



## STATE OF NEW JERSEY

In the Matter of Cheryl Borowski  
Kean University

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

CSC DKT. NOS. 2017-1322 & 2017-  
1391  
OAL DKT. NO. CSV 09280-17

ISSUED: NOVEMBER 23, 2018 (NFA)

The appeal of Cheryl Borowski, former Adjunct Professor, Kean University, appeal of violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy), was before Administrative Law Judge Elissa Mizzone Testa (ALJ), who rendered her initial decision on October 23, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, as well as having reviewed the exceptions and reply, and made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on November 21, 2018, accepted the attached Administrative Law Judge's initial decision wherein the appellant's appeal was dismissed for lack of jurisdiction.

### DISCUSSION

By way of background, in an unrelated appeal of the proper classification of a position filed by a State College employee in October 2017, four months after the subject matter was transmitted to the Office of Administrative Law for a hearing, the primary issue reviewed by the Commission was its jurisdiction with respect to certain classes of State College and University employees. After an exhaustive review of the legislative and regulatory history and the overlapping responsibilities between the Commission and State Colleges and Universities, it was determined that certain classes of employees, such as professors and adjunct professors, were not subject to the provisions of Title 11A of the New Jersey Statutes or Title 4A of

the New Jersey Administrative Code pertaining to the classification of positions. A subsequent review was undertaken to determine whether those classes were similarly not subject to Title 11A and Title 4A in the context of a discrimination appeal. Of note in this regard, *N.J.S.A. 18A:64-21.2*, which became effective on July 9, 1986, provides that professional members of the academic, administrative, and teaching staff are *not* subject to the provisions of Title 11A. Therefore, per that statute, professors, adjunct professors and other teaching staff are not considered Civil Service employees.

*N.J.A.C. 4A:7-3.1(a)1* provides in pertinent part, that the State Policy applies to *all employees* and applicants for employment in State departments, commissions, *State colleges or Universities*, agencies, and authorities. *N.J.A.C. 4A:7-3.2(a)* provides that *all employees* and applicants for employment have the right and are encouraged to immediately report suspected violations of the State Policy. Consequently, all employees of a State College or University, including those employees not covered by Title 11A may file a complaint alleging discrimination under the State Policy. However, the ability to appeal the resulting determination to the Commission is limited to specific classes of employees. Specifically, *N.J.A.C. 4A:7-3.2(m)* states that a complainant who is in the *career, unclassified or senior executive service*, or who is an applicant for employment, who disagrees with the determination of the State agency head or designee, may submit an appeal to the Commission. Moreover, *N.J.A.C. 4A:7-3.2(n)* provides that in a case where a violation has been substantiated, and no disciplinary action recommended, the party against whom the complaint was filed may appeal the determination to the Commission. Although *N.J.A.C. 4A:7-3.2(n)* does not specify that the “party against whom the complaint was filed” must be in the career, unclassified or senior executive service or an applicant for employment, it is clear from a full reading of *N.J.A.C. 4A:7-3.2* that *the ability to appeal* a determination is to be limited to only applicants for Civil Service employment, or employees already serving in the career, unclassified or senior executive service, *i.e.*, individuals who are in the Civil Service or who are attempting to enter the Civil Service. To conclude otherwise is neither logical nor reasonable. In this regard, since *N.J.A.C. 4A:7-3.2(m)* specifically limits appeals from complainants only to employees or candidates subject to Civil Service law and rules, the same conditions must apply to *N.J.A.C. 4A:7-3.2(n)*. To not conclude so would give parties against whom a complaint is filed who are not subject to Civil Service law and rules greater appeal rights than similarly situated complainants under *N.J.A.C. 4A:7-3.2(m)*. No such intent can be found in the legislative or regulatory history.

Consequently, as the appellant in this matter was an Adjunct Professor, her appeal to the Commission of the determination made regarding the subject State Policy matter was invalid. The Commission notes that variables such as the fact that its interpretation of the rules above prohibiting such classes of employees the right to appeal discrimination matters to the Commission occurred after the

appellant's original appeal, or the fact that other previous appellants may have been afforded such rights, cannot be used as justification for the continuance of any such appeal. It is clear from the Commission's analysis that such employees do not have the right to appeal discrimination determinations to the Commission and any such appeals permitted previously were allowed in error. Thus, a current appellant cannot assert any estoppel or other rights to such an appeal as no vested or other rights are accorded by an administrative error. *See Cipriano v. Department of Civil Service*, 151 N.J. Super. 86 (App. Div. 1977); *O'Malley v. Department of Energy*, 109 N.J. 309 (1987); *HIP of New Jersey v. New Jersey Department of Banking and Insurance*, 309 N.J. Super. 538 (App. Div. 1998). Accordingly, the ALJ's dismissal of the appellant's appeal for lack of jurisdiction was proper.

