



STATE OF NEW JERSEY

In the Matter of Michele O’Connell,
Middletown Township Public Library

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

CSC Docket No. 2023-2669

Administrative Appeal

ISSUED: August 23, 2023 (HS)

The Middletown Township Public Library and Michele O’Connell request that O’Connell receive a retroactive date of permanent appointment to the title of Senior Library Assistant.

As background, O’Connell received a permanent appointment to the title of Library Assistant, effective September 10, 2012. She received a provisional appointment, pending promotional examination procedures, to the title of Senior Library Assistant, effective November 28, 2021. Subsequently, she appeared on the eligible list for Senior Library Assistant (PM5840D), Middletown Township Library, which promulgated on March 23, 2023 and expires on March 22, 2026. O’Connell ranked first on the eligible list of four non-veteran eligibles. On March 27, 2023, the eligible list was certified with the names of all four eligibles. O’Connell was listed on the certification in position one. The appointing authority returned the certification permanently appointing, effective March 27, 2023, O’Connell and two additional eligibles.

In its request to the Civil Service Commission (Commission), the appointing authority indicates that O’Connell was appointed as a Senior Library Assistant, effective April 1, 2018, but the appointment was never entered into the County and Municipal Personnel System due to an administrative error. The appointing authority notes that O’Connell commenced a leave of absence on March 29, 2018 and returned May 29, 2018. The appointing authority argues that because O’Connell was not physically present during that leave of absence, she had no opportunity to bring

the administrative error to its attention. The appointing authority contends that O'Connell had no knowledge of her opportunity to apply and make her Senior Library Assistant position permanent. The appointing authority requests that O'Connell receive a retroactive date of permanent appointment in her Senior Library Assistant title, made effective one year before the June 21, 2023 closing date for the Principal Library Assistant (PM3120E), Middletown Township Library promotional examination, so that she will be eligible for that examination. Specifically, the examination was open to employees with one year of continuous permanent service as of the June 21, 2023 closing date in the Senior Library Assistant title. In support, the appointing authority submits copies of the following documents: the March 26, 2018 Library Board of Trustees resolution promoting O'Connell to Senior Library Assistant; the March 27, 2018 e-mail to staff, including O'Connell, announcing the personnel actions approved by the Library Board of Trustees on March 26, 2018; and the Township of Middletown Personnel Action Request Form documenting O'Connell's promotion to Senior Library Assistant, effective April 1, 2018, with the associated salary change.

O'Connell acknowledges that she was "provisionally" appointed to Senior Library Assistant in 2018. However, she maintains that she was not aware, and was never informed by the appointing authority, that she had to apply and test for the title to become permanent. In support, O'Connell submits copies of various correspondence.

CONCLUSION

N.J.A.C. 4A:4-1.10(c) provides that when a regular appointment has been made, the Commission may order a retroactive appointment date due to administrative error, administrative delay or other good cause, on notice to affected parties. Generally, this unique remedy has been reserved for two particular situations. First, the Commission has granted retroactive permanent appointment dates in circumstances in which an employee was actually serving in and performing the duties of a title, but due to some error or other good cause, his or her attainment of permanent status was delayed or hindered. The second situation in which an employee may be awarded a retroactive date of permanent appointment is where the name of an employee, whose appointment would have otherwise been mandated, was improperly removed from or bypassed on an eligible list, thereby preventing their appointment. When the Commission subsequently corrects the improper list removal or bypass, the Commission also orders the employee's appointment and a retroactive permanent appointment commensurate with the date on which others were appointed from the certification of the eligible list. *See In the Matter of Neil Layden* (MSB, decided March 23, 2005); *In the Matter of Ciri Castro, Jon Martin, and Luis Sanchez* (MSB, decided January 12, 2005).

Upon review, the Commission finds that it cannot provide the requested remedy. O'Connell's name did not appear on any Senior Library Assistant eligible list other than PM5840D, which did not promulgate until March 2023. Thus, there is no list from which O'Connell could have been appointed in the June 2022 timeframe. Neither can she be made permanent retroactively merely because she had effectively remained provisional for an extended period of time. In *O'Malley v. Department of Energy*, 109 N.J. 309 (1987), our Supreme Court concluded that a long-term provisional employee was not entitled to retain his provisional position without complying with the examination procedures set forth in *N.J.S.A. 11A:1-1 et seq.* In *O'Malley*, the employee provisionally occupied a position for more than two years before he was returned to his former permanent title. No examination was conducted during this time period. The employee contended that the failure to give a timely examination vested him with the automatic right to retain his provisional position. The Court rejected this claim:

Neither the original act nor the 1986 Act expressly created such a right in favor of provisional employees. In addition, nothing in the legislative history suggests that the Legislature intended to create such a right. It is the welfare of the public, not that of a particular provisional employee, that underlies civil service legislation. We believe it would thwart the legislative intent to allow a provisional employee to retain his or her position merely because the Commission could not offer a timely test.

