



**STATE OF NEW JERSEY**

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

In the Matter of Stephen Goodman,  
Long Branch

Administrative Appeal

CSC Docket No. 2019-2122

**ISSUED: JUNE 28, 2019** (SLK)

Stephen Goodman, a former provisional Assistant Director, Economic and Industrial Development with Long Branch, represented by Mark E. Belland, Esq., appeals his separation, effective January 11, 2019.

By way of background, the appellant was provisionally appointed as an Assistant Director, Economic and Industrial Development, effective September 1, 2015. Thereafter, the appellant applied to the open-competitive examination for Assistant Director, Economic and Industrial Development (M0823T). However, on or about January 20, 2016, he received notice from this agency that he did not meet the eligibility requirements for the examination. It is noted that he did not appeal this determination of ineligibility. Subsequently, the appellant applied to the open-competitive examination for Assistant Director, Economic and Industrial Development (M0339W). On or about November 21, 2018, the appellant was again determined to be ineligible for the examination. Further, he did not appeal this second determination of ineligibility.

Subsequently, the appellant received notice from the appointing authority that he was being terminated from his position in the subject title. The appellant appealed his termination to this agency. He argued that he was improperly terminated as he was never issued a Preliminary or Final Notice of Disciplinary Action nor was he afforded the right to receive a departmental hearing. In response, the Division of Appeals and Regulatory Affairs (DARA) issued a letter

stating that as a provisional employee, the appellant did not have the right to appeal.

In reply, the appellant argues that the appointing authority misclassified him as a provisional employee because he worked many years in the position and beyond the statutory limit for a provisional employee and was qualified for the position. Therefore, the appellant contends that the decision to close the matter was in error. The appellant asserts that the appointing authority misclassified his appointment to prevent him from exercising his Civil Service and other public employment rights.

In response, the appointing authority, represented by Suzanne M. Brennan, Esq., argues that a permanent employee is an employee in the career service who has acquired such status from regular appointment and successful completion of a working test period. Therefore, while it acknowledges that the appellant did work past the 12-month statutory limit for a provisional appointment, it cites cases to support its argument that working past the statutory limit as a provisional employee does not yield permanent status nor does it entitle an employee the right to appeal a separation from employment. Further, it contends that this matter is distinguishable from other cases where long-term provisional employees were afforded permanent career service rights as in those cases, the appointing authorities failed to provide this agency the necessary information to allow an examination to be announced for the position held by the provisional employee. In this matter, the appointing authority did inform this agency that the appellant was provisionally appointed to the subject title, which led to examinations for this title in January 2016 and March 2018. Further, it was this agency which found that the appellant was ineligible for both examinations. Therefore, it asserts that contrary to the appellant's statement, he was found not qualified for a position in the subject title. Moreover, the appellant did not appeal this agency's determinations that he was ineligible. Accordingly, there is no evidence that the appointing authority "misclassified" his appointment to prevent him from exercising his Civil Service rights as he never achieved permanent status.

In reply to the appointing authority, the appellant argues that the appointing authority was either neglectful in terminating him or his position was misclassified. Further, he argues that due process requires that he be afforded a department hearing, which the appointing authority is trying to prevent. Moreover, the appellant argues that this matter is like *Ruby Robinson Kyer, City of East Orange*, 315 N.J. Super. 524 (App. Div. 1998), and similar cases where a long-term provisional is afforded permanent status rights because the appointing authorities were negligent in their actions. Specifically, he highlights that provisional employees who fail to file for a promotional examination shall be separated from their provisional title within 30 days' notice. Therefore, the appellant argues that the appointing authority was negligent by permitting him to work well beyond the

12-month statutory limit for a provisional employee and for failing to remove him within 30 days after he was determined ineligible in 2016 and 2018 for examinations for the subject title. Additionally, he argues that he is qualified to perform the duties of the subject title as the appointing authority admittedly violated numerous statutes just so that it could employ him in the subject title, which he did so for over three years with an unblemished record. Finally, the appellant argues that the appointing authority is using the appellant's provisional status as both a shield to defend its violations of law and as a sword to summarily discharge him without due process rights.

### CONCLUSION

*N.J.S.A.* 11A:4-13(a) provides that regular appointments shall be to a title in the competitive division of the career service upon examination and certification or to a title in the noncompetitive division of the career service upon appointment. The appointments shall be permanent after satisfactory completion of a working test period.

*N.J.S.A.* 11A:4-13(b) provides that provisional appointments shall be made only in the competitive division of the career service and only in the absence of a complete certification, if the appointing authority certifies that in each individual case the appointee meets the minimum qualifications for the title at the time of appointment and that failure to make a provisional appointment will seriously impair the work of the appointing authority. In no case shall any provisional appointment exceed a period of 12 months.

*N.J.A.C.* 4A:2-2.1(a) provides that the subchapter on major discipline applies only to permanent employees in the career service or person serving a working test period.

