

B-150



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matter of CathyJo Rogosich,  
West Milford Municipal Utilities  
Authority

CSC Docket No. 2014-2333

Court Transfer

ISSUED: FEB 09 2015 (DASV)

Cathyjo Rogosich, a Keyboarding Clerk 1 with the West Milford Municipal Utilities Authority (MUA), represented by John M. Barbarula, Jr., Esq., petitions the Civil Service Commission (Commission) for relief pursuant to the attached order of the Superior Court of New Jersey.

By way of background, the petitioner was appointed on November 26, 2007 as a part-time Clerk Typist with the MUA and achieved permanent status. Thereafter, she was provisionally appointed pending open competitive examination procedures as a full-time Senior Account Clerk effective February 1, 2010. On February 1, 2012, the petitioner was returned to her permanent title of Clerk Typist, which had been renamed Keyboarding Clerk 1.<sup>1</sup> Keyboarding Clerk 1 is a noncompetitive title and Senior Account Clerk is a competitive title. On May 21, 2012, the petitioner filed a complaint<sup>2</sup> in the United States District Court, District of New Jersey, against the MUA and Kelly Love, who serves in the unclassified title of Executive Director, Utilities Authority, and is designated as the appointing

<sup>1</sup> It is noted that, on April 6, 2011, the Commission consolidated various local government titles within the clerical occupations group and renamed the titles to more appropriately represent the type of work performed by the incumbents. As a result, the noncompetitive Clerk Typist title was renamed Keyboarding Clerk 1.

<sup>2</sup> The appointing authority indicates that the federal complaint included claims under the First and Fourteenth Amendments, Law Against Discrimination, and the Conscientious Employee Protection Act. There were also allegations of simple assault and civil conspiracy.

authority.<sup>3</sup> On or about August 9, 2013, the case was dismissed with prejudice as to all federal claims and without prejudice as to the State claims. On or about August 29, 2013, the petitioner filed her complaint in the Superior Court of New Jersey, Passaic County, Law Division. By order dated January 2, 2014, the Superior Court upon motions by the parties, granted the petitioner's motion to file an Amended Complaint and ordered "that this matter is temporarily transferred to the [Commission] for disposition of issues alleged in the Amended Complaint, as plaintiffs<sup>4</sup> have failed to exhaust all remedies provided under *N.J.S.A. 11A:8-4*." Thereafter, the petitioner filed the instant matter requesting relief as to the issues alleged in the Amended Complaint. The parties were then given the opportunity to supplement the record. It is noted that the petitioner was placed on medical leave beginning in February 2012. The petitioner has not returned to work nor has the appointing authority begun disciplinary actions to separate her from employment.

In the instant matter, the petitioner alleges that she was "demoted in lieu of layoff," disciplined, and subjected to other penalties in retaliation for reporting activities of the appointing authority in violation of the Conscientious Employee Protection Act (CEPA), *N.J.S.A. 34:19-1, et seq.* She contends that the Commission has jurisdiction over this case since it may review disciplinary actions, demotions, layoffs, and other employment actions. Further, the petitioner maintains that she is entitled to a hearing pursuant to *N.J.A.C. 4A:8-2.6* and requests "[l]ost wages," "[l]oss of senior level 'front and back pay'" and related benefits, "[c]ompensatory and punitive damages for intentional/negligent infliction of emotional distress," and attorney fees and costs. The petitioner submits her Amended Complaint and a certification, stating that Love discriminated against her and failed to prevent other employees and officials of the MUA from engaging in discriminatory, harassing, and demeaning conduct towards her. The petitioner lists the various incidents that allegedly occurred between her and Love and members of the MUA's Board of Commissioners (Board) whom she claims to have violated CEPA and created a hostile work environment. For instance,<sup>5</sup> on or about June 23, 2009, Love "cut and taped" the names of the chairman and treasurer on a resolution for bills and told the petitioner to "turn her head" and that "she does this all the time." Additionally, when the petitioner questioned a Board member about vouchers for a trip to Atlantic City and alcohol purchases, she was told to "shut up and do it." In retaliation, on or about February 8, 2011, the petitioner did not receive a salary increase, but rather, her salary decreased because personal and administrative leave days and her 2% longevity payments were discontinued. She was also called a "spoiled bitch" by Love when the petitioner received a Jeep for her birthday. A

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<sup>3</sup> The MUA and Love will collectively be known as "the appointing authority" in this decision unless otherwise specifically identified.

<sup>4</sup> The petitioner's husband, Anthony Rogosich, is a plaintiff in the lawsuit, but he is not an employee of the MUA. Therefore, none of his claims will be reviewed or addressed by the Commission.

<sup>5</sup> The Amended Complaint and the petitioner's certification list other incidents, which are not specifically asserted as CEPA or LAD violations.

Board member told Love that the petitioner would need to sell the Jeep because in a few months she would not be able to afford it. Further, the petitioner contends that other retaliatory acts occurred in violation of CEPA, such as being given a list of tasks which ordinarily were performed by Love, not being offered to work overtime hours based on her seniority in violation of Civil Service rules,<sup>6</sup> and being directed to write the minutes of the Board meetings in a certain manner. She also notes that on December 15, 2011, she provided Love with the deposits for the day, but the cash receipts were not deposited. The petitioner reported the incident and asserts that her reporting caused further retaliation. There was another incident on January 9, 2012 where the cash receipts were not deposited. The petitioner questioned Love and reported the incident by letter dated January 9, 2012 to the MUA Board at its meeting the following night. The petitioner asserts that she was immediately asked to leave the meeting.

Moreover, the petitioner stresses that, on May 17, 2011, Love was talking to an attorney on the telephone regarding an account and provided the wrong amounts. The petitioner tapped the computer screen to show Love the correct amounts. The petitioner alleges that, in response, Love slapped the petitioner and told her to "shut up." The petitioner then told Love never to touch her again or that she would call the police. Love replied that a Board member owned the police department and the petitioner would be fired if she called. The petitioner therefore did not make a complaint. The petitioner submits a photograph which purportedly shows welts on a body part as a result of the slap. In addition, the petitioner indicates that on May 26, 2011, when she was on her lunch break, she was involved in a car accident. She was out of work for approximately two weeks due to her injuries. When she returned to work, she was handed a notice on June 15, 2011, dated June 1, 2011, that she was immediately suspended without pay for two days for not returning from her lunch break on the day of her accident and endangering the well-being of another employee. The petitioner states that she responded to the notice of suspension by letter, but she did not receive a response. It is noted that the letter is undated and Love contends that she never received it. The petitioner asserts that she responded no later than June 17, 2011, and her attorney responded as well. The petitioner also claims that she was required to keep a daily log of her activities, had a specified lunch hour, and was excluded from having a key to the MUA office. However, not all employees were keeping track of their activities. Furthermore, after Love received the petitioner's Notice of Tort Claim on or about August 26, 2011, Love's "hostile behavior increased and adverse employment actions intensified." The notice, dated August 23, 2011, alleged violations of the petitioner's federal and State civil rights, violation of the Americans with Disabilities Act, "Violation of Whistle blower," and a hostile work environment. On the same day as Love's receipt of the notice, the petitioner says she was written up for allegedly leaving the office 12 minutes early. She was also written up on

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<sup>6</sup> There is no Civil Service law or rule which regulates the distribution of overtime work of local government employees.

another occasion for being late less than two minutes and had been given restrictions on the use of the bathroom and her breaks. The petitioner contends that these incidents violate the Law Against Discrimination (LAD).

Lastly, the petitioner indicates that she received written notice on or about January 30, 2012 that she was being "demoted" and would no longer have full-time hours and benefits. She was also required to work until 6:00 p.m. on Thursdays, although the office closes at 4:30 p.m. After reading the notice, the petitioner felt ill, left work early, and sought medical attention. She states that she did not return to work and was placed on temporary disability by her treating psychologist, Dr. Inara Segal, "due to the hostile work environment and the deterioration of her health." The petitioner submits numerous documents, including photographs, which she has categorized to support her claims of "Wrongful Termination," "Improper Classification," "Harassment Hostile Work Enviro[nment]," "Discipline," "Assault," "Improper Termination," and "CEPA" violations.

In response, the appointing authority, represented by Little E. Rau, Esq., argues that the petitioner cannot show that the alleged acts against her were the proximate cause of her condition given that she only provided a net opinion from her psychologist and the appointing authority has not had the opportunity to examine the petitioner by its own expert. It notes that Dr. Segal indicated on September 17, 2012 that the petitioner may return to work but not to her part-time position with the MUA. Additionally, the appointing authority maintains that it did not "demote" the petitioner in bad faith. It asserts that the petitioner's "demotion" and two-day suspension were warranted based on her actions on May 26, 2011. The appointing authority initially explains that the petitioner's promotion was recommended by Love in consultation with a representative of this agency. Love also consulted with the representative regarding the petitioner's two-day suspension and return to her permanent part-time position of Keyboarding Clerk 1. In addition, the appointing authority states that, on May 26, 2011, the petitioner was involved in an automobile accident on the way to meet her husband for lunch. She was the only employee in the office and left without any coverage and did not advise anyone that she was doing so. Love had taken a vacation day and gave specific instructions to have the office open and attended to at all times during business hours, including lunch hours. Another employee was not at work, and the other employee had to seek medical treatment due to chemicals spilling on him at a plant. The hospital attempted to call the office to ascertain what chemicals were at the plant, but no one was at the office. As a result, the petitioner was issued a two-day suspension. The appointing authority presents the certification of Love, who states that, contrary to the petitioner's representations, she did not sanction the petitioner for not returning to work after her accident.

Regarding the other alleged retaliatory acts, the appointing authority maintains that the overtime policy changed in 2011 due to cost concerns, which was

nearly one year prior to the petitioner's "whistle-blowing letter" of January 9, 2012. Budget concerns were also evident as early as January 2011. The appointing authority states that, as a result of the events of May 26, 2011, the Board directed Love and the MUA attorney to investigate ways to increase efficiency, which Love did in part by asking the employees to keep a log of their daily activities at work. The appointing authority notes that no employee had a key to the office, except for Love, contrary to the petitioner's claim that she was the only employee without a key. Further, as a result of the investigation, the appointing authority indicates that it hired another temporary employee<sup>7</sup> and returned the petitioner to her part-time Keyboarding Clerk 1 title. It anticipated that money would be saved on benefits for a full-time employee and the additional employee would provide greater coverage for the office. Moreover, Love certifies that she did not slap the petitioner and denies that the conversation surrounding the alleged slap occurred. Love emphasizes that the petitioner did not report the alleged slap to the police or any MUA official or its attorney. There is also no witness to corroborate the allegation or documentation that the petitioner sought medical treatment after the alleged slap. Love notes that the petitioner had no reservations lodging complaints to a former Board member. Further, Love contends that she did not falsify any documentation with respect to the petitioner's start date and two other employees in 2010 and 2011 were denied salary increases as part of cost-cutting measures. Moreover, the petitioner was properly asked to leave when the Board went into executive session to discuss personnel issues unrelated to the petitioner. In addition, the issue of the cash receipts were known and addressed by the MUA auditor, who recommended that the cash receipts be deposited within 48 hours. As of March 1, 2014, the MUA no longer accepts cash payments.

Based on the foregoing, the appointing authority argues that the petitioner fails to make a *prima facie* case of retaliation under CEPA since she has not demonstrated that the appointing authority violated any law or rule or that its actions were against public policy. Moreover, it contends that none of the petitioner's actions constitutes a "protected whistle-blowing activity." The petitioner also has not shown that a causal connection exists between her various complaints and disagreements with any adverse employment actions, such as her two-day suspension or "demotion." Furthermore, the appointing authority asserts that the petitioner has not established that her work environment was hostile to sustain a claim of retaliation under CEPA or a claim under the LAD. The appointing authority notes that the petitioner has not identified any protected class of which she is a member to sustain a claim under the LAD. It also emphasizes that the other employees were subjected to the same conditions as the petitioner, *i.e.*, they were not given salary or longevity increases, they had no key to the office when the locks changes, and they were required to keep a log of their daily tasks,

