B-22

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Justin Peggs,
Township of Deptford

Administrative Appeal

CSC Docket No. 2014-8

ISSUED: SEP - 4 2014 (SLD)

Justin Peggs, represented by Kenneth A. Sandler, Esq., appeals the Township of Deptford's decision to terminate his temporary employment as a Laborer, effective June 11, 2013.

By way of background, the appellant was hired as a temporary hourly employee to the title of Laborer in 2011.[1] On May 1, 2013, the appellant received two verbal warning forms for insubordinate conduct on April 25 and 26, 2013, due to his failure to follow his supervisor's directions. The forms noted that the appellant refused to sign the forms. In a May 13, 2013 letter to the President of Local Union No. 676, International Brotherhood of Teamsters, AFL-CIO, the appellant asserted that since his name appeared on the roster of employees appended to the January 1, 2012 collective negotiations agreement (contract), he was entitled to additional monies he had never been paid. Specifically, he asserted that he had only been compensated at the hourly rate of $10, with no paid leave time, despite the contract providing he should have received a salary of $21,626.12 and paid leave time. Therefore, the appellant requested that the union intercede on his behalf. In a June 11, 2013 letter to the appellant, the appointing authority indicated:

> Please be advised that the Township's offer of employment to which you have not responded to has now been revoked. You are hereby

[1] It is noted that there is no record of the appellant's employment in the County and Municipal Personnel System (CAMPS).

> instructed to return all Township property in your possession which you utilized as a temporary employee of the Township: keys, fobs, ID badges, etc. to your former supervisor. Good luck in your future endeavors.

Thereafter, the appellant appealed his termination to the Civil Service Commission (Commission). However, because the appellant did not have any underlying permanent status, his appeal was initially dismissed by letter from Commission staff.

On appeal to the Commission, the appellant initially argues that the appointing authority kept him in a temporary position for more than two years, and was therefore in violation of *N.J.A.C.* 4A:4-1.7, which only provides for temporary appointments of six months with an additional six months upon approval. He also maintains that no approval was sought nor provided for his appointment. The appellant argues that it was only after he raised the issue of the appointing authority's violation of the contract with regard to his salary and benefits that he was terminated. Thus, he maintains that his termination was clearly in retaliation for raising those issues. In support, he provides a 2012 contract which includes his name on a roster of employees that was annexed to the contract; a copy of his commercial driver's license which he claims was a condition of his employment; a January 15, 2011 performance report which indicates the appellant's title of Laborer, his salary was $10 per hour and that the Director of Public Works "would recommend this past employee first to full time employment;" and his May 13, 2013 letter to the union about his salary and benefits.

In response, the appointing authority, represented by Kathleen M. Bonczyk, Esq., denies that the termination of the appellant's employment was retaliatory. Rather, it asserts that the appellant's position was funded through an outside source, and when that funding was not renewed, the appellant was offered alternate employment. However, on May 1, 2013, the appellant received two verbal warnings for insubordinate conduct. As a result, the appointing authority maintains that it revoked its offer of employment. The appointing authority argues that despite the appellant's assertion to the contrary, it was not aware of his May 13, 2013 letter to the union, and as evidenced by the letter itself, the appointing authority was not copied on it. Additionally, the appointing authority notes that the appellant does not claim to have raised any of his employment issues with any appointing authority representative.

Additionally, the appointing authority asserts that at no time did it consider the appellant to be a member of the union. In support, it submits an April 30, 2013 contract. Rather, it asserts that the appellant worked as a casual member of its workforce, for which he was offered and accepted the position for a specific hourly rate. Under that agreement, the appellant was paid for every penny he was owed.

The appointing authority maintains that the appellant cannot be converted to a bargaining unit member, simply because he wishes to be made one. Moreover, the appellant has offered no evidence consistent with his assertion that he considered himself to be a member of the union. Rather, it was only upon his obtainment of legal counsel that he made any assertion that he was a member of the union. Furthermore, the appellant has never tendered any dues nor made any application to become a member.

In response, the appellant reiterates that the appointing authority violated *N.J.A.C.* 4A:4-1.7 by temporarily appointing him to a position for more than 12 months. Therefore, he maintains that since his "employment with the Township was not a proper 'temporary appointment' . . . he should be considered a permanent or provisional employee subject to all of the rights and benefits inuring to same." In support, the appellant cites *In re Hudson County Probation Department*, 178 *N.J. Super.* 362 (App. Div. 1981).

The appellant also argues that the appointing authority's claim that his two verbal warnings justified the termination of his employment is contradicted by the fact that the appellant had been told that although the temporary funding for his position had run out on May 24, 2013, he "would be returned to employment as a permanent employee with full benefits on June 10, 2013." The appellant claims that if the warnings were truly the basis for the termination of his employment, then he would have been advised of the same during the May 24, 2013 meeting. Moreover, he asserts that his May 13, 2013 letter to the union supports an inference of retaliation, since neither warning indicated that the offenses were terminable offenses. Rather, it was only after the union president had indicated to him that he had in fact communicated with the appointing authority, that his employment was terminated. Based on the foregoing, the appellant maintains that he should be reinstated and awarded back pay, benefits and counsel fees.

CONCLUSION

N.J.A.C. 4A:2-5.1, generally provides that an appointing authority shall not take or threaten to take any reprisal action against employees in retaliation for an employee's lawful disclosure of information on the violation of any law or rule, governmental mismanagement or abuse of authority or on the employee's permissible political activities or affiliations. *See also, N.J.S.A.* 11A:2-24. In *Katherine Bergmann v. Warren County Prosecutor*, Docket No. A-5665-01T5 (App. Div. December 1, 2004), it was determined that an employee asserting a cause of action under *N.J.S.A.* 11A:2-24 is required to prove the following elements:

1) The employee "reasonably believed" in the integrity of the disclosure at the time it was made, meaning the employee had no reasonable basis to question the substantive truth or accuracy of

the content of the disclosure just prior to communication (it is here that the term "reasonable belief" is borrowed from the Conscientious Employee Protection Act (CEPA), *N.J.S.A.* 34:19-1, *et seq.*, to define what is the substantive content of a "lawful disclosure");

2) The employee disclosed the information to a source "reasonably" deemed an appropriate recipient of such information just prior to communication (here, the term "reasonably" is used to describe the perceived proper channels through which a "lawful disclosure" should be communicated);

3) There is a connection, or nexus, between the disclosure and the complained of action (this is a standard cause-and-effect showing by the employee). *Carlino v. Gloucester City High School*, 57 *F. Supp. 2d* 1, 35 (D.N.J. 1999); *Kolb v. Burns*, 320 *N.J. Super.* 467, 476 (App. Div. 1999).

Only after the employee satisfies the criteria above does the appointing authority bear the burden of showing that the action taken was not retaliatory. *See Wright Line*, 251 *NLRB* 1083 (1980); *Mount Healthy City School District Bd. of Educ. v. Doyle*, 429 *U.S.* 274 (1977).

Using the test as enumerated above, the appellant has failed to present a *prima facie* case of reprisal. Although the appellant met the first and second prong of the test, he has failed to satisfy the third prong of the test. In this regard, the appellant has not presented any documentation that the termination of his employment was due to his complaint to the union. In this regard, the appellant acknowledges that the temporary funding of his position was not renewed, and that as a result, his employment would end. However, regardless of the reason that the offer of different employment was withdrawn, the appellant was not entitled to new employment with the appointing authority. *See In the Matter of Edward Oskay, State Parole Board* (CSC, decided September 24, 2008). Accordingly, the appellant has failed to present a *prima facie* case of reprisal.

Further, the Commission rejects the appellant's claim that because his temporary employment was more than 12 months he is entitled to a permanent appointment. The Appellate Division's decision in *In re Hudson County Probation Department*, *supra*, is not controlling. In that decision, the Appellate Division found that because *N.J.A.C.* 4:1-14.5 indicates that "*Should a temporary position not be terminated at the expiration of such respective periods, the position shall be considered a permanent position*" then the positions were to be considered permanent positions. *Id*, at 365. However, *N.J.A.C.* 4:1-14.5 was replaced by *N.J.A.C.* 4A:4-1.7, which no longer contains the provision that temporary

appointments that span more than the allowable period of time automatically become permanent appointments.[2] Rather, the only requirement would have been for the temporary appointment to have been terminated. *See In the Matter of Michael Morris* (CSC, decided April 3, 2013) (Commission ordered the termination of improper temporary appointment that spanned more than one year). Accordingly, absent a showing of invidious motivation, there is no basis to award permanent status to a temporary employee whose temporary appointment exceeds the regulatory maximum period of time. However, the appointing authority is cautioned to follow the regulatory provisions regarding temporary appointments in the future. Failure to adhere to those provisions may subject it to fines pursuant to *N.J.A.C.* 4A:10-2.1.

Finally, with regard to the appellant's claims regarding the contract, it is noted that for the purpose of determining the status of his appointment, it is irrelevant whether he was a union member. Moreover, the Commission has no jurisdiction over the remainder of his contractual claims.

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.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 3RD DAY OF SEPTEMBER, 2014

Robert M. Czech
Chairperson
Civil Service Commission

[2] Additionally, *N.J.S.A.* 11:22-15, which barred successive temporary appointments, was repealed and replaced by *N.J.S.A.* 11A:4-13.

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