



B-8

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matter of John Buonanno,  
Borough of Elmwood Park

Court Remand

CSC Docket No. 2015-407

ISSUED: APR - 2 2015

(SLD)

The Superior Court of New Jersey, Appellate Division, has remanded the issue of John Buonanno's status as a Construction Official with the Borough of Elmwood Park to the Civil Service Commission (Commission). A copy of the Appellate Division's August 12, 2014 decision is attached hereto and incorporated herein.

The facts of this matter are thoroughly discussed in the attached decision. The appellant had appealed his termination as a Municipal Department Head with the Borough of Elmwood Park to the Superior Court, Law Division, and he had requested that a Shared Services Agreement (SSA) between Elmwood Park and the Township of Rochelle Park be voided. The appellant asserted that he had originally been hired as the Building Inspector/Construction Code Official/Zoning Officer by Elmwood Park in 1998 and that later that same year, he was appointed to the unclassified title of Municipal Department Head. The trial court denied the appellant's request to invalidate the SSA and to void his termination. Upon appeal to the Appellate Division, the Court, reversed and remanded the matter to the Trial Court, but transferred the issue of the appellant's status as a Construction Official to the Commission. In this regard, the Appellate Division noted that initially, the appointing authority hired the appellant to the title of Building Inspector/Construction Code Official/Zoning Officer, which was not a Civil Service title. Subsequently, the appellant was appointed to the unclassified title of Municipal Department Head. However, since the title of Municipal Department Head was an unclassified title, the appellant could not attain tenure in either that title or the unrecognized triple title he had previously held. The Appellate Division

noted that the title of Construction Official was a competitive Civil Service title, subject to examination, and thus, an employee could attain tenure in that title. However, the appellant was never provisionally appointed to the title of Construction Official, nor was the Civil Service Commission ever advised that he was acting in that capacity. Therefore, he was never provided with an opportunity to take the examination and attain permanent status in that title. In particular, the Appellate Division stated that by:

. . . permitting a municipality to withhold permanent status from an apparently qualified . . . employee by failing to transmit the proper notices to Civil Service, and thereby preventing it from doing its job, also subjects government employment opportunities for subterfuge and circumvention. *Kyer v. City of East Orange*, 315 N.J. Super 524, 532 (App. Div. 1998)

Accordingly, the Appellate Division stated that, as the *Kyer* Court did under analogous factual circumstances, it was appropriate to refer the matter to the Commission to determine the appellant's qualifications and whether, had the inquiry into his qualifications been timely made, the appellant would have achieved permanency as a Construction Official.

The appellant, represented by John J. Segreto, Esq., maintains that a March 12, 1998 resolution of the Elmwood Park Council appointed him to the position of Building Inspector/Construction Code Official/Zoning Officer. He notes that a subsequent resolution appointed him to the title of Municipal Department Head. Therefore, he maintains that from March 12, 1998 to June 28, 2010, he "served, consecutively, as the Elmwood Park Building Inspector/Construction Code Official/Zoning Officer, its Construction Official and Building Department Head."

The appellant further maintains that N.J.S.A. 52:27D-126 requires municipalities to appoint a Construction Official. Therefore, he contends that he should not suffer the consequences because the appointing authority "created titles for which no Civil Service examination could be held." He argues that it is "uncontroverted" that he served for 12 years as the Construction Official, and therefore, if the Commission does not determine that he possesses permanent status as a Construction Official, he will be the only Construction Official in the State to have had no employment protection. The appellant notes that in *Kyer, supra*, the individual was appointed to a position, but the appointing authority failed to file the required documents notifying this agency of the provisional appointment. However, in the instant matter, the appointing authority "created" an unclassified title and although it "hired" him as a Construction Official, did not treat the appointment as a provisional appointment, but rather a "permanent appointment."

The appellant also asserts that he has been a licensed Construction Official for 24 years, is a certified instructor for New Jersey code enforcements and he has 24 years of experience in building and construction code enforcement. The appellant notes that he is currently employed as the Construction Official, Building and Fire Subcode Official and Inspector, Fire Official and Zoning Official for the Borough of Glen Ridge; the Fire Subcode/Inspector for the Borough of Pompton Lakes; and the Fire Subcode/Inspector for the Borough of Hawthorne. The appellant notes that he is also a certified exempt fireman with tenure. The appellant maintains that while employed with the appointing authority, he served in four positions, including the Municipal Department Head, Construction Code Official/Building Inspector/Zoning Official, and as the Construction Official. Therefore, he asserts that the Commission "should waive the requirement for a promotional examination" concerning any of those titles.

In response, the appointing authority, represented by Brian T. Giblin, Esq., maintains that the appellant was not eligible to hold the title of Construction Official, Zoning Official or Building Subcode Official, all of which are career service titles that are subject to competitive examination. Therefore, it asserts that since the appellant never took an examination for any of those positions, he could not have been serving in any of those titles. Moreover, it argues that it is clear that the appellant did not achieve tenure in his position pursuant to *N.J.S.A. 52:27D-126(b)* since it is a Civil Service jurisdiction. The appointing authority notes that although the appellant was originally hired to the triple title of Building Inspector/Construction Code Official/Zoning Officer on March 12, 1998, that title was not a Civil Service title. However, three months later, the appellant was appointed to the unclassified Civil Service title of Municipal Department Head. The appointing authority also asserts that the appellant was aware and understood that he had been appointed to the unclassified title of Municipal Department Head, an "at-will" position.<sup>1</sup> Additionally, the appointing authority asserts that the appellant never served provisionally in the title of Construction Official, since to do so would have violated *N.J.S.A. 11A:4-13(b)*, which provides that a provisional appointment may not exceed 12 months.

In response, the appellant asserts that the Appellate Division concluded that he had been appointed to four positions with the appointing authority, and that he also served as the Construction Official for 12 years and therefore, the matter was remanded to the Commission to determine his status as a Construction Official.

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<sup>1</sup> It is noted that the appointing authority refers to the position of Municipal Department Head as a "noncompetitive" position and thus calls it an "at-will" position. However, the title of Municipal Department Head is an unclassified title and is not subject to the tenure provision of Title 11A. See *N.J.S.A. 11A:3-5* and *N.J.A.C. 4A:3-1.3*. On the other hand, a title in the noncompetitive division of the career service is subject to the tenure provisions of Title 11A. See *N.J.S.A. 11A:3-2* and *N.J.A.C. 4A:3-1.2*.

Agency records reveal that Elmwood Park submitted a Request for Personnel Action/New Hire to this agency, appointing the appellant to the unclassified title of Municipal Department Head, effective March 16, 1998. This form was signed by the appellant and the appointing authority on June 30, 1998 and was approved by this agency on July 8, 1998. Attached was a June 18, 1998 resolution adopted by the Mayor and Council of the Borough of Elmwood Park, which appointed the appellant to the title of Municipal Department Head, retroactive to March 16, 1998.

The Department of Community Affairs records indicate that the appellant was listed as the Construction Official for Elmwood Park from 1998 to 2003 on its annual roster, until it was discontinued in approximately 2003. It also indicated that the appellant signed the annual Uniform Construction Code report as the Construction Official to 2010.

### CONCLUSION

In remanding this matter, the Appellate Division stated that, as the *Kyer* Court did under analogous factual circumstances, it was appropriate to refer the matter to the Commission to determine the appellant's qualifications and whether, had the inquiry into his qualifications been timely made, the appellant would have achieved permanency as a Construction Official. In *Kyer*, the Court determined that the City of East Orange's ("City") actions in denying *Kyer*, a seven-year employee, the opportunity to ever achieve permanent status in her competitive career service position, contrary to the Civil Service Act, were so egregious that they warranted a unique remedy.

It is our view that a delicate balance must be struck between the public and private interests that are subject to prejudice when a governmental entity fails to comply with its statutory obligations. Estoppel is not the answer. First, the Supreme Court has precluded that solution. Second, unqualified persons may thereby be afforded an improper route to permanency. But by the same token, it is no solution to leave remediless the well-qualified, experienced, high-performing, long-term provisional employee *who is unaware that her position is not permanent, who in all likelihood would have easily achieved permanency but for the municipal negligence*, and whose summary discharge from employment is as obviously unfair and arbitrary as this jury found plaintiffs to be. *Kyer, supra*, 315 N.J. Super. at 532-533 (emphasis added).

