

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Michael Chase,
Irvington Township

Court Remand

CSC Docket No. 2018-3278

ISSUED: JUNE 22, 2018 (HS)

The Superior Court of New Jersey, Appellate Division, has remanded the matter of Michael Chase’s request for interim relief to allow the parties to submit additional information for the Civil Service Commission (Commission) to consider. Copies of the Appellate Division’s May 15, 2018 order and the Commission’s decision, *In the Matter of Michael Chase* (CSC, decided February 22, 2017), are attached hereto and incorporated herein.

By way of background, on or about January 12, 2016, the Township Council adopted an ordinance consolidating the police, fire and parking divisions within a new Public Safety Department and abolished the title of Police Chief. By letter dated January 15, 2016, the petitioner, the former Police Chief, was informed that his position was abolished pursuant to the ordinance and instructed to “return all Chief of Police related equipment, which includes your service weapons, badges and any other relevant material” at 9:00 a.m. on January 19, 2016. The letter also thanked the petitioner for his “dedication and service over the many years.” In the Commission’s previous decision, it noted that the petitioner submitted a determination from the Department of Labor and Workforce Development, mailed March 21, 2016, finding that his position was eliminated as of January 19, 2016 and that he was eligible for benefits from January 31, 2016. Relying on this and other documents in the record then before the Commission, the Commission found that the petitioner was improperly separated from employment on January 19, 2016. Specifically, the Commission found that this action was contrary to established layoff procedures in that it appeared that the appointing authority separated the petitioner from employment before submission and approval of its plan to lay off the

petitioner effective May 11, 2016. However, the Commission also took into account that the petitioner had been removed on disciplinary charges effective March 11, 2016¹ and that the appointing authority had rescinded the planned layoff in April 2016. Based on these circumstances, the Commission determined that it was appropriate to grant the petitioner back pay from the time he was apparently separated from employment on January 19, 2016 to the effective date of his removal on disciplinary charges, March 11, 2016. The appointing authority appealed the Commission's decision to the Appellate Division and thereafter requested an opportunity to supplement the record. The Appellate Division instead remanded the matter to the Commission to consider the parties' additional information. The Appellate Division further ordered that the proceedings be completed by July 16, 2018.

On remand, the appointing authority, represented by Christopher J. Turano, Esq., argues that the petitioner was not actually separated from employment until March 11, 2016. In this regard, it states that the petitioner continued to receive his regular salary through that date, and as such, he had suffered no financial impact at the time he "erroneously" filed his unemployment claim on January 31, 2016. The appointing authority states that despite his application for unemployment benefits, the petitioner at the same time demanded that the appointing authority issue him paper checks, all of which it duly sent the petitioner through March 11, 2016; however, the petitioner did not accept the checks. In support of these claims, the appointing authority provides the following supplementary documents that were not provided to the Commission previously: a letter dated February 18, 2016 from the Business Administrator to the petitioner clarifying that the appointing authority had not ended the petitioner's employment relationship and confirming that he was being paid his regular salary through paper checks; a letter dated May 13, 2016 from the appointing authority to the petitioner's counsel enclosing paystubs/paychecks that were previously mailed to the petitioner but that were returned to the appointing authority as unclaimed; correspondence dated March 21, 2017 from the appointing authority's counsel to the petitioner's counsel enclosing checks made payable to the petitioner that the petitioner returned to the appointing authority uncashed; and copies of paychecks, paystubs and payroll registers reflecting payments made to the petitioner for the period of December 26, 2015 to March 31, 2016. Further, the appointing authority maintains that the petitioner's March 11, 2016 separation from employment was for disciplinary reasons only rather than pursuant to the layoff plan, which it argues had not yet become effective.

In addition, the appointing authority contends that the petitioner was collaterally estopped from arguing that January 19, 2016 was his actual termination date. Specifically, it notes that the petitioner requested, in Superior Court, interim relief in the form of a stay of the ordinance and restoration to his

¹ His appeal of the disciplinary removal remains pending.

position. In deciding that request, the court found that “it is undisputed that [the petitioner’s] termination did not become effective until March 11th, 2016.” In support of its claim that collateral estoppel applies, the appointing authority presents the transcript of the basis for the court’s decision, which also was not provided to the Commission previously.

In response, the petitioner states that he “return[ed] all Chief of Police related equipment, which include[d] [his] service weapons, badges and any other relevant material” on January 19, 2016 as instructed and was escorted out of the building. He states that on January 22, 2016, he requested that the Revenue and Finance Director issue him a partial check for pay earned prior to January 19, 2016, but the Revenue and Finance Director advised that he had been instructed to issue a full check. The petitioner states that he, in turn, responded that he could not and would not accept a full check because he was “no longer an employee” and acceptance of the full check would be “illegal.” The petitioner further states that the determination that he was eligible for unemployment benefits was based on interviews and a review of records, including the Township Council’s ordinance and the January 15, 2016 letter. The petitioner acknowledges that, subsequently, the appointing authority “eventually fully complied with” the Commission’s previous order awarding him back pay. In support, the petitioner submits various documents, including those previously provided.

CONCLUSION

Initially, it is noted that the Appellate Division remanded the matter to the Commission to allow additional submissions and to consider whether the appointing authority’s additional documents were relevant to the issues on appeal. Upon review, the Commission reiterates that Irvington Township is a Civil Service jurisdiction and is governed by the Civil Service Act and the rules promulgated thereunder. The petitioner achieved permanent status in his Civil Service title and is afforded protection against arbitrary and capricious employment actions. In this regard, it remains undisputed that the appointing authority disallowed the petitioner from performing the duties of his permanent title on January 19, 2016. As of that particular point in time, the appointing authority had yet to even submit a layoff plan to this agency and had not yet made a decision on the petitioner’s disciplinary charges. As such, no provision of Civil Service law and rules permitted the appointing authority’s action on January 19, 2016. Thus, the appointing authority is cautioned that if it seeks to disallow a permanent employee from performing the duties of his or her title, it may only do so consistent with Civil Service law and rules. *See N.J.A.C. 4A:2; N.J.A.C. 4A:8.*

In light of the appointing authority’s unequivocal indication to the petitioner that he was disallowed from performing the duties of his permanent title on January 19, 2016, the petitioner’s choice at the time not to accept paychecks

covering the relevant time period was reasonable. The appointing authority could not cure its January 19, 2016 procedural violation of its own accord by attempting to retain the petitioner on the payroll while, at the same time, disallowing him from performing the duties of his permanent title. The Commission reiterates that the appointing authority may be subject to fines if there are future egregious procedural violations. In this regard, the Commission is specifically given the power to assess compliance costs and fines against an appointing authority, including all administrative costs and charges, as well as fines of not more than \$10,000, for noncompliance or violation of Civil Service law or rules or any order of the Commission. *N.J.S.A. 11A:10-3; N.J.A.C. 4A:10-2.1(a)2*. See *In the Matter of Fiscal Analyst (M1351H), Jersey City*, Docket No. A-4347-87T3 (App. Div. 1989).

Finally, as to the appointing authority's contention that, in light of a Superior Court proceeding, collateral estoppel bars any argument that January 19, 2016 rather than March 11, 2016 was the effective date of the petitioner's termination, that doctrine may apply and preclude the re-litigation of an issue where:

1. The issue to be precluded is identical to the issue decided in the first proceeding;
2. The issue was actually litigated in the prior action, that is, there was a full and fair opportunity to litigate the issue in the prior proceeding;
3. A final judgment on the merits was issued in the prior proceeding;
4. Determination of the issue was essential to the prior judgment; and
5. The party against whom issue preclusion is asserted was a party to or in privity with a party to the prior proceeding.

See In re Estate of Dawson, 136 N.J. 1, 20 (1994); *Selective Ins. Co. v. McAllister*, 327 N.J. Super. 168, 173-74 (App. Div. 1999), *cert. denied*, 164 N.J. 188 (2000); *Pivnick v. Beck*, 326 N.J. Super. 474, 485 (App. Div. 1999), *aff'd*, 165 N.J. 670 (2000); *In the Matter of Darren Nance* (CSC, decided November 7, 2012); *In the Matter of Jane Lyons* (MSB, decided May 9, 2007); *In the Matter of Joseph Wallace* (MSB, decided November 4, 2004). However, the issue in this matter is whether the appointing authority's January 19, 2016 action was consistent with Civil Service law and rules, not whether the petitioner's March 11, 2016 effective date of removal should be changed. The Commission is in fact leaving that date undisturbed. As such, the Commission's decision finding that the appointing authority's January 19, 2016 action was inconsistent with Civil Service law and rules and awarding a limited amount of back pay as a remedy of that procedural violation is not inconsistent with the finding in the Superior Court proceeding and is not precluded.

ORDER

Therefore, the Commission finds that the additional arguments and documentation do not change its previous decision. Accordingly, it reaffirms its previous February 22, 2017 decision on this matter.

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 20TH DAY OF JUNE, 2018



Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

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and
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Attachments

- c. Michael Chase
Tony Vauss, Mayor
Christopher J. Turano, Esq.
Pamela N. Ullman, Deputy Attorney General
Clerk, Superior Court, Appellate Division
Kelly Glenn

Wilman

ORDER ON CROSS MOTION

IN THE MATTER OF MICHAEL CHASE,
IRVINGