



Re: Fatima Fowlkes, Kerry Kosick, Mary Ann Ryan and Elizabeth Wainman

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  
NOVEMBER 6, 2014



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Member  
Civil Service Commission

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**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. CSV 01396-12

AGENCY DKT. NOS. 2012-1798, et al

**IN THE MATTER OF FATIMA FOWLKES,  
KERRY KOSICK, MARY ANN RYAN, AND  
ELIZABETH WAINMAN, TOWN OF KEARNY.**

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**Paul L. Kleinbaum, Esq.,** for appellants (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

**Jonathan F. Cohen, Esq.,** for respondent (Apruzzese, McDermott, Mastro & Murphy, Attorneys)

Record Closed: January 31, 2014

Decided: September 3, 2014

**BEFORE IRENE JONES, ALJ:**

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

The appellants, Fatima Fowlkes, Kerry Kosick, Mary Ann Ryan, and Elizabeth Wainman (appellants) filed an appeal with the Civil Service Commission on December 21, 2011, contesting their impending layoff, effective December 31, 2011, from their respective positions with the respondent, Town of Kearny. On February 3, 2012, the Civil Service Commission transmitted the matter to the Office of Administrative Law for

hearing as a contested case. The matter was assigned to the undersigned and a prehearing conference was held on February 29, 2012.

On June 25, 2012, appellant Fatima Fowlkes filed an amendment to her appeal alleging that the respondent's decision to lay her off was in retaliation for complaints that she filed against her supervisor (J-13). The motion to amend was granted and on September 30, 2013, a written order was issued accepting the amendment. Pursuant to the prehearing conference, hearings were scheduled for July 16 and 19, 2012, but were adjourned. At the plenary hearing on April 2, 2013, the appellant's moved for the recusal of the undersigned. On May 21, 2013, an Order was issued by the undersigned denying the motion. On June 20, 2013, the denial was affirmed by Chief Administrative Law Judge Laura Sanders.

On September 25 and October 31, 2013, hearings were held. After the conclusion of the appellants' direct case, the respondent moved to dismiss the matter on the basis that the appellants failed to meet their required burden of proof. The motion was denied on December 5, 2013. Written submissions were filed by parties on January 31, 2014. At the request of the undersigned, the time for issuance of this decision was extended by the Civil Service Commission to September 15, 2014.

### **FACTUAL DISCUSSION**

This is a layoff case wherein four former employees of the Town of Kearny<sup>1</sup> were laid off from their jobs, effective December 31, 2011. The appellants allege that their layoffs were done in bad faith and not for reasons of economy and efficiency. As will be discussed later, under the Civil Service Act, there is a legal presumption that a layoff plan was implemented in good faith, and an employee challenging a layoff/demotion plan under N.J.A.C. 4A:8-2.6(a) must overcome the "substantial burden" of proving otherwise. Greco v. Smith, 40 N.J. Super. 182, 189 (App. Div. 1956); In re Passaic Cnty., Civilian Emps. 2008 Layoffs, CSV 01151-09, Initial Decision (June 7, 2011),

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<sup>1</sup> The original appeal consisted of eight appellants; however, four of the appellants withdrew their appeals.

adopted, CSC (September 7, 2011), <http://njlaw.rutgers.edu/collections/oal/>; Stone v. Camden Cnty. Bd. of Chosen Freeholders, 180 N.J. Super. 430 (Ch. Div. 1981).

The respondent, Town of Kearny (Town or respondent), is a Civil Service municipal corporation of the State of New Jersey and thus this matter is governed by the Civil Service Act N.J.S.A. 11A:1-1 et seq. and the regulations promulgated thereunder, N.J.A.C. 4A:1-1 et seq. The respondent alleges that layoffs that were implemented in 2012 as a result of budget crisis resulting from reduced State aid, increasing expenses, and diminishing municipal revenues. The crisis, as noted by the Town's CFO really began in 2009. It was averted when the Town switched its budget from a fiscal year to a calendar year basis. It continued in 2011, but layoffs were averted with "union give backs" resulting in substantial furloughs for the Town employees. Despite these efforts, the layoffs proved to be unavoidable in 2012. Additionally, it must be noted that during this the time, the entire country was facing the greatest economic crisis since the Great Depression. The layoff plan for 2012 originally contemplated that there would be thirty-two layoffs, in which the appellants were included. The plan was approved by the Civil Service Commission. The Town and unions continued to negotiate and through retirements, the number layoffs were reduced. However, Council 11 failed to reach an agreement to avoid the layoff of some of its clerical workers. The Union refused to agree to further furloughs. That being said, the Civil Service Act gives protections to a Civil Servant that his or her position with not be abolished simply as a colorable device to circumvent the employees rights and protections while retaining the position in substance. City of Camden v. Civil Serv. Comm'n, 118 N.J.L. 501 (1937); City of E. Orange v. Civil Serv. Comm'n, 132 N.J.L. 181 (1944).

