



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Michael Randolph,
et al., Irvington

CSC Docket Nos. 2022-1760
2022-1768
2022-1767

Classification Appeals

ISSUED: JULY 5, 2022 (RE)

Michael Randolph requests a retroactive effective date of the reclassification of his position from December 14, 2021 to March 16, 2020 as Fire Lieutenant. The appointing authority appeals that Randolph be reclassified to Fire Fighter. Paul Atkinson and Tyrone Brown appeal the decisions of the Division of Agency Services (Agency Services) which found that their positions with Irvington are properly classified as Fire Fighter. They seek Fire Lieutenant job classifications in these proceedings. These appeals were consolidated due to common issues.

The appellants were regularly appointed as Fire Fighters on October 1, 2012, March 1, 2006 and August 18, 1997, respectively. In August 2020, the appellants requested classification reviews of their positions as they believed they were working in the capacity of Fire Lieutenant. After classification reviews of the positions, and decisions dated February 3, 2020 (amended), January 14, 2022, and January 14, 2022, Agency Services determined that the proper classification of Randolph’s position was Fire Lieutenant, effective December 14, 2021, and the proper classification of Atkinson’s and Brown’s positions were Fire Fighter. Each of the appellants are supervised by a Deputy Fire Chief, and each was assigned to serve as “acting” Fire Lieutenant and supervise the daily operations of the fire house.

It is noted for the record that an Active Employee Listing of the Fire Department from the County And Municipal Personnel System (CAMPS), dated March 24, 2022, indicated there were 94 Firefighters, 22 Fire Lieutenants, 4 Fire

Captains, 4 Deputy Fire Chiefs, and one Fire Chief in the jurisdiction.¹ Further, an eligible list for Fire Lieutenant was promulgated on January 17, 2019 with eleven names, and has an expiration date of January 16, 2023. The appellants ranked last on this list, 9 through 11, and the eligible list was certified twice. On March 6, 2020, eight appointments were made from the certification (PL200349) with effective dates of March 16, 2020. The list was certified again on February 8, 2022 (PL220142), with the names of the three appellants, Brown, Atkinson and Randolph, in that order. No appointments have yet been made. It is noted that official records indicate that there is one provisional serving in the title, and one vacancy.

In its determinations, Agency Services found that each appellant had supervisory responsibilities such as being in charge of an engine or ladder company or platoon intended to assist in extinguishing of fires; supervised daily operations at the fire house; conducted regular training with subordinates; conduct monthly and annual evaluations of subordinates; may have been required to initiate disciplinary actions ranging from counseling to verbal and written warnings; and ensured the safety of subordinates. These duties are supervisory in nature. Agency Services explained that there was no dispute that the appellants were assigned duties of Fire Lieutenant in an acting capacity to gain experience, and indicated that duties assigned in an acting capacity is inappropriate. Agency Services then evaluated out-of-title work performed from August 24, 2021, the date of that the classification review requests were filed, to January 7, 2022 for each appellant on the basis that classification reviews are performed on a review of currently assigned duties and that duties performed in the past cannot be verified. As Randolph was assigned Fire Lieutenant duties six times in three weeks, this was found to be regular and recurring, and Randolph's position was reclassified to Fire Lieutenant. As Atkinson had only two dates, and Brown had no dates with responsibilities as a Fire Lieutenant from August 24, 2021 to January 7, 2022, their positions were found to be classified as Fire Fighter.

On appeal, Randolph takes umbrage with Agency Services' effective date. In this regard, Randolph states that Irvington has manipulated the review by removing his Fire Lieutenant duties after learning that he filed for a classification review of his position. He states that Irvington is hiding a vacancy by consistently paying officers overtime to fill a vacant position. He states that he was instructed to perform supervisory duties for three 24-hour shifts, with one 24-hour shift as a Fire Fighter in order to break up consistent acting duties. Regarding the appointments from (PL200349), Randolph states that the eight appointees purchased tickets to attend political events, while he, Atkinson and Brown declined to do so and were subsequently not promoted. Further, he points out that an organizational chart supplied by the appointing authority on appeal has four open slots for supervisors on various shifts. It also shows that an engine is in reserve

¹ No organizational chart was provided in any of the original files.

status² and that four shifts are currently unassigned due to this status. Randolph maintains that Fire Fighters are being hired to staff the out-of-service engine and they are currently assigned to other shifts. Randolph argues that while the appointing authority indicates that it assigned supervisory duties on a temporary basis, no officer was on leave and therefore there was no manpower deficiency, but rather officers are working overtime due to vacant positions.

