

B-66



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Brenda Miller,
Newark School District

CSC Docket No. 2015-673

Administrative Appeal

ISSUED: JUL 17 2015 (DASV)

Brenda Miller, represented by Nancy I. Oxfeld, Esq., appeals the determination that she was not permanent with the Newark School District upon the termination of her employment as a Confidential Assistant effective August 15, 2014.

By way of background, the records in the County and Municipal Personnel System (CAMPS) indicate that the appellant first received a permanent appointment as a Clerk¹ with the Newark School District on January 1, 2000.² She subsequently served in the following titles: Technical Assistant 3 (provisional appointment from March 25, 2002 to March 31, 2004); Senior Clerk (permanent appointment from April 1, 2004 to July 22, 2007); and Secretarial Assistant, Typing (permanent appointment from July 23, 2007 to June 15, 2012). Secretarial Assistant, Typing was subsequently renamed Secretarial Assistant effective June 16, 2012. Additionally, the records indicate that the appellant served as a Secretarial Assistant until her resignation in good standing effective July 1, 2012. In the comment section of the resignation in good standing entry, a notation was made on December 27, 2013 that the appellant had "Accepted unclassified position."

¹ On April 6, 2011, the Civil Service Commission consolidated various local government titles within the clerical occupations group and renamed the titles to more appropriately represent the type of work performed by the incumbents. As a result, the noncompetitive Clerk title was renamed Clerk 1. The Senior Clerk title was renamed Clerk 2. In this decision, the former names will be referenced for actions occurring prior to April 6, 2011.

² The appellant began her employment with the Newark School District as a provisional Personnel Clerk, Typing, on May 4, 1998.

Thereafter, in a letter dated August 15, 2014, the appointing authority advised the appellant that “[a]s an unaffiliated, at-will employee, the [Newark School District was] exercising its right to terminate [her] services as a Confidential Assistant, effective the close of business [on] Friday, August 15, 2014.” It is noted that the appellant’s appointment and her dates of service in the Confidential Assistant title, which is allocated to the unclassified service, were not specifically recorded in CAMPS. Subsequently, the appellant appealed her separation and requested a hearing. However, the appellant was advised by this agency that since she was serving in an unclassified title and did not appear to have taken a leave of absence from her permanent title pursuant to *N.J.A.C. 4A:6-1.10(a)*, she was not entitled to appeal to the Civil Service Commission (Commission) or have a hearing on her termination. See *N.J.S.A. 11A:2-6* and *N.J.A.C. 4A:2-2.1*. Thereafter, the appellant pursued the within matter.

On appeal, the appellant maintains that she obtained permanent status with the Newark School District “many years ago.” She indicates that *N.J.A.C. 4A:6-1.10(a)* does not apply to her since that rule governs only State service. She was employed by a school district. The appellant argues that her termination violated *N.J.A.C. 4A:4-1.9(a)*, which she asserts requires that an employee with permanent status “who has been temporarily assigned to a non-career service title must be returned to” his or her permanent title. The appellant further contends that *N.J.A.C. 4A:4-1.9(b)* and (c) provide her with alternatives to return to a vacant position, be placed into a provisional position, or accept appointment in other titles at the same or lower level, which the appointing authority did not offer. Moreover, the appellant maintains if the foregoing was not available, the appointing authority was required, under *N.J.A.C. 4A:4-1.9(f)*, to institute layoff procedures, including providing notice of the layoff and applicable layoff rights, which it did not do in her case. Alternatively, the appellant submits that her termination was major discipline and she should have the right to appeal. As her remedy, the appellant requests that she be reinstated to her position or a comparable position and receive back pay with interest, seniority, and counsel fees.

In response, the appointing authority, represented by Christina M. Michelson, Esq., contends that the appellant has failed to establish a violation of *N.J.A.C. 4A:4-1.9* or that she has permanent status.³ It maintains that the appellant served as a Confidential Assistant, an “at-will employee,” at the time of her termination. It explains that the appellant’s position was “reclassified” to a Confidential Assistant position and she was advised of this “reclassification” and the July 1, 2012 effective date by letter, dated June 28, 2012, from the Interim

³ The appointing authority also argues that there is no proof that the appellant’s appeal was timely. However, the appellant was terminated on August 15, 2014. The appellant’s initial letter of appeal was marked for hand delivery on September 3, 2014, and it was delivered on September 4, 2014. Thus, the appellant’s appeal of that notice of termination would be considered timely, as it was filed within the 20-day time period for filing appeals.

