



B-9

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Stanley Kolbe, Jr.

CSC Docket No. 2015-1186

Administrative Appeal

ISSUED: APR - 2 2015 (SLK)

Stanley Kolbe, Jr., a Fire Fighter with the City of Pleasantville, represented by Mark E. Belland, Esq., requests enforcement of the final decision rendered on May 21, 2014 which ordered his retroactive appointment for salary step placement and seniority-based purposes.

By way of background, in *In the Matter of Stanley E. Kolbe, Jr., Fire Fighter (M2388H)* (CSC, decided April 15, 2009), and subsequently enforced in *In the Matter of Stanley E. Kolbe, Jr.*, (CSC, decided May 21, 2014), the Civil Service Commission (Commission) ordered the appointing authority to appoint Mr. Kolbe as a Fire Fighter retroactive to the date he would have been appointed if his name had not been inappropriately removed from the eligible list. The Commission specified that this date was for salary step placement and seniority-based purposes. However, the Commission did not grant any other relief, such as back pay or counsel fees. Personnel records indicate that on July 1, 2014, the appellant was appointed to the position of Fire Fighter with a retroactive effective date of February 25, 2008. There is no dispute that Mr. Kolbe has been placed on the correct salary step and longevity pay. However, the appellant is petitioning the Commission for all of his seniority-based benefits including vacation time, terminal leave, and pension credits which correspond to his February 25, 2008 retroactive appointment date.

In his petition, Mr. Kolbe presents that in accordance with his collective negotiations agreement, a Fire Fighter with his seniority receives five tours of vacation which is equivalent to 240 hours. Mr. Kolbe states that the appointing authority is not granting him any vacation for his first full year and that he has

been advised that he will be granted one tour of vacation time after July 1, 2015. The appellant indicates that he was further advised by the appointing authority that it will take him five years to build up to his five tours of vacation time. Mr. Kolbe asserts that he has seniority over three individuals who receive five tours of vacation per year. The appellant maintains that he is entitled to two and one-half tours of vacation for 2014 and then, beginning in 2015, he should receive the full five tours of vacation time.

In reply, the appointing authority, represented by Melissa A. Ferrara, Esq., states that the Commission's order which required it to hire the appellant as a Fire Fighter with retroactive seniority back to February 25, 2008 is specifically limited to "salary step placement and seniority-based purposes only" and "does not grant any other relief ... except the relief enumerated." Thus, since Mr. Kolbe acknowledged that he has received seniority and salary steps as ordered, the appointing authority asserts that it has complied with the Commission's order and the appellant is not entitled to any additional remedies.

In response, Mr. Kolbe states that the appointing authority is using a literal reading of the Commission's order to defend its actions and asserts that he is entitled to receive each and every seniority-based benefit predicated upon his retroactive date of appointment such as vacation time, terminal leave, and pension credits. In this regard, he maintains that it is well established that an award of a retroactive appointment "for seniority purposes only" establishes that an appellant has no claim for or entitlement to back pay, but such an award establishes that for seniority based programs, such as salary step placement, layoffs, and vacation leave time entitlement, seniority is predicated upon the retroactive appointment date. Further, Mr. Kolbe submits his union contract that provides, as a Journeyman Firefighter as of July 1, 2014, he should have been entitled to five tours of vacation as of that date. The appellant maintains that the appointing authority's refusal to provide him with five tours of vacation is a blatant and egregious violation of the Commission's orders. The appellant also contends that the appointing authority's actions depriving him of his benefits are punitive and an egregious violation and in non-compliance with the Commission's orders. Therefore, Mr. Kolbe requests that the Commission issue an order of non-compliance and fine or take other appropriate action against the appointing authority pursuant to *N.J.A.C. 4A:10-2.1(a)*. Mr. Kolbe highlights that this is the third time that the appointing authority is forcing him to unnecessarily fight for his rights and therefore he is requesting counsel fees and costs incurred in this matter.

CONCLUSION

In its prior decision, the Commission ordered that upon the successful completion of his working test period, Mr. Kolbe was to be granted a retroactive date of appointment to the date he would have been appointed if his name had not

been removed from the eligible list for Fire Fighter (M2388H), Pleasantville, and the date would be for salary step placement and seniority-based purposes only.

A review of the instant matter indicates that there is no dispute as to Mr. Kolbe's salary step placement upon his initial appointment. Rather, this case involves a disagreement as to the achievement of Journeyman Firefighter status as it relates to the accumulation of vacation leave, which is a negotiated item in the parties' collective negotiations agreement. *See Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*, Docket No. A-0270-13T (App. Div. February 26, 2015) (Court affirmed grievance arbitration award concerning contractual benefits based on Civil Service Commission-ordered retroactive appointment date). However, the Commission does not have jurisdiction to enforce or interpret items which are contained in a collective negotiations agreement negotiated between the employer and the majority representative. *See In the Matter of Jeffrey Sienkiewicz, Bobby Jenkins and Frank Jackson*, Docket No. A-1980-99T1 (App. Div., May 8, 2001). Furthermore, *N.J.A.C. 4A:6-1.1(a)4* specifically states that vacation and sick leaves for firefighters are established by local ordinance. As such, in this case, since the local appointing authority and the majority representative agreed to have the calculation for vacation and sick leaves as part of their collective negotiations agreement, the Commission is unable to review this matter. Additionally, the Commission does not have jurisdiction to award Mr. Kolbe pension credits and he should pursue any concerns that he may have in this regard with the Board of Trustees of the Police and Fire Retirement System.

With regard to Mr. Kolbe's request that an order of non-compliance be issued against the appointing authority, the Commission notes that it is specifically given the power to assess compliance costs and fines against an appointing authority, including all administrative costs and charges, as well as fines of not more than \$10,000, for noncompliance or violation of Civil Service law or rules or any order of the Commission. *N.J.S.A. 11A:10-3; N.J.A.C. 4A:10-2.1(a)2. See In the Matter of Fiscal Analyst (M1351H), Newark*, Docket No. A-4347-87T3 (App. Div. February 2, 1989). However, the Commission will only impose fines and penalties in such matters where an appointing authority has not made a good faith effort to comply. In this matter, the appointing authority implemented the Commission's May 21, 2014 order and retroactively appointed Mr. Kolbe effective February 25, 2008. As the appellant has not provided any evidence that the appointing authority has not acted in good faith in its attempts to comply with the Commission's May 21, 2014 order, there is no basis for an order of non-compliance.

Similarly, in respect to the appellant's request for counsel fees and costs, the record in this matter does not evidence that the appointing authority unreasonably delayed implementing the Commission's order. The record also fails to indicate that the appointing authority took adverse action against the employee in bad faith or with invidious motivation. Rather, the appointing authority followed a literal,

albeit narrow reading of the May 21, 2014 order. Thus, the record does not reflect a sufficient basis for the award of counsel fees in this matter. *See In the Matter of Lawrence Davis* (MSB, decided December 17, 2003); *In the Matter of William Carroll* (MSB, decided November 8, 2001).

ORDER

Therefore, it is ordered that this request for enforcement be dismissed for the Commission's lack of jurisdiction.

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 DAY OF , 2015

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals and
Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

c: Stanley Kolbe Jr.
Mark E. Belland, Esq.
Melissa M. Ferrara, Esq.
Jesse Tweedle, Sr., Mayor
Beth Wood
Joseph Gambino

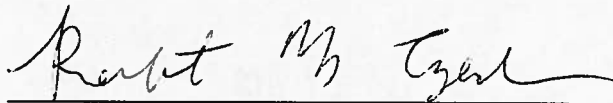
albeit narrow reading of the May 21, 2014 order. Thus, the record does not reflect a sufficient basis for the award of counsel fees in this matter. *See In the Matter of Lawrence Davis* (MSB, decided December 17, 2003); *In the Matter of William Carroll* (MSB, decided November 8, 2001).

ORDER

Therefore, it is ordered that this request for enforcement be dismissed for the Commission's lack of jurisdiction.

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 1st DAY OF APRIL, 2015



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals and
Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

c: Stanley Kolbe Jr.
Mark E. Belland, Esq.
Melissa M. Ferrara, Esq.
Jesse Tweedle, Sr., Mayor
Beth Wood
Joseph Gambino

B.2



STATE OF NEW JERSEY
FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Stanley E. Kolbe,
Jr., Fire Fighter (M2388H),
Pleasantville

Medical Review Panel Appeal

CSC Docket No. 2008-4110

ISSUED: APR 17 2009 (BS)

Stanley E. Kolbe, Jr., represented by Michelle J. Douglass, Esq., appeals his rejection as a Fire Fighter candidate by Pleasantville and its request to remove his name from the eligible list for Fire Fighter (M2388H) on the basis of psychological unfitness to perform effectively the duties of the position.

This appeal was brought before the Medical Review Panel on December 17, 2008, which rendered the attached report and recommendation on December 17, 2008. No exceptions were filed by the parties.¹

The report by the Medical Review Panel discusses all submitted evaluations. The test results and procedures and the behavioral record, when viewed in light of the Job Specification for Fire Fighter, indicate that the applicant is mentally fit to perform effectively the duties of the position sought, and therefore, the action of the hiring authority should not be upheld. The Panel recommended that the candidate be restored to the eligible list.

