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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Timothy Hart,
Newark

CSC Docket No. 2015-3056

Request for Reconsideration

ISSUED: **FEB 14 2017** (SLD)

Timothy Hart, represented by William W. Hart, Jr., Esq., petitions the Civil Service Commission (Commission) for reconsideration of the attached final decision rendered on April 1, 2015, which ordered that his layoff from the title of Police Officer with Newark be rescinded and his record corrected to reflect that he was not laid off and instead resigned, effective June 30, 2011.¹

The background of this matter is thoroughly detailed in the Commission's prior decision in which it granted in part the petitioner's appeal of the determination of his layoff rights. It is also denied back pay and counsel fees finding that the petitioner had not established that the appointing authority acted in bad faith or with invidious motivation. Rather, the Commission found that this agency erroneously slotted the petitioner into rank 9,528 on the S9999H eligible list instead of leaving him as the first listed eligible on the certification which would have broken the layoff title seniority tie in his favor. However, since the petitioner's name was removed from the special reemployment list for Police Officer due to his failure to respond to the October 17, 2011 certification, his appointment to the title of Police Officer with Elizabeth, effective July 1, 2011, and the fact that he indicated he was not interested in returning to Newark, the only remedy available to him was to correct his record to reflect that he was not laid off on November 30, 2010, and instead resigned in good standing, effective June 30, 2011.

¹ It is noted that there is a typographical error in the Commission's order. The date should read June 30, 2011 as noted in the body of the decision and not June 30, 2010.

In the petitioner's request for reconsideration, he argues that the Commission erred by not finding that the appointing authority had acted in bad faith and denying him back pay and counsel fees. The petitioner reiterates his previous arguments that he was never properly served with a layoff notice, should not have been laid off as he was listed as the first listed eligible on the certification for his initial appointment, and others who were appointed after him were not laid off. Additionally, the petitioner asserts that due to his wrongful removal from an earlier certification, he should have been credited with an additional two years of seniority.

Moreover, the petitioner argues that he originally filed a good faith layoff appeal as he had initially challenged the retention of five individuals who possessed less seniority than he did. Thus, he maintains that his appeal should have been immediately referred to the Office of Administrative Law (OAL) for a hearing. The petitioner also objects to the Commission's acceptance of the appointing authority's "late" response to his appeal, which only addressed whether the layoff notice had been properly served. Therefore, he maintains that the appointing authority should be estopped from submitting any additional arguments in response to the instant request.

The petitioner also asserts that the only equitable remedy is an award of back pay, less any amounts earned, until his salary with his current employer is equal to his former salary with Newark. The petitioner contends that this is the only equitable remedy since he has identified actual financial losses that "were the result of a bad faith layoff" and the Commission's failure to promptly address the issue. Furthermore, the petitioner notes that although the appointing authority had offered him reemployment on October 17, 2011, it was not at the same salary as he had received prior to the improper layoff, the result which would have permanently lowered his compensation and provided a financial award to the appointing authority for its misconduct. Finally, the petitioner maintains that he is also entitled to attorney's fees due to the appointing authority's bad faith in laying him off.

Despite being provided an opportunity to do so, no arguments were submitted by the appointing authority.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding. The instant request for reconsideration is based on the assertion that the Commission

made an error by denying, in part, the petitioner's appeal of his layoff. However, a review of the record in the instant matter reveals that reconsideration is not justified.

Initially, the petitioner disputes the Commission's determination that he had not originally filed a good faith layoff appeal. Specifically, he asserts that as he had challenged the retention of five individuals who possessed less seniority, he was challenging the good faith of the layoff action, and thus the matter should have been referred to the OAL for a hearing. However, *N.J.S.A.* 11A:8-4 and *N.J.A.C.* 4A:8-2.6(a)1 provide that good faith appeals may be filed based on a claim that the appointing authority laid off or demoted the employee in lieu of layoff for reasons other than economy, efficiency or other related reasons. When a local government has abolished a position, there is a presumption of good faith and the burden is on the employee to show bad faith and that the action taken was not for purposes of economy. *Greco v. Smith*, 40 *N.J. Super.* 182 (App. Div. 1956); *Schnipper v. North Bergen Township*, 13 *N.J. Super.* 11 (App. Div. 1951). As the Appellate Division further observed, "That there are considerations other than economy in the abolition of an office or position is of no consequence, *if, in fact, the office or position is unnecessary, and can be abolished without impairing departmental efficiency.*" *Schnipper, supra* at 15. (emphasis added). The question is not whether the plan or action actually achieved its purpose of saving money, but whether the motive in adopting a plan or action was to accomplish economies or instead to remove a public employee without following *N.J.A.C.* 4A:8-1 *et seq.* Thus, a good faith layoff exists if there is a logical or reasonable connection between the layoff decision and the personnel action challenged by an employee. Additionally, it is within an appointing authority's discretion to decide how to achieve its economies. *See Greco, supra.*

On the other hand, *N.J.S.A.* 11A:2-11h and *N.J.A.C.* 4A:8-2.6(a)2 provide that a permanent employee or an employee in his or her working test period may file a determination of rights appeal based on a claim that the employee's layoff rights or seniority were determined and/or applied incorrectly. Such appeals shall be subject to a review of the written record. Since the petitioner's appeal concerned his claim that his layoff rights and his seniority, as compared to other individuals, were not properly determined, it was properly decided on the written record. Although the petitioner now claims that his appeal concerned the "bad faith actions" of the determination of his seniority, this does not convert his appeal into a good faith appeal since the question raised by his appeal was not whether the motive in adopting a layoff plan or action was to accomplish economies or remove a public employee without following *N.J.A.C.* 4A:8-1, *et seq.*

With regard to the remainder of the petitioner's arguments, he has failed to provide any documentation which establishes that the Commission's decision was contrary to the evidence presented. Instead, the petitioner merely reiterates his

prior arguments and claims that the Commission made an error. Although the petitioner claims that he was entitled to an additional two years of seniority based upon his improper removal from a certification, the Commission does not agree. As noted in the prior decision, in *In the Matter of Timothy Hart, Police Officer (S9999F), City of Newark* (MSB, decided January 17, 2007), the former Merit System Board (Board) ordered that the S9999F eligible list be revived so that the petitioner's name could be certified at the time of the next certification, for *prospective* employment opportunities only. Since the Board did not provide the petitioner with any retroactive relief in that matter, such as retroactive seniority, his claim that he was entitled to additional seniority because of that decision is unpersuasive. Regardless, in the attached decision, the Commission found that the former Division of State and Local Operations² had, in breaking the tie of the individuals appointed from the August 7, 2007 certification, incorrectly slotted the petitioner's name by rank with the other eligibles on that certification. In this regard, the Commission noted that since the S9999F list would have had priority over the S9999H list, the petitioner's name should have been listed as the first ranked non-veteran eligible, thereby breaking the tie to his benefit.

With respect to the petitioner's claim that he is entitled to back pay, the Commission notes that normally in appeals of this nature, the remedy is to reinstate the individual improperly laid off, after an updated background check, and to correct his or her record to reflect that he or she had not been laid off. However, the Commission noted that since the petitioner indicated he was not interested in returning to Newark, the only remedy available to him was to correct his record to reflect that he was not laid off on November 30, 2010, and instead show that he resigned in good standing, effective June 30, 2011, upon his appointment to the title of Police Officer with Elizabeth, effective July 1, 2011. Moreover, upon review of the matter, the Commission determined that this agency erred in combining the rankings of the petitioner with the other individuals on a subsequent list, instead of utilizing his position on the certification. Thus, there was no evidence of bad faith or invidious motivation on behalf of *the appointing authority* to justify an award of back pay or counsel fees. See *N.J.A.C. 4A:8-2.6(a)1*. See also *Cipriano v. Department of Civil Service*, 151 *N.J. Super.* 86 (App. Div. 1977); *O'Malley v. Department of Energy*, 109 *N.J.* 309 (1987); *HIP of New Jersey v. New Jersey Department of Banking and Insurance*, 309 *N.J. Super.* 538 (App. Div. 1998). Accordingly, the petitioner has failed to present a sufficient basis for reconsideration of the Commission's prior decision.

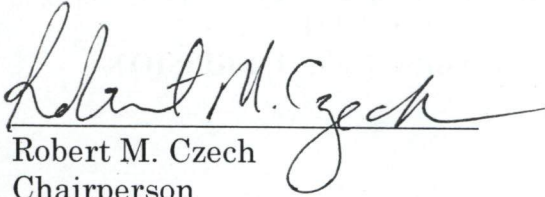
ORDER

Therefore, it is ordered that this request for reconsideration be denied.

² Currently named the Division of Agency Services.

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 8TH DAY OF FEBRUARY, 2017



Robert M. Czech
Chairperson
Civil Service Commission

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and
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Attachment

c: Timothy Hart
William Hart, Jr., Esq.
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Kelly Glenn
Records Center



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Timothy Hart, City
of Newark

CSC Docket No.2011-2387

ISSUED: APR - 2 2015 (SLD)

Timothy Hart, a former Police Officer with the City of Newark, represented by William W. Hart, Jr., Esq., appeals the determination of his layoff rights by the Division of State and Local Operations (SLO).¹

By way of background, the appointing authority submitted a layoff plan to this agency. Upon approval of the plan, 45-day layoff notices were sent to the affected public safety employees by Newark on or about September 23, 2010. In a letter dated October 29, 2010, SLO notified the appellant that he was to be laid off from his position as a Police Officer, effective November 12, 2010. It is noted that both the 45-day notice and the letter from SLO were sent to the appellant's address in Newark. Subsequently, the layoff was stayed until November 30, 2010. On that date, the appellant was laid off and placed on the special reemployment list for Police Officer, Newark.

On appeal to the Civil Service Commission (Commission), the appellant initially asserts that he never received written layoff notice, nor was the layoff notice conspicuously posted, in violation of *N.J.A.C. 4A:8-1.6*. In support, he submits an Affidavit in which he states that he never received written notice, and it was only on November 8, 2010 that he was verbally told by the appointing authority and this agency that he was targeted for layoff. Moreover, he notes that the certified copy of the layoff notice was sent to his former address in Newark, which he had not lived at for more than a year. In this regard, he maintains that he had

¹ Now known as the Division of Agency Services.

timely filed a change of address to a Belleville address with his precinct several months earlier and with the United States Postal Service. In support, he submits copies of the 45-day notice letter addressed to his former address in Newark and the certified mail receipt from the appointing authority which indicates that delivery was unsuccessful since the addressee was unknown.

Additionally, the appellant argues that he possessed more seniority than other individuals who were not laid off from their positions as Police Officers. In this regard, he maintains that in *In the Matter of Timothy Hart, Police Officer (S9999F), City of Newark* (CSC, decided January 17, 2007), the Commission ordered that the S9999F eligible list be revived so that the appellant's name could be certified at the time of the next certification, for prospective employment opportunities only. The appellant maintains that as a result of the restoration of his name to the S9999F eligible list for Police Officer, his name was added as the first listed eligible on the August 7, 2007 certification of the S9999H list for Police Officer that was issued to the appointing authority and he was appointed, effective December 26, 2007.

The appellant also maintains that 167 Police Officers were laid off and that he should have been the 167th laid off, and therefore, when two eligibles with less seniority than he were reinstated on December 2, 2010, prior to being subsequently laid off, he should have been reinstated instead. In this regard, the appellant maintains that he should have been allowed to rely upon his rank on the certification that he had originally been removed from for seniority purposes.

The appellant maintains that the appointing authority's actions, including its initial attempt to remove him from the Police Officer (S9999F) eligible list, and its failure to timely provide him with requested documents, establishes a *prima facie* case that the appointing authority's actions in laying off the appellant were made in bad faith, and thus, the appellant is entitled to back pay and attorney's fees. The appellant maintains that reinstatement is not appropriate in this matter, since the appointing authority's offer of reemployment to those laid off would not have restored the appellant to his former position and salary. Rather, it would have required him to accept a lower pay with longer steps to reach his prior salary with him only having "provisional status." Further, he notes that he was appointed as a Police Officer with the City of Elizabeth, effective July 1, 2011.

In response, the appointing authority, represented by Michael A. Oppici, Assistant Corporation Counsel, disputes the appellant's argument that he possesses more seniority than other individuals on the August 7, 2007 certification, solely due to his name appearing as the first listed eligible. However, the appointing authority notes that it does not make seniority determinations since only this agency makes seniority and title right determinations. With regard to the appellant's arguments that its decision to lay him off was made in bad faith, the appointing authority notes

that it has the right to lay off an employee for purposes of economy, efficiency or other valid reasons, and the appellant has failed to establish that his layoff was not for reasons of economy or efficiency.