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<sup>7</sup> The appointing authority previously appointed a temporary employee while the petitioner was recovering from her accident. At the time of her certification, Love indicates that there were three employees working in the MUA office.

including Love.<sup>8</sup> Thus, the appointing authority maintains that there is nothing to suggest that the conditions of employment “were pervasive or severe enough to have created a retaliatory hostile work environment” against the petitioner. As such, the appointing authority submits that summary judgment is appropriate because the petitioner’s case should be dismissed as a matter of law.<sup>9</sup>

Furthermore, the appointing authority reiterates that the petitioner’s “demotion” was not made in bad faith. Rather, it maintains that due to economy and efficiency reasons as set forth above, it returned the petitioner to her part-time Keyboarding Clerk 1 position. The appointing authority notes, however, that the Commission has explicitly indicated that if there is evidence that the layoff was designed to effect economies, evidence that a layoff was partially motivated by improper considerations would not be sufficient to satisfy an employee’s burden to prove that the layoff was conducted in bad faith. As such, the appointing authority contends that “[t]his observation . . . effectively forecloses the majority of the [petitioner’s] case.” It is noted that in Love’s certification, she states that a “demotion” was selected instead of proceeding with actual layoff procedures since the petitioner was serving in a provisional position. Lastly, the appointing authority argues that the petitioner’s claim to the Commission that she was deprived of due notice and a hearing regarding her two-day suspension and her “demotion” are untimely. The petitioner did not file an appeal to the Commission regarding these actions.

In response, the petitioner contends that her case is not qualified to be disposed of by summary disposition since there are numerous facts in dispute. She submits a supplemental certification, which disputes the appointing authority’s version of the facts.<sup>10</sup> Particularly, the petitioner disagrees that she was a provisional full-time employee. She points to an e-mail between Love and an agency representative where Love writes that the petitioner is a permanent full-time Senior Account Clerk. It is noted that Love also referred to herself as a permanent employee in listing all of the employees of the MUA. However, she was actually in the unclassified service. The e-mail exchange, which began in December 2010 and ended in January 2011, discussed, among other things, a current accounting of all employees of the MUA and an update of agency records. Moreover, the petitioner maintains that she has viable claims, including a claim of emotional distress, and reiterates the incidents which she alleges were discriminatory and retaliatory in violation of the LAD and CEPA. Furthermore, she argues that the time limit of *N.J.A.C.* 2-1.1(b) does not apply to the instant matter. That rule provides that “[u]nless a different time period is stated, an appeal must be filed

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<sup>8</sup> Love indicates in her certification that one of the temporary employees was not asked to keep a log since she was temporary and “whose tasks were known and unchanged, i.e., filing and answering phones.”

<sup>9</sup> Summary judgment is not available under Civil Service law and rules.

<sup>10</sup> The petitioner also presents other accusations against Love, the Board members, and the MUA.

within 20 days after either the appellant has notice or should reasonably have known of the decision, situation or action being appealed.” The petitioner explains that her original complaint was filed in District Court on May 21, 2012 and an Amended Complaint was filed in Superior Court. She indicates that there has been a continuous litigation process since that time. She also notes that the appointing authority has never filed an answer and they have not engaged in discovery. Moreover, the petitioner argues that there is no requirement to exhaust State administrative remedies for actions arising under 42 U.S.C. § 1983. Thus, the petitioner submits that the procedural history of this case provides an explanation as to why relief was not previously sought from the Commission. Nonetheless, she maintains that the 20-day time limit should be relaxed, as good cause has been presented. In that regard, she underscores the fact that the Superior Court transferred this matter to the Commission.

The appointing authority further replies to the petitioner’s allegations under the LAD. It contends that these allegations were omitted in the petitioner’s initial submission to the Commission and should be disregarded. Nonetheless, it argues that the facts do not support a *prima facie* case of discrimination, hostile work environment, or retaliation under the LAD; the petitioner has not identified any protected class; and the LAD and CEPA claims are based on the same set of facts. With regard to the latter, the appointing authority indicates that the election of remedies provision of CEPA requires a dismissal of the claims brought pursuant to the LAD. It also notes that certain alleged incidents are beyond CEPA’s one-year time limitation to bring a claim. Therefore, it requests that the Commission dismiss all claims set forth in the petitioner’s Amended Complaint, including due process claims and claims under New Jersey Constitution. However, it states that if any “viable claim” remains, an administrative hearing should be granted.

The petitioner responds that the election of remedies under CEPA is not applicable in the instant matter because she did not elect to pursue remedies before the Commission. Rather, she sought relief in District Court, which eventually led to a filing in Superior Court. The petitioner underscores that the Superior Court transferred this matter to the Commission. She also argues that the Commission does not have jurisdiction to adjudicate claims of retaliation pursuant to CEPA. In other words, she states that the transfer “before a tribunal lacking jurisdiction to adjudicate CEPA retaliation claims cannot trigger CEPA’s election of remedies provision.” The petitioner also states that “the claim for relief pursuant to the [LAD] should not be affected by the claim of [the petitioner] relative to [CEPA], and in fact it would appear that neither of those claims is in the jurisdiction of the [Commission].” Moreover, the petitioner argues that her claims are not time barred under CEPA since, among other reasons, she has not been terminated.

In reply, the appointing authority indicates that the petitioner’s attempt to “throttle back” from issues she raised under CEPA and the LAD in her initial

submission to the Commission or to declare that the Commission is powerless to deliberate those issues should be rejected based on current case law. Further, it states that “[i]f only termination serves as the adverse employment action, then [the petitioner] would have no CEPA claim in the first instance.” The petitioner opposes the appointing authority’s reply and relies on her previous submissions.

### CONCLUSION

This matter has come before the Commission by order of the Superior Court to dispose of issues alleged in the petitioner’s Amended Complaint, as she has “failed to exhaust all remedies provided under *N.J.S.A. 11A:8-4*.” Although the petitioner raises claims under CEPA and the LAD and has extensively argued the merits of her case, the Commission does not have primary jurisdiction to interpret these laws or find a violation of such statutes. It is also clear that the only claims that have been transferred are the issues which implicate *N.J.S.A. 11A:8-4*. In that regard, it is well established that in the absence of an appeal that is properly before the Commission, the Commission lacks jurisdiction to interpret such statutes, which are outside the scope of Title 11A of the New Jersey Statutes Annotated, or determine the applicability of the cited statute or any purported violations. *Cf. Kowaluk v. Township of Middletown*, Docket No. A-4866-02T1 (App. Div. August 6, 2004); *Matter of Allen*, 262 N.J. Super. 438 (App. Div. 1993); *In the Matter of Michael Giannetta* (MSB, decided May 23, 2000). Indeed, the petitioner herself later argues that the Commission lacks the authority to render a determination under CEPA and the LAD.

Moreover, the petitioner fully acknowledges her choice to proceed in District Court and Superior Court rather than bringing an appeal before the Commission. The Commission notes that the petitioner could have filed an appeal of reprisal pursuant to *N.J.A.C. 4A:2-5.1(a)*, which generally provides that an appointing authority shall not take or threaten to take any reprisal action against an employee in the career, senior executive or unclassified service in retaliation for an employee’s lawful disclosure of information on the violation of any law or rule, governmental mismanagement or abuse of authority. *See also N.J.S.A. 11A:2-24*. She elected not to do so. Therefore, any attempt at this juncture to file a reprisal claim would be considered untimely, pursuant to *N.J.A.C. 4A:2-5.2(a)*, and would also be precluded by the petitioner’s complaint in Superior Court. In that regard, once a CEPA claim is instituted, parallel claims under State law are deemed waived. *See Young v. Schering Corporation*, 141 N.J. 16 (1995); *Scouler v. City of Camden*, 332 N.J. Super. 69 (App. Div. June 15, 2000).

Accordingly, the Commission’s evaluation of the instant matter is limited to an analysis of the remedies that could be provided to the petitioner under *N.J.S.A. 11A:8-4* based on the alleged issues in her Amended Complaint. Initially, it is noted that the parties have requested a hearing in this matter. Specifically, the petitioner



indicates that she is entitled to a hearing pursuant to *N.J.A.C.* 4A:8-2.6 and in relation to allegations of her complaint, including her two-day suspension. *N.J.A.C.* 4A:8-2.6(a)<sup>1</sup> provides that permanent employees and employees in their working test period may file good faith appeals, 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. Such appeals shall be subject to hearing and final administrative determination by Commission. However, the petitioner is not entitled to a hearing since, as discussed further below, the petitioner was not permanent as a Senior Account Clerk nor was she serving in a working test period. The petitioner's appointment to Senior Account Clerk was provisional and, as such, she was not "laid off" or "demoted" in lieu of layoff as those phrases are utilized in the Civil Service system. In addition, the action cannot be considered a disciplinary demotion since such a demotion can only be effected from one's permanent title. Moreover, the Commission generally does not have jurisdiction over challenges to minor discipline imposed on local government employees unless exceptions apply. See *N.J.S.A.* 11A:2-6; *N.J.S.A.* 11A:2-14; *N.J.S.A.* 11A:2-16 and *N.J.A.C.* 4A:2-3.1, *et seq.* The petitioner's two-day suspension was a minor suspension and the record does not indicate that it qualifies for a hearing pursuant to *N.J.A.C.* 4A:2-2.9(b)<sup>11</sup> nor was an appeal filed.<sup>12</sup> Additionally, the appointing authority states that if any "viable claim" remains, an administrative hearing should be granted. However, unless statutorily mandated, appeals are generally treated as reviews of the written record. See *N.J.S.A.* 11A:2-6(b). Hearings are granted in those limited instances where the Commission determines that a material and controlling dispute of fact exists which can only be resolved through a hearing. See *N.J.A.C.* 4A:2-1.1(d). In the present case, there are no material issues of fact which necessitates a hearing with regard to the petitioner's remedies under *N.J.S.A.* 11A:8-4. See *Belleville v. Department of Civil Service*, 155 *N.J. Super.* 517 (App. Div. 1978). Therefore, the requests for a hearing are denied.

*N.J.S.A.* 11A:8-4 provides that:

A permanent employee who is laid off or demoted in lieu of layoff shall have a right to appeal the good faith of such layoff or demotion to the

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<sup>11</sup> Minor discipline matters will be heard by the Commission or referred to the Office of Administrative Law for a hearing before an administrative law judge for an employee's last suspension or fine for five working days or less where the aggregate number of days the employee has been suspended or fined in a calendar year, including the last suspension or fine, is 15 working days or more, or for an employee's last suspension or fine where the employee receives more than three suspensions or fines of five working days or less in a calendar year.

<sup>12</sup> Even assuming that the Commission had jurisdiction to review the petitioner's minor suspension, the petitioner was served with notice of the two-day suspension on June 15, 2011 and did not file an appeal of that suspension with the Commission. The petitioner's Notice of Tort Claim, dated August 23, 2011, and her District Court complaint which was filed on May 21, 2012 were also beyond the 20-day time period to file an appeal of the suspension.

[Commission]. Appeals must be filed within 20 days of final notice of such layoff or demotion. The burden of proof in such actions shall be on the employee and rules adopted pursuant to *N.J.S. 11A:2-22* would also be applicable to these appeals.

The record indicates that the petitioner was appointed part-time in the noncompetitive title of Clerk Typist effective November 26, 2007. The title was later renamed Keyboarding Clerk 1. There is no dispute that she achieved permanent status in this noncompetitive title with the MUA. However, her appointment as a full-time Senior Account Clerk, effective February 1, 2010, is considered provisional. It is emphasized that Senior Account Clerk is a competitive title. Pursuant to *N.J.A.C. 4A:1-1.3*, a provisional appointment means employment in the competitive division of the career service pending the appointment of a person from an eligible list. A permanent employee means an employee in the career service who has acquired the tenure and rights resulting from regular appointment and successful completion of the working test period. Additionally, the method by which an individual can achieve a permanent appointment in a competitive title is if the individual applies for and passes an examination, is appointed from an eligible list, and satisfactorily completes a working test period. The steps necessary to perfect a regular appointment, include, but are not limited to, this agency's review and approval of a certification disposition proposed by an appointing authority and the employee's completion of a mandatory working test period. *See e.g., In the Matter of Roger Fort* (CSC, decided May 7, 2014).

In the petitioner's case, there is nothing in the record which demonstrates that she was subject to the examination process or appointed from an eligible list to have begun her working test period as a Senior Account Clerk. Furthermore, the record does not indicate that the petitioner was misled regarding her provisional status. The reference by Love in an e-mail that the petitioner was "permanent" is insufficient to afford the petitioner such status. Indeed, Love also was mistaken in her own classification. *See e.g., In the Matter of Roberta Farber*, Docket No. A-5714-04T2 (App. Div. July 18, 2006) (Provisional appointee's request for permanent status denied because she failed to demonstrate how her long term provisional employment was the result of negligence or malfeasance on the part of the appointing authority, but rather, was the result of appellant's failure to file for examinations and other routine administrative delays). *Compare, In the Matter of William Malayter* (MSB, decided March 22, 2006) (Retroactive permanent status granted to a long-term provisional employee and hearing granted at the Office of Administrative Law regarding his 45-day suspension and removal since appellant was given notice, a departmental hearing, and appeal rights regarding three major disciplinary actions he received during his tenure, thereby conveying the impression that he was permanent). Individuals cannot be "laid off" or "demoted" in lieu of layoff from a provisional position. A "layoff" action can only be from an employee's permanent title. *See e.g., N.J.A.C. 4A:8-2.1* and *N.J.A.C. 4A:8-2.2(c)*. Therefore,

since the petitioner was provisional as a Senior Account Clerk, *N.J.S.A.* 11A:8-4 does not apply to her separation from that position. Accordingly, she is not entitled to any remedy flowing from that statute or any accompanying rules from Title 4A of the New Jersey Administrative Code.

It must be emphasized that a provisional appointee can be removed at any time and does not have a vested property interest in the provisional title. In other words, a provisional employee has no automatic right or expectation of achieving permanent appointment to the position which he or she is occupying. *See O'Malley v. Department of Energy*, 109 *N.J.* 309 (1987) (Appointing authority was not equitably estopped from removing a provisional employee even when the provisional employee occupied the position longer than the statutory one-year limit). Furthermore, the Commission does not have jurisdiction to review the termination of a provisional appointment. *See N.J.S.A.* 11A:2-6 and *N.J.A.C.* 4A:2-2.1. However, the petitioner alleges that the termination of her appointment as a Senior Account Clerk and subsequent return to her permanent title of Keyboarding Clerk 1 were motivated by discriminatory and retaliatory reasons. Even assuming that the petitioner filed a timely appeal to the Commission or that the Superior Court transferred that issue to the Commission, there is not a sufficient basis to have overturned the action based on the existing record.<sup>13</sup>

In that regard, the Commission is mindful that administrative agencies, such as the MUA, have wide discretion in selecting the means to fulfill the duties that have been delegated to them. Deference is normally given to an agency's choice in organizing its functions, considering its expertise, so long as the selection is responsive to the purpose and function of the agency. *See In the Matter of Gloria Iachio*, Docket No. A-3216-89T3 (App. Div., January 10, 1992); *See In the Matter of Correction Major, Department of Corrections* (CSC, decided October 5, 2011), *aff'd on reconsideration* (CSC, decided December 21, 2011), *aff'd on appeal*, Docket No. A-2697-11T4 (App. Div. August 15, 2013). Thus, when classifying the kinds of employment and in providing designations for those engaged in various classifications, the only requirement for the Commission when it exercises its broad reclassification powers is to ensure that such action is not arbitrary, capricious, or unreasonable. *See Mullin v. Ringle*, 27 *N.J.* 250 (1958); *Carls v. Civil Service Commission*, 17 *N.J.* 215, 223 (1955). In the present case, the appointing authority presents that due to economy and efficiency reasons, it returned the petitioner to her prior permanent title of Keyboarding Clerk 1. Specifically, it states that the action would save on the cost of providing benefits to a full-time employee and provide more coverage to the office since an additional employee could be employed.