Accordingly, the Court transferred the case to the Department of Personnel<sup>2</sup> to retroactively determine whether *Kyer* would have qualified for the competitive

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<sup>2</sup> On June 30, 2008, Public Law 2008, Chapter 29 was signed into law and took effect, changing the Merit System Board to the Civil Service Commission, abolishing the Department of Personnel and

career service position she provisionally held for seven years and, if so, "to fashion an appropriate remedy." *Id.* at 534. Ultimately, after the remand, the Merit System Board determined that, notwithstanding Kyer's years of service or the misdeeds of the appointing authority, she was not entitled to a permanent appointment since she did not meet the open-competitive requirements for the position at the time the provisional appointment was initially made. See *In the Matter of Ruby Robinson Kyer* (MSB, decided May 4, 1999).

Initially, after a review of his qualifications, it appears that the appellant was qualified for the title of Construction Official prior to March 1998. However, the Commission finds this case to be factually distinguishable from *Kyer*. Kyer was appointed to a provisional career service position, performed the duties of that title for many years, and was led to believe that she had attained permanent status. In that case, her appointing authority never reported her appointment to this agency, which would have afforded her the opportunity to attain permanency through the Civil Service selection and appointment process. Accordingly, it was the complete breakdown of the proper selection and appointment process by the City that led to the Appellate Division to fashion its extraordinary remedy in that case. Such is not the case in the current matter. No evidence has been presented that the appointing authority acted in such a reckless, negligent and possibly malicious manner as the City of East Orange did with respect to Kyer. Unlike in *Kyer*, the appellant in the instant matter was clearly and admittedly aware that he was appointed to the unclassified title of Municipal Department Head, effective March 16, 1998. Moreover, unlike in *Kyer*, there is a question as to what actual duties the appellant performed and for what duration. In this regard, the record reveals that Elmwood Park submitted a Request for Personnel Action/New Hire to this agency, appointing the appellant to the unclassified title of Municipal Department Head, effective March 16, 1998. Moreover, the appellant acknowledges that he was appointed to the unclassified title of Municipal Department Head and that he performed, *inter alia*, the duties of a Municipal Department Head. Therefore, it is irrelevant that the appointing authority had previously attempted to appoint him to a provisional title not recognized by this agency, since his appointment to the title of Municipal Department Head superseded the prior appointment.

Additionally, the Commission does not agree with the appellant's claim that he is now entitled to a permanent appointment to the title of Construction Official since he performed some duties of a Construction Official during his employment with the appointing authority. In determining the proper classification of a particular position, it must first be determined what the primary focus of that position is. In this matter, although there is no dispute that the appellant performed *some* Construction Official duties, he also admittedly performed duties appropriate to his title of Municipal Department Head as well as, presumably, the

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transferring its functions, powers and duties primarily to the Civil Service Commission. In this decision, the former names will be used to refer to actions which took place prior to June 30, 2008.

other titles he claims to have held. Given that the facts of this matter are not analogous to *Kyer*, the mere fact that the appellant performed some duties as a Construction Official over several years does not establish his entitlement to a permanent appointment to that, or any other, title. In this regard, the foundation of position classification, as practiced in New Jersey, is the determination of duties and responsibilities being performed at a given point in time as verified by this agency through an audit or other formal study. Thus, classification reviews are based on a current review of assigned duties and any remedy derived therefrom is prospective in nature since duties which may have been performed in the past cannot be reviewed or verified. Given the evolving nature of duties and assignments, it is simply not possible to accurately review the duties an employee may have performed six months ago or a year ago or several years ago. This agency's established classification review procedures in this regard have been affirmed following formal Civil Service Commission review and judicial challenges. See *In the Matter of Community Service Aide/Senior Clerk (M6631A)*, *Program Monitor (M62780)*, and *Code Enforcement Officer (M00410)*, Docket No. A-3062-2T2 (App. Div. June 15, 2004) (Accepting policy that classification reviews are limited to auditing current duties associated with a particular position because it cannot accurately verify duties performed by employees in the past). See also, *In the Matter of Engineering Technician and Construction and Maintenance Technician Title Series, Department of Transportation*, Docket No. A-277-90T1 (App. Div. January 22, 1992). See also, *In the Matter of Theresa Cortina* (Commissioner of Personnel, decided May 19, 1993). Moreover, the record clearly establishes that the appellant was well aware that he had been appointed to the unclassified title of Municipal Department Head. Therefore, if he was performing out-of-title duties as a Municipal Department Head, he could have requested a classification audit of his position. See *N.J.A.C. 4A:3-3.9*. However, since the appellant did not do so, it is impossible at this point in time to verify that the primary focus of his position were not duties appropriate to the title of Municipal Department Head, but instead that the primary focus of his position was more appropriately classified by some other title, such as Construction Official, Zoning Official, Subcode Official or Building Inspector. Indeed, it is incumbent on an employee who believes that his or her position is misclassified to seek an audit since this agency will only review a position based on such a request. Although the appellant apparently functioned as a Construction Official for many years, he only sought to challenge his status as such upon his separation, even though he knew of his status as an unclassified Municipal Department Head since 1998. Consequently, and since he has not established his entitlement to a permanent appointment under *Kyer*, he should not now benefit from his failure to timely assert his rights to such a position.<sup>3</sup>