¹ The appellant filed "exceptions" asserting that his age was incorrectly given as 42 on the Report and Recommendation of the Medical Review Panel and that his correct age is 29. Additionally, the appellant requested that he be given a retroactive date of appointment back to the date he would have been hired had he not been psychologically disqualified. The Civil Service Commission acknowledges a typographical error incorrectly indicating the appellant's age as 42 and notes that the appellant's correct age is 29. The Commission further notes that, once the appellant successfully completes his working test period, he will be granted the retroactive date of appointment as indicated in the Order.

CONCLUSION

Having considered the record and the Medical Review Panel's Report and Recommendation issued thereon, and having made an independent evaluation of same, the Civil Service Commission accepted and adopted the findings and conclusions as contained in the attached Medical Review Panel's Report and Recommendation.

ORDER

The Civil Service Commission that the appointing authority has not met its burden of proof that Stanley E. Kolbe, Jr. is psychologically unfit to perform effectively the duties of a Fire Fighter and, therefore, the Commission orders that his name be restored to the subject eligible list. Absent any disqualification issue ascertained through an updated background check conducted after a conditional offer of appointment, the appellant's appointment is otherwise mandated. A federal law, the Americans With Disabilities Act (ADA), 42 U.S.C.A. §12112(d)(3), expressly requires that a job offer be made before any individual is required to submit to a medical or psychological examination. See also the Equal Employment Opportunity Commission's *ADA Enforcement Guidelines: Preemployment Disability Related Questions and Medical Examination* (October 10, 1995). That offer having been made, it is clear that, absent the erroneous disqualification, the aggrieved individual would have been employed in the position.

Since the appointing authority has not supported its burden of proof, upon the successful completion of his working test period, the Civil Service Commission orders that appellant be granted a retroactive date of appointment to the date he would have been appointed if his name had not been removed from the subject eligible list. This date is for salary step placement and seniority-based purposes only. However, the Commission does not grant any other relief, such as back pay or counsel fees, except the relief enumerated above.

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 15TH DAY OF APRIL, 2009

Hope L. Cooper

Hope L. Cooper
Chairperson
Civil Service Commission

Inquiries
and
Correspondence:

Henry Maurer
Director
Merit System Practices
and Labor Relations
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

c: Stanley E. Kolbe, Jr..
Michelle J. Douglass, Esq.
Ralph Peterson
Kenneth Connolly

ACTION REQUIRED



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Stanley Kolbe Jr.

CSC Docket No. 2013-1291

Request for Enforcement

ISSUED: **MAY 21 2014** (SLK)

Stanley Kolbe Jr., a candidate for Fire Fighter with the City of Pleasantville, petitions the Civil Service Commission (Commission) for enforcement of the decision rendered on April 15, 2009 ordering his appointment.

In *In the Matter of Stanley E. Kolbe, Jr., Fire Fighter (M2388H)* (CSC, decided April 15, 2009), the petitioner appealed his rejection as a Fire Fighter candidate by Pleasantville and its request to remove his name from the eligible list for Fire Fighter (M2388H) on the basis of psychological unfitness. The appeal was reviewed by the Medical Review Panel which found that he was mentally fit to perform the duties of a Fire Fighter. The Commission adopted the Medical Review Panel's recommendation and ordered the petitioner's name be restored to the eligible list, and, absent any disqualification issue ascertained through an updated background check, that he be appointed. The Commission further ordered that, upon the successful completion of his working test period, he be granted a retroactive date of appointment to the date he would had been appointed if his name had not been removed from the subject eligible list.

In his petition, Mr. Kolbe states that Pleasantville has not hired him for the position of Fire Fighter. He asserts that he spoke to staff from this agency and was advised that he was supposed to be hired at the time his appeal was granted, even if someone else was to be displaced. Mr. Kolbe also indicates that he has lost almost five pension years and has endured many headaches as a result of not yet being hired.