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<sup>13</sup> The Commission generally does not have jurisdiction to review discrimination complaints concerning local government employees. In this regard, *N.J.A.C.* 4A:7-1.1(g) provides that in local service, an appointing authority may establish policies and procedures for processing discrimination complaints. Additionally, it is noted that the petitioner does not identify herself as a member of a protected class.

The Commission does not find such action to be arbitrary, capricious, or unreasonable.

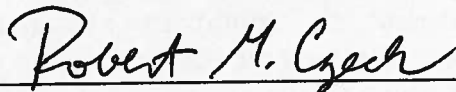
Moreover, even if the Commission found the petitioner to have been "demoted" in lieu of layoff from a permanent position, it is mindful that the burden is on the employee to show bad faith and that the action taken was not for purposes of economy. *Greco v. Smith*, 40 N.J. Super. 182 (App. Div. 1956); *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.* As indicated above, a reasonable connection has been presented by the appointing authority for the petitioner's return to her permanent title of Keyboarding Clerk 1.

### ORDER

Therefore, it is ordered that this 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 4<sup>TH</sup> 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**

**Attachment**

**c: Cathyjo Rogosich  
John M. Barbarula, Jr.  
Kelly Love  
Littie E. Rau, Esq.  
Kenneth Connolly  
Joseph Gambino**

COPY

PREPARED BY THE COURT

FILED  
JAN 02 2014

SUPERIOR COURT  
OF NEW JERSEY

CATHYJO ROGOSICHH and ANTHONY  
ROGOSICH,

*Plaintiff,*

vs.

TOWNSHIP OF WEST MILFORD  
MUNICIPAL UTILITIES AUTHORITY,  
KELLY LOVE, INDIVIDUALLY and as  
Administrator of the West Milford  
Municipal Authority, and JOHN DOES 1-10  
said names being fictitious,

*Defendants.*

DOCKET NO.: PAS-L-3395-13

THIS MATTER having been brought before the Court upon motion by Ruderman & Glickman, P.C., attorneys for defendants West Milford Municipal Utilities Authority and Kelly Love, for an Order transferring this case to the Civil Service Commission and/or dismissing certain Counts of the Complaint and/or for More Definite Statement of Facts and for Attorney's Fees and Costs, on notice to John M. Barbarula, Esq., attorney for plaintiffs Cathyjo Rogosich and Anthony Rogosich, who filed a Motion to File an Amended Complaint; and the court having read and considered the papers in connection with this application;

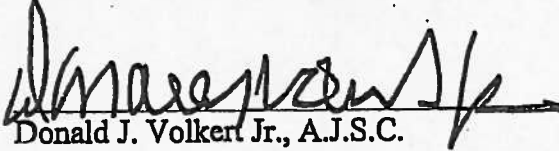
IT IS on this 2<sup>nd</sup> day of January, 2014, hereby

ORDERED that Plaintiffs' Motion to File an Amended Complaint is granted pursuant to R. 4:9-1; and it is further

ORDERED that this matter is temporarily transferred to the Civil Service Commission for disposition of issues alleged in the Amended Complaint, as plaintiffs have failed to exhaust all remedies provided under N.J.S.A. 11A:8-4. The court defers exercising jurisdiction over this

matter at this time in order to avoid piecemeal adjudication or duplicative or contradictory results; and it is further

**ORDERED** that a copy of this Order shall be provided to all parties in the matter within seven (7) days of receipt of a filed stamped copy.

  
Donald J. Volkert Jr., A.J.S.C.

Motion was:  Opposed  
 Unopposed

