

N.J.A.C. 4A:8-1.1(d) states that at no time shall any employee be subject to any layoff action if the employee is on a military leave of absence for active service in the Armed Forces of the United States in time of war or emergency.

CONCLUSION

In an appeal of this nature, it must be determined whether CPM properly applied the uniform regulatory criteria found in *N.J.A.C.* 4A:8-2.1 *et seq.*, in determining layoff rights. It is an appellant's burden to provide evidence of misapplication of these regulatory criteria in determining layoff rights and the appellant must specify a remedy.

In this case, the appellant and another individual have 8 years, 1 month and 3 days of seniority. Another Principal Physical Therapist, Elizabeth Hutchinson, has 3 years, 7 months and 8 days of seniority. She is in the National Guard, and was on military leave from September 29 to October 1, 2014, Monday through Wednesday, when interviews for class code 25 were held. It is noted that she also has been on military leave from October 17 to 18, 2014, Friday and Saturday; November 7 to 11, 2014, Friday to Tuesday; and went out on military leave November 17, 2014, and is scheduled to be out until February 27, 2015. Her military orders for September 29 and 30, 2014 indicated that the purpose was for "medical records scanning" and that it was a special project. Her military orders for November 17, 2014 to February 27, 2015 do not specify a purpose.

As noted above, *N.J.A.C.* 4A:8-1.1(d) states that no employee on a military leave of absence for active service in the Armed Forces of the United States in time of war or emergency shall be subject to any layoff action. This rule was adopted to implement a statute, P.L. 2007, Chapter 239, which was enacted January 3, 2008. This law amended several statutes, including provisions in Title 11A governing layoffs, for the purpose of protecting employees in active military service in the case of layoffs. In this case, Ms. Hutchinson's military leave on the interview date is not the controlling factor. She is on a four month military leave of absence for active service in the National Guard, from November 17, 2014 to February 27, 2015, and the layoff date is January 9, 2015. As such, she is scheduled to be on active duty on the effective date of the layoff.

As to the tie, the layoff team did an analysis of the employment records of the appellant and this other employee, and the tie breaker factors one through ten were equal, *i.e.*, one employee over another could not be selected based on this criterion. As such, the factor that was used in this instance was *N.J.A.C.* 4A:8-2.4(h)11, other factors as may be determined by the Chairperson or designee. With all other factors as equal, the layoff team decided that that the choice would be random, and the appellant's name was selected by chance. Sick leave usage was not a factor. The appellant had a 50% chance of being selected, and he was selected by random

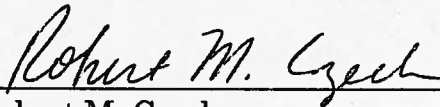
chance instead of the other employee. When other tie breaker factors are not available, random choice is an accepted factor. *See In the Matter of Marilyn Majewski* (CSC, decided September 17, 2014). In addition, *N.J.A.C. 4A:8-2.4* states that voluntary furloughs and leaves without pay for the following purposes: military, educational, gubernatorial appointment, unclassified appointment, personal sick, disability, family, furlough extension, and voluntary alternative to layoff, shall not be deducted from seniority. With respect to his placement in the tiebreaker, he has failed to uphold his burden of proof.

ORDER

Therefore, it is ordered that this appeal be denied.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4th DAY OF FEBRUARY, 2015



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

c: David Rizzo
Elizabeth Hutchinson
Kathryn Cappeta
Christina Mongon
Kenneth Connolly
Joseph Gambino