



STATE OF NEW JERSEY

In the Matter of Chad Hutchinson,
Ewing

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket No. 2022-1582

Administrative Appeal

ISSUED: JULY 25, 2022 (HS)

Chad Hutchinson, a Fire Fighter with Ewing, appeals multiple employment issues and requests varied relief.

In his appeal to the Civil Service Commission (Commission), dated January 8, 2022, the appellant states that on March 30, 2019, a Fire Captain vacancy opened up. At the time, the appellant was the sole eligible remaining on the eligible list for Fire Captain (PM1029V), Ewing. The appellant states that although he inquired about the vacancy, he was told that his promotion was not mandated because the PM1029V list was incomplete.¹ The appellant argues that K.W.’s temporary appointment to Fire Captain, which lasted from June 22, 2019 through March 13, 2020—more than six months—was improper. On September 13, 2019, the appellant was served with a Preliminary Notice of Disciplinary Action, which contained various charges and proposed a penalty of removal. The appellant states that a departmental hearing was held on September 25, 2019, and his attorney submitted a post-hearing brief on March 31, 2020. However, to date, the appointing authority has not issued a Final Notice of Disciplinary Action (FNDA). Further, the appellant argues that he was bypassed for regular appointment to Fire Captain on certification PL200258 in favor of K.W., who was appointed on March 14, 2020, against past practice.² Additionally,

¹ The PM1029V list did not expire until January 16, 2022.

² The certification contained the names of the appellant and K.W. only, both of whom are non-veterans. The disposition of the certification was recorded by this agency on March 26, 2020. K.W.’s appointment was from the eligible list for Fire Captain (PM0432A), Ewing. As K.W. was the only eligible who appeared on the PM0432A list, that list was exhausted upon his appointment.

the appellant states that another Fire Captain vacancy opened up in October 2021. He contends that the vacancy has not been acted upon. Rather, according to the appellant, the position has been continuously covered using a different Fire Fighter as an “acting” Fire Captain each day. The appellant seeks damages for the following items: loss of time-in-grade for Police and Firemen’s Retirement System purposes; fire officer seniority; and back pay along with any associated step pay increases and percentage raises. In support, the appellant submits various documents.

In response, the appointing authority, represented by David J. Truelove, Esq., states that with respect to the March 30, 2019 vacancy, it had the right to act as it did in light of *N.J.A.C.* 4A:4-4.2(c)2. The appointing authority maintains that K.W.’s temporary appointment for a period in excess of six months was proper because the position was the result of a short-term grant, *see N.J.A.C.* 4A:4-1.7, and this agency approved the appointment. Concerning the appellant’s disciplinary matter, the appointing authority acknowledges that a departmental hearing was held, but the hearing determination was never issued and the appellant did not suffer any adverse action. K.W.’s March 14, 2020 appointment, according to the appointing authority, complied with all Civil Service provisions including the “Rule of Three.” The appointing authority notes that K.W. was appointed in 2002 and has experienced no discipline, while the appellant was appointed in 2014 and received a five-day suspension in 2017. Any issue of past practice, in the appointing authority’s view, is not a Civil Service issue but rather a collective bargaining or union issue, which would be under the purview of the Public Employment Relations Commission. As for the October 2021 vacancy, the appointing authority states that it is awaiting the issuance of the new Fire Captain eligible list (PM2326C) to fill that vacancy. The appointing authority maintains that the instant appeal was ill-advised and appears to be nothing more than a targeted effort against K.W., who has properly attained his position. In support, the appointing authority submits various exhibits, including its own post-hearing brief, dated March 23, 2020, in the appellant’s disciplinary matter.

CONCLUSION

The appellant’s claims concerning the March 30, 2019 vacancy; K.W.’s June 22, 2019 through March 13, 2020 temporary appointment; the failure of the appointing authority to issue an FNDA after the submission of post-hearing briefs in March 2020; and the appellant’s March 26, 2020 bypass have not been timely presented as the instant appeal was not filed until January 2022. *See N.J.A.C.* 4A:2-1.1(b) (providing, in pertinent part, that 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).³ Nor is there any basis in this case to extend or to relax the time for appeal. *See N.J.A.C.* 4A:1-1.2(c) (the Commission has the

³ It is noted that pursuant to a rule modification, which went into effect April 9, 2020, this timeframe is 60 days so long as the emergency declared pursuant to Executive Order No. 103 (2020) is in effect. 52 *N.J.R.* 971(a).

discretionary authority to relax rules for good cause). In this regard, it is appropriate to consider whether the delay in asserting the appellant's right to appeal was reasonable and excusable. *Appeal of Syby*, 66 *N.J. Super.* 460, 464 (App. Div. 1961) (construing "good cause" in appellate court rules governing the time for appeal); *Atlantic City v. Civil Service Com'n*, 3 *N.J. Super.* 57, 60 (App. Div. 1949) (describing the circumstances under which delay in asserting rights may be excusable). Among the factors to be considered are the length of delay and the reasons for the delay. *Lavin v. Hackensack Bd. of Educ.*, 90 *N.J.* 145 (1982). See e.g., *Matter of Allen*, 262 *N.J. Super.* 438 (App. Div. 1993) (allowing relaxation of former Merit System Board's appeal rules where police officer repeatedly, but unsuccessfully, sought clarification of his employment status). In this case, the appellant has not presented any substantial explanation for the delay in appealing the above issues, and so the claims could be dismissed on that basis alone.