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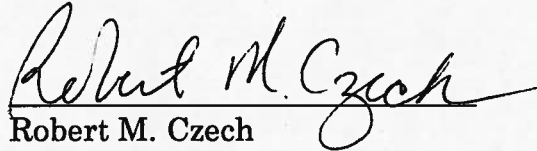
<sup>3</sup> Further, it would appear disingenuous for the appellant to assert that he did not know that he would have to go through a Civil Service selection and appointment process to achieve permanent status as a Construction Official in Elmwood Park. In this regard, agency records show, for example,

**ORDER**

Therefore, the Civil Service Commission finds that the appellant is not entitled to a permanent appointment as a Construction Official.

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

**DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 1<sup>ST</sup> DAY OF APRIL, 2015**



Robert M. Czech  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

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

**Attachment**

c: John Buonanno  
John J. Segreto, Esq.  
Keith Kazmark  
Brian T. Giblin, Esq.  
Pamela Ullman, DAG  
Clerk, Appellate Division  
Kenneth Connolly  
Joseph Gambino

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that the appellant applied for an examination announcement for Construction Official/Zoning Officer (M60336), Fair Lawn in December 2005.

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0742-12T3

JOHN J. BUONANNO,

Plaintiff-Appellant,

v.

BOROUGH OF ELMWOOD PARK,  
TOWNSHIP OF ROCHELLE PARK  
and RICHARD BOLAN,

Defendants-Respondents.

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Argued May 6, 2014 – Decided August 12, 2014

Before Judges Fisher and O'Connor.

On appeal from Superior Court of New  
Jersey, Law Division, Bergen County,  
Docket No. L-8091-10.

John J. Segreto argued the cause for  
appellant (Segreto, Segreto & Segreto,  
attorneys; Mr. Segreto, on the brief).

Brian T. Giblin argued the cause for  
respondent Borough of Elmwood Park (Mr.  
Giblin, on the brief).

Joseph J. Rotolo, attorney for respondent  
Township of Rochelle Park, joins in the  
brief of respondent Borough of Elmwood Park.

PER CURIAM



In this action in lieu of prerogative writs, plaintiff appeals the trial court's denial of his request to invalidate a Shared Services Agreement (SSA) between defendant Borough of Elmwood Park and defendant Township of Rochelle Park, pursuant to the Uniform Shared Services and Consolidation Act, N.J.S.A. 40A:65-1 to 65-35, and void Elmwood Park's decision to terminate him.<sup>1</sup> We reverse and remand, and transfer the matter, in part, to the Civil Service Commission (Commission).

I

In 1998, plaintiff was appointed the Building Inspector/Construction Code Official/Zoning Officer for Elmwood Park. Later that same year he was also appointed Municipal Department Head of its Building Department. Plaintiff worked in these positions until he was laid off in 2010. Although never appointed as the Construction Official, plaintiff also served in this capacity from 1998 to 2010. While employed by Elmwood Park, plaintiff was a member of the Elmwood Park Volunteer Fire Department and held an Exempt Fireman's Certificate. At the time plaintiff was terminated, he was earning \$78,806 per year.

In 2008, defendant Richard Bolan, the Construction Official/Building Inspector/Zoning Official for Rochelle Park,

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<sup>1</sup> Defendant Rochelle Park did not file a brief and presumably is not taking a position on the alleged invalidity of the SSA.

commenced serving as Elmwood Park's conflicts Building Inspector/Code Enforcement Officer/Zoning Officer while maintaining his position with Rochelle Park. At his deposition<sup>2</sup>, Bolan testified that after he commenced this latter position, he inspected properties in Elmwood Park owned by Richard Trawinski, one of Elmwood Park's councilmen, in 2008 and possibly in 2009. Trawinski, a self-described builder, engineer and developer, testified that Bolan issued building permits to him in 2008, 2009 and 2010 for property he owned in Elmwood Park. In April and June 2010, Bolan also issued building permits to Trawinski for property he owned in Rochelle Park.

In April 2010, Bolan learned that his position with Rochelle Park was going to become part time; specifically, his hours were to be reduced to twenty per week. Bolan had been earning \$88,988 per year in his full-time position, \$10,182 more per year than plaintiff. In May 2010, Trawinski began urging other council members that Elmwood Park enter into a SSA with Rochelle Park, in which they would agree that one person perform all of the Building Department services for both municipalities. The proposed arrangement was that such person spend twenty hours a week in each municipality.

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<sup>2</sup> No witnesses testified at the trial other than the clerk of Elmwood Park. The evidence consisted of various documents and deposition transcripts plaintiff introduced into evidence.

Aware Elmwood Park and Rochelle Park were considering entering into a SSA, plaintiff told the Elmwood Park council on June 17, 2010 that he was willing to reduce his hours to twenty per week. Councilman Frank Caramagna, who opposed entering into the SSA because Elmwood Park would save more money by reducing plaintiff's hours than by entering into the SSA, testified that Trawinski "tried so hard" to get plaintiff laid-off and the SSA executed by both municipalities.

On June 17, 2010, the Elmwood Park council voted in executive session to lay-off plaintiff; Trawinski was one of the council members who voted in favor of plaintiff's termination. On June 28, 2010, plaintiff received an "Individual Notice of Layoff" which stated that he was laid off "for reasons of economy and efficiency and the entrance into a shared services agreement with another local agency."

On July 22, 2010, Rochelle Park and Elmwood Park entered into a SSA, which stated they agreed to share the same Construction Official, Building Subcode Official and Zoning Official. The person appointed was to work twenty hours per week for each municipality, and each municipality was required to contribute \$55,666.83 per year to that person's annual salary and benefits. Before signing the SSA, the governing body of each municipality passed a resolution stating Bolan was to be

the person to serve as the shared Construction Official, Building Subcode Official and Zoning Official under the SSA. Trawinski voted in favor of Elmwood Park's resolution.

Although plaintiff's lay-off notice stated that one of the reasons he was terminated was due to the economy, the Elmwood Park Council adopted an ordinance in December 2010 that gave retroactive raises to all of its employees for 2010. In 2011, the Council adopted another ordinance giving an additional raise to its employees.

Elmwood Park is a civil service community, making its hiring decisions subject to the review and approval of the Commission. N.J.A.C. 4A:4-1.10(a). The combined job title Building Inspector/Construction Code Official/Zoning Officer, one of the titles plaintiff held from 1998 to 2010, is not recognized by the Commission. The position Municipal Department Head is a recognized job title but is an unclassified position. An unclassified position is one in which one cannot attain tenure. N.J.A.C. 4A:1-1.3. At the time plaintiff was terminated, he did not have and could not have attained tenure under the Civil Service Act (Act), N.J.S.A. 11A:1-1 to 12-6, in either one of these two positions, as one was not even recognized by the Commission and the other was an unclassified position.

The position of Construction Official is recognized by the Commission; it is also deemed a "competitive" position under the Act. Generally, an employee may attain tenure in a competitive job by taking the examination administered by the Commission for the position, scoring sufficiently high enough in comparison to competitors, and satisfactorily completing a working test period. N.J.S.A. 11A:4-13(a). Before one can take an examination, however, one must be provisionally appointed by the subject political subdivision. N.J.S.A. 11A:4-13(b). Although plaintiff performed – and Elmwood Park benefitted from his providing – the services of a Construction Official, Elmwood Park never appointed plaintiff provisionally or advised the Commission he was acting in this capacity. Plaintiff never had the chance to take the examination, and thus was not tenured in this position, either, when he was terminated.

On appeal, plaintiff argues that when Elmwood Park entered into the SSA, Councilman Trawinski had a conflict of interest given his relationship with Bolan, necessitating that the SSA be set aside and his positions with Elmwood Park reinstated. Plaintiff also argues that various laws protected him from being terminated, also mandating that his positions be restored.

II

A

Under the common law public officials are to "perform their duties free from any personal or pecuniary interests that may affect their judgment." Barrett v. Union Twp. Comm., 230 N.J. Super. 195, 200 (App. Div. 1989). Further, "it is not simply the existence of a conflict that may be cause to overturn an action of a public official, but also the appearance of a conflict." Randolph v. City of Brigantine Planning Bd., 405 N.J. Super. 215, 226 (App. Div. 2009). Municipal officials must "'avoid conflicting interests that convey the perception that a personal rather than the public interest might affect decision-making on matters of concern. Officials must be free of even the potential for entangling interests that will erode public trust in government actions.'" Id. at 226-27 (quoting Thompson v. City of Atlantic City, 190 N.J. 359, 374 (2007)). Disqualification is required when the officials' "direct or indirect private interests may be at variance with the impartial performance of their public duty." Randolph, supra, 405 N.J. Super. at 225 (citing Aldom v. Borough of Roseland, 42 N.J. Super. 495, 501 (App. Div. 1956)).

In addition to the common law, the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 to -22.25, is to be considered when

determining whether a conflict exists. Shapiro v. Mertz, 368 N.J. Super. 46, 52 (App. Div. 2004). The Ethics Law expanded what constitutes a conflict of interest. Ibid. Not only may personal or financial "interests" but also personal or financial "involvement" may create a conflict of interest. Id. at 53.

N.J.S.A. 40A:9-22.5(d) states:

No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

[Emphasis added.]

In 2008, 2009 and 2010, Bolan was issuing permits to Trawinski for property he owned in Elmwood Park. In April 2010, Bolan learned his full-time position with Rochelle Park was going to become part-time. In April and June 2010, Bolan issued permits to Trawinski for property he owned in Rochelle Park. In May, June and July 2010, Trawinski advocated and then voted in favor of a resolution that authorized Elmwood Park to enter into a SSA with Rochelle Park which made Bolan the shared Construction Official, Building Subcode Official and Zoning Official for both municipalities.

Trawinski's vote to layoff plaintiff and to vote in favor of a resolution that put Bolan back into a full-time position

may well have been innocent and well-meaning. But there was an appearance of a conflict and that was all that mattered.

Trawinski was a developer in both municipalities and Bolan was issuing permits to him for his properties. Given Trawinski's and Bolan's business interactions, there existed a perception that, in exchange for getting permits from Bolan, Trawinski encouraged the Elmwood Park council to lay-off plaintiff and pass a resolution that made Bolan the shared Construction Official, Building Subcode Official and Zoning Official under the SSA, thereby restoring Bolan to a full-time job.

Adding to the perception that Trawinski may have deviated from his obligation to perform his official duties free from any pecuniary or personal involvement that may have affected his judgment is the fact that Elmwood Park did not have anything to gain by entering into the SSA under the circumstances.

Plaintiff, who earned approximately \$10,000 less per year than Bolan, was willing to work only twenty hours a week. The cost to the municipality to pay plaintiff to work twenty hours a week would have been less than paying Bolan to work the same number of hours under the SSA. The goal of entering into a SSA is to provide property tax relief, see N.J.S.A. 40A:65-2(d); here, Elmwood Park would have saved more money had it not entered into



the SSA but had instead opted to retain plaintiff and reduce his hours to twenty per week.

The fact the other council members may not have had a conflict does not salvage the actions taken by the council, as Trawinski may have affected how the other members voted. Marlboro Manor, Inc. v. Board of Comm'rs, 187 N.J. Super. 359, 363 (App. Div. 1982). The remedy is that the official action taken — the vote to lay-off plaintiff, the resolution authorizing Elmwood Park to enter into the SSA, and the SSA — must be invalidated. Id. at 362-63. Plaintiff's positions with Elmwood Park as Building Inspector/Construction Code Official/Zoning Officer and Department Head of the Building Department are reinstated. We remand the matter to the trial court for further proceedings to consider plaintiff's claims for an award of back pay, emoluments and attorneys' fees.

B

As the Elmwood Park council may seek to terminate plaintiff after his reinstatement to these two positions, it is necessary to address other issues he raised. Plaintiff argues he cannot be terminated because he possessed an exempt fireman certificate. N.J.S.A. 40A:14-60 provides in relevant part:

Whenever any person possessing an exempt fireman certificate holds an office, position or employment of the State, or a county or municipality or a school board or

board of education for an indeterminate term, such person shall hold his office, position or employment during good behavior and shall not be removed therefrom for political reasons but only for good cause after a fair and impartial hearing.