Randolph submits a work schedule that lists the date, time, length of shift, shift, engine or ladder truck assignment, station assignment, rank (Fire Fighter or acting Fire Lieutenant), type (such as regular, overtime or leave period), and assignment. In this schedule, Randolph's first date as acting Fire Lieutenant was June 19, 2019. He was assigned in an acting capacity off and on. Using this schedule, from the date of the appointments from the first certification, March 16, 2020, to the January 14, 2022 decision date, the appellant worked 108 days and 74 of those were in an acting capacity. It is noted that after filing for a classification review on August 24, 2021, Randolph worked 19 days and 6 were in an acting capacity. There are no temporary appointments in Randolph's CAMPS record.

The appointing authority, represented by Jordynn Jackson, Esq., states that Randolph worked in an acting capacity as Fire Lieutenant for six days following his request for a classification review. It states that he did so due a manpower deficiency due to leaves, including Covid-19 and vaccination absences. The appointing authority states that Agency Services erred in determining that Randolph's position was appropriately classified as Fire Lieutenant due to filling a permanent vacancy. The appointing authority argues that the assignments of supervisory duties were temporary appointments, and that such acting appointments have been recognized by the Commission. *See Capibianco v. Civil Service Commission*, 60 N.J. Super. 307, 315 (App. Div. 1960), at 316. It argues that performing supervisory duties on an acting basis for six dates over a one month span (December 14, 2021 to January 14, 2022), does not rise to the level of regular and recurring. The appointing authority states that it can provide a temporary appointment to fill the need of essential governmental services. *See Adams v. Goldner*, 79 N.J. 78, 81-81 (1979). It states that it has 20 first level officers (Fire Lieutenants), so there was no vacancy to fill, and Randolph had a temporary appointment. It argues that classifying this position beyond limitations will lead to layoffs and disrupt the services of the organization.

With his appeal, Atkinson provides a work schedule wherein the first date of his supervisory assignment was December 29, 2016. He was assigned in an acting capacity off and on³ until he went out on injury leave from January 1, 2020 to June 19, 2020. However, using this schedule, from the date of his return to work on June 19, 2020, to the January 14, 2022 decision date, the appellant worked 96 days and

² Randolph maintains that this is due to a lack of manpower to staff the engine.

³ He was on light duty for a significant time wherein he maintained Fire Fighter duties.

90 of those were in an acting capacity. He provides platoon schedules for various dates starting August 23, 2021, and highlights in each the Fire Captains and Fire Lieutenants working overtime. He claims that this highlights the need for appointments. He states that after he filed his classification review request on August 24, 2021, he was no longer given supervisory assignments, yet officers were working overtime in supervisory positions. He argues that he was out on leave from December 5, 2021 to January 14, 2022 or he would have accrued more than the two days of supervisory time that was calculated from August 24, 2021 (when he filed his request) to January 14, 2022. There are no temporary appointments in Atkinson's CAMPS record.

On appeal, Brown disagrees with Agency Services' determination that duties performed in the past could not be verified, and he also provides a work schedule. He argues that the appointing authority removed his supervisory duties after three years and had other officers to work overtime due to the lack of supervisors. He states that some are working 48 hours straight and are exhausted, posing a threat to safety. Brown states that in March 2020 he returned to duty after an injury, but that several months earlier, all eleven candidates on the list were asked to purchase tickets to several political events for the Mayor. It was mentioned that "it would be in our best interest" to buy tickets, which were thousands of dollars. He states that it is known that if you don't pay, you will not be promoted, and that the first eight candidates paid for tickets and were promoted in March 2020. He states that they wanted to make an example of himself, Atkinson and Randolph by letting the list expire without promoting them. Brown states that he had to go on leave, and that he should not be retaliated against for going on a leave. He states that he performed supervisory duties for three years, which was not training to obtain experience. He contends that his duties were regular and recurring.

In response, the appointing authority argues that Brown's duties as a Fire Lieutenant were not recurring and regular, but he was performing temporary duties due to manpower deficiencies. It maintains that the position should be classified based on current duties, and any prior duties should not be considered. It also argues that he was not provisionally appointed to Fire Lieutenant, and there was no vacancy to fill.

On Brown's work schedule, his first date as acting Fire Lieutenant was March 4, 2019. He was assigned in an acting capacity off and on. Using this schedule, from the date of the appointments from the first certification, March 16, 2020, to the January 14, 2022 decision date, the appellant worked 114 days and 113 of those were in an acting capacity. It is noted that after filing for a classification review on August 24, 2021, Randolph worked 2 days and 1 was in an acting capacity. Otherwise, he was on leave. There are no temporary appointments in Brown's CAMPS record.

CONCLUSION

N.J.A.C. 4A:3-3.9(e) states that in classification appeals the appellant shall provide copies of all materials submitted, the determination received from the lower level, statements as to which if portions of the determination are being disputed, and the basis for appeal. Information and/or argument which was not presented at the prior level of appeal shall not be considered.

N.J.A.C. 4A:3-3.9(e)3(ii) states that if an appeal is granted by the Civil Service Commission (Commission), the effective date of implementation shall be, in local service, the date an appropriate representative of the Commission first received the appeal or reclassification request, or at such earlier date as directed by the Commission.

N.J.S.A. 11A:3-1 and *N.J.A.C.* 4A:3-3.1(1) provide that each position in the career and unclassified services shall be assigned by the Commission to a job title.

N.J.A.C. 4A:3-3.4 provides that no person shall be appointed or employed under a title not appropriate to the duties to be performed nor assigned to perform duties other than those properly pertaining to the assigned title which the employee holds.

N.J.A.C. 4A:3-3.5(a)1 states that when the duties and responsibilities of a position change to the extent that they are no longer similar to the duties and responsibilities set forth in the specification, and the title is no longer appropriate, the Commission shall reclassify the position to a more appropriate title if there is one.

N.J.S.A. 11A:2-24, and *N.J.A.C.* 4A:2-5.1(a) state that an appointing authority shall not take or threaten to take any action against an employee in the career, senior executive or unclassified service in retaliation for an employee's lawful disclosure of information on the violation of any law or rule, governmental mismanagement or abuse of authority.

N.J.A.C. 4A:2-5.2(a) provides that an employee may appeal a reprisal or political coercion action to the Commission within 20 days of the action or the date on which the employee should reasonably have known of its occurrence.

N.J.A.C. 4A:2-1.4(c) provides that the burden of proof shall be on the appellant.

N.J.A.C. 4A:4-1.7(a) states that the Chairperson or designee may approve temporary appointments to positions in which the job assignment is for an aggregate period of not more than six months in a 12-month period. A temporary

appointment for a maximum of 12 months may be approved by the Chairperson or designee to a position established as a result of a short-term grant. *See also N.J.S.A. 11A:4-13(c).*

N.J.A.C. 4A:4-1.7(d) states that consecutive temporary appointments in excess of the periods set forth in (a) are prohibited.

The definition section of the job specification for Fire Fighter states:

During an assigned tour of duty, extinguishes fires; performs rescue operations; aids in emergency situations involving hazardous or toxic materials; administers emergency medical treatment; maintains all related equipment, buildings and grounds; does related work.

The definition section of the job specification for Fire Lieutenant states:

Under direction of a Fire Captain, has charge of a fire department company or platoon intended to assist in the extinguishing of fires; does other related duties.

Initially, Agency Services relied on the policy that generally, classification reviews are based on a current review of assigned duties and any remedy derived therefrom is prospective in nature. Usually, given the evolving nature of duty assignments, it is not possible to accurately review the duties an employee may have performed six months ago, or a year ago, or several years ago. However, it is noted that titles in the fire service are unlike most other civil service titles. As an organization in charge of preventing and fighting fires, it is a highly organized emergency service. As such, incumbents in the Fire Fighter title series work under a plethora of Standard Operating Guides and Procedures. The effectiveness of the fire service is based on teamwork, and each individual must be aware of who is in command or control. On this basis, there are no ambiguous or vague supervisory duties. If an individual is assigned supervisory duties, this is not uncertain or unclear. If it can be assumed that the work schedules provided are accurate, then the appellants performed duties as listed therein, either as a Fire Fighter or as an acting Fire Lieutenant. Thus, for this title, it *is* possible to review the past duties that an individual has performed, given that the supervisory duties have remained relatively consistent over the past few years. It is unclear if Agency Services had access to the work schedules provided by the appellants. If it had not, the determinations were correct based on the information provided. However, to leave it at that given the new information would be inherently unfair to the appellants.

On that basis, a review of the work schedules indicates that all three appellants were consistently assigned the supervisory duties of Fire Lieutenant from March 16, 2020, the date that initial appointments were made from the

certification, to January 14, 2022, when Agency Services' decision was issued. Further analysis shows that supervisory duties were removed once the requests for classification reviews were filed. Randolph worked in an acting Fire Lieutenant position from March 16, 2020 to the filing of his request on August 24, 2021 for 76% of the time (68 days out of 89). Atkinson worked in an acting Fire Lieutenant position from March 16, 2020 to the filing of his request on August 24, 2021 for 93% of the time (90 days out of 96). Randolph worked in an acting Fire Lieutenant position from March 16, 2020 to the filing of his request on August 24, 2021 for 99% of the time (112 days out of 113). After filing the requests, Randolph worked in an acting capacity 31% of the time (6 days out of 19); Atkinson worked in an acting capacity 7% of the time (2 out of 28 days); and Brown worked in an acting capacity 50% of the time (1 out of 2 days). It is noted that Brown was on leave for much of that period. In each case, the appellants were working as supervisors on a consistent and recurring basis from when the other applicants were appointed from the prior certification until the filing of their classification requests.

The appointing authority stated on the Position Classification Questionnaires (PCQs) that "The Fire Fighters Union and the Administration have a negotiated agreement whereby Fire Fighters act in a title above their rank on an as needed basis. At the request of the Fire Fighters Union and the approval of the Administration this provision was established over a decade ago in order for the Fire Fighter to gain experience in a title that he/she may be promoted to in the future at the discretion of the Appointing Authority. The Fire Fighters do not perform these duties 100% of the time nor do they receive a title change from Fire Fighter as a result of performing these duties. The Fire Fighters are compensated similar to being paid a stipend they perform these [duties]. The Appointing Authority could eliminate the capacity for Fire Fighters to act by simply paying overtime to the current Fire Lieutenants. The claim that Fire Fighters are working out of their title is false. This current desk audit is an attempt by this individual to undermine the Appointing Authority discretion to promote and circumvent civil service testing requirements. The Article attached hereto has been a provision of the negotiated contract for many years. Dozens of Fire Fighters has acted in the position of Fire Lieutenant and there ha[s] never been a grievance filed." The Article was not included in the file received for review; however, the appointing authority provides a copy on appeal. This Article XIV Acting Officers, states, "Any Fireman assigned to a Lieutenant's position, on an acting basis for a period of one (1) full day or more shall be paid for such work at the applicable base rate of pay for the acting supervisory position."

In this regard, there is no such designation as an acting appointment under Civil Service rules. *N.J.S.A. 11A:4-13* and *N.J.A.C. 4A:4-1.1 et seq.* provide for regular, conditional, provisional, interim, temporary, and emergency appointments. *See In the Matter of Michael Shaffery* (MSB, decided September 20, 2006) and *In the Matter of Russell Davis* (MSB, decided August 10, 2005). The appointing authority

states that the acting provision was established over a decade ago in order for the Fire Fighter to gain experience in a title that he/she may be promoted to in the future at the discretion of the appointing authority. In that regard, Randolph, Atkinson and Brown were each initially given acting assignments on June 11, 2019, December 29, 2016 and March 4, 2019, respectively. This bodes the question of how long a Fire Fighter must receive out of title assignments as a supervisor until they are trained for the position. Atkinson surely has accrued sufficient experience after five years of such assignments. The others each have at least two and half years of such assignments. The appointing authority maintains that such duties are not assigned 100% of the time. Yet, prior to filing requests for classification reviews, the appellants were assigned such duties 68%, 93% and 99% of the time. The quantity of these assignments belies the appointing authority's contention that acting assignments were intermittent and on an as needed basis. Surely the appellants are sufficiently trained after so much time, yet the appointing authority failed to certify the eligible list to include the names of the appellants on the first certification.