Additionally, although the appointing authority acknowledges that it sent the 45 day notice to the appellant's former Newark address, it notes that the Newark address was the only address on file with its Division of Personnel. In this regard, it maintains that the Division of Personnel's records indicate that the effective date of the appellant's address change to an address in Belleville was not until November 10, 2010, more than six weeks after it had sent the layoff notice. Moreover, although the appellant claims to have timely filed a change of address to the Belleville address with his precinct several months earlier, the Emergency Recall card maintained by the Police Department, which all Police Officers must keep current, indicates that on July 19, 2010, the appellant submitted an amended card that listed a different address in Newark than what was recorded with the Division of Personnel. The appointing authority asserts that the July 19, 2010 Emergency Recall card completed by the appellant refutes his assertion that he had notified his precinct several months earlier as to his new address in Belleville. The appointing authority contends that since it was the appellant's responsibility to notify the Division of Personnel of any changes to his address, and since he had not done so, it correctly mailed the 45 day notice to his reported address. In support, it submits the July 19, 2010 Emergency Recall card and a printout from its personnel system noting the appellant's change of address to the Belleville address with the effective date of November 10, 2010.

In response, while the appellant "disputes the documentation" provided by the appointing authority regarding the notice issue, he does not provide any further substantive arguments or documentation on that issue.

Agency records indicate that in order to break the seniority tie for the 80 individuals appointed from the August 7, 2007 certification for Police Officer, SLO utilized the individuals' ranking on that certification. *See N.J.A.C. 4A:8-2.4(h)6*. It is noted that the appellant's name was restored from the prior S9999F eligible list, and was therefore listed first on the subject certification, ahead of the eligibles from the S9999H eligible list. However, the appellant's actual rank on the S9999F eligible list was 9,528. Therefore, SLO slotted the appellant into rank 9,528 on the S9999H eligible list. Agency records also indicate that the appellant was certified to the appointing authority from the special reemployment list for Police Officer on October 17, 2011. The appointing authority returned the certification, requesting the appellant's removal, due to his failure to respond to the certification notice.

CONCLUSION

N.J.A.C. 4A:8-2.2(a)1 provides that for purposes of the exercise of layoff rights, employees in local service shall be ranked in order of seniority. *N.J.A.C.* 4A:8-2.4(b) provides, in part, that for police and fire titles, seniority is the amount of continuous permanent service in an employee's current permanent title and other titles that have (or would have had) lateral or demotional rights to the current permanent title. *N.J.A.C.* 4A:8-2.4(b)3 provides, that for employees in a police or fire title that have equal seniority, the tie shall be broken in the order of priority set forth in *N.J.A.C.* 4A:8-2.4(h), except that the fifth tie-breaking factor shall give priority to the employee with greater continuous permanent service, regardless of title. *N.J.A.C.* 4A:8-2.4(h) provides, in pertinent part, that:

Tie-breakers based on service shall include service accumulated prior to an intergovernmental transfer effected in accordance with *N.J.A.C.* 4A:4-7.1A, except for all firefighters, and except where a law enforcement officer, including a sheriff's officer and a county correction officer, waives all accumulated seniority rights in the intergovernmental transfer. If two or more employees have equal seniority, the tie shall be broken in the following order of priority:

• • •

(6) The employee who ranked higher on the same eligible list for the title shall have priority;

• • •

Furthermore, *N.J.A.C.* 4A:8-2.6 provides that the appellant has the burden of proof in appeals of this type.

In this matter, the appellant was appointed to the title of Police Officer, effective December 26, 2007, from an August 7, 2007 certification. Since the individuals appointed from that certification possessed equal seniority, it was necessary to break the seniority tie. In breaking the tie, SLO utilized the individuals' ranking on the August 7, 2007 certification pursuant to *N.J.A.C.* 4A:8-2.4(h)6. Since the certification contained names from both the S9999F and S9999H eligible list, SLO combined the two eligible lists, and slotted the appellant's name in at rank 9,528 instead of leaving his name as the first ranked non-veteran eligible on the certification. However, since the S9999F list would have had priority over the S9999H list, his name should have been listed as the first ranked non-veteran eligible, thereby breaking the tie to his benefit. Accordingly, the appellant should

not have been laid off.

Normally in appeals of this nature, the remedy is to reinstate the individual improperly laid off, after an updated background check, and to correct his or her record to reflect that he or she had not been laid off, and the individual who should have been laid off would be laid off, and his or her record corrected to reflect that he or she had been laid off. However, the appellant's name was removed from the special reemployment list for Police Officer due to his failure to respond to the October 17, 2011 certification, and he was appointed to the title of Police Officer with Elizabeth, effective July 1, 2011. Therefore, since the appellant has indicated he is not interested in returning to Newark, the only remedy available to him is to correct his record to reflect that he was not laid off on November 30, 2010, and instead resigned in good standing, effective June 30, 2011.

Additionally, the Commission does not find persuasive the appellant's argument that, since he did not receive the 45 day notice despite notifying his precinct of his address change, his layoff was improper. In this regard, other than the appellant's mere assertion that he changed his address at his precinct "several months" prior to the issuance of the 45 day notice to his Belleville address, he has presented no documentary evidence in support of that assertion. Moreover, the appointing authority provides documentation that, while the appellant did change his address with his precinct in July 2010 to another Newark address, there is no evidence that, prior to the notice being sent, he similarly informed either his precinct or the Division of Personnel about his subsequent move to the Belleville address. Rather, the appointing authority indicates that the appellant did not notify its Division of Personnel about his Belleville address change until six weeks **after** his 45 day notice was sent certified mail. It submits a computerized personnel record as evidence of this fact. Since it is the responsibility of an employee to ensure that his or her employer has a current and valid address on file, the appellant cannot now benefit from his failure to do so. Moreover, even if the Commission agreed with the appellant's argument, the remedy in such a situation would not be a rescission of the layoff, but rather, the appellant would be entitled to up to 45 days back pay to remedy that procedural defect. However, as explained above, he is not entitled to such a remedy since it was his responsibility to ensure a valid address was on file with the Division of Personnel.

Finally, with regard to the appellant's claim that he is entitled to back pay and counsel fees, it is noted that pursuant to *N.J.A.C. 4A:2-1.5(b)*, in all appeals other than disciplinary and good faith layoff appeals, back pay and counsel fees may be granted as a remedy where an appointing authority has unreasonably failed or delayed to carry out an order of the Commission or where the Commission finds sufficient cause based on the particular case. A finding of sufficient cause may be made where the employee demonstrates that the appointing authority took adverse action against the employee in bad faith or with invidious motivation. Initially, the

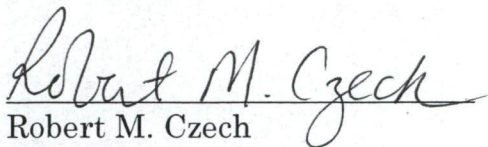
Commission notes that the appellant did not file an appeal of the good faith of his layoff pursuant to *N.J.A.C. 4A:8-2.6(a)1*, where the remedy for establishing the bad faith of his layoff would have been an award of back pay and counsel fees. Further, in evaluating the underlying merits of the petitioner's case, the Commission finds that the appellant has not established that the appointing authority acted in bad faith or with invidious motivation in this matter. In this regard, it must be noted that the determination of the appellant's title rights was done by *this agency* and not the appointing authority. There is no evidence in the record that the original determination of the appellant's title rights was done in bad faith or with invidious motivation. Rather, upon review of the matter, the Commission has determined that this agency erred in combining the rankings of the appellant and the other individuals on a subsequent list, instead of utilizing his position on the subject certification. Therefore, the instant matter was an administrative error and generally, no vested or other rights are accorded by an administrative error. See *Cipriano v. Department of Civil Service*, 151 *N.J. Super.* 86 (App. Div. 1977); *O'Malley v. Department of Energy*, 109 *N.J.* 309 (1987); *HIP of New Jersey v. New Jersey Department of Banking and Insurance*, 309 *N.J. Super.* 538 (App. Div. 1998). Moreover, the appellant's arguments regarding his allegation that bad faith is supported by Newark's failure to initially appoint him or supply him with documents is unpersuasive. As indicated above, Newark relied on this agency's determination of title rights in effecting his layoff. Therefore, based on the specific merits of this case, the appellant has not established an entitlement for an award of back pay for the time period after he was laid off or for counsel fees.

ORDER

Therefore, it is ordered that this appeal regarding the determination of layoff rights be granted in part and Timothy Hart's layoff be rescinded and his record corrected to reflect that he was not laid off and instead resigned, effective June 30, 2010. It is also ordered that no back pay or counsel fees be awarded.

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 1ST DAY OF APRIL, 2015



Robert M. Czech

Chairperson

Civil Service Commission

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