Executive Director. In the following year, by letter dated November 8, 2013, the appellant was advised by the Chief Talent Officer that, because of the appellant's "reassignment" to the Confidential Assistant position, her employment record would reflect "a resignation from [her] civil service title . . . effective June 30, 2012." The letter further advised the appellant that "[a]s a result of this transfer, there was a change in [her] employment status from non-instructional (governed by NJ Civil Service Commission) to unaffiliated" and that she would "no longer be afforded Civil Service rights." The appointing authority emphasizes that the appellant did not file an appeal to the Commission at that time. Additionally, the November 8, 2013 letter informed the appellant that, pursuant to *N.J.A.C. 4A:4-7.10*, she could request reemployment in her "prior Civil Service title from the Newark School District by indicating [her] availability within three (3) years of [her] resignation." The appointing authority notes that the appellant has not requested to be placed on the regular reemployment list. It maintains that the appellant resigned from her permanent position and was properly terminated from her "at-will" employment. In support of its position, the appointing authority submits documentation, including the letters sent to the appellant and the job description for Confidential Assistant in the Newark School District.

In reply, the appellant reiterates that the appointing authority violated *N.J.A.C. 4A:4-1.9*, failed to follow layoff procedures, and denied her due process because her termination constituted major discipline. Moreover, she claims that she retained her permanent status and "was arbitrarily, without legal basis and without any procedure being followed, deemed by the Newark [School District] to be transferred from a career service position to an unclassified position, although her job duties remained the same." She notes that, despite the various positions she held, she worked in the human resources and labor relations department of the Newark School District. Additionally, the appellant states that she was notified that her job title was changed from Secretarial Assistant, Typing to Confidential Assistant effective July 1, 2012. In that regard, the appellant submits a memorandum, dated June 26, 2012, which states that "[t]o promote uniformity in the confidential offices of the Superintendent, Office of Labor/Employee Relations and the Legal Department and in recognition of the functions, the following secretarial/clerical titles in said offices are approved to be reclassified to Confidential Assistant effective July 1, 2012. The salary range for the new title of Confidential Assistant shall be \$44,300 to \$60,000, however, the increase in salary for affected employees . . . shall be no more than \$2,000 . . . Please implement the change accordingly." The appellant then received the June 28, 2012 letter from the Interim Executive Director. The appellant emphasizes that in neither the June 26, 2012 memorandum nor the June 28, 2012 letter does it advise her that she would be moving from the career service to the unclassified service. Moreover, the appellant argues that the foregoing information makes it clear that she did not resign. Rather, she was "unilaterally transferred to a new job title" without an explanation that she would be placed in the unclassified service and had given up her rights.

Further, the appellant submits that reclassification procedures were not followed, as this agency did not conduct a review of her position and reclassify it pursuant to *N.J.A.C. 4A:3-3.5*.

In addition, the appellant claims that the November 8, 2013 letter was "incomprehensible." In that regard, the appellant points out that she was notified that her employment status would change from "non-instructional" to "unaffiliated." However, she states that "[t]his distinction has no meaning in Civil Service." Therefore, she did not respond to the letter. She also notes that the letter is inconsistent with the June 28, 2012 letter from the Interim Executive Director, which states that her union affiliation would remain the same. In any event, the appellant maintains that she could not understand how she could have lost her Civil Service protection. She was still employed with the Newark School District. Moreover, the appellant argues that even if she was appropriately placed in an unclassified position, she is still entitled to return to her permanent position since she did not resign from that position. As noted above, the appellant claims that she was involuntarily transferred. In support of her appeal, the appellant submits a certification, attesting to the foregoing, particularly, that she did not resign and was performing the same job duties as when she served in her prior permanent title.