* * *

In the present case, however, we are persuaded that the legislative goal of appointments based on merit and fitness is the paramount consideration. *With respect to provisional employees, that goal is met by competitive examinations, not by holding a position beyond the time prescribed by the Legislature.* *Id.* at 316-317 (emphasis added).

In *Kyer v. City of East Orange*, 315 N.J. Super. 524 (App. Div. 1998), the court determined that the City of East Orange's (East Orange) actions in denying Kyer, a seven-year employee, the opportunity to ever achieve permanent status in her competitive career service position, contrary to the Civil Service Act, were so egregious that they warranted a unique remedy:

It is our view that a delicate balance must be struck between the public and private interests that are subject to prejudice when a governmental entity fails to comply with its statutory obligations. Estoppel is not the answer. First, the Supreme Court has precluded that solution. Second, unqualified persons may thereby be afforded an improper route to permanency. But by the same token, it is no solution to leave remediless the well-qualified, experienced, high-performing, long-term provisional

employee who is unaware that her position is not permanent, who in all likelihood would have easily achieved permanency but for the municipal negligence, and whose summary discharge from employment is as obviously unfair and arbitrary as this jury found plaintiff's to be. *Id.* at 532-533.

Accordingly, the court transferred the case to this agency to retroactively determine whether Kyer would have qualified for the competitive career service position she provisionally held for seven years and, if so, "to fashion an appropriate remedy." *Id.* at 534. Ultimately, the former Merit System Board determined that, notwithstanding Kyer's years of service or the misdeeds of East Orange, she was not entitled to a permanent appointment since she did not meet the open competitive requirements for the position at the time the provisional appointment was initially made. *See In the Matter of Ruby Robinson Kyer* (MSB, decided May 4, 1999).

In this matter, O'Connell's date of permanent appointment to the Senior Library Assistant title cannot be changed to June 2022 simply because she had effectively served in the title provisionally on a long-term basis. *See e.g., N.J.S.A. 11A:4-13a* (permanent appointment can only be achieved when an individual takes an examination, is placed on an eligible list and is permanently appointed from that eligible list). The petitioner had no property interest in her provisional position that would give her a mandatory right to permanent appointment. *See Nunan v. Department of Personnel*, 244 *N.J. Super.* 494, 497 (App. Div. 1990) (a candidate on an eligible list only has an expectancy interest in appointment); *In re Crowley*, 193 *N.J. Super.* 197, 210 (App. Div. 1984) ("[t]he only benefit inuring to such a person is that so long as that list remains in force, no appointment can be made except from that list."); *see also, N.J.A.C. 4A:4-4.8(a)3* (appointing authority may choose any of the top three eligibles for permanent appointment). In fact, as already noted, O'Connell did not even appear on any Senior Library Assistant eligible list until March 2023.

The facts in this matter are distinguishable from those in *Kyer*. In this regard, there is no indication in the record that O'Connell was ever informed that she had become permanent in her Senior Library Assistant position prior to March 2023. *Kyer*, in contrast, had been *specifically erroneously informed* by her employer that she was a permanent employee. The parties' arguments are not persuasive. The appointing authority suggests that because O'Connell was on a leave of absence in the March-May 2018 timeframe, she had no opportunity to call attention to its administrative error. However, there is no evidence that O'Connell, who acknowledges here that she was only appointed "provisionally" to Senior Library Assistant in 2018, was somehow precluded from raising the issue upon her return to work. Both O'Connell and the appointing authority make an argument to the effect that O'Connell was unaware that she had to apply for an examination and test before she could become a permanent Senior Library Assistant. However, this is far from

arguing that the appointing authority had specifically misled O'Connell that she was already permanent prior to March 2023. Again, O'Connell acknowledges the provisional nature of her appointment in 2018. And per the job specification for Senior Library Assistant, the title is clearly identified as a *competitive* career service title.

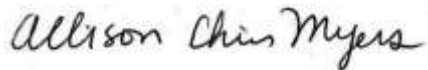
Accordingly, the parties have not established that O'Connell is entitled to a retroactive date of permanent appointment to the title of Senior Library Assistant. The March 27, 2023 date shall stand.

ORDER

Therefore, it is ordered that this request be denied. Michele O'Connell's date of permanent appointment to the title of Senior Library Assistant shall remain March 27, 2023.

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 23RD DAY OF AUGUST, 2023



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