee, grant leaves of absence without pay to permanent employees for a period not to exceed one year unless otherwise provided by statute. A leave may be extended beyond one year for exceptional situations upon request by the appointing authority and written approval by the Chairperson or designee. *N.J.A.C. 4A:6-1.10(c)* provides that an appointing authority may permit an employee to return from a leave of absence without pay prior to its conclusion.

N.J.A.C. 4A:4-1.9(a) provides, in pertinent part, that an employee with permanent status in a career service title, who is returned from an unclassified appointment under *N.J.A.C.* 4A:4-1.3, to his or her permanent title, will have rights to a position in the permanent title in the same organizational unit. *N.J.A.C.* 4A:4-1.9(b)-(f) provide the procedures to effect the return of the permanent employee.

N.J.A.C. 4A:4-7.8(a)2 provides that, in State service, a voluntary demotion is the voluntary movement to another title with a lower class code within the same organizational unit.

N.J.A.C. 4A:3-4.10(e)1 provides, in pertinent part in reference to demotional pay adjustments in State service, that this section shall not be used to gain a salary increase for an employee, except when an employee is moving from a managerial to a non-managerial title and the applicable salary regulation issued in accordance with the annual Appropriations Act provides that the affected employee shall receive a salary increase.

N.J.A.C. 4A:3-4.12(a) provides, in pertinent part, when an employee moves from a no-range title to a title having a salary range, the salary shall be adjusted up to the step in the range that is the same or next higher salary of the no range title.

N.J.A.C. 4A:1-1.2(c) states that the Civil Service Commission (Commission) may relax a rule for good cause in order to effectuate the purposes of Title 11A, New Jersey Statutes.

In this matter, McCabe is a permanent AAO2, who took a leave of absence to accept an unclassified appointment as an EEO, and is now requesting to be returned to his permanent title. Therefore, this is not a request for a voluntary demotion that is governed by *N.J.A.C.* 4A:4-7.8(a)2 or *N.J.A.C.* 4A:3-4.10(e)1 since the movement would not be to a title with a lower class code. In this regard, McCabe's unclassified appointment is a no range title and does not have a *per se* class code designation.

The Commission notes that in State service under *N.J.A.C.* 4A:6-1.10, a leave of absence is for one year and it may be extended for subsequent 12-month periods upon approval. However, it is the appointing authority who has the discretion to permit an employee to return from a leave of absence prior to its conclusion. See *N.J.A.C.* 4A:6-1.10(c). Personnel records indicate that McCabe's current 12-month leave of absence commenced on April 5, 2018 and ends on April 4, 2019. Therefore, under *N.J.A.C.* 6-1.10(c), it was within the appointing authority's discretion to not allow McCabe to return from his current 12-month leave of absence prior to it concluding at the end of the one-year period. Under such circumstances, an appointing authority cannot involuntarily force a permanent employee wishing to end a voluntary leave of absence at its expiration from doing so. To find otherwise

would be an infringement on an employee's right to function in his/her permanent title, or otherwise be draconian in nature, permitting an appointing authority to compel performance in a function that the employee rightfully requests no longer to perform. Thus, McCabe has the right not to continue his leave of absence beyond its expiration. His current leave of absence would end on April 4, 2019. Consequently, the Commission finds that, for salary purposes, McCabe shall be returned to his permanent title, AAO2, effective April 5, 2019. However, to give the appointing authority time to plan for its operational needs, this movement shall be effectuated May 11, 2019, which is the beginning of the first pay period that starts in May 2019.

Concerning McCabe's salary, it is governed under *N.J.A.C. 4A:3-4.12(a)* as he is an employee moving from an unclassified title, a title without a salary range, to AAO2, a title with a Y28 salary range. McCabe's salary as an EEO is \$91,781.49. A review of the current salary range for Y28 indicates that the salary for step 6 is \$91,186.57 and step 7 is \$94,670.32. Therefore, under *N.J.A.C. 4A:3-4.12(a)*, McCabe's salary would be \$94,670.32, as this would adjust his salary up to the step in the range that is the same or next higher salary of the no range title. However, it cannot be ignored that McCabe initially asked to be returned to his permanent title on May 15, 2015. The Commission is cognizant that the rules regarding leaves of absence without pay to accept unclassified appointments do not clearly articulate each party's rights and responsibilities. Nevertheless, based on the rationale articulated earlier in this decision, under *N.J.A.C. 4A:6-1.10*, McCabe's 12-month leave of absence at that time could have ended on April 4, 2016. A review of the Y28 salary range on April 5, 2016 indicates that the salary for step 10 was \$91,781.72. In other words, if the appointing authority could have returned him to his permanent title on April 5, 2016 as requested, his salary would have been Y28, step 10 under *N.J.A.C. 4A:3-4.12(a)*. A review of agency records indicates that a new salary range for Y28 became effective September 29, 2018, and the step 10 salary for that range is now \$105,121.57. Under these extremely limited circumstances, the Commission finds good cause under *N.J.A.C. 4A:1-1.2(c)* to relax the provisions of *N.J.A.C. 4A:3-4.12(a)*, and McCabe's salary shall be \$105,121.57, effective April 5, 2019, which is the salary that McCabe would have received if the appointing authority had returned him to his permanent title by April 5, 2016.

One other matter needs to be addressed. The sections in Title 4A addressing leaves of absences, unclassified appointments and salary upon a return of a leave of absence from an unclassified appointment do not clearly articulate each party's rights and responsibilities concerning a situation like the instant matter. In this light, the Commission orders that these provisions be reviewed.

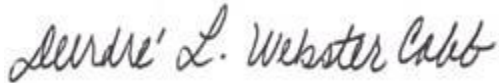
This determination is limited to the facts in the instant matter and does not provide precedent in any other matter.

ORDER

Therefore, it is ordered that the appeal be granted. McCabe's salary shall be set at \$105,121.57 effective April 5, 2019. The appointing authority shall effectuate his movement to his permanent title, AA02, by May 10, 2019.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 27th DAY OF MARCH, 2019



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