

In the Matter of Silvio Acosta, West New York

CSC Docket No. 2013-2670

(Civil Service Commission, decided November 7, 2013)

The Town of West New York appeals the attached decision of the Division of Classification and Personnel Management (CPM) which ordered removal of the duties performed in the Department of Public Works (DPW) by Silvio Acosta, a Confidential Aide to the Mayor.

Mr. Acosta was hired as a Confidential Aide to the Mayor on May 27, 2011. On October 16, 2012, the Division of Classification and Personnel Management received a written complaint from Communications Workers of America (CWA) Local 1045, which alleged that Mr. Acosta was performing out-of-title work. On January 10, 2013, CPM provided the appointing authority with a Position Classification Questionnaire (PCQ) and instructions that Mr. Acosta should complete it within twenty days. The PCQ was returned listing two duties, and was signed and dated by Mr. Acosta and the appointing authority on January 29, 2013.

Subsequently, in a letter dated February 27, 2013, Fernando Jimenez, Esq., the attorney for a West New York Commissioner, Count Wiley, wrote to the Civil Service Commission (Commission) that on April 18, 2012, the Board of Commissioners for West New York implemented a hiring freeze, effective April 19, 2012. He stated that, on June 20, 2012, the Board of Commissioners restructured five departments and Commissioner Wiley was moved from his position as Executive Director of DPW to a position in the Department of Parks and Public Property. He indicated that shortly thereafter, 11 employees from the Department of Parks and Public Property were unilaterally transferred to DPW, and he listed six full-time employees and five part-time employees. He stated that Commissioner Wiley was wrongfully stripped of his executive power to run his department responsibly due to constant interference by the Mayor, and he sought intervention from the Commission.

In the meantime, prior to issuing its determination, a CPM staff member attempted to conduct a phone or in-person classification review, and made repeated attempts to contact Mr. Acosta commencing on or about March 8, 2013. Mr. Acosta could not be reached although messages were left to contact CPM. Finally, the staff member noted that West New York's attorney, Gilberto Garcia, Esq., informed her that, "No one from the DPW will speak with you, including Silvio." In its March 14, 2013 determination, CPM noted that the appellant spends 15% of his time providing managerial advice to department heads, and that he is acting in an advisory capacity to the Commissioner of DPW, Ruben Vargas. CPM indicated that the position was assigned to the Department of Public Safety, but should be

transferred to the Department of Public Affairs, where the Mayor is located, and duties within other departments such as DPW should be removed.

On April 23, 2013, CWA Local 1045 wrote a letter to the CPM staff member listing ten ways that Mr. Acosta had interfered with human resource issues and actions within DPW to the detriment of the employees.

In a letter dated April 24, 2013, CPM responded to West New York that it had adopted the Walsh Act form of government in 1931. It indicated that according to *N.J.S.A. 40:72-6*, the Board of Commissioners designates one Commissioner to be the director of each department. Additionally, the designations may be changed whenever it appears that the public service would be benefited by the change. According to the statute, it would take an action of the Board of Commissioners to transfer one of its members to head a different department. CPM indicated that the Mayor presides over the meetings of the Board of Commissioners, but has no statutory power to veto any measure. It stated that the Mayor supervises all departments and reports to the town council for actions requiring its attention, but that a Commissioner is not elected to a specific department by voters of the town. Rather, a Commissioner is designated by a majority vote of the Commission board members to a specific department, and the designation may change by vote of the Board of Commissioners when it is determined that it is for the good of the public.

On appeal of CPM's March 14, 2013 determination, the appointing authority writes that it does not object to transferring Mr. Acosta's position to the Department of Public Affairs, and he has been transferred. Nevertheless, the appointing authority objects to the requirement that Mr. Acosta's duties should not include participation in the decision-making process of other departments. It states that as an Aide to the Mayor, he is permitted and allowed to engage in daily operations of the entire town. It argues that the title of the position transcends any department, and has the ability to oversee and comment on actions in other departments. It indicates that Mr. Acosta assists the DPW on an as-needed basis at the request of the Mayor and the Commissioner of DPW.

Gilberto Garcia, Esq., West New York's attorney, states that CPM's findings were erroneous as "the whole description of Mr. Acosta's duties ... is completely inaccurate." He states that Mr. Acosta aids the Commissioner of DPW, Ruben Vargas, with managerial tasks and provides advice, at the direction of the Mayor. Mr. Garcia argues that there was no reason to order Mr. Acosta's transfer from the Department of Public Safety to the Department of Public Affairs since that transfer already occurred by resolution.¹ He also argues that there is no jeopardy to any career service position under "Title 11," and Mr. Acosta is not performing duties belonging to a career service position. He suggests that the Commission

¹ He stated that the resolution was attached to the letter, however, the resolution was not attached.

overreached its jurisdictional authority by assuming that Mr. Acosta is not performing unclassified duties in DPW.

Mr. Garcia further argues that a Confidential Aide to the Mayor must maintain the flow of information between the Mayor, the community, and various departments in the municipality, and therefore cannot be barred from providing advice to departments within the municipality. He argues that in *Wiesel v. Hooks*, 277 N.J. Super. 78 (Ch. Div. 1994), the Court found that a “Confidential Secretary” to the Mayor’s duties are to undertake those functions in relation to the flow of information, whether by writing, speech or personal visit, to and from the Mayor’s office, that the Mayor wants the Secretary to perform. The Confidential Aide is a political appointment, not subject to classification jurisdiction within “Title 11,” and is privy to critical policy making decisions with access and exposure to the policymakers. It is a position of trust and is akin to a high level cabinet officer with access to all areas.

Mr. Garcia contends that CPM did not describe Mr. Acosta’s duties as violating Civil Service rules, nor does it specify functions performed by him that should be performed by a career service title. He states that indicating that all duties performed in other Departments should cease is inappropriate. He contends that policymaking procedures of the Mayor include assisting the Commissioner of DPW, and he maintains that Mr. Acosta is sent by the Mayor to departments to assist and provide advice.

CONCLUSION

The issue in this matter is not whether Mr. Acosta is appropriately classified, but what duties are allowable under the title. The Confidential Aide to the Mayor is an unclassified title permitted for an incumbent that reports directly to the Mayor of a municipality. No job specification for this title exists. N.J.S.A. 11A:3-5 (Political subdivision unclassified service) provides for one secretary and one Confidential Assistant to each Mayor. “Unclassified Service” means those positions and job titles outside of the senior executive service, not subject to the tenure provisions of Title 11A, New Jersey Statutes or the rules codified in Title 4A of the New Jersey Administrative Code unless otherwise specified.

When the appellant signed his PCQ, he certified that he had read the instructions and the entries made above were in his own words and, to the best of his knowledge, were accurate and complete. There were two duties. For 85% of the time, the appellant wrote: “Advise Mayor regarding the performance of the Public Affairs Department, including but not limited to employees, events and payroll. Advise Mayor and implement programs and ideas regarding the Public Affairs Department and other issues regarding the governing body implementation of regulations.” For the remaining 15% of the time, the appellant wrote, “When

instructed to do so or requested by a Director of a Department – as is the case here, Mr. Acosta provides managerial advice to department heads. In this in the case of DPW, Mr. Acosta has been advising – acting in an advisory capacity – Director/Commissioner Ruben Vargas on the affairs of DPW.” From the wording of the second duty, it appears as though the PCQ was not completed by Mr. Acosta. This could not be confirmed or denied as Mr. Acosta would not communicate with CPM, and Mr. Garcia denied CPM access to Mr. Acosta and all other staff.

On appeal, Mr. Garcia states that CPM’s findings were erroneous as “the whole description of Mr. Acosta’s duties ... is completely inaccurate.” In fact, the duties listed in CPM’s findings are practically word for word from the PCQ. In its determination, CPM indicated that “all duties within other departments, such as the Department of Public Works shall be removed.” The appointing authority disagrees and believes that a Confidential Aide to the Mayor is “permitted and allowed to engage in daily operations of the entire town.” This is incorrect. An incumbent in an unclassified title holds that position by statute or other reason which makes it not practicable to determine merit and fitness for appointment in or promotion to that title by examination, and that it is not appropriate to make permanent appointments to the title. In this case, while the Mayor has the flexibility to assign duties or issue orders as he sees fit, this does not countenance an unclassified position performing duties otherwise belonging to career service positions. *See In the Matter of Josephine Smith*, Docket Nos. A-2420-88T2 and A-1804-89T2 (App. Div. April 15, 1991); *In the Matter of Ellen Bloom*, Docket No. A-3562-86T8 (App. Div. January 28, 1988). In *Bloom*, the Court stated that while the Commission “has no authority to regulate what goes on in an unclassified position, its functions in enforcing the Civil Service Act must be liberally and broadly interpreted in order to allow it to properly bring public employees within its reach to effectuate its announced purpose.” The Court confirmed that to allow a local appointing authority unregulated discretion regarding unclassified positions “would be to render unsupervised the ability of subordinate governmental units to place a job position into an unclassified position and with impunity, frustrate the constitutional mandate that persons compete to gain positions properly classified as subject to the civil service system.” *See also, State Dept. of Civil Service v. Clark*, 15 N.J. 334, 341 (1954); *Bowser v. State Dept. of Civil Service of N.J.*, 108 N.J. Super. 132 (App. Div. 1970); *Follari v. State Dept. of Civil Service*, 102 N.J. Super. 598 (App. Div. 1968).

CWA argues that the Confidential Aide to the Mayor has changed employee job duties, titles and hours, transferred and fired employees, made determinations on validity of employee sick leave, denied leave or requested leave changes, ticketed employees for violations of public works policies (such as ticketing cars in the way of sweepers and putting out leaves), and changed the location of where employees signed in. If even one or two of these allegations are correct, Mr. Acosta has stepped out the boundaries of his title. Any actions regarding employees are within

the purview of the appointing authority, and the definition of “appointing authority” is a person or group of persons having power of appointment or removal. *See N.J.A.C. 4A:1-1.3.* In addition to appointments, the appointing authorities’ responsibilities include assignments, disciplinary actions, changes to work status, layoffs, demotions, promotions, approval of leaves, removals, salary decisions, terminations, transfers, and other personnel actions. For West New York, while the Mayor is the appointing authority, there is also a Town Administrator, Joseph DeMarco, whose function it is to carry out the personnel actions as directed by the Mayor. There is no need for the Confidential Aide to the Mayor to usurp these duties and take personnel actions.

While there is no job specification for Commissioner, a Director of Public Works, under direction, plans, organizes, and directs the programs and activities of a comprehensive public works department. While it is appropriate to relay information and provide communication with the Mayor’s Office, the Confidential Aide to the Mayor, and his subordinates, should not be “assisting” with these duties. Issues such as changing the location of where employees sign in, or deciding who gets tickets, is the responsibility of the Director of DPW,² who is accountable for these actions. The Confidential Aide to the Mayor has no authority to make these types of decisions. While the Mayor has the authority over the Town, the Confidential Aide to the Mayor does not. He is privy to critical policy making decisions with access and exposure to the policymakers: however, he should not be performing the duties of the Mayor, the Administrator or the Directors as his function is to *aid the Mayor* with confidential issues. The Confidential Aide to the Mayor can communicate with the Directors of other departments, but is not entitled to make decisions for them, and should not be assisting other Departments with personnel actions or actual work pertaining to those departments. Mr. Acosta must cease performing work in departments other than the Department of Public Affairs and focus his attention on the Mayor and the Department of Public Affairs. Mr. Vargas has the authority to perform the duties of his position, and he should rely on Mr. DeMarco to assist with personnel issues.

Finally, the matter of incorrect County and Municipal Personnel System (CAMPS) records in West New York must be resolved. Mr. Acosta’s record was incorrect to start, and Mr. Vargas’ record is incorrect currently. Also, Mr. Jimenez pointed out the transfer of 11 employees from the Department of Parks and Public Property to the DPW in June 2012, but a listing of employees in DPW does not include any of those names. As such, CPM should work with Mr. DeMarco to ensure that employee records in CAMPS are updated and corrected.

² Ruben Vargas and Count Wiley are both listed in Civil Service Commission records as Commissioners in the Department of Parks and Public Property, while there is no Commissioner listed for DPW. As such, CPM should correct Mr. Vargas’ CAMPS record and list him as the Commissioner of DPW.

A thorough review of the information presented in the record establishes that it is inappropriate for the appellant to perform duties in departments other than the Department of Public Affairs, and the appointing authority has failed to maintain its burden of proof in this matter.

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.