On that note, on appeal the appointing authority maintains that it is entitled to make temporary appointments. Indeed, it is. The question is why did it not do so for these appellants for so many months, and years. It argues that reclassifying these positions will lead to layoffs and disrupt the services of the organization, and indicates that it could eliminate the capacity for Fire Fighters to act by simply paying overtime to the current Fire Lieutenants. The Civil Service Commission (Commission) recognizes that many appointing authorities find it necessary to designate an "acting" supervisory officer in a public safety department for one or more shifts, due to illness, injury, or vacation schedules of permanent supervisory officers. Nevertheless, the remedy the appointing authority is seeking in effect mandates the out-of-title work duties in violation of *N.J.A.C. 4A:3-3.4*. The Commission declines to violate its own rules. As such, the Commission finds that the appointing authority's excessive assignment of out-of-title duties is inappropriate and orders it to limit such out-of-title duties to situations described above. Failure to do so may subject it to further penalties or fines pursuant to *N.J.A.C. 4A:10-2.1*.

Also, in an email dated September 21, 2021, Brown told Agency Services that the three appellants were not promoted as they did not buy tickets for the administration's political fund in March 2020, which was presented to them by a Fire Lieutenant working directly for the Deputy Director of the Fire Department. He states that he was repeatedly told that it would be in his best interest, and he replied that he should not have to buy a promotion. He adds that after the requests for classification reviews were filed, their acting assignments were curtailed. He indicates that he received an additional \$159.00 for a 24 hour shift as acting Fire Lieutenant, while the total overtime amount paid out to September 2021 was \$54,000. He also indicated that the appointing authority was refusing to sign his

PCQ and rejected it each time it was submitted. His PCQ was dated August 24, 2021, and logged as received September 21, 2021.

Nonetheless, the appellants have provided no physical evidence of the allegation that they did not receive promotions due to not buying tickets to a political event. Given the lack of proof, the failure of the appointing authority to request a certification of the entire eligible list and promote the appellants from the first certification is not in violation of any Civil Service law or rule. Moreover, as the appellants were the three lowest-ranked candidates on the list, they were not improperly bypassed in favor of lower-ranked candidates. *See N.J.A.C. 4A:4-4.8*. In any event, an appeal of classification review is not the forum to present violation of reprisal or political coercion action. If the appellants wish to pursue an appeal of that issue, they should do so within 20 days of receipt of this decision.

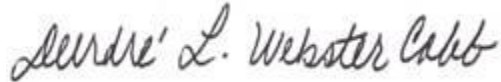
Nevertheless, Randolph received an effective date to Fire Lieutenant effective December 14, 2021, and Agency Services found that the proper classification of Atkinson's and Brown's positions were Fire Fighter. These determinations were based on the premise that reviews are based on a current review of assigned duties and any remedy derived therefrom is prospective in nature. Thus, only assignments after submission of the classification review appeals in September 2021 were considered. However, pursuant to the work schedules, the appellants were performing supervisory duties for more than three years, making it clear that they were performing in more than temporary appointments. Nonetheless, the appellants' assignments to supervisory duties were severely curtailed once they filed classification review requests. The Commission recognizes a causal link of this action and the filing of the classification review requests. The animus of this action has a chilling effect on other individuals who may believe that they too are working out of title, and may want to file classification review requests. The appointing authority is certainly within its rights to remove out of title duties from a position. However, assigning such duties on a regular and recurring basis for three years and then removing them when classification review requests are filed appears to be an adverse action beyond that of assigning "acting" duties on an intermittent or emergent basis. Particularly when the appellants appeared on an eligible list and were not certified, but continued to be assigned out of title work for a year and six months (March 2020 to August 2021) on a regular basis, and there were vacancies to be filled. The appointing authority does not provide a scintilla of evidence that layoffs would have been necessary if the three appellants had been promoted at the same time the other eight candidates on the eligible list were appointed. For equity purposes, the appellants are to be granted provisional appointment dates to Fire Lieutenant as of September 24, 2021, the date that their appeals were received, pursuant to *N.J.A.C. 4A:3-3.9(e)3(ii)*.

ORDER

Therefore, it is ordered that the appeals of Michael Randolph, Paul Atkinson and Tyrone Brown be granted, and they receive retroactive provisional appointment dates to Fire Lieutenant, effective September 24, 2021, and the appointing authority's 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 29TH DAY OF JUNE 2022



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