### ORDER

The Civil Service Commission therefore dismisses the appeal of Cheryl Borowski for 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 21<sup>ST</sup> DAY OF NOVEMBER, 2018



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Deirdre L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Christopher S. Myers  
Director  
Division of Appeals and Regulatory Affairs  
Civil Service Commission  
Unit H  
P. O. Box 312  
Trenton, New Jersey 08625-0312

Attachment



***State of New Jersey***

OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**DISMISSAL**

OAL DKT. NO. CSV 09280-17

AGENCY DKT. NO. 2017-1322 &

2017-1391

**CHERYL BOROWSKI,**

Petitioner,

v.

**KEAN UNIVERSITY,**

Respondent.

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**Raymond Staub, Esq.,** for petitioner (Destribats, Campbell, De Santis, McGee  
& Staub, attorneys)

**Marolhin D. Mendez,** Deputy Attorney General., for respondent (Gurbir S.  
Grewal, attorney)

Record Closed: October 19, 2018

Decided: October 23, 2018

BEFORE ELISSA MIZZONE TESTA, ALJ:

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

On June 28, 2017, the above captioned matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case pursuant to N.J.A.C. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A hearing was conducted in this matter on June 14, 20 and 26, 2018. Prior to the submission of Post Summation Briefs, a Directive from the Director of the Civil Service Commission, Christopher Myers, was forwarded to the undersigned indicating that the OAL does not have jurisdiction to review this matter. See, correspondence dated October 4, 2018 and October 19, 2018 attached hereto. More specifically, that Adjunct Professors are not considered Civil Service employees and therefore, do not have the standing to appeal a State Policy determination. Since C.B. is serving in a position not subject to Title 11A, this Directive impacts her appeal before the OAL because the Civil Service Commission does not have jurisdiction to review her appeal. Consequently, as the issue of the Commission's jurisdiction was not raised prior to its review of C.B.'s appeal, this matter was improperly referred to the OAL for a hearing.

### **ORDER**

It is therefore **ORDERED** that this matter is hereby **DISMISSED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-**

0312, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 23, 2018

\_\_\_\_\_  
DATE

  
\_\_\_\_\_  
ELISSA MIZZONE TESTA, ALJ

Date Received at Agency:

Date Mailed to Parties:  
sej



PHILIP D. MURPHY  
Governor

SHEILA Y. OLIVER  
Lt. Governor

RECEIVED  
*State of New Jersey*  
OFFICE OF THE ATTORNEY GENERAL  
DEPARTMENT OF LAW AND PUBLIC SAFETY  
DIVISION OF LAW  
25 MARKET STREET  
PO Box 112  
TRENTON, NJ 08625-0112

GURBIR S. GREWAL  
Attorney General

MICHELLE L. MILLER  
Director

October 4, 2018

Honorable Elissa Testa, A.L.J.  
Office of Administrative Law  
33 Washington Street  
Newark, NJ 07102

Re: Cheryl Borowski v. State of NJ/ Kean University  
OAL Docket No.: CSV 09280-2017N

Dear Judge Testa:

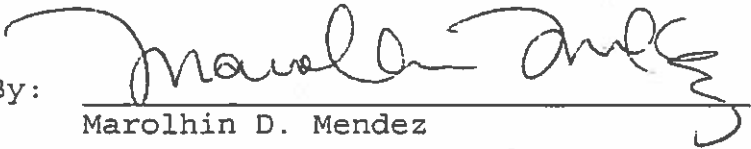
Kean University is in receipt of correspondence from the Director of the Civil Service Commission (CSC) regarding a separate matter that impacts this case. Please see attached letter dated October 1, 2018. In this letter, the Director expressly says adjunct professors are not considered Civil Service employees and therefore do not have the right to appeal a State Policy determination. This directly impacts Borowski's appeal as the CSC does not have jurisdiction to review these matters.

Given this letter, we request this matter be formally withdrawn. Should Your Honor need any additional information, please do not hesitate to contact our office.

Respectfully submitted,

GURBIR S. GREWAL  
ATTORNEY GENERAL OF NEW JERSEY

By:

  
Marolhin D. Mendez  
Deputy Attorney General

Cc: Raymond C. Staub, Esq.  
Christopher Myers, Director of CSC





Phil Murphy  
Governor  
Sheila Oliver  
Lt. Governor

STATE OF NEW JERSEY  
CIVIL SERVICE COMMISSION  
Division of Appeals and Regulatory Affairs  
Written Record Appeals Unit  
P.O. Box 312  
Trenton, New Jersey 08625-0312  
Telephone: (609) 984-7140 Fax: (609) 984-0442

Deirdre L. Webster Cobb  
Chair/Chief Executive Officer

October 19, 2018

Honorable Elissa Testa, ALJ  
Office of Administrative Law  
33 Washington Street  
Newark, NJ 07102

**Re: In the Matter of C.B., Kean University; Discrimination Appeal  
(CSC Docket Nos. 2017 and 2017-1391)**

Dear Judge Testa:

This letter is in furtherance of the above-referenced matter which was referred for a hearing at the Office of Administrative Law (OAL) by the Civil Service Commission (Commission) on June 21, 2017. In this matter, C.B. is challenging the determination of the Chief of Staff, Kean University, which found that she had violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

By way of background, in a classification appeal filed by a State College employee in October 2017, four months after the matter of C.B. was referred for a hearing, the primary issue reviewed by the Commission was the matter of its jurisdiction with respect to certain classes of employees of the State Colleges and Universities. After an exhaustive review of the legislative and regulatory history and the overlapping responsibilities between the Commission and State Colleges, it was determined that certain classes of employees, such as professors and adjunct professors, were removed from the provisions of Title 11A of the New Jersey Statutes (Title 11A). As a result, this agency reviewed the status of the employees of State Colleges and Universities to determine whether professional members of the academic, administrative and teaching staff, and the non-professional and clerical staff in those institutions were removed from Civil Service with regard to discrimination matters. In particular, *N.J.S.A. 18A:64-21.2*, which became effective on July 9, 1986, provides that professional members of the academic, administrative, and teaching staff are *not* subject to the provisions of Title 11A. Therefore, professors,



adjunct professors and other teaching staff are not considered Civil Service employees, and thus, as set forth below, do not have the right to file an appeal to the Commission of a State Policy determination.

In that regard, *N.J.A.C. 4A:7-3.1(a)* provides in pertinent part, that the State Policy applies to *all employees* and applicants for employment in State departments, commissions, *State colleges or universities*, agencies, and authorities. *N.J.A.C. 4A:7-3.2(a)* provides that *all employees* and applicants for employment have the right and are encouraged to immediately report suspected violations of the State Policy. Consequently, all employees of a State College or University, including those employees not covered by Title 11A may file a complaint alleging discrimination under the State Policy. However, the ability to appeal the resulting determination to the Commission is limited to specific classes of employees. *N.J.A.C. 4A:7-3.2(m)* states, in relevant part, that a complainant who is in the *career, unclassified, or senior executive service*, or who is an applicant for employment, who disagrees with the determination of the State agency head or designee, may submit a written appeal, within 20 days of the receipt of the final letter of determination from the State agency head or designee, to the Civil Service Commission. Therefore, it is clear that C.B., as a former Adjunct Professor with Kean University, does not have a right to appeal the Chief of Staff's determination.

Consequently, as the issue of the Commission's jurisdiction was not raised prior to its review of C.B.'s appeal, the matter of the disputes of material fact was improperly referred to OAL for a hearing. As noted above, the matter of jurisdiction arose in another case before the Commission and it was determined that certain classes of State College and University employees, such as adjunct professors and professors, were statutorily removed from the provisions of Title 11A effective July 9, 1986. Therefore, since July 2018, the Commission has advised those employees serving in a position not subject to Title 11A that it does not have the jurisdiction to review any type of appeal.

Sincerely,



Christopher Myers  
Director

c: Elizabeth Davies, DAG  
Mamta Patel