The appellants were laid off. They contend that their respective layoff was not budget-related but was in retaliation for their union activity for filing complaints against their superior and for filing an EEOC complaint alleging harassment. It is against this backdrop that this matter will be evaluated.

**TESTIMONY**

**THE APPELLANTS' TESTIMONY**

**Kerry Kosick**

Appellant Kerry Kosick was employed by the Town of Kearny in 2006 as a Librarian. Two years later, she was promoted as Senior Librarian. She held this title for 2.5 years and her salary was approximately \$71,000. She was laid off in December of 2011. Kosick recalled that she learned of the layoff list at a union meeting in September 2011. J-9 is the Individual notice of layoff that she signed. As senior librarian, she instituted many programs at the library such as book clubs, guest speakers, and ordering fiction books. She also did reference work as needed. She noted that Kearny has one branch library and one main library. She has worked at both sites and she was the branch manager at the branch site. The main library employed a senior librarian, a director, three assistants, and one secretary. She is not aware of any new hires at the library since her layoff.

In 2008/09 Julie McCarthy was Director of the Library. Kosick believes she was targeted for the layoff because she filed a complaint against McCarthy. The complaint concerned a program that she sponsored at the library wherein she hired a professional to do portraits of the kids' faces at the library. The program was heavily advertised and thirty-eight children were in attendance. Two days after the program, McCarthy called her "on the carpet" because two local politicians came to the event to have pictures done of their kids. They arrived within five minutes of closing and did not have their child's portraits taken because it was too late. When McCarthy left her office she slammed the door. Kosick filed a union grievance about the incident. Thereafter, she felt uncomfortable with McCarthy and things were never the same.

Joseph De Arco was administrator when the library incident took place concerning the kids' portraits. Under cross-examination, she conceded that Director

Joshua Humphrey, who succeeded McCarthy upon her retirement, did not write her up about the portrait incident. She identified J-6, p. 115, as the proposed layoff plan that was effective September 15, 2011. It reflects the library employees who were there when she was laid off.

The library is now staffed with monitors from the high school and a local college student. She denies that the monitors can perform any of her functions.

**Elizabeth Wainman**

Elizabeth Wainman was employed by the respondent for 14 years as a clerk for Construction Code Department. Prior thereto, she worked as a part-time clerk typist in the Municipal Court for 4 years. On December 31, 2011, she reported to Martello who was at that time, the construction official. In her position, she worked the counter, helped the inspector, did filing, manned the phones, and scanned documents. She earned in excess of \$55,000. Her relationship with Martello ended when he became Town administrator.

Wainman believes that she was targeted for layoff because she filed a complaint against her superiors. She noted that she had a cyst on her knee that needed an injection and was out on sick time. She was called at home and was told to bring in a doctor's note. This was unusual because she had not been absent for three days, which required a doctor's note. On another occasion, she was 19 minutes late and was told to leave and was docked a half sick day. She recalls a third incident where she was assisting a Spanish customer with a crying baby. Tony Chesari, the Construction Code building inspector, came out of his office screaming that she "get that baby out of there."

Thereafter, she made a verbal complaint about the incident to Human Resource Director Kim Bennett (Bennett). Ms. Bennett told her that she was not harassed and the complaint was without merit. (A-1.) A-1 is the memorandum from Bennett reporting her harassment complaint. She was referred to as "Pot Stirrer."

Chris Nee, a clerk typist, worked in her department and she had less seniority than her, however, Nee was not laid off. Further, Kosick asserts that she was never offered a typing class, but managed to do some typing. She concedes that she was offered the opportunity to apply for a permit clerk's position.

Under cross-examination, she admits that she could have bumped Nee, but elected not to because Nee had small children. She further admitted that she could only type with one finger.

### Mary Ann Ryan

Mary Ann Ryan was a principal clerk typist (PCT) for the Fire Department. She was employed by the Town for 28 years when she was hired as a PCT. She has worked for six different fire chiefs. Her duties as a PCT consisted of preparing the payroll receipts, inclusive of overtime, reviewing department purchases, account receivables, phone coverage, and assisting the public as needed. At the time of her layoff, she was assigned to the Bureau of Combustibles and earned \$75,000 annually inclusive of longevity pay, but excluding benefits. She was the sole civilian in the department. She retired on April 1, 2013.

Ryan is a member and president of Kearny Council #11 that represents all office workers, the Water Department, DPW employees, and crossing guards. She has been the president for 7 to 8 years and prior thereto she was the vice president for 6 years. At the time of the layoff, there were eighty to eighty-five Crossing Guards, now there are only thirty-five.

Her duties as president of the council included the filing of grievances. She has also filed suit against the Town as evidenced in A-17. She believes her layoff was due to her representing aggrieved union personnel. For example, she represented appellant Fatima Fowlkes in her harassment charges against her supervisor Jerry Kerr.



She is well acquainted with the Town Administrator Martello. She also knows De Arco. (J-3.) In 2012, the Layoff Plan was implemented as set forth in J-3 and A-7. She was "told" by Martello that Chief Bill (Dyl) put her on the list. Many people were on the list that were subsequently restored or were removed from the list.

Ryan admitted that Spanish-speaking people came to the Fire Department for assistance. Most spoke primarily Spanish. She does not speak Spanish but says she did not have a problem assisting them. If she needed assistance with Spanish, she would contact Liz Wainman in the Construction Code office. She asserts that this occurred only two or three times per year. Chief Dyl never raised an issue about her inability to speak Spanish.

As president of Council #11 she was a party to two collective negotiations agreements. One agreement was between the Town and the unit of nonsupervisory blue and white collar employees. (J-1.) The other unit consisted of crossing guards employed by the Town. (J-2.) She was notified in July of 2011 by Martello that the Town anticipated a shortfall of \$5 million in 2012 and that he wanted to meet with the presidents of all the unions to discuss the 2012 budget situation. (J-3.)

Ryan recalls that the first meeting with the Town was sometime in August wherein the Town gave her a list of Council #11 members to be laid off. She was included on the list. (A-7.) The Town also discussed what steps had to be taken to avoid the layoffs including 26 furlough days. Ryan asserts it was during this meeting which Martell indicated that Dyl had put her on the layoff list.

Subsequently, she requested that Martello justify the \$5 million deficit because the Town had a \$5 million surplus. She also spoke with Martello and the Town's CFO. (Exhibit A-9) regarding the budget. She emailed Firozvi and requested an accounting of the savings due to retirements among Council #11 members. (A-11.) Firozvi provided her with a list of retirements of Council #11 members and retirements of assistant department heads and supervisors who were in a separate union. She wanted to show the Town that savings had been achieved as it never replaced the

retirees. Ryan was also provided with an accounting from other personnel changes. Nevertheless, the Town wanted Council #11 to come up with more savings than originally requested in A-7. She recalls that the Town originally sought \$785,000 in savings through concessions, now it wanted \$870,000 in savings. Additionally, during the meeting, the Town initially wanted 26 furlough days but would accept 20 furlough days if she retired. When the union rejected that, the Town came back with an offer of 13 furlough days and that was rejected as well. By reducing the number of furlough days if she retired, the Town was sending a signal that employees would save money from her retirement. She believes that the Town was attempting to drive a wedge between her and her members. (Exhibit J-12.)

Ryan listed the people who were retiring along with those who had previously retired and added up the savings to the Town. Her certification (J-12) contains a list of those employees who left. The list was to demonstrate the savings to the Town because these employees were not replaced. It came to over \$700,000. She believed that this figure matched, or came close to, the original dollar savings the Town was seeking. Indeed, she recalls that the Council came close to the goal set by the Town, falling short by only \$26,000.

Ryan denies that she did not relay this information to Council #11. While she could not recall when the discussions took place, she was certain that they had met.

During her tenure as President, Ryan filed a number of grievances as well as lawsuits against the Town. (A-17). In fact, she was the plaintiff in a lawsuit filed against the Town dealing with an Open Public Meeting Act issue. (A-17.) The complaint was later dropped because the Town subsequently hired the employee during an open public meeting.

As Council #11 president, Ryan would deal with the administrator when problems arose. Ryan testified that her relationship with Martello was sometimes helpful and sometimes hostile.

The Town has hired six to seven new part-time clerical employees. Three or four are new hires at the Library, one new firefighter, and twenty-two communication dispatchers. The hiring freeze that was imposed in J-4 is now lifted.

Under cross-examination, Ryan agreed that she knew of budgeting problems prior to the instant layoff because of the layoff plan in 2011 as well as the furlough days which she help negotiate. (J-3.)

**Fatima Fowlkes**

Fatima Fowlkes was employed by Kearny as a clerk typist bilingual for three years. At the time of her lay off on December 31, 2011, her salary was \$54,000, annually. Her duties as clerk typist consisted of customer service handling request for permits, dealing with citizen complaints regarding trees; substitute payroll clerk, attendance and requisition clerk. Gerard Kerr was her supervisor. She recalled a work environment that was tense, hostile, and frustrating. Initially, their relationship with Kerr was cordial. It changed in January or February 2009 when Kerr began to treat her differently. He intimidated her and she thinks he did so because of her race.

In 2009, she went to mayor's office and told him of her concerns. There was an investigation. However, he found her complaint to be unsubstantiated. Thereafter, her treatment became worse. She also knew that her work schedule was different from her co-workers. She worked 9-5 whereas all other DPW employees worked 8-4. She filed a second complaint about her treatment. (A-2.) This time, she did not receive anything in writing about the Town's findings. People would not interact with her. Thus, she refused to reduce to writing any further complaints. Her relationship continued to deteriorate with her supervisor.

In May of 2011 she filed a complaint with the Equal Employment Opportunity Commission (EEOC). She wrote a memo about the situation (A-4). In response, a new investigation was commenced and she was placed in the Finance Department. She recalled incidents that she felt were hostile. Specifically, Kerr said in the office loudly to

one of her co worker "has anyone ever seen a black squirrel?" Her co-worker, Mario said he saw one in Canada. She reported incident to Town investigator because she believed they were referring to her. One day, she came back from ladies room and found a big black rubber rat on her desk that looked very real. Everyone denied knowing where the rat came from. She had the maintenance man remove it from her desk. In April Kerr told her to get out of his office, he had enough of her. "He just blew up." She went to see Martello and he pulled her from DPW, put her in Finance Department.

In July 2011, Martello gave her a letter that once again concluded no finding of racial discrimination or hostile environment. (A-6.) However, a she recalls that the entire department had to take a class on racial harassment. Despite this, Kerr's attitude did not change. She filed no further complaints. Her relationship continued to be tense and very hostile with her supervisor and she was afraid of him. She was returned to the DPW and felt that she had to be "humble."

She learned of her layoff on November 11, 2011, and was laid off on December 3, 2011. (A-2 to A-6; J-8.) She was not part of union meetings and no one told her about the proposals to avoid layoff. She denies getting a letter from union.

She is presently working at Passaic Valley Sewage Commission in Newark and has been since March 11, 2013. Her salary is the same. After her layoff, she was out of work for a year and three months.

She admits that she took twenty-six furlough days and understood from Ryan that this was done to avoid layoffs. She also acknowledged that DPW Bilingual Clerk Typist Irma Rozzelle shared same title as her. However, Rozzelle had more than three year's seniority over her.

**THE RESPONDENT'S TESTIMONY**

**Steven M. Dyl**

Fire Chief Steven M. Dyl has been employed by the respondent for 29 years. He was appointed the chief in 2007 and reports directly to Town Administrator Michael Martello. As chief, Dyl is responsible for the personnel in the Fire Department. In 2010 /2011 the Fire Department, like all municipal departments, was targeted for layoffs because of the Town's financial difficulties. Martello did ask for his input regarding the layoff. He simply requested that firefighters be avoided in any layoff.

He attended a meeting in the administrator's office in August 2010 wherein the layoff plan was finalized. Every department had a layoff or demotion plan. In 2011, the layoff plan was approved by Civil Service Commission. However, the plan was not implemented because of union "give backs." Specifically, all nonuniformed employees were furloughed for 26 days. Because of the furloughs and "give backs," the Layoff Plan as provided in J-4 did not occur. (J-4.)

At the hearing, Dyl noted that the Fire Department was already short staffed. He recalled that in 1984 the Township had 145 firefighters and it currently employs eighty-four firemen, notwithstanding that the Town's population has grown. Further, the Town did not meet national standards for staffing a fire apparatus and was forced to close a ladder company in 2012 because of the shortage.

Eventually, there was a layoff and Mary Ann Ryan, a clerical worker and the only civilian in the fire department, was laid off. He was well acquainted with Ryan. She performed clerical duties which included phone duty, billing, preparing purchase orders, serving as the receptionist, preparation of payroll overtime records, time cards, reimbursement for NJ Turnpike expenses, preparing on-duty injury reports, and preparation of paperwork for prescription benefits of retired personnel.

Dyl denies that he offered Ryan's name for the layoff or that he was involved in the decision to lay her off. Since the layoff, he has assumed some of Ryan's responsibilities and other duties were transferred to the purchasing department and active firefighters. Ryan was paid roughly \$65,000.

Dyl conceded on that September 30, 2013, the department hired a part-time bilingual clerk typist. This occurred after Ryan retired. The new clerk typist duties included some of the duties that Ryan performed. He also acknowledged that a previously laid-off firefighter returned to active duty in September 2013. He noted that the population in Kearny has changed and it is now very diverse, thus requiring the need for a translator or someone who is fluent in Spanish and English. Ryan was not bilingual. Finally, Dyl admitted that when Martello gave him a choice of losing a firefighter or Ryan. He chose Ryan.

### **Shuaib Firozvi**

On May 14, 2007 Shuaib Firozvi became the Town treasurer and was appointed the CFO in September 2007. He is also the Town tax collector. He is responsible for the Town's finances, budget, capital improvements, and all other financial matters. Since 2007, the Town's resources have been diminishing while its appropriations are increasing. As tax collector, he is responsible for collecting all tax revenues. The Town's biggest expenses are its personnel costs, debt service, and fringe benefit expenses. Personnel costs takes up fifty to seventy percent of the budget.

The Town's revenue sources consist of tax levies, local revenues, such as permits and licenses, and State aid. The latter two sources, State aid and local revenues, have been diminishing. While health-benefit costs have increased every year. When he was first hired there were in excess of 400 Town employees. There are now 350 or less due to attrition from retirements, and not filling open positions as a result of the retirements.

He was CFO in 2009 and responsible for projecting 2010 budget. In 2009, at his recommendation, the Town switched from fiscal year to calendar year. This budget caused the surplus to increase significantly and the Town received two years of State aid in 18 months due to the switch. This resulted in \$13 million surplus. There was no tax increase or layoffs. If switch had not occurred, the surplus would have been about \$1 or less.

Firozvi alerted the Town's Finance Committee that there were potential budget problems for 2011. Specifically, in 2010, State aid was kept flat, if not reduced. Firozvi had kept some of the 2010 surplus in reserve for 2011. The shortfall for 2011 was projected in excess of \$5 million. He recommended personnel cuts and union give backs. The Town needed \$1 million from each of the three unions. The 2011 furloughs amounted to a 10% wage reduction and generated over \$700,000 in savings. The Town also used the \$5 million surplus and was able to avoid the proposed layoffs. The proposed budget for 2012 again was projected to have a \$5 million shortfall. Once again, the Town sought give backs from the unions in the way of furloughs, layoffs, and retirements. He acknowledged sending documents to Ryan with projected savings from personnel cuts. He denies that he was asked to put her name on the layoff list. (A-7, A-13; R-7.) He further acknowledged that new employees have been hired since the layoff. However, he was not certain as to how many new hires there were.

**Michael J. Martello**

Michael John Martello (Martello) was hired by the Town in 1992 as a building inspector. In 2001, he was appointed as the Town's construction officer and the zoning officer network administrator. In 2010, he became the Town administrator.

Martello recalls that in 2011, then Town Administrator Joseph D'Arco approached him seeking personnel reductions from his department. While he did not want to lose anyone, if forced to, he recommended an unclassified clerk's position occupied by Elizabeth Wainman. Wainman was not a typist, but used "hunt and peck" finger typing. During the years 2001 to 2008, his department was extremely busy until

the recession. It was difficult for Wainman to keep up, thus her work was distributed to the other typist. In 2010, a layoff plan was drafted for implementation in 2011. (J-4.) All departments were involved.

Since he was the Town administrator in 2011, he submitted the Layoff Plan to Civil Service Commissioner for budget year 2012. It was submitted in September of 2011. He concedes that the Police and Fire Departments were not subject to layoffs. However, he met with all the unions prior to the layoff. The Police and Fire Departments indicated that they had a number of retirements. He met with the Civil Service Commission and they approved the Layoff Plan. (J-7.)

He was acquainted with Mary Ann Ryan. He met with Council #11 and asserts that the layoff of the appellants could have been avoided if Council 11 had made more concessions. He asserts that there was a deliberate process in determining the layoffs: review of title and a meeting with department heads.

Kosick's position was partially funded by Federal funds, which were cut. He does not know her and has no personal animus against her. He knows Wainman as she resides in his dad's apartment house. He denies selecting Fowlkes, and notes that it was the DPW that selected her. He denies any personal animus with any of the laid-off workers.

He recalls that a desk audit was requested by Joyce Donnor. The audit resulted in a raise and a change in her title to a classified position. (R-20, p. 2.) She is now serving provisionally. Christine Nee also requested a desk audit as a permanent clerk. (R-21.) Her appointment was made provisionally. Nee was eventually promoted after taking a service exam. When Wainman was laid off, Nee became a permanent clerk.



**FINDINGS OF FACT**

1. In 2009, the Town switched from a fiscal year budget to calendar year budget. This switch provided the Town with 2 years of State aid in 18 months. The switch also increased the Town surplus significantly or by \$13 million.
2. In 2010, State aid to the Town was kept flat or was reduced.
3. In 2010-2011, the Town's revenues were "diminishing" while its health-care expenses were increasing.
4. In September 2011, the respondent submitted a Layoff Plan to the Civil Service Commission wherein they proposed to lay off thirty-two employees, effective December 31, 2011.
5. The Civil Service Commission approved the Layoff plan. (J-7.)
6. The proposed layoffs were avoided in 2010 because of "give backs" by the Town's labor unions. Said "give backs" consisted of furloughs and department closures.
7. In 2011, the Town employees took 26 furlough days which amounted to a 10% wage reduction savings in excess of \$700,000. In 2010-2011, the Town's revenues were "diminishing" while its health-care expenses were increasing.
8. The respondent projected a budget short fall of \$5 million in 2012.
9. In 2012 a combination of retirements and give backs prevented additional layoffs.
10. The appellants were all members of Council 11. Council # 11 represents office workers, the DPW, the Water Department, and crossing guards.
11. Council #11 did not agree to the 13 furlough days and thus several employees in their union were laid off.

## DISCUSSION AND CONCLUSIONS

The appellants contend that their layoff was in bad faith and for reasons other than economy, efficiency or other related reasons. Specifically, appellant Ryan contends that she was laid off in retaliation for her union activities. Appellant Fowlkes contends that she was a victim of retaliation for filing a racial discrimination complaint with the EEOC. Appellant Wainman asserts that her layoff was in retaliation for having filed complaints against the Construction Code Supervisor Anthony Chesari and Town Administrator Michael Martello. Appellant Kosick contends that she had problems from an incident with a Town politician that caused problems with her then supervisor. Further she asserts that after she was laid off the Town hired a part-time librarian in violation of its own hiring-freeze mandate.

The Town of Kearny is a Civil Service Municipal Corporation of the State of New Jersey and this is subject to the New Jersey Civil Service Act as set forth in N.J.S.A. 11A:1-1 et seq. and the regulations as promulgated in N.J.A.C. 4A:1-1 et seq. The Civil Service Act specifically authorizes a civil service municipality such as the Town to layoff or demote an employee "for economy, efficiency or other related reason." N.J.S.A. 11A:8-1(a); N.J.A.C. 4A:8-1(a).

If a civil service municipality's layoff/demotion plan is even partially motivated by economic or budgetary considerations, that layoff/demotion plan was, as a matter of law, implemented in "good faith" for "economy, efficiency or other related reasons." N.J.A.C. 4A:8-2.6(a)(1), (c). Passaic Cnty., Civilian Emps. 2008 Layoffs, supra, CSV 01151-09; In re Newark Housing Auth. Layoffs 2009, CSV 13507-09, Initial Decision (February 17, 2012), adopted, CSV (May 2, 2012), <http://njlaw.rutgers.edu/collections/oal/>. The Act provides for a legal presumption that a layoff/demotion plan was implemented in good faith, and an employee challenging a layoff/demotion plan under N.J.A.C. 4A:8-2.6(a) must overcome the "substantial burden" of proving otherwise. Greco, supra, 40 N.J. Super. at 189; Passaic Cnty., Civilian Emps. 2008 Layoffs, supra, CSV 01151-09; Stone, supra, 180 N.J. Super. 430.

To overcome the presumption of showing that good faith under N.J.A.C. 4A:8-2.6(a), “the laid off employees must provide evidence which is probative of the fact that at the time of the layoff the appointing authority was aware that the layoff would neither achieve economies nor efficiency.” Passaic Cnty., Civilian Emps. 2008 Layoffs, supra, CSV 01151-09 (Initial Decision).

As a matter of law, an employee cannot satisfy his or her onerous burden in a good-faith appeal under N.J.A.C. 4A:8-2.6(a) by offering evidence that the challenged layoff/demotion plan was partially motivated by an “unlawful motive . . . in the face of evidence that the layoff was [also] designed to effect economies.” Passaic Cnty. Civilian Emps. 2008 Layoffs, supra, CSV 01151-09 (Initial Decision). Indeed, in Newark Housing Authority Layoffs 2009, supra, CSV 13507-09 it was held that “[I]t is of no consequence that there be proof showing that considerations other than economy underlay or played some part in the action” and “a showing of invidious motives will be insufficient to satisfy the burden of proof if the appointing authority can nevertheless demonstrate the need to effect economy.” (Citations omitted.)

Likewise, as a matter of law, an employee cannot satisfy his or her onerous burden in a good faith appeal under N.J.A.C. 4A:8-2.6(a) by offering evidence that the municipality could “have chosen a different method of achieving the needed savings or that the agency had other alternatives available.” Passaic Cnty., Civilian Emps. 2008 Layoffs, supra, CSV 01151-09 (Initial Decision).

A layoff/demotion plan will be said to have been implemented in good under N.J.A.C. 4A:8-2.6(a) where those layoffs/demotions are at least intended “to save money . . . , that is, for reasons of economy or efficiency.” Newark Hous. Auth. Layoff 2009, supra, CSV 13507-09. In other words, “[w]hen a layoff action is appealed the question of good faith is not based on whether a plan conceived and adopted for the purpose of saving money actually attained its purpose. Indeed, the ultimate test for good faith “is not whether the layoff actually accomplished efficiency or economy, but whether its aim was to accomplish that result.” Ibid.

Thus, where it is uncontested that the challenged layoff/demotion plan was, at least in part, aimed at saving money and reducing budgetary expenditures in a civil service municipality, and no evidence has been offered to show that at the time of the layoff the appointing authority was aware that the layoff would achieve neither economies nor efficiency, the employee has failed to meet his or her substantial burden under N.J.A.C. 4A:8-2.6(a).

In Greco, supra, 40 N.J. Super. at 190, the court held:

The question is, not narrowly whether a plan conceived and adopted for the purposes of saving money actually in operation, attained that purpose, but whether the design in adopting the plan was to accomplish economy or, on the contrary, was to effect the removal of a public employee, protected by civil service, without following the statutory procedure for removal. City of Newark v. Civil Service Commission, 112 N.J.L. 571, 574 (Sup. Ct. 1934), affirmed 114 N.J.L. 185 (E.& A. 1935).

Said differently, the elimination of a position must not be merely colorable or a device for circumventing the employee's civil service protections while retaining the position in substance. City of Camden, supra, 118 N.J.L. 501; Mattia v. City of Newark, 122 N.J.L. 557 (1939); City of E. Orange, supra, 132 N.J.L. 181.

The facts herein reveal that the respondent faced a budget shortfall of \$5 million in 2012. In September 2011, the Town submitted layoff plans for each of its departments effective December 31, 2011. The plan was approved by the Civil Service Commission. While other labor unions in the Town came up with sufficient savings to offset the need for layoffs in their departments, Council 11 did not. As noted by the respondent, the appellants have not articulated any procedural or misrepresentations by the Town with respect to their plans. Indeed, I must agree that individually and in the aggregate, appellants failed to demonstrate in any way how the Town acted in bad faith.

I **FIND** no merit to the contention that the director of the library or Martello harbored ill feelings against Kosick. Kosick's assertion that her layoff was because of a 2010 argument she had with a library director is without any support. Indeed as noted by respondent, neither the former library director or the former business administrator had any participation in the Layoff Plan being contested. Moreover, Kosick admitted on the record that she has no evidence to support her contention. Indeed, Martello testified that he did not even know Kosick. She concedes that she had the least seniority of the three senior librarians who were employed at the library at the time of the layoff, and there was but one person in that title identified by the Civil Service Commission to be laid off. The Town provided evidence that its funding had been reduced, and Kosick acknowledges that the Town has not hired any librarians to replace her. The only new hires in the library are minimum-wage monitors or pages, who Kosick herself described as low-level employees. I do not **FIND** the positions to be similar. Thus, I **CONCLUDE** no bad faith regarding the layoff of Kerry Kosick.

Appellant Wainman contends that her layoff was in bad faith because of a harassment complaint she submitted in August of 2010 which was after the layoff plan for 2011 was formulated. Further she admitted that it was her choice not to apply for the position of permit clerk, which would have insulated her from layoff. Finally, Wainman testified that she chose not to apply for the permit clerk position because she did not want Chris Nee—the mother of three children—to be laid off, and I so FIND. Therefore I **CONCLUDE** there was no bad faith.

I **FIND** no merit to Appellant Ryan's claim of retaliation due to her union presidency. As noted by the respondent, the record herein does not support that the Town exhibited any anti-union animus. Indeed, the record supports that the Town and unions worked together to avoid layoffs in the prior year and to reduce the overall number of layoffs by agreeing to furlough days and other concessions. Therefore I **CONCLUDE** her layoff was not in bad faith.

Moreover, I **FIND** Chief Dye's testimony credible that it was his desire to avoid the lost of a firefighter, thus the only civilian in the Department was Ryan. Finally, I

**FIND** no merit to the appellant's allegations that things could have been done differently.

Likewise, I **FIND** the appellant Fowlkes was found by the Civil Service Commission to have less seniority than Irma Rozzelle, the other bilingual clerk in the DPW. As noted by respondent, it is the Civil Service Commission, not the Town who determines seniority. With respect to Fowlkes's claim of racial animus, the complaint was investigated by the EEOC and was dismissed. Based on the record before me, I cannot **CONCLUDE** that Fowlkes's layoff was pretextual. The record herein is insufficient to satisfy the required burden of a finding that appellant Fowlkes was the victim of racial harassment and or discrimination.

**ORDER**

I **ORDER** the appellants' layoff appeal be and is hereby **DISMISSED**.


I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 3, 2014

\_\_\_\_\_  
DATE

  
\_\_\_\_\_  
IRENE JONES, ALJ

Date Received at Agency:

\_\_\_\_\_  
9/3/14

Date Mailed to Parties:

\_\_\_\_\_  
9/3/14

sej

**APPENDIX**

**WITNESSES**

**For Appellants:**

Kerry Kosick  
Elizabeth Wainman  
Mary Ann Ryan  
Fatima Fowlkes

**For Respondent:**

Steven M. Dyl  
Shuaib Firozvi  
Michael J. Martello

**EXHIBITS**

**Joint:**

- J-1 Collective Bargaining Unit Agreement re: blue and white collar unit
- J-2 Collective Bargaining Agreement re: crossing guards
- J-3 7/26/11 letter
- J-4 9/15/11 layoff plan for Fire Department
- J-6 Not Presented
- J-9 Notice of layoff to Kosick

**For Appellants:**

- A-1 Memo from Bennett re: investigation of Wainman's complaint
- A-7 List of positions to be laid off
- A-8 Email exchange Ryan w/Martello
- A-9 Email exchange Ryan w/Martello and Shuaib
- A-10 Email exchange Ryan with Shuaib
- A-11 Email exchange Ryan with Shuaib



A-12 Not presented

A-13 Second set of numbers from Town

A-14 Not presented

A-17 Litigation re: open public meeting 174

For Respondent:

R-1 Appellant's responses to Interrogatories

R-22 Document dated 3/26/10