

B-16



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Mark Pitchell,
Department of Environmental
Protection

Request for Reconsideration

CSC Docket No. 2014-641

ISSUED: NOV 06 2014

(SLD)

Mark Pitchell, a Superintendent, Parks and Forestry 1, represented by Molly Richardson, Esq., petitions the Civil Service Commission (Commission) for reconsideration of the attached final decision rendered on August 15, 2013, which denied his appeal of the Department of Environmental Protection's (DEP) decision to reassign him,¹ effective December 17, 2011.

In *In the Matter of Mark Pitchell* (CSC, decided August 15, 2013), the petitioner argued that the continuation of his reassignment from Island Beach State Park, for a "special project" under the supervision of the Assistant Director, State Park Service in Toms River was made in bad faith. Specifically, he asserted that the bad faith was evidenced by the appointing authority's decision to appoint R.B.,² a "completely unqualified political crony" to the petitioner's position at Island Beach State Park. The petitioner asserted that R.B.'s only qualification was his political connections. The petitioner also asserted that the appointing authority's claim that the extension of his reassignment was necessary since his work was not finished was further evidence of bad faith. The petitioner subsequently argued that he was told that at the conclusion of the project, he would not be returned to Island Beach State Park. Instead, he would be reassigned to Monmouth Battlefield State

¹ Agency records indicate that the petitioner was reassigned from Island Beach State Park to the Office of the Assistant Director, State Park Service, with a physical office location in the Coastal Engineering and Construction Office.

² Agency records indicate that R.B. was provisionally appointed, pending a promotional examination, to the title of Management Improvement Specialist 1, effective July 17, 2010, and was reassigned from the Commissioner's Office to Island Beach State Park, effective December 17, 2011.

Park, which he argued would be a "demotion." Additionally, the petitioner claimed that his reassignment was retaliatory due to his opposition to the privatization plan for the State Parks and/or a "personal vendetta" against him by the Assistant Commissioner. Moreover, the petitioner asserted that the appointing authority was harassing him in an attempt to get him to "leave or retire" by making changes to his residency on Island Beach State Park. In response, the appointing authority, asserted that it acted within its discretion to temporarily reassign the petitioner to work full-time on updating the Natural and Historic Resources Area Arrangement Classification System, as well as developing three regional comprehensive operation guides to help with future succession planning efforts. The appointing authority maintained that the petitioner was chosen for the project due to his institutional knowledge of the operations of the State's park systems. Moreover, it was determined that in order to successfully achieve the essential results, it was necessary for the petitioner to focus his efforts on a full-time basis throughout the duration of the temporary reassignment. Additionally, it noted that R.B., a career service employee, was assigned to manage the day-to-day park operations during the petitioner's temporary reassignment.

Based on the foregoing, the Commission found that other than the petitioner's mere allegations, he had failed to present any evidence in support of his allegations that his reassignment was made in bad faith. Specifically, the Commission noted that *N.J.A.C. 4A:4-7.7* applied and specifically provides that when an employee challenges the good faith of a reassignment, the burden of proof is on the employee. Additionally, *N.J.A.C. 4A:4-7.2* provides that reassignments are to be made at the discretion of the appointing authority, and do not require the consent of an employee. Moreover, the appointing authority had provided legitimate business and operational reasons for the petitioner's reassignments. Furthermore, the petitioner had not conclusively established that management of the State parks could solely be accomplished by individuals in the Superintendent of Parks and Forestry title series. Finally, the Commission concluded that even assuming, *arguendo*, that R.B. did not meet the requirements for the title of Superintendent of Parks and Forestry 1, that fact would not in and of itself establish that the petitioner's reassignment was made in bad faith. Rather, it would only establish that the position would need to be filled by a qualified individual, but not necessarily the petitioner.

In the instant matter, the petitioner argues that the Commission erred in finding he had failed to present any evidence in support of the bad faith nature of his reassignment. In support, he reiterates his arguments. In particular, he maintains that he did provide evidence that he was reassigned soon after he expressed concerns about the privatization as evidenced by his statements to that effect in his previous submissions to the Commission. The petitioner asserts that "closeness in time between protected activity and an adverse action may evidence bad faith" and therefore, the Commission erred in finding that he had failed to

establish that his reassignment was made in bad faith. The petitioner also reiterates that he provided evidence that he was replaced by an individual who lacked the qualifications for the position but who supported privatization efforts. In this regard, he notes that he submitted a memorandum which indicates that R.B. had worked on the "strategy" and power point presentation. The petitioner also asserts that the Commission erred in finding that he had failed to establish that his reassignment was in fact not temporary. In this regard, the petitioner maintains that by acknowledging that it extended his reassignment past the initial six month period and then reassigned him to a different park, the appointing authority's submissions acknowledged that it "lied" about his reassignment being temporary. The petitioner also reiterates that the appointing authority has "apparently given" R.B. the position of Superintendent of Island Beach State Park, despite R.B. not meeting the requirements for the position, simply because R.B. supported privatization efforts. The petitioner maintains that he presented significant evidence that the appointing authority reassigned him from the most desirable park assignment and replaced him with an unqualified individual due to the petitioner's privatization concerns.

The petitioner also asserts that the appointing authority failed to present any evidence to support the Commission's finding that it had presented a legitimate business reason for his reassignment to Monmouth Battlefield Park. The petitioner argues that the Commission determined that his reassignment was made in good faith, without the appointing authority providing any evidence concerning its failure to return him to his position at Island State Beach Park. Moreover, he asserts that although the appointing authority provided a reason for his initial reassignment and extension, it did not provide any reason for his reassignment to Monmouth Battlefield Park, and therefore, the Commission erred in finding that there was no bad faith in his reassignment. Additionally, he asserts that the Commission's failure to consider that he was not returned to his position at Island State Beach Park upon completion of his temporary reassignment was a clear reversible error. Furthermore, the petitioner maintains that since the appointing authority did not dispute his evidence that his reassignment to Monmouth Battlefield Park was made in bad faith, the Commission should have granted his appeal and ordered his return to Island State Beach Park.

Additionally, the petitioner maintains that he has additional evidence he had not originally submitted because he believed that the information he had originally submitted was more than sufficient to grant his appeal. In this regard, the petitioner asserts that "within months" of his initial appeal to the Commission, his reassignment became permanent. Thus, the closeness in time of his complaint of violations of Civil Service law and regulations and his reassignment to Monmouth Battlefield State Park is clear evidence of bad faith on the part of the appointing authority. Additionally, the petitioner asserts that the same month he filed a grievance concerning his reassignment, he received a call from an Assistant

Commissioner during which he was told to stop complaining about the reassignment, attempting to undermine the appointment of R.B. and talking to peers and staff about the matter. The petitioner argues that this is direct evidence of the appointing authority's hostility towards his protected activity, and therefore, he has established that his reassignment was made in bad faith. Finally, the petitioner asserts in his certification that R.B. remains in the position at Island Beach State Park, and thus the appointing authority's assertion that R.B.'s reassignment was temporary is false. In support of his petition, the petitioner submits, in part, his certification, articles, letters from the petitioner, his lease, memorandums and a power point presentation on the "direction" of Island State Beach Park.

In response, the appointing authority, represented by Ernest Bongiovanni, Deputy Attorney General, argues that the petitioner fails to articulate any clear material error made by the Commission, and instead, merely reiterates his previous allegations. The appointing authority maintains that pursuant to *N.J.A.C. 4A:4-7.2*, the petitioner had the burden of proof to establish that his reassignment was not made in good faith, however, as noted by the Commission, other than his mere allegations, he provided no evidence in support of his allegations. In this regard, the appointing authority notes that although the petitioner claims that he was retaliated against for speaking out against privatization, other than his mere allegations, he has provided no evidence in support. Moreover, he does not even describe the context of the alleged conversation, when it took place or even how the Commissioner responded. Rather, the petitioner merely asserts that this alleged conversation was the motivating factor for his reassignment and that the project was a mere pretext.

The appointing authority also disputes the petitioner's assertion that it lied that his reassignment was "temporary" since it extended the reassignment and ultimately reassigned him elsewhere after the project was completed. In this regard, the appointing authority notes that it adequately explained that the petitioner was initially reassigned to work on a special project, which necessitated an initial extension to complete, because he was qualified for the project. Moreover, it notes that despite his assertions to the contrary, the Commission did address his reassignment to Monmouth Battlefield State Park by indicating that he could submit a classification review request if he believed that he was misclassified at that location.

The appointing authority asserts that despite the petitioner's assertion that he was replaced by an "unqualified" individual, it notes that there is no requirement that Island Beach State Park be managed by a Superintendent 1 or 2. Instead, the appointing authority maintains that it has exercised its managerial prerogative to determine when or if a Superintendent is to be appointed to manage the park. Moreover, it notes that R.B., who was assigned to the park during the petitioner's

temporary reassignment, was not appointed as a Superintendent. Rather, he manages the day to day operations. Additionally, as noted by the Commission, even if R.B. was unqualified, the petitioner failed to cite any authority that required that he had to be reassigned to Island Beach State Park.

Finally, the appointing authority notes that the petitioner's title, salary and management functions as a Superintendent 1 have not changed. Rather, the only change made was to the location that he performed those duties, and, as noted by the Commission, such movements of employees are an exercise of managerial prerogative.

CONCLUSION

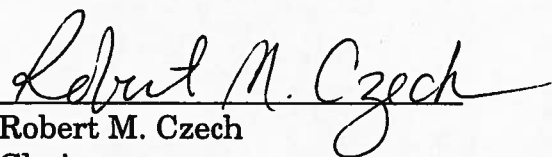
N.J.A.C. 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding. The instant request for reconsideration appears to be based on the assertion that the Commission made an error by denying the petitioner's appeal of his reassignment, and he submits new evidence in the form of a certification. However, a review of the record in the instant matter reveals that reconsideration is not justified. In this regard, the petitioner 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 by not accepting his certifications as sufficient evidence to establish his reassignment was made in bad faith. However, the Commission does not agree. *N.J.A.C.* 4A:4-7.2 provides that the petitioner had the burden of proof to establish that his reassignment was not made in good faith. His mere suppositions as to what may have caused his reassignment, without evidence of more, is not sufficient in the face of the appointing authority's exercise of its managerial prerogative to reassign its employees. Moreover, even assuming that he had spoken with a Commissioner and Assistant Commissioner about his concerns with privatization, he has failed to establish that those conversations, and not the legitimate business reasons offered by the appointing authority, were the reason for his reassignment. Accordingly, the petitioner has failed to present a sufficient basis for reconsideration of the Commission's prior decision.

ORDER

Therefore, the Commission orders that the petition be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

**DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6TH DAY OF NOVEMBER, 2014**



**Robert M. Czech
Chairperson
Civil Service Commission**

**Inquiries
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Attachment

**c: Mark Pitchell
Molly Richardson, Esq.
Ernest Bongiovanni, Deputy Attorney General
Deni Gaskill
Kenneth Connolly
Joseph Gambino**

B-12



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Mark Pitchell,
Department of Environmental
Protection

Administrative Appeal

CSC Docket No. 2013-649

ISSUED: **AUG 16 2013** (SLD)

Mark Pitchell, a Superintendent, Parks and Forestry 1, appeals the decision of the Department of Environmental Protection (DEP) to reassign him,¹ effective December 17, 2011.

In the appellant's August 15, 2012 appeal, he argues that in late 2011 he was told that he was being "temporarily" reassigned to a "made up job in Toms River" and he was being "replaced" at Island Beach State Park, by R.B.² The appellant maintains that he was never consulted nor given an option to refuse the "temporary" reassignment to a "cubicle" for a "special project" under the supervision of the Assistant Director, State Park Service. On June 5, 2012, he was told that his reassignment would be extended for an additional six months because the project had not been completed. In support, he submits a June 4, 2012 memorandum from John Trontis, Assistant Director, State Park Service, concerning the appellant's "Temporary Assignment – Special Park Planning Projects" to complete Operational Guides for State Parks, Forests, Recreational Areas and Historic Sites and to also update the Area Management Classification System. It was noted that the appellant's temporary assignment would be extended for an additional six months, effective June 17, 2012.

¹ Personnel records indicate that the appellant was reassigned from Island Beach State Park to the Office of the Assistant Director, State Park Service, with a physical office location in the Coastal Engineering and Construction Office.

² Personnel records indicate that R.B. was provisionally appointed, pending a promotional examination, to the title of Management Improvement Specialist 1, effective July 17, 2010, and was reassigned from the Commissioner's Office to Island Beach State Park, effective December 17, 2011.

The appellant claims that his reassignment was made in bad faith as evidenced by the fact that the appointing authority appointed R.B., a "completely unqualified political crony" to his position at Island Beach State Park. The appellant asserts that R.B. is using the title of "Area Supervisor" which is not a Civil Service title, and that R.B. does not meet the experience or education requirements for the title of Superintendent, Parks and Forestry 1, which is required for the Superintendent of Island Beach State Park. Also in support, the appellant submits a 1984 Area Management Classification System for the State Parks, which indicates that the "Management Level" for Island Beach State Park is a Superintendent 1, Superintendent 3 and a Chief Ranger 1. The appellant argues that installing R.B. as the Superintendent of Island Beach State Park is a blatant violation of the Civil Service Act. Rather, the appellant asserts that R.B.'s only qualification is his political connections and the matter should therefore be referred to the Attorney General's Office for criminal sanctions. Furthermore, the appellant argues that R.B.'s failure to provide Performance Evaluation System (PES) evaluations to the individuals at Island Beach State Park is further evidence of the appointing authority's bad faith in reassigning him.

Additionally, the appellant claims that his reassignment was retaliatory due to his opposition to the privatization plan for the State Parks. Specifically, the appellant argues that his reassignment occurred "very shortly" after he spoke with the Commissioner of DEP about his concerns about the privatization of the parks. The appellant maintains that his concerns were expressed as a conservationist, not as a Superintendent, and at no time did he indicate an unwillingness to follow all directions issued by his superiors. Moreover, the appellant maintains that he had previously been involved in one of the largest privatization projects in the parks, by bringing in a catering company to run a special events catering operation at Skylands Manor, Ringwood State Park. The appellant also claims that his reassignment for voicing his personal concerns violated his rights under the First Amendment of the Constitution and is expressly forbidden by the Civil Service Act. Further, he contends that he was told that his rent for his residence in Island Beach State Park would be doubled since his housing was changed from mandatory to non-mandatory, which is clearly more evidence of bad faith and retaliation.

The appellant also asserts that the appointing authority's claim that the extension of his reassignment was necessary since his work was not finished is further evidence of bad faith. In this regard, he asserts that he completed his portion of the work on the assignment and the only missing information is from other Superintendents. The appellant argues that the appointing authority is not ordering them to timely submit their required information, only to ensure that the project is not finished and his "temporary" reassignment would be extended. The appellant asserts that further evidence of the appointing authority's bad faith is the fact that he has not been given a PES job description, making it impossible for him to know what is expected. Consequently, the appellant maintains that his

reassignment should be reversed, R.B. should be reassigned and that R.B. and all others responsible should be immediately penalized for their violations of Civil Service law and regulations. Finally, the appellant objects to this matter being classified as an appeal and him as an appellant. Specifically, he asserts that he should not have the burden of proof in this matter. Rather, he contends this is an "enforcement matter."

In response, the appointing authority, represented by Ernest Bongiovanni, Deputy Attorney General, asserts that it acted within its discretion to temporarily reassign the appellant to work full-time on updating the Natural and Historic Resources Area Arrangement Classification System, as well as developing three regional comprehensive operation guides to help with future succession planning efforts. In support, it submits a November 10, 2011 memorandum which listed the appellant and R.B.'s temporary reassignments. The memorandum also listed several other temporary reassignments and indicated that more would be forthcoming in the near future. The appointing authority maintains that the appellant was chosen for the project due to his institutional knowledge of the operations of the State's park systems. Moreover, it was determined that in order to successfully achieve the essential results, it was necessary for the appellant to focus his efforts on a full-time basis throughout the duration of the temporary assignment. Additionally, it notes that R.B., a career service employee, was assigned to manage the day-to-day park operations during the appellant's temporary assignment. Furthermore, the appointing authority asserts that the temporary reassignment, which was effective December 17, 2011, was discussed with the appellant on November 17, 2011, and confirmed with him on December 8, 2011. On June 4, 2012, the appellant was informed that the six-month assignment would be extended an additional six months, as the project had not yet been completed.

In response, the appellant asserts that although the appointing authority claims that his reassignment was at its discretion, it fails to cite any specific regulation. The appellant argues that the appointing authority cannot cite any regulation in support because its actions in reassigning him violated Civil Service law and rules. Additionally, the appellant maintains that on December 5, 2012, he met with management and was told that although the project would finish on December 15, 2012, he would not be returning to Island Beach State Park. Instead, he would be reassigned to Monmouth Battlefield State Park, against his wishes. The appellant claims that he was told he would be reassigned so as not to disturb the "continuity" of management at Island Beach State Park. He argues that the appointing authority's reason for not returning him to Island Beach State Park is illogical since it was not concerned with "continuity" when he was reassigned. The appellant asserts that his reassignment to Monmouth Battlefield State Park is clearly a "demotion." In this regard, he notes that when he began his career with the Park Service as a Superintendent 3 in 1977, he was the Superintendent for

Monmouth Battlefield State Park. He asserts that this "demotion" is just more evidence of the appointing authority's bad faith in reassigning him.

Moreover, he asserts that his and R.B.'s reassignments are simply part of a "personal vendetta" against him. In this regard, he notes that he was told by his immediate supervisor during the temporary project that the Assistant Commissioner at the time of his reassignment had some "personal issues" with him and that this "personal animosity" was passed onto the current Assistant Commissioner. Moreover, the appellant asserts that the appointing authority is harassing him in an attempt to get him to "leave or retire." Specifically, he asserts that after the house he lived in on Island Beach State Park sustained some "minor damage," he was told by the appointing authority that it would not be fixed and he would need to move. The appellant maintains that although the house only needed a new furnace, water heater and electric panel, he and his wife were instead made to pack their belongings "in the winter with no heat, electricity or running water." The appellant claims that after he moved out, he knows "for a fact" that work started on repairing the house. The appellant argues that the appointing authority's use of Super Storm Sandy to further harass him is just more evidence of its bad faith.

CONCLUSION

N.J.A.C. 4A:4-7.2 states that a reassignment is the in-title movement of an employee to a new job function, shift, location or supervisor within the organization unit. Reassignments shall be made at the discretion of the head of the organizational unit. Further, *N.J.A.C. 4A:4-7.7* states that when an employee challenges the good faith of a reassignment, the burden of proof is on the employee. That section also provides that such an action may not be used as part of a disciplinary action, "except when disciplinary procedures have been utilized." See also, *N.J.S.A. 11A:4-16*.

In the instant matter, the appellant argues that his reassignment was done in bad faith, possibly because of personal animus or due to his voicing his disagreement with privatizing the State Parks. He also alleges that he was replaced with an unqualified individual. However, other than his mere allegations, the appellant had failed to present any evidence in support. With regard to the appellant's complaints concerning his housing, it is noted that the Civil Service Commission (Commission) does not have jurisdiction over housing issues. Further, it does not appear that such action would establish bad faith regarding his reassignment. Moreover, although the appellant argues that he should not have the burden of proof and the instant matter should not be considered an appeal, the Commission notes that *N.J.A.C. 4A:4-7.7* applies and specifically provides that when an employee challenges the good faith of a reassignment, the burden of proof is on the employee. Additionally, *N.J.A.C. 4A:4-7.2* provides that reassignments are

to be made at the discretion of the appointing authority, and do not require the consent of an employee. In this regard, the appointing authority has provided legitimate business and operational reasons for the appellant's reassignments. Other than his bare allegations, the appellant has not established in any way that these reasons were not legitimate or served as a pretext to allow the appointing authority to reassign him in bad faith. Furthermore, the appellant has not conclusively established that management of the State parks can solely be accomplished by individuals in the Superintendent of Parks and Forestry title series. Even assuming, *arguendo*, that R.B. did not meet the requirements for the title of Superintendent of Parks and Forestry 1, that fact would not in and of itself establish that the appellant's reassignment was made in bad faith. It would only establish that the position would need to be filled by a qualified individual, and not necessarily the appellant. Therefore, the appellant has failed to establish by a preponderance of the evidence that his reassignment was made in bad faith.

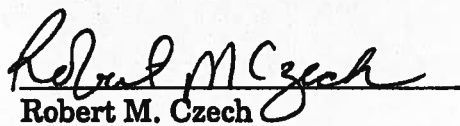
Finally, with regard to the appellant's assertion that his current position at Monmouth Battlefield State Park is misclassified, the appellant may file an appeal of the classification of his position pursuant to *N.J.A.C. 4A:3-3.9*.

ORDER

Therefore, the Commission orders that the appeal be dismissed.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF AUGUST, 2013



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