



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matters of Jeffrey Kowalski, *et al.*, Department of Transportation

CSC Docket No. 2020-2426, *et al.*

Reconsideration

ISSUED: May 1, 2020 (SLK)

Jeffrey Kowalski, Michael Saulnier, Shawn Smith and Adam Wenstrom request reconsideration of *In the Matter of Jeffrey Kowalski, et al.* (CSC, decided February 12, 2020) where the Civil Service Commission (Commission) denied their requests to adjust their salaries to Step 4 or Step 5 of their respective salary ranges. These requests have been consolidated due to common issues presented.

By way of background, Kowalski, Saulnier and Smith alleged that when they were interviewed for positions as Automotive Mechanics in August 2013, the appointing authority advised that they would be compensated at Step 4 of the salary range for Automotive Mechanics. However, after they gave notice to their prior employers, they were advised that their actual salaries when appointed in November 2013 would be at Step 1 of salary range C17. Further, they asserted that in May 2015, another individual was hired as an Automotive Mechanic at Step 4. Therefore, they believed that they were entitled to have their salaries automatically adjusted to Step 4 under *N.J.A.C. 4A:3-4.4(c)*. Similarly, Wenstrom presented that he was hired in November 2014 as a Construction and Maintenance Technician 5 at Step 1 of salary range III. Additionally, he indicated that more recent new appointments for this title were compensated at Step 5. Therefore, he believed that his salary should have been adjusted to Step 5. The Commission initially noted that Kowalski, Saulnier and Smith's appeals were untimely as they claimed that they should have been hired at Step 4 in November 2013, but they did not file their grievances until May 2015. Regarding the merits, the Commission denied all of the appellants' requests as the fact that the appointing authority chose to hire the appellants at Step 1 and use its discretion under *N.J.A.C. 4A:3-4.4(a)* to compensate newer employees at higher initial Steps did not violate *N.J.A.C. 4A:3-4.4(c)*.

On reconsideration, the appellants state that there were aspects of their appeals that were not addressed in the Commission's initial decision. They state that in addition to claiming that *N.J.A.C.* 4A:3-4.4(c) was violated, they also alleged that *N.J.S.A.* 11A:7-1, which refers to equal opportunity employment including compensation, was violated. The appellants indicate that at the time they filed their grievances, employment law addressing the wage differences between men and women was a gray area. However, they now present that during the time their appeals were held in abeyance due to the Commission lacking a quorum, the Diane B. Allen Equal Pay Act was passed, effective July 1, 2018. The appellants indicate that this law includes many protected classes beyond gender, including age and sexual expression. Specifically, they highlight that one of the grievants, Kevin Tynan¹, who is 67, is considered a senior citizen under federal law. Further, the appellants state that another nameless grievant falls under the protected category of sexual expression. They represent that under the new law, the only justification for hiring a newer employer at a higher rate of pay is experience, and they state that all of the appellants in this appeal have more experience than the new employees appointed by the appointing authority. The appellants contend that they can provide documentation to support this claim "if requested." They also highlight that New Jersey Transit recently raised the salaries of 200 employees in February 2019 to comply with the Diane B. Allen Equal Pay Act. The appellants argue that if one State agency takes certain action than such action should be applied to another agency, and if not done so, this would be an act of discrimination.

The appellants request that their pay be equal to their counterparts who were hired in 2015. They continue to insist that the appointing authority's actions violated *N.J.A.C.* 4A:3-4.4(c) and cite their former attorney's letter in April 2016 to this agency as evidence which stated that these actions violated this regulation. The appellants state that their discrimination claim is not new as the paperwork submitted over the term of the grievance always referred to the Equal Pay Act of 1963.² However, the appellants chose not to address it at that time because women were not involved. However, they claim since the law changed in 2018, the appointing authority's action against certain individuals in their group become a direct violation. The appellants claim that they needed to wait for a ruling from the Commission, which was on hold due to its lack of quorum, to present this claim.

¹ Mr. Tynan was one the appellants in the initial decision. It is noted that Mr. Tynan is not listed as one of the appellants in this request for reconsideration.

² The appellants submit grievance procedure forms dated June 14, 2015 and August 28, 2015, where they stated that the appointing authority's action was discriminatory. They also submit an unsigned letter, which indicated that it is an "Update 6/10/15," which claims that the situation falls under the Equal Pay Act of 1963, which requires that men and woman be given equal pay for equal work in the same establishment. The appellants also submit an unsigned letter date March 26, 2015, where they claim that the appointing authority's action violated *N.J.A.C.* 4A:3-4.4(c), *N.J.A.C.* 4A:7-1.1 and *N.J.A.C.* 10-1.1(d) as well as *N.J.S.A.* 11A:7-1.

CONCLUSION

N.J.A.C. 4A:2-1.1(b) provides that unless a different time period is stated, an appeal must be filed within 20 days after either the appellant has notice or should reasonably have known of the decision, situation, or action being appealed.

N.J.A.C. 4A:2-1.6(b) provides that a petition for reconsideration shall be in writing signed by the petitioner or his or her representative and must show the following:

1. The new evidence or additional information not presented at the original proceeding, which would change the outcome and the reasons that such evidence was not presented at the original proceeding; or

2. That a clear material error has occurred.

N.J.A.C. 4A:3-4.4(a) provides that an appointing authority may place a new employee at a salary step up to and including the fourth step of the salary range for the employee's title. A new employee, for purposes of this section, is one who has had no immediate prior State service with that appointing authority.

N.J.A.C. 4A:3-4.4(c) indicates that an authorized hiring rate (AHR) is the set salary for initial appointments to particular job titles as established by the Chairperson. When an AHR is established or changed, current employees in such titles whose salaries are below the AHR shall be advanced to the AHR, and current employees in such titles whose salaries are the same as the AHR may be advanced by the Chairperson.

The State Policy Prohibiting Discrimination in the Workplace (State Policy),

N.J.A.C. 4A:7-1, provides that, in pertinent part, there shall be equal employment opportunity, including compensation, for all persons regardless of age, sexual expression, and other protected classes.

N.J.A.C. 4A:2-1.4(c) provides that the appellant has the burden of proof in appeals of this nature.

In this matter, the appellants failed to meet the standard for reconsideration as they have provided no new evidence that was not available at the time of original proceeding that would have changed the outcome of the appeal, nor have they demonstrated that a clear material error has occurred. With respect to Kowalski's, Saulnier's and Smith's claim that the appointing authority initially indicated that they would be hired at Step 4, as indicated in the prior decision, that claim was untimely as they knew that they were hired at Step 1 in 2013 and waited until 2015 to file their grievances. Regardless, they were unable to provide any documentation during the original proceeding confirming that the appointing authority made such a promise.

In reference to *N.J.A.C. 4A:3-4.4(c)*, the appellants continue to misinterpret this regulation. The AHR is the set salary for initial appointments to particular job titles as established by the Chairperson. As indicated in the prior decision, the AHR is the Step 1 salary for a salary range and the increment for salary step increases for that salary range. In this matter, the *appointing authority* used its discretion to appoint new hires subsequent to the appellants' initial appointments at a salary step greater than Step 1 under *N.J.A.C. 4A:3-4.4(a)*. The appointing authority's actions did not in any way change the AHR, the Step 1 salary and the increment for the applicable salary range, which can only be established by the Chairperson. Further, there is nothing in this regulation that indicates that when an appointing authority uses its discretion under *N.J.A.C. 4A:3-4.4(a)*, that all other prior hires must have their salaries adjusted to the step of the new employee who received an appointment at a higher salary step when appointed. The fact that the appellants' attorney in the original proceeding also misinterpreted *N.J.A.C. 4A:3-4.4(c)* is not evidence that a clear material error occurred as it is the Commission which has the sole authority to make final decisions on the meaning of Civil Service regulations.

Regarding the appellants' claim that they are being "discriminated" against, in the original proceeding, the appellants did not make a specific claim that they were treated differently based on their membership in a protected class. Instead, it appears that they used the term of "discrimination" as a synonym for what they believed was unfair treatment. Treatment that one believes is unfair that is not based on one's membership in a protected class is not an allegation that touches the State Policy under *N.J.A.C. 4A:7-3.1*. On reconsideration, for the first time, there is a claim that two appellants were discriminated against due to either their age or sexual expression. However, these two appellants have not presented any evidence that the reason that they were offered their initially salaries at Step 1 and subsequent new employees were offered salaries higher than Step 1 was based on their membership in a protected class. Similarly, it does not appear that the appellants are claiming that the appointing did not adjust their salary steps higher after the new employees were hired at a higher salary step due to their membership in a protected class. Instead, it appears that they are claiming that their mere membership in a protected class means that the circumstance which they describe must be discriminatory. Mere membership in a protected class is not evidence that one has been subjected to an action based on one's membership in that protected class. Therefore, it does not appear that the appellants are making an allegation that touches the State Policy. Regardless, as these allegations are new and were not presented at the original proceeding, they cannot be considered on reconsideration. However, if any appellant feels that they have received adverse treatment, such as less compensation, due to their membership in a protected class, that appellant can file a complaint with the appointing authority's equal employment office.

With respect to the appellants' claims that the circumstances they describe violates the Diane B. Allen Equal Pay Act, this law was effective July 1, 2018. Therefore, the Commission finds that this claim is untimely as this claim was not presented at the original proceeding and is well past 20 days from the effective date of this law. Further, the Commission is not persuaded

by the appellants' argument that they were waiting for the original Commission decision which was held in abeyance while it lacked a quorum before bringing this claim, as there was nothing preventing the appellants from augmenting their original appeals prior to that decision. It is also noted that the appellants are complaining about actions that took place in 2013 through 2015, which was prior to this law being enacted. Moreover, the Commission does not have jurisdiction to review a complaint under the Diane B. Allen Equal Pay Act, as such complaints must be filed with the Division on Civil Rights or with the Superior Court of New Jersey. *See In the Matter of L.J.* (CSC, decided April 7, 2019). Additionally, the fact that New Jersey Transit raised the salary of 200 employees in February 2019 to comply with this Act has no bearing on whether the appointing authority in this matter violated *N.J.A.C. 4A:3-4.4(c)* when it used its discretion to appoint new employees at a salary step above Step 1 without also raising the appellants' salaries to the same salary step as new employees.³ Similarly, the Commission does not have jurisdiction over claims under the Equal Pay Act of 1963, which involves unequal pay between men and woman for the same work and does not appear to be applicable in this matter.

ORDER

Therefore, it is ordered that these requests be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

^a Moreover, New Jersey Transit is not covered under Title 11A of the New Jersey Statutes or Title 4A of the New Jersey Administrative Code.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 29TH DAY OF APRIL , 2020

Deirdre' L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

c: Jeffrey Kowalski (2020-2426)
Shawn Smith (2020-2427)
Michael Saulnier (2020-2428)
Adam Wenstrom (2020-2429)
Michele Shapiro
Kelly Glenn
Records Center