



B-149

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Lamar
Mackson, City of Plainfield

CSC Docket No. 2015-1130

Administrative Appeal

ISSUED: FEB - 5 2015 (CSM)

Lamar Mackson, represented by Dayna R. Katz, Esq., appeals the City of Plainfield's decision to discontinue his provisional appointment as a Media Technician 1, effective June 18, 2014.

By way of background, agency records reflect that the appointing authority provisionally appointed the appellant, pending open competitive examination procedures, to the title of Media Technician 1 on January 6, 2014. Due to reductions in the budget, the appointing authority discontinued the appellant's provisional appointment and separated him from employment effective June 18, 2014. In an appeal to the Civil Service Commission (Commission) dated and postmarked September 10, 2014, the appellant asserted that he began his employment with the appointing authority on May 1, 2013 as an Audio Visual Specialist but he was never advised that his title was changed to Media Technician 1 effective January 6, 2014. The appellant argued that he was terminated from employment without being provided a Preliminary Notice of Disciplinary Action (PNDA) or Final Notice of Disciplinary Action (FNDA) and that the appointing authority retained him in a provisional capacity in excess of 12 months in violation of *N.J.S.A. 11A:4-13(b)*. In this regard, he claimed that the appointing authority withheld the information regarding his actual hire date of May 1, 2013 from this agency in order to retain his provisional status. He also argued that the appointing authority's contention that he was terminated because of a budget reduction was pretextual. However, as there is no right to a provisional appointment and the right to appeal in disciplinary matters is limited to employees in the career service with underlying permanent status or persons serving in a working test period, the

appellant was advised by Division of Appeals and Regulatory Affairs (DARA) staff that there was no basis on which the Commission could review his appeal.

In response, the appellant states that he never took a competitive examination because the appointing authority never advised him it was necessary to achieve permanent status. He reiterates that his title was changed to Media Technician 1 on January 6, 2014 without his knowledge and his County and Municipal Personnel System (CAMPS) record erroneously indicates that he was a new hire on that date. As such, the appellant maintains that the appointing authority neglected to advise this agency that he had actually been working for it since May 1, 2013. Therefore, the appellant contends that his provisional service exceeded 12 months in contravention of *N.J.S.A. 11A:4-13(b)*. In support of his request, the appellant provides copies of the appointing authority's Employee Action Forms indicating that he was hired as an Audio Visual Specialist effective May 1, 2013 and then appointed as a Media Technician 1 on January 6, 2014. Accordingly, the appellant requests that the Commission retroactively determine if he met the qualifications for Media Technician 1, and, had the determination been timely made, if he would have achieved permanent status so that he can challenge his removal.

In reply, the appointing authority, represented by Little E. Rau, Esq., presents that the appellant is not entitled to a hearing regarding his separation because he was not a permanent employee. Regardless, even assuming *arguendo* that it did not comply with the 12 month limitation for provisional appointment, the appointing authority maintains that this would not convert a provisional employee into a permanent one. In this regard, even if it erroneously failed to submit the required forms to this agency regarding his appointment as an Audio Visual Specialist, it argues that this error was not the cause for his termination as a Media Technician 1. Rather, the appointing authority provides a certification from Karen Dabney, Personnel Director, stating that the appellant's position was eliminated due to economic reasons. Additionally, the appointing authority states that there is no basis on which to retroactively determine his qualifications or whether he would have achieved permanent status as he was not a long term provisional employee. Moreover, it emphasizes that the appellant was clearly aware that his title changed from Audio Visual Specialist to Media Technician because he received a corresponding increase in salary. Further, the appellant was an Audio Visual Specialist for little more than eight months and a Media Technician 1 for six months. As such, since his total service was for little more than one year, the appointing authority maintains that there is no basis on which to convert his provisional status into a permanent appointment.

CONCLUSION

N.J.S.A. 11A:2-6 and *N.J.A.C. 4A:2-2.1*, state, in pertinent part, that the right to appeal and a hearing in disciplinary matters is limited to permanent employees in the career service or persons serving in a working test period.

In *Kyer v. City of East Orange*, 315 *N.J. Super.* 524 (App. Div. 1998), the court determined that the City of East Orange's ("City") actions in denying Kyer, a seven-year employee, the opportunity to ever achieve permanent status in her competitive career service position, contrary to the Civil Service Act, were so egregious that they warranted a unique remedy.

It is our view that a delicate balance must be struck between the public and private interests that are subject to prejudice when a governmental entity fails to comply with its statutory obligations. Estoppel is not the answer. First, the Supreme Court has precluded that solution. Second, unqualified persons may thereby be afforded an improper route to permanency. But by the same token, it is no solution to leave remediless the well-qualified, experienced, high performing, long-term provisional employee *who is unaware that her position is not permanent, who in all likelihood would have easily achieved permanency but for the municipal negligence*, and whose summary discharge from employment is as obviously unfair and arbitrary as this jury found plaintiffs to be. *Id.* at 532-533 (emphasis added).

Accordingly, the court transferred the case to this agency to retroactively determine whether Kyer would have qualified for the competitive career service position she provisionally held for seven years and, if so, "to fashion an appropriate remedy." *Id.* at 534. Ultimately, after the remand, it was determined that, notwithstanding Kyer's years of service or the misdeeds of the appointing authority, she was not entitled to a permanent appointment since she did not meet the open-competitive requirements for the position at the time the provisional appointment was initially made. *See In the Matter of Ruby Robinson Kyer* (MSB, decided May 4, 1999). *See also Melani v. County of Passaic*, 345 *N.J. Super.* 579 (App. Div. 2001).

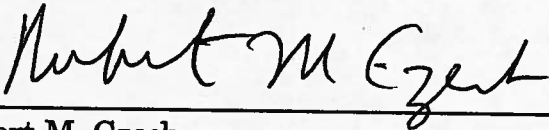
In the instant matter, while there is no evidence which establishes that the appointing authority acted in such a grossly negligent manner as the City of East Orange did with respect to Kyer, there is evidence in the record that the appellant's provisional appointment to the competitive Audio Visual Specialist title was not recorded even though he served in the title for eight months. Therefore, the Division of Agency Services should correct the appellant's CAMPS record to reflect his initial provisional appointment to the title of Audio Visual Specialist. However, it is equally evident that the appellant's title was changed to the competitive title of Media Technician 1 in January 2014. The appointing authority advised this agency

of the appointment and an open competitive examination Media Technician 1 was in the process of being announced when budgetary reasons resulted in it requesting that the examination be cancelled since it was discontinuing the appellant's provisional appointment. Thus, even though the appellant's initial provisional appointment was not recorded, the appointing authority was clearly taking the steps necessary for a provisional appointee to achieve permanency in the Media Technician 1 title. Further, it cannot be ignored that unlike Kyer, the appellant was employed by the appointing authority in a provisional capacity, in two different provisional titles, for a total of 13 ½ months. Therefore, the appellant was not a long term provisional appointee who had an expectation that he had achieved permanent status as either an Audio Visual Specialist or a Media Technician 1. Accordingly, since the appellant did not have permanent status in either career service title, he is not entitled to a hearing regarding the discontinuation of his provisional appointment.

ORDER

Therefore, it is ordered that this appeal be denied. It is also ordered that the appellant's CAMPS record be corrected to reflect his provisional appointment, pending open competitive examination procedures to the title of Audio Visual Specialist effective May 1, 2013.

DECISION RENDERED BY
THE CIVIL SERVICE COMMISSION ON
THE 4TH DAY OF FEBRUARY, 2015



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