NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0571-09T1

PAUL EBERT,

Plaintiff-Appellant,

v.

THE JUDICIARY OF THE STATE OF NEW JERSEY, MIDDLESEX COUNTY VICINAGE,

Defendant-Respondent,

and

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 73,

Defendant.

Submitted January 4, 2011 - Decided March 11, 2011

Before Judges Wefing and Baxter.

On appeal from Superior Court of New Jersey, Law Division, Union County, Docket No. L-2506-07.

Lora B. Glick, attorney for appellant.

Paula T. Dow, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Matthew Sapienza, Deputy Attorney General, on the brief).

PER CURIAM

Plaintiff appeals from a trial court order granting summary judgment to defendant Judiciary of the State of New Jersey and dismissing his complaint with prejudice.[1] After reviewing the record in light of the contentions advanced on appeal, we affirm.

Plaintiff filed suit in February 2009 alleging in a six-count complaint that his termination from his position as a Judiciary Clerk 3 ("JC-3") was wrongful. Plaintiff premised his claim on the following factual complex.

In 2004 he applied to fill a vacant position as a Judiciary Clerk 2 ("JC-2") in the Probation Division in Middlesex County. Appointment to a classified position, such as a JC-2, is through an open competitive civil service examination. The Civil Service Commission will provide the hiring entity, in this case defendant, with a list of persons deemed eligible, generally ranked in the order of the scores they received on the civil service exam. There are two exceptions to this ranking. Disabled veterans who receive a passing score on the exam are placed at the head of the list of eligibles, N.J.S.A. 11A:5-4, and veterans who receive a passing score are placed immediately below disabled veterans and ahead of other individuals.

[1] Plaintiff voluntarily dismissed his complaint against defendant American Federation of State, County and Municipal Employees.

N.J.S.A. 11A:5-5. N.J.S.A. 11A:5-6 provides that if a disabled veteran or veteran appears on the list of eligibles, "the appointing authority shall appoint the disabled veteran or veteran in the order of ranking."

Plaintiff served in the military during the Vietnam War and received an honorable discharge; he was thus entitled to a veteran's preference, and he was appointed as a JC-2 at the end of October 2004. N.J.S.A. 11A:4-13 creates six categories of appointment, the first of which is a "regular appointment." N.J.S.A. 11A:4-13(a) provides that such an appointment "shall be permanent after satisfactory completion of a working test period." N.J.S.A. 11A:4-15 states that "[t]he purpose of the working test period is to permit an appointing authority to determine whether an employee satisfactorily performs [his or her] duties." An individual with a regular appointment has a working test period of four months; that four-month period may be extended to six months in the discretion of the Civil Service Commission. N.J.S.A. 11A:4-15(a). If the individual performs satisfactorily during the working test period, the appointment becomes permanent. Ibid. If the individual's performance is not satisfactory, he or she may be terminated or, if the individual had previously worked in a lower title, be returned to that lower title. N.J.S.A. 11A:4-15(d).

Plaintiff started work as a JC-2 on November 15, 2004. He said when he started he found a letter on his desk referring to a four-month working test period. While he said he had no real understanding of what that meant, he did not ask anyone. His supervisor was Barbara Mason. He said she did not describe the evaluation process to him from the outset. While she disputed that assertion, that disagreement is not material to the issues before us.

Plaintiff described his duties as a JC-2 as primarily clerical. He gave the following description at his deposition

> My job duties with the Probation Department were filing. Opening up e-mails. Routing process. Filing cards with reference to cases. Putting things in alphabetical order. Answering phones. Bringing other mail [to the appropriate location.]

According to Mason, plaintiff had difficulty completing tasks such as answering the phone and taking messages and was slow at other tasks such as filing. She completed a two-month evaluation on January 12, 2005, and ranked his work as unsatisfactory.

Prior to the expiration of his four-month working test period, an opening developed for a JC-3 position in the vicinage's Family Division. Because of his veteran's status, plaintiff's name was near the top of the list of eligible candidates for this post, and he was contacted to see if he was

interested. He expressed an interest and was interviewed. On February 18, 2005, he was offered the position of JC-3 and he accepted. On that same day he submitted a letter of resignation from his JC-2 position. In the letter he said his last day of work as a JC-2 would be March 4, 2005 and that he would start the new position on March 7, 2005. Because plaintiff resigned from the JC-2 position before the end of the four-month working test period, Ms. Mason did not complete his final evaluation, although she had begun to draft it.

Plaintiff started as a JC-3 on March 7, 2005. As a JC-3, his job duties were again clerical in nature, as they had been as a JC-2. His supervisor was Lynn Torgersen, who told him that he was starting a new four-month working test period. Ms. Torgersen observed that plaintiff was having the same sort of difficulties that Ms. Mason had observed, and on May 2, 2005, she completed his two-month evaluation, which ranked his work as unsatisfactory. His performance was still unsatisfactory at the end of the four-month working test period. Ms. Torgersen did not seek plaintiff's termination at that point but asked that his working test period be extended an additional two months, for a six-month total, the maximum permitted by statute. N.J.S.A. 11A:4-15(a). His performance did not improve, however,

and at the end of that two month period, she again evaluated his work as unsatisfactory and recommended his termination.

On September 2, 2005, plaintiff was notified that he was being terminated from his JC-3 position, effective September 7, 2005. He was also informed of his right to appeal this termination to the Merit System Board, which he initially did. He later withdrew that appeal, however, and filed a complaint in the Law Division. The underlying premise to his complaint was that his termination violated defendant's policy of granting tenure to veterans because, in his view, he had attained tenure as a JC-2. The trial court rejected his argument, and this appeal followed.

On appeal, plaintiff raises the following arguments for our consideration.

> POINT I
> THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S SUMMARY JUDGMENT MOTION BASED UPON HIS MISINTERPRETATION OF VETERANS' TENURE ACT ("VSA") AND ITS RELATIONSHIP TO THE CIVIL SERVICE ACT ("CSA").
>
> A. Plaintiff Officially Achieved Permanent Status in His J-2 Position Due to Defendant's Failure to Follow the Relevant CSA Regulations Concerning The Issuance of a Final Performance Rating Eleven Days Prior to the Conclusion
>
> B. The Fact that Plaintiff Held a Classified and Permanent Position as a JC-2 Clerk Mandated that He Be Entitled to Tenure Under the VTA
>
> C. The Trial Court Failed to Consider the Strong Underlying Public Policy

Supporting the VTA and Its Parity with the CSA

D. Plaintiff Achieved Permanent Status in His J-3 Position Because Defendant Failed to Follow N.J.A.C. 4A:4-5.1 When It Did Not Timely File an Extension of Plaintiff's Working Test Period

POINT II
PLAINTIFF PROPERLY BROUGHT THIS ACTION IN SUPERIOR COURT BECAUSE THE CIVIL SERVICE COMMISSION DOES NOT HAVE JURISDICTION TO HEAR MATTERS CONCERNING THE VTA AND PLAINTIFF IS NOT BARRED BY THE EXHAUSTION OF ADMINISTRATIVE REMEDIES DOCTRINE

POINT III
PLAINTIFF WAS NOT REQUIRED TO SERVE TORT CLAIM NOTICES REGARDING HIS BREACH OF EMPLOYMENT CONTRACT CLAIM.

Plaintiff's first contention is that he acquired tenure in his JC-2 position because his then-supervisor never filed a final evaluation of his performance at the end of the four-month working test period. Plaintiff's argument completely disregards the fact that he had resigned from that JC-2 position prior to the end of the four-month working test period. He could not achieve permanency in a position he did not occupy at the critical moment in time.

We also reject his contention that he achieved tenure as a JC-2 because he was unlawfully "promoted" to the JC-3 position during the working test period. He rests this argument on N.J.A.C. 4A:4-5.1(d) which provides that "[a]n employee who is serving a work test period shall not be eligible for a

promotional examination from that title." We agree with the trial court that this regulation is not material because plaintiff did not obtain the JC-3 position as a result of a promotional exam.

Similarly, we reject plaintiff's contention that he had tenure under the Veterans Tenure Act. The statute provides in pertinent part:

> No person now holding any employment, position or office...under the government of this State...whose term of employment, office or position is not now fixed by law, and receiving a salary from such State...who has served as a soldier...in any war of the United States...and has been honorably discharged from the service of the United States...prior to or during such employment in or occupancy of such position or office, shall be removed from such employment, position or office, except for good cause shown after a fair and impartial hearing, but such person shall hold his employment, position or office during good behavior, and shall not be removed for political reasons.
>
> [N.J.S.A. 38:16-1.]

By its own terms, however, the VTA only affords such tenure protection to veterans in permanent positions. It concludes with the following directive. "[I]n no event is it intended that this act shall apply to appointments made for a fixed or stated period of time." Ibid. Thus, veterans who are appointed subject to a probationary working test period are not entitled to tenure under the statute until their positions are made

permanent by satisfactory completion of the test period. See Giannone v. Carlin, 20 N.J. 511, 519 (1956) ("The [CSA] provides for temporary appointments, and it goes without saying that no such employment can give rights to permanent tenure under the [VTA]...").

Since plaintiff never had a permanent position as a JC-2 or JC-3, he could not achieve tenure as a veteran. Contrary to plaintiff's assertion, this construction of the statute is not against the public policy of protecting veterans; it simply recognizes the clear language of the statute.

Finally, we cannot agree that plaintiff achieved permanent status in the JC-3 position. A request for a two-month extension of the working test period is to be submitted "at least five working days before the end of the four month period." N.J.A.C. 4A:4-5.2(b)(2). Plaintiff asserts Torgersen's request for an extension was submitted one day late, on July 1, 2005, rather than June 30, 2005. We reach this result for two reasons. If there had not been a request for an extension, plaintiff would have been terminated at the end of the four-month period. Plaintiff was afforded an additional two months to bring his work performance to a satisfactory level and yet was unable to do so. We can perceive no policy justification for permitting plaintiff to benefit from a one-day

delay, if such occurred. In our view, the five-day period is for the benefit of those who must rule upon the request, giving them time to consider whether it should be granted. Further, even if plaintiff were in some manner entitled to take advantage of the claimed delay, his remedy would be to pursue an appeal before the Merit System Board, not to commence litigation.

Plaintiff also alleged in his complaint that the evaluations that Ms. Mason and Ms. Torgersen completed were not fairly done. We agree with the trial court that such an issue is properly brought before the Civil Service Commission.

The final count in plaintiff's complaint alleged breach of contract. The trial court correctly dismissed this count because plaintiff failed to file a notice of claim as required by the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1 to -10. Plaintiff's arguments to the contrary are meritless. R. 2:11-3(e)(1)(E).

The order under review is affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION