STATE OF NEW JERSEY

In the Matter of I.C., City of East Orange	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
	:	Administrative Appeal
CSC Docket No. 2018-3263	:	

ISSUED: OCTOBER 5, 2018 (HS)

I.C. petitions the Civil Service Commission (Commission) for relief, pursuant to *N.J.S.A.* 11A:2-24 and *N.J.A.C.* 4A:2-5.1, from alleged reprisal from the City of East Orange (East Orange).

By way of background, East Orange issued the appellant a Preliminary Notice of Disciplinary Action on January 30, 2018. At that time, the appellant was assigned to the Office of the City Clerk and serving provisionally in the title of Records Support Technician 2. On February 9, 2018, the parties entered into a settlement agreement to resolve the disciplinary matter. As pertinent here, East Orange agreed to "ensure that the transfer of [the appellant] shall be effectuated upon her return to work on April 2, 2018." The agreement also provided:

> 11. This Agreement constitutes the complete understanding between [East Orange] and [the appellant] and supersedes all prior or contemporaneous representations, written or oral. This Agreement may only be modified by a writing signed by all of the signatories to this Agreement.
>
> 12. [The appellant] acknowledges that she has been represented during the proceedings leading to the execution of this Settlement Agreement by her union representative, [J.G.] - CWA representative. [The appellant] acknowledges that she is fully satisfied with the representation that she has received.

* * *

22. Except as otherwise specifically provided for, [the appellant] and [East Orange] acknowledge and agree that this Agreement constitutes the full, complete and entire agreement between the parties; fully supersedes any and all prior agreements or understandings between the parties and that there are no other presentations, covenants, warranties or other agreements binding the parties that are not expressly set forth herein.

23. [The appellant] and [East Orange] also acknowledge that they have not relied on any representation, promises, or agreements of any kind made in connection with the decision to sign this Agreement, except for those set forth in this Agreement.

* * *

25. [The appellant] EXPRESSLY ACKNOWLEDGES, REPRESENTS, AND WARRANTS THAT SHE HAS CAREFULLY READ THIS AGREEMENT; THAT SHE FULLY UNDERSTANDS THE TERMS, CONDITIONS, AND SIGNIFICANCE OF THIS AGREEMENT; THAT SHE HAS HAD AMPLE TIME TO CONSIDER AND NEGOTIATE THIS AGREEMENT; THAT SHE HAS HAD A FULL OPPORTUNITY TO REVIEW THIS AGREEMENT; AND THAT SHE HAS EXECUTED THIS AGREEEMENT VOLUNTARILY AND KNOWINGLY.

The appellant, her union representative, the City Administrator, the Director of Human Resource Services and an Assistant Corporation Counsel signed the agreement. Subsequently, the appellant was transferred to the East Orange Public Library (Library).

On appeal to the Commission, the appellant claims that she had negotiated for a transfer to one of several specific organizational units excluding the Library. She also states that her new duties, hours and schedule at the Library conflict with her family obligations and are not comparable to her prior duties, hours and schedule. She asserts that her transfer to the Library was retaliation for her whistleblowing, via communication with employees of this agency, on alleged "employment favors" East Orange granted certain individuals, namely appointments to secure permanency for those individuals without a regard for the proper classification of the positions. According to the appellant, these favors were evidenced by personnel forms showing that the individuals had received permanent appointments to a competitive title for which they did not test. In addition, the appellant argues that she was not given sufficient notice of the organizational unit

to which she was being transferred in that she only received such notice on March 29, 2018. As such, the appellant maintains that East Orange did not transfer her to the Library in good faith.

The appellant further complains that she was denied a promotional appointment, when she was performing the duties of the title, from the eligible list for Records Support Technician 2 (PM0451V), which promulgated on October 5, 2017 and expires on October 4, 2020. She also requests that the Commission interview various individuals.[1] In support, the appellant submits various e-mails and other documents.

In response, East Orange maintains that the terms of the settlement agreement dispense with the appellant's complaint respecting her transfer. Specifically, East Orange argues that as it sought to maintain flexibility, the agreement granted it broad discretion to transfer the appellant. It contends that the appellant cannot now take issue with the fact that she was transferred in a manner consistent with the agreement that she willingly and voluntarily executed and after she had specifically made requests to be transferred to another organizational unit. East Orange also maintains that the issue of the appellant's promotion to the title of Records Support Technician 2 has been resolved. Specifically, it states that although the promotion was delayed, the appellant received a retroactive permanent appointment to the title of Records Support Technician 2, effective June 24, 2014.[2] In support, East Orange submits a copy of the settlement agreement.

CONCLUSION

Initially, with respect to the appellant's request that various individuals be interviewed, it is not the Commission's role to conduct interviews of named witnesses. Moreover, administrative appeals are treated as reviews of the written record. *See N.J.S.A.* 11A:2-6b. Hearings are granted in those limited instances where the Commission determines that a material and controlling dispute of fact exists that can only be resolved through a hearing. *See N.J.A.C.* 4A:2-1.1(d). For the reasons explained below, no material issue of disputed fact has been presented that would require a hearing. *See Belleville v. Department of Civil Service,* 155 *N.J. Super.* 517 (App. Div. 1978).

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[1] It is noted that in her appeal, the appellant claims that she has not yet received a response to a grievance she filed with East Orange Human Resources through her union representative. However, the Commission lacks jurisdiction over this issue. *See N.J.A.C.* 4A:2-3.1(d).

[2] In *In the Matter of Records Support Technician 2 (M0157S), East Orange* (CSC, decided April 18, 2018), the Commission denied East Orange's request for a waiver of the appointment requirement and ordered it to properly dispose of the June 24, 2014 certification and make the appropriate appointment from the eligible list with retroactive seniority to June 24, 2014 for record and salary step purposes. As a result of the Commission's order, the appellant received a retroactive permanent appointment to the title of Records Support Technician 2, effective June 24, 2014.

N.J.A.C. 4A:2-5.1 generally provides that an appointing authority shall not take or threaten to take any reprisal action against employees in retaliation for an employee's lawful disclosure of information on the violation of any law or rule, governmental mismanagement or abuse of authority or on the employee's permissible political activities or affiliations. *See also, N.J.S.A.* 11A:2-24. In *Katherine Bergmann v. Warren County Prosecutor*, Docket No. A-5665-01T5 (App. Div. December 1, 2004), it was determined that an employee asserting a cause of action under *N.J.S.A.* 11A:2-24 is required to prove the following elements:

1) The employee "reasonably believed" in the integrity of the disclosure at the time it was made, meaning the employee had no reasonable basis to question the substantive truth or accuracy of the content of the disclosure just prior to communication (it is here that the term "reasonable belief" is borrowed from the Conscientious Employee Protection Act (CEPA), *N.J.S.A.* 34:19-1, *et seq*., to define what is the substantive content of a "lawful disclosure");

2) The employee disclosed the information to a source "reasonably" deemed an appropriate recipient of such information just prior to communication (here, the term "reasonably" is used to describe the perceived proper channels through which a "lawful disclosure" should be communicated);

3) There is a connection, or nexus, between the disclosure and the complained of action (this is a standard cause-and-effect showing by the employee). *Carlino v. Gloucester City High School*, 57 *F. Supp. 2d* 1, 35 (D.N.J. 1999); *Kolb v. Burns*, 320 *N.J. Super*. 467, 476 (App. Div. 1999).

Only after the employee satisfies the criteria above does the appointing authority bear the burden of showing that the action taken was not retaliatory. *See Wright Line*, 251 *NLRB* 1083 (1980); *Mount Healthy City School District Bd. of Educ. v. Doyle*, 429 *U.S.* 274 (1977).

Using the test as enumerated above, the appellant has failed to present a *prima facie* case of reprisal. Assuming the appellant has met the first and second prongs of the test, she has failed to satisfy the third prong. In this regard, the appellant has not presented any documentation that her transfer to the Library, along with her new duties, hours and schedule there, was due to any prior whistleblowing activity. Rather, the record reflects that the appellant had made requests to be transferred from the Office of the City Clerk. As part of a settlement of a disciplinary matter, East Orange agreed to effect that transfer. It is also not apparent from the record how the appellant's new duties, hours and schedule at the

Library represent retaliation by East Orange when it was the Library, a distinct appointing authority, that set the duties, hours and schedule. Further, there is no evidence of a conspiracy between East Orange and the Library. Accordingly, the appellant has failed to present a *prima facie* case of reprisal. The appellant's dissatisfaction with her duties, hours and schedule alone is not sufficient evidence of reprisal. Moreover, it should be noted that as the Library is a local appointing authority, it has discretion to establish the hours of work, subject to applicable negotiations requirements, and shifts. *See N.J.A.C.* 4A:6-2.1(a) and *N.J.A.C.* 4A:4-7.2.

Neither has the appellant presented a basis for the Commission to ignore the settlement agreement as written, which the appellant signed. In this regard, the policy of the judicial system strongly favors settlement. *See Nolan v. Lee Ho*, 120 *N.J.* 465 (1990); *Honeywell v. Bubb*, 130 *N.J. Super.* 130 (App. Div. 1974); *Jannarone v. W.T. Co.*, 65 *N.J. Super.* 472 (App. Div. 1961), *cert. denied,* 35 *N.J.* 61 (1961). This policy is equally applicable in the administrative area. A settlement will be set aside only where there is fraud or other compelling circumstances. *See Nolan, supra.* Such circumstances are not present in this matter. Specifically, by the terms of the settlement agreement, East Orange only agreed to "ensure that the transfer of [the appellant] shall be effectuated." No specific organizational unit for transfer was specified. Although the appellant now claims to have had earlier negotiations over this issue, the settlement agreement specifies that it "constitutes the complete understanding between [East Orange] and [the appellant] and supersedes all prior or contemporaneous representations, written or oral." The appellant also acknowledged that she was "fully satisfied with the representation that she has received" from her union representative and that she was executing the agreement "VOLUNTARILY AND KNOWINGLY." A settlement agreement should be enforced where a party has competent representation of his or her choosing and entered into the agreement knowingly and voluntarily. *See e.g., In the Matter of Barbara Knier* (MSB, decided January 12, 1999) and *In the Matter of William Munoz* (MSB, decided June 16, 1998). As such, the Commission declines to read into the settlement agreement a term specifying one or more preferred organizational units for the appellant's transfer.

The Commission also finds unpersuasive the appellant's argument that she did not receive proper notice of her transfer. In this regard, *N.J.A.C.* 4A:4-7.1(f) provides that any affected employee must be given at least 30 days' written notice of an *involuntary* transfer. However, in entering into the settlement agreement on February 9, 2018, the appellant *voluntarily agreed* to a transfer to an unspecified organizational unit. Therefore, the Commission rejects the appellant's claim over the sufficiency of the notice she received.

Finally, the Commission finds that the appellant's argument that she should have been appointed from the eligible list for Records Support Technician 2

(PM0451V) has been rendered moot by its decision in *In the Matter of Records Support Technician 2 (M0157S), East Orange* (CSC, decided April 18, 2018). The pertinent effect of that decision was the appellant's retroactive permanent appointment to the title of Records Support Technician 2, effective June 24, 2014. As such, the Commission need not address the appellant's nonappointment from the PM0451V list.

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 3RD DAY OF OCTOBER, 2018

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