Although the Commission has determined that the above-noted claims have not been timely presented, it nevertheless finds it necessary to add the following comments. The appellant suggests that he was entitled to be promoted once a vacancy opened up on March 30, 2019 since he was the sole eligible remaining on the PM1029V eligible list. However, there is no provision in Civil Service law or regulation that requires an appointing authority to fill a vacancy immediately upon its creation. See *In the Matter of Todd Sparks* (MSB, decided April 6, 2005); *In the Matter of Michael Shaffery* (MSB, decided September 20, 2006). Further, an appointing authority is entitled to a complete certification for consideration in making a permanent appointment, which means, from a promotional list, the names of three interested eligibles for the first permanent appointment. *N.J.A.C.* 4A:4-4.2(c)2. When fewer than three interested eligibles are certified and no provisional currently serving in the title is listed on the certification, the appointing authority may take one of several actions, including to vacate the position. *N.J.A.C.* 4A:4-4.2(c)2i. Moreover, it must be noted that individuals whose names merely appear on a list do not have a vested right to appointment. See *In re Crowley*, 193 *N.J. Super.* 197 (App. Div. 1984); *Schroder v. Kiss*, 74 *N.J. Super.* 229 (App. Div. 1962).

Regarding the appellant's bypass, the appointing authority correctly notes that any allegation that it did not follow past practice is a collective bargaining issue, not a Civil Service issue. See, e.g., *Barila v. Bd. of Educ. of Cliffside Park*, 241 *N.J.* 595 (2020) ("Public employers are barred from unilaterally altering . . . mandatory bargaining topics, whether established by expired contract or by *past practice*, without first *bargaining* to impasse.") (emphases added) (internal quotation marks omitted). As far as *Civil Service* rules are concerned, an appointing authority possesses the discretion to appoint any one of the top three interested eligibles from a promotional list, provided that if the eligible who ranks first on a promotional list is a veteran, then a non-veteran may not be appointed. See *N.J.A.C.* 4A:4-4.8(a)3.

Concerning the disciplinary issue, because the appointing authority has indicated here that the departmental hearing determination was never issued and the appellant suffered no adverse action, the Commission considers all disciplinary charges to have been dismissed. However, the appointing authority is cautioned that in future cases, it must issue an FNDA. *See N.J.S.A. 11A:2-14 and N.J.A.C. 4A:2-2.6(d)*. Failure to do so may subject it to fines and penalties. *See N.J.S.A. 11A:10-3 and N.J.A.C. 4A:10-2.1(a)2*.

Turning to the October 2021 Fire Captain vacancy, the appellant alleges that the vacancy has not been acted upon. According to him, the position has been continuously covered using a different Fire Fighter as an “acting” Fire Captain each day. However, as already noted, an appointing authority is not required to fill a vacancy immediately upon its creation. The appellant, moreover, possessed no vested right to an appointment to fill the vacancy. Additionally, if it is in fact the case that a different Fire Fighter is “acting” as Fire Captain each day, this would actually not be a violation of the classification system. In this regard, the occasional performance of higher level duties is not a basis for reclassification of a lower level position, and it is not uncommon for an employee to perform some duties which are above or below the level of work that is ordinarily performed. *See, e.g., In the Matter of Benjamin Ritter* (CSC, decided July 13, 2011).⁴ Further, a new Fire Captain eligible list (PM2326C) is forthcoming.

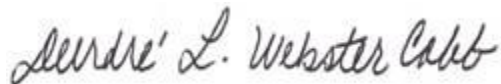
In light of all of the above, the appellant is not entitled to any of his requested remedies, some of which the Commission would not even have jurisdiction to grant.

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 20TH DAY OF JULY 2022



Deirdre L. Webster Cobb
Chairperson

⁴ It would be a different matter if an employee’s duties changed to such an extent that the employee was *primarily* performing higher level duties. The employee could then seek recourse through a position review request. *See N.J.A.C. 4A:3-3.9*.

Civil Service Commission

Inquiries
and
Correspondence

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

c: Chad Hutchinson
Marc Strauss
David J. Truelove, Esq.
Division of Agency Services
Records Center