CONCLUSION

N.J.A.C. 4A:2-2.1 provides that the right to appeal major discipline, which includes the termination of an employee, applies only to permanent employees in the career service or a person serving a working test period. *See also N.J.S.A. 11A:2-6*. As such, individuals in unclassified titles cannot appeal their separation to the Commission unless they retain underlying status in a career service title. In order to retain underlying career service status, an employee must receive a leave of absence from his or her career service title for the duration of the unclassified appointment. *See generally, N.J.S.A. 11A:6-1 and N.J.A.C. 4A:6-1.1(a)2*. In that regard, the appellant is correct that *N.J.A.C. 4A:6-1.10(a)* does not apply to her. That rule states in part that in *State* service, an appointing authority may, with Commission approval, grant leaves of absence without pay to permanent employees for a period not to exceed one year unless otherwise provided by statute. Rather, the applicable rule is *N.J.A.C. 4A:6-1.1(a)2*, which provides that in local service, appointing authorities shall establish types of leaves and procedures for leaves of absence. An appointing authority may grant permanent employees a leave of absence without pay for a period not to exceed one year. A leave may be extended beyond one year for exceptional circumstances upon request of the appointing authority and written approval of the Commission.

In the present case, the appellant has not shown that she retained her permanent status in the career service at the time of her termination. The Confidential Assistant title is allocated to the unclassified service. Pursuant to

N.J.S.A. 11A:2-6 and *N.J.A.C.* 4A:2-2.1, the Commission does not have jurisdiction to review the termination of an unclassified employee. Moreover, contrary to the appellant's contention that the November 8, 2013 letter was "incomprehensible," the letter unequivocally states that her personnel records would reflect a resignation from her Civil Service title and she would no longer be afforded Civil Service rights. Additionally, the November 8, 2013 letter informed the appellant that she could request reemployment in her prior Civil Service title within three years of her resignation. Thus, regardless of whether the appointing authority used the term "unclassified" to describe the appellant's appointment, it was clear that the appellant would no longer be afforded Civil Service rights. Moreover, there is no documentation whatsoever that the appellant requested or was granted leave from her permanent career service title to the unclassified title of Confidential Assistant. Although the appellant disputes that her appointment was voluntary, she did not contest it at the time.

Moreover, the appellant's arguments with respect to *N.J.A.C.* 4A:4-1.9(a) are misplaced. That rule provides that an employee with permanent status in a career service title, who is returned during or at the end of the working test period in another title, or from, *inter alia*, an unclassified appointment, to his or her permanent title, will have rights to a position in the permanent title in the same organizational unit. In this case, the appellant was not being returned to her permanent title since, as determined above, she was not granted leave from her permanent title. Therefore, *N.J.A.C.* 4A:4-1.9(a) through (f) are not applicable. It is reiterated that the sole means of preserving a career service position while serving in an unclassified title is to maintain an inactive relationship with the career service title designation through a valid leave of absence. Additionally, there is no Civil Service authority for retroactive placement of an employee on a leave of absence and an employee, at any level, cannot grant himself a leave of absence. See *In the Matter of Ryan Brown* (CSC, decided April 29, 2009) (Appellant serving in unclassified title who did not maintain an active relationship with his career service title not entitled to a hearing regarding his termination at the Office of Administrative Law).

Additionally, while the Commission is indeed troubled by the length of time between the effective date of the appellant's resignation, July 1, 2012, and the confirmation of that action on November 8, 2013, the fact remains that the appellant's Confidential Assistant position was unclassified, and the appointing authority notified the appellant that she would no longer be afforded Civil Service rights eight months prior to her termination on August 15, 2014. Although the appellant argues that she was "arbitrarily, without legal basis and without any procedure being followed, deemed . . . transferred from a career service position to an unclassified position," it is reiterated that the appellant did not file an appeal at that time. She essentially acquiesced to her new position, accepting the benefits, including any increase in pay, of the unclassified appointment without complaint

until her termination. See e.g., *In the Matter of Carol Hardy* (CSC, decided February 4, 2015) (Appellant who did not demonstrate that she retained her underlying permanent career service status by taking a leave of absence when she accepted an unclassified appointment not entitled to a hearing and she was properly dismissed).