In response, the appointing authority, represented by Elizabeth M. Garcia, Esq., presents that it contacted Pleasantville's representative at the Commission to determine how to comply with the decision and received an email response indicating that, "although the appointing authority is not required to displace someone who has completed training, Mr. Kolbe must be given the next available appointment, irrespective of any lists." Also, the appointing authority highlights that it applied to the Commission for a Reduction in Force due to a budget crisis and notes that it has not hired any Fire Fighters since the 2008 appointments. Further, it submits that it sent a letter to the Commission stating that it has not hired any Fire Fighters immediately prior to or subsequent to Mr. Kolbe's successful appeal, that it understands that if it seeks to appoint a Fire Fighter it must be Mr. Kolbe, and that his appointment date will be retroactive for seniority purposes only. It presents that it did not receive any communication in response from the Commission requiring it to appoint Mr. Kolbe, except in reference to the next time it were to appoint a Fire Fighter. It reiterates that it continues to be in financial crisis, it is contemplating layoffs, and does not plan on hiring any Fire Fighters in the immediate future. It also notes that Mr. Kolbe's attorney threatened to petition the Commission if he was not immediately appointed. However, after being copied on a letter to the appointing authority from the Commission indicating that Mr. Kolbe only needed to be appointed the next time it appointed any Fire Fighter, no petition was filed. Consequently, it argues that the petition for enforcement should be denied or that it should reflect that Mr. Kolbe is to be provided an offer of appointment the next time it appoints a Fire Fighter.

According to agency records, the petitioner's name appeared in the 8th position on certification OL072450 that was issued to the appointing authority on November 19, 2007. In disposing of that certification, the appointing authority appointed eligibles in positions one through six, nine, ten, twelve through fourteen, and seventeen, effective February 25, 2008. Thereafter, on June 23, 2008, it appointed two more eligibles from another certification (OL080737) that was issued from the subject list. Subsequently, on December 31, 2013, the appointing authority laid off the two individuals appointed on June 23, 2008 and the individuals appointed on February 28, 2008 in positions thirteen, fourteen, and seventeen from certification OL072450. Thus, eight eligibles, including three who ranked in lower positions on the certification than petitioner, were not laid off and continue employment with the appointing authority.

CONCLUSION

In its April 15, 2009 decision, the Commission ordered, "[a]bsent any disqualification issue ascertained through an updated background check conducted after a conditional offer of appointment, the appellant's appointment is mandated." Therefore, notwithstanding the erroneous information provided by agency staff which may have suggested that the appointing authority need not immediately

appoint Mr. Kolbe and only appoint him the next time it is appointing a Fire Fighter, the Commission mandated his appointment subject to any disqualification issue ascertained through an updated background check. While the Commission is cognizant of the appointing authority's fiscal constraints as it has laid off five Fire Fighters in December 2013, three employees who were ranked lower than the petitioner on certification OL072450 were not impacted by the layoff. Therefore, if no other positions are available, Mr. Kolbe must be appointed to one of these positions.

The Commission notes that it is specifically given the power to assess compliance costs and fines against an appointing authority, including all administrative costs and charges, as well as fines of not more than \$10,000, for noncompliance or violation of Civil Service law or rules or any order of the Commission. *N.J.S.A. 11A:10-3; N.J.A.C. 4A:10-2.1(a)2. See In the Matter of Fiscal Analyst (M1351H), Newark, Docket No. A-4347-87T3 (App. Div. February 2, 1989).* However, the record indicates that the appointing authority was erroneously advised by staff from this agency that it was not required to appoint Mr. Kolbe until the next time it is appointing Fire Fighters. Therefore, the Commission will not fine the appointing authority at this time for non-compliance. Accordingly, the appointing authority is ordered to appoint Mr. Kolbe to the position of Fire Fighter within 30 days of receipt of this decision. However, absent any disqualification issue ascertained through an updated background check, if the appointing authority does not appoint Mr. Kolbe to Fire Fighter within 30 days of receipt of this decision, it shall be assessed a fine of \$100 per day for each day of continued violation up to a maximum of \$10,000.

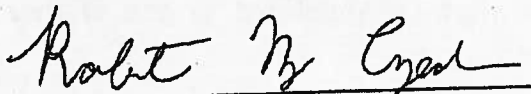
ORDER

Therefore, it is ordered that Mr. Kolbe's request be granted and that the appointing authority is ordered to appoint Mr. Kolbe to the position of Fire Fighter within 30 days of receipt of this decision. Absent any disqualification issue ascertained through an updated background check, if the appointing authority does not appoint Mr. Kolbe to Fire Fighter within 30 days of receipt of this decision, it shall be assessed fines of \$100 per day for each day of continued violation up to a maximum of \$10,000.

Further, the Commission reiterates the order contained in the initial April 15, 2009 decision indicating that upon successful completion of his working test period, the appellant be granted a retroactive date of appointment to the date he would have been appointed if his name had not been removed from the subject eligible list. This date is for salary step placement and seniority-based purposes only. However, the Commission does not grant any other relief, such as back pay or counsel fees, except the relief enumerated above.

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 21st DAY OF MAY, 2014**



**Robert M. Czech
Chairperson
Civil Service Commission**

**Inquiries
and
Correspondence**

**Henry Maurer
Director
Division of Appeals and
Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
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