

On appeal, appellants state that they were permanently appointed to the positions of Carpenters, Mason/Plasterers, Electricians, Plumbers, and Steamfitters and worked in the Schools' Facilities Maintenance, Facilities Support, and Project Control Departments. They argue that on or about August 8, 2014, the NSD hired a number of Carpenters, Mason/Plasterers, Electricians, Plumbers, and Steamfitters as temporary or "per diem" employees to perform the same duties as the 21 employees in the Facilities Maintenance, Facilities Support, and Project Control Departments. They also argue that, as of the effective date of the layoff, the temporary per diem employees retained their positions of Carpenters, Mason/Plasterers, Electricians, Plumbers, and Steamfitters while the 21 permanent employees were laid off from their positions. In addition, they argue that, pursuant to *N.J.A.C. 4A:8-1.3*, the temporary per diem employees, who did not have permanent status, should not have been placed in positions being vacated, reclassified or abolished. Similarly, they argue that, pursuant to *N.J.A.C. 4A:8-1.2*, et seq., the 21 employees listed should have retained their positions as Carpenters, Mason/Plasterers, Electricians, Plumbers, and Steamfitters based on their greater seniority in their permanent titles. Based on these arguments, the Essex County Building and Construction Trades Council and the 21 employees listed appeal their layoff and request that they be returned to their permanent positions as Carpenters, Mason/Plasterers, Electricians, Plumbers, and Steamfitters and be made whole. Additionally, they argued that they have also appealed the good faith issue of their layoffs from their permanent positions while NSD retained temporary per diem employees contrary to the approved layoff plan.

In a supplement to their appeal, the appellants argue that the 21 employees listed should have retained their positions as Carpenters, Mason/Plasterers, Electricians, Plumbers, and Steamfitters based on their greater seniority in their permanent titles as long as there was continuing work available in their classifications. In addition, appellants state that, in or about November 2014, as a result of an unfair practice charge filed with the Public Employment Relations Commission, many of the laid off employees were reinstated into per diem positions. They argue that, while the lost wages and benefits of the reinstated employees have been partially mitigated by their reinstatement, the Council and the employees continue to request that the employees be reinstated into their permanent positions and be made whole for lost wages and benefits.

Jachowski submits an additional appeal reiterating the above arguments regarding per diem employees. He argues that he was laid off with six other Carpenters and more than 15 Electricians and Plumbers. He also argues that, a week prior to the layoffs, NSD hired temporary workers from the Union Hall. In addition, he argues that, when he was laid off, per diem Carpenters stayed on to fill his vacancy. Therefore, he argues that this violates *N.J.A.C. 4A:8-1.3*. He questions why he was not offered per diem employment since he is on a Special

Reemployment List and should have the first right of refusal for temporary employment.

It is noted that the appeals of the good faith of their layoffs remain pending at the Office of Administrative Law (OAL).

Official records indicate that the appellants were laid off from their permanent titles on August 15, 2014.

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. Therefore, the only issues to be discussed in this proceeding are layoff rights issues. Any good faith issues that appellants may have will be determined at the OAL as indicated above.

Pursuant to *N.J.A.C. 4A:8-2.6(a)2*, a determination of rights appeal is based on a claim that an employee's layoff rights or seniority were determined and/or applied incorrectly. It is noted that the determination of lateral and demotional rights is based on a comparative analysis of Civil Service Commission (Commission) job specifications and application of *N.J.A.C. 4A:8-2.1(a)* and (b). *N.J.A.C. 4A:8-2.1(a)* defines a lateral title right as the right of a permanent employee to exercise displacement rights against an employee in the layoff unit holding a title determined to be the same or comparable to the employee's affected title. Title comparability is determined by the Commission based on the following four factors:

1. The title(s) shall have substantially similar duties and responsibilities and, in State service, the same class code;
2. The education and experience requirements for the title(s) are the same or similar and the mandatory requirements shall not exceed those of the affected title;
3. There shall be no special skills, licenses, certification or registration requirements which are not also mandatory for the affected title; and
4. Any employee in the affected title with minimal training and orientation could perform the duties of the designated title by virtue of having qualified for the affected title.

N.J.A.C. 4A:8-2.1(b) defines a demotional title right as the right of a permanent employee to exercise displacement rights against an employee in the layoff unit holding a title determined to be lower than but related to the affected title of the employee. The Commission determines demotional title rights on the basis of the following criteria:

1. The title(s) shall have lower but substantially similar duties and responsibilities and, in State service, where applicable, a lower class code;
2. The education and experience requirements for the title(s) shall be similar and the mandatory requirements shall not exceed those of the affected title;
3. Special skills, licenses, certification or registration requirements shall be similar and not exceed those which are mandatory for the affected title; and
4. Any employee in the affected title with minimal training and orientation could perform the duties of the designated title by virtue of having qualified for the affected title.

Moreover, it is noted that the current system for determining title rights was the result of agency policy to automate the determinations consistent with the aforementioned criteria. This policy, which arose out of State layoffs in 1995, was upheld by the former Commissioner of Personnel on appeal and reconsideration and affirmed by the Appellate Division, Superior Court. *See In the Matter of State Layoff Rights* (Commissioner of Personnel, decided July 7, 1995), *recon. denied*, (Commissioner of Personnel, decided May 24, 1996), *aff'd*, Docket No. A-5847-95T3 (App. Div., December 9, 1997). *See also, In the Matter of Emily Graham-Weber* (Commissioner of Personnel, decided June 30, 2000), *aff'd*, Docket No. A-6681-99T5 (App. Div., December 4, 2001).

In *Graham-Weber, supra*, the Appellate Division observed that, because of the above-described system for determining demotional title rights, "an employee with far less seniority may displace another individual when the displacing individual is in a title with duties and responsibilities that are higher but substantially similar to the displaced employee's title." Thus, as the court rightly noted, "a particular individual's qualifications, the functions currently performed by any one individual, and even an individual's special abilities to perform other jobs are not a factor in the Department of Personnel's [now Civil Service Commission] comparative analysis to determine title rights. Rather, the agency focuses only upon a comparison of the responsibilities and duties of the affected title and other designated positions."

Based on a review of the record, appellants' title rights were properly determined based on their permanent titles. Appellants were the least senior employees in their titles with seven Carpenters, ten Electricians, and three Plumbers positions targeted and, therefore, had no bumping rights.

As indicated above, there were no lateral or demotional positions in the layoff unit for the appellants to exercise any bumping rights. Layoff rights are based on *permanent* titles, not the education, experience or work performed by particular individuals as indicated above. Regarding appellants' arguments that their seniority and displacement rights were violated, they have not established that they have title rights to per diem positions in the NSD and appellants have not persuasively argued otherwise. Regarding their argument that, pursuant to *N.J.A.C. 4A:8-1.3*, the temporary per diem employees, who did not have permanent status, should have been placed in positions being vacated, reclassified or abolished, per diem employees are not Civil Service employees and are not in Civil Service positions. The sole issue in a title rights appeal is whether CPM properly applied the uniform regulatory criteria found in *N.J.A.C. 4A:8-2.1 et seq.*, in determining layoff rights. For the reasons presented above, appellants have not established any error or evidence of misapplication of the pertinent uniform regulatory criteria in determining their layoff rights.

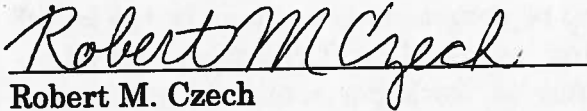
Nevertheless, the appointing authority is cautioned regarding the employment of per diem workers in the place of permanent Civil Service employees. If per diem positions exist, they should be offered first to laid off employees who are on the Special Reemployment Lists for the appropriate titles. *See In the Matter of Dawn Solano* (CSC, decided June 1, 2011) (Appointing authority should have contacted appellant to ascertain her interest in filling a temporary part-time position for which she was on a special reemployment list). If there are per diem workers who are in the employ of the NSD, these per diem employees may be subject to a classification review by CPM to determine whether they are, in fact, only per diem employees. *See In the Matter of Margaret Pacanowski* (CSC, decided February 16, 2011) (Commission ordered review of appellant's temporary appointment who was laid off from her position as a Clerk Typist but subsequently received a temporary appointment notwithstanding existence of a special reemployment list).

ORDER

Therefore, it is ordered that these appeals 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
Written Record Appeals Unit
Civil Service Commission
P.O. Box 312
Trenton, NJ 08625-0312**

**c: Raymond G. Heineman,, Esq.
Christopher Jachowski
Vanessa Rodriguez
Kenneth Connolly
Joseph Gambino**