Further, the appellant claims she was performing the same duties as her prior held permanent title. If the appellant believed that she was performing out-of-title duties as a Confidential Assistant, she could have requested a classification review of her position pursuant to *N.J.A.C.* 4A:3-3.9. Her claim at this juncture cannot be verified. In that regard, the foundation of position classification, as practiced in New Jersey, is the determination of duties and responsibilities being performed at a given point in time as verified by this agency through an audit or other formal study. Thus, classification reviews are based on a current review of assigned duties and any remedy derived therefrom is prospective in nature since duties which may have been performed in the past cannot be reviewed or verified. Given the evolving nature of duties and assignments, it is simply not possible to accurately review the duties an employee may have performed six months ago or a year ago or several years ago. This agency's established classification review procedures in this regard have been affirmed following formal Commission review and judicial challenges. See *In the Matter of Community Service Aide/Senior Clerk (M6631A)*, *Program Monitor (M62780)*, and *Code Enforcement Officer (M00410)*, Docket No. A-3062-2T2 (App. Div. June 15, 2004) (Accepting policy that classification reviews are limited to auditing current duties associated with a particular position because it cannot accurately verify duties performed by employees in the past). See also, *In the Matter of Engineering Technician and Construction and Maintenance Technician Title Series, Department of Transportation*, Docket No. A-277-90T1 (App. Div. January 22, 1992). See also, *In the Matter of Theresa Cortina* (Commissioner of Personnel, decided May 19, 1993).

In addition, to the extent that the appellant is arguing that she did not receive proper notice of her separation and her rights in accordance with the applicable layoff procedures, it is noted that an appointing authority is required to provide an employee in the career service with written notice 45 days prior to the employee's separation or demotion as a result of a layoff action and this agency advises the employee of his or her layoff rights prior to the layoff. See *N.J.S.A.* 11A:8-1, *N.J.A.C.* 4A:8-1.6(a), *N.J.A.C.* 4A:8-1.6(e), and *N.J.A.C.* 4A:8-1.6(f). However, the appellant was not laid off. In addition, while the appellant argues that her termination was major discipline and she is entitled to a hearing, as noted above, the Commission does not have jurisdiction to review the termination of an unclassified employee. Thus, based on the foregoing, the Commission does not find that the appellant's Civil Service rights were violated. Accordingly, the Commission concludes that the appellant no longer retained permanent career service status with the Newark School District at the time of her separation on August 15, 2014.

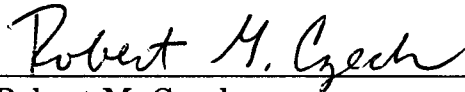
As final comments, the appointing authority is directed to correct the appellant's personnel record in CAMPS to reflect her unclassified appointment as a Confidential Assistant and her dates of service. Moreover, since the appellant was permanent as a Secretarial Assistant, she may request to be placed on a regular reemployment list. In this regard, *N.J.A.C. 4A:4-7.10(a)* provides that a permanent employee who has resigned in good standing, received a general resignation, retired or voluntarily demoted, may request consideration for reemployment by indicating availability to his or her appointing authority. Should the appellant file an Application for Reemployment upon receipt of this decision⁴ and the appointing authority recommends her reemployment,⁵ pursuant to *N.J.A.C. 4A:4-7.10(b)*, the appellant shall be placed on the regular reemployment list to be considered for appointment for four years from July 1, 2012 to June 30, 2016.⁶ The appellant is to enclose a copy of this decision with her Application for Reemployment.

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 15TH DAY OF JULY, 2015



Robert M. Czech
Chairperson
Civil Service Commission

⁴ The appellant may find the Application for Reemployment on the Commission's website at <http://www.state.nj.us/csc/about/publications/forms/pdf/dpf-178.pdf>, but it is also being sent to her along with this decision.

⁵ The determination as to whether to place the appellant's name on a regular reemployment list rests within the discretion of the appointing authority. That discretion is not reviewable by the Commission. See *Richard Marinelli v. Department of Personnel*, Docket No. A-1415-97T2 (App. Div. Mar. 9, 2000).

⁶ Under the circumstances of this case, good cause has been shown to extend the regular reemployment list to four years. In this regard, *N.J.A.C. 4A:4-7.10(c)* provides that regular reemployment lists for non-public safety titles shall have a duration of three years from the date of resignation unless extended for one year for good cause pursuant to *N.J.A.C. 4A:4-3.3(b)1*. See also *N.J.S.A. 11A:4-9c* and *N.J.S.A. 11A:4-6*.

**Inquiries
and
Correspondence**

**Henry Maurer
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trénton, New Jersey 08625-0312**

**c: Brenda Miller
Nancy I. Oxfeld, Esq.
Christina M. Michelson, Esq.
Vanessa Rodriguez
Kenneth Connolly
Joseph Gambino**