*N.J.A.C.* 4A:2-1.4(c) provides that the petitioner has the burden of proof on appeal.

The record indicates that the appellant was hired provisionally, and this agency twice determined that he did not meet the eligibility requirements for the subject title, which he did not appeal either time. It is well settled that a provisional employee, whether provisional for one day, one year or seven years, does not have a vested right to a permanent position. While the requirements of *N.J.S.A.* 11A:4-13(b) allow a provisional employee to serve for only 12 months, an appointing authority's non-compliance with this provision does not automatically afford a provisional employee a permanent appointment. *See O'Malley v. Department of Energy and Department of Civil Service, 109 N.J. 309 (1987)*. Moreover, while *N.J.S.A.* 11A:4-13(b) allows for an appointing authority to certify that an appointee meets the minimum qualifications for the title at the time of

appointment, the fact that the appointing authority erroneously determined that a provisional appointee satisfies the minimum qualifications for the title prior to an actual eligibility determination by this agency, does not automatically establish a presumption of eligibility when the examination is announced. *See In the Matter of Cynthia Bucchi, Maria D'Angelo, Rosalind R. James, Carla M. Lewis, and Rhonda McLaren, Management Assistant (PS5831F), Department of Education, Docket No. A-1266-04T2* (App. Div. February 27, 2006). As such, the appellant was properly classified as a provisional employee as he never achieved permanent status and does not have appeal rights under *N.J.A.C. 4A:2-2.1(a)*.

Concerning the appellant's arguments that this matter is like *Kyer, supra*, and its ilk, it is noted that the Appellant Division did not presume that Kyer met the eligibility requirements due to the appointing authority's negligence. Instead, it remanded the matter back to the Merit System Board to see if Kyer met the eligibility requirements as her qualifications had never been reviewed by this agency. Therefore, this matter is distinguishable as this agency twice reviewed the appellant's qualifications and each time determined that he was ineligible. Further, the *Kyer* court, citing *O'Malley, supra*, noted that "the application of estoppel would frustrate the paramount legislative goals of appointments based on merit and fitness" and its reluctance to "permit employees to retain by estoppel their provisional appointments to retain such an appointment pending an examination [since it] would subject governmental employment to the subterfuge and circumvention the civil service system was designed to prevent." *Id.* at 318. In other words, the court acknowledged that regardless of the actions of this agency or an appointing authority, the *first* threshold to overcome in seeking permanent status is whether the employee meets the requirements for the position. Absent such qualifications, any subsequent acts of negligence, omission or commission do not automatically confer career service permanent status on a long-term provisional employee.<sup>1</sup> Accordingly, the appellant cannot be permanently appointed simply because the appointing authority was negligent by violating *N.J.S.A. 11A:4-13(b)* and for failing to remove him sooner when it learned that he was ineligible. Moreover, this matter is distinguishable from other matters where long-term provisionals were granted permanent status, as in those matters, the appointing authority's neglect or misleading actions were to the detriment of the employee. In this matter, the appointing authority's negligence was to the appellant's benefit as he should not have been hired in the first place and he should not have been able to serve in the subject title for over three years as he did not meet the qualifications for the subject title.<sup>2</sup> With respect to the appellant's belief that he is qualified for

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<sup>1</sup> In fact, subsequently, Kyer was found ineligible for her provisional position by the Merit System Board and did not achieve permanent status. *See In the Matter of Ruby Robinson Keyer* (MSB, denied May 4, 1999).

<sup>2</sup> It is noted that while the appointing authority should have immediately removed the appellant from the subject title upon notification in 2016 that he did not meet the eligibility requirements, *N.J.A.C. 4A:4-1.5(b)*, which the appellant cites, is not applicable as that section involves provisional employees who fail to file and take a promotional examination, which is not the case here.

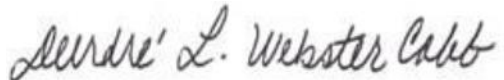
the subject title based on his contention that the appointing authority must have deemed him qualified or it would not have violated the law and kept him employed in the subject title for so long, it is this agency which determines whether an applicant meets the qualifications for a permanent career service title. Finally, while the Civil Service Commission does not condone the appointing authority's violation of *N.J.S.A. 11A:4-13(b)* nor its failure to remove the appellant sooner upon learning that he was ineligible for the subject title, there are no vested or other rights are accorded by an administrative error and any such errors in this case clearly do not confer permanent status. To conclude otherwise would be to frustrate the paramount intent of civil service system employment. *See Cipriano v. Department of Civil Service*, 151 *N.J. Super.* 86 (App. Div. 1977); *O'Malley, supra*; *HIP of New Jersey v. New Jersey Department of Banking and Insurance*, 309 *N.J. Super.* 538 (App. Div. 1998).

### 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 26<sup>th</sup> DAY OF JUNE, 2019



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