First, the provisions of N.J.S.A. 40A:14-60 to N.J.S.A. 40A:14-65 provide tenure to unclassified civil servants who meet the qualifications set forth in these statutes. See Smith v. Board of Chosen Freeholders, 139 N.J. Super. 229 (Law Div. 1976), aff'd, 146 N.J. Super. 45 (App. Div.), certif. denied, 74 N.J. 266 (1977). These two positions are ones in which plaintiff cannot obtain tenure under the Civil Service Act, and plaintiff meets the applicable qualifications set forth in N.J.S.A. 40A:14-60 to N.J.S.A. 40A:14-65. Therefore, plaintiff has tenure under these statutes. But tenure is not absolute; plaintiff can be terminated for good cause after a fair and impartial hearing.

We do note that, contrary to what plaintiff claims, N.J.S.A. 40A:14-65 does not require that there be widespread economic depression or mandatory retrenchment before a municipality can abolish, change the title or reduce the emoluments of any office held by an exempt fireman. See Viviani v. Borough of Boqota, 170 N.J. 452, 454 (2002). A municipality

may abolish a position or office held by an exempt fireman for any good faith economic reason. Ibid.

C

As for the services plaintiff rendered as Construction Official, although all personnel actions in the career service<sup>3</sup> are to be forwarded to the Commission for its review and approval, see N.J.A.C. 4A:4-1.10(a), Elmwood Park failed to advise the Commission that plaintiff acted as its Construction Official. Had it done so, the Commission would have likely been compelled to announce and administer an examination for this position because it was a competitive one. See Melani v. County of Passaic, 345 N.J. Super. 579, 586 (App. Div. 2001).

Plaintiff was therefore deprived of the chance to take the examination and, assuming he scored favorably compared to the other competitors, become a tenured Construction Official. There are even more serious implications. "[P]ermitting a municipality to withhold permanent status from an apparently qualified . . . employee by failing to transmit the proper notices to Civil Service, and thereby preventing it from doing its job, also subjects government employment to opportunities for subterfuge and circumvention." Kyer v. City of East Orange,

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<sup>3</sup> "Career service" means those positions and job titles subject to the tenure provisions of the Civil Service Act. N.J.A.C. 4A:1-1.3.

315 N.J. Super. 524, 532 (App. Div. 1998). After all, one of the underlying purposes of the Act is that the selection and advancement of employees be based on merit, see N.J.S.A. 11A:1-2a and -2c, and not political favoritism.

The remedy here is to do that which the Kyer court ordered under analogous factual circumstances and refer the disposition of this aspect of plaintiff's claim to the Commission. Although the plaintiff in Kyer had been provisionally appointed by the municipality to the position in question and here Elmwood Park did not appoint plaintiff, even provisionally, to the position of Construction Official, this distinction is inconsequential. As found and handled by the Kyer court,

[t]he Department of Personnel<sup>4</sup> . . . [with its] broad powers to effectuate the legislative purpose enable it to protect the Civil Service System by protecting employees such as plaintiff from falling through the cracks [and] . . . should now do what it would have done had it received the required timely notice from East Orange of plaintiff's provisional appointment, namely, determine her qualifications. . . .

We therefore hold that where, as here, a long-term provisional employee has performed satisfactorily and has failed to achieve permanent status because of the appointing authority's neglect, the Department of Personnel has the authority to retroactively, as it were, determine the employee's qualifications by such methods as

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<sup>4</sup> Effective June 30, 2008, the Commission assumed the duties of the Department of Personnel. N.J.S.A. 11A:11-2b.

it shall in its discretion deem appropriate and to further determine whether, had the inquiry into qualifications been timely made, the employee would have achieved permanency in the normal course of municipal management of its affairs. In making these determinations, the Department shall afford the parties such procedural due process as it shall deem required under the circumstances and shall fashion such remedy as it deems appropriate.

[Supra, 315 N.J. Super. at 533-34.]

As in Kyer, the Commission shall determine plaintiff's qualifications by the methods it deems appropriate and whether, had the inquiry into his qualifications been timely made, plaintiff would have achieved permanency. The Commission shall fashion the remedy it deems appropriate.

After careful consideration of the record, we are satisfied that the remaining arguments lack sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(1)(E).

The determination of plaintiff's status as Construction Official under the Civil Service Act is transferred to the Commission and the judgment of the trial court is reversed and remanded for proceedings consistent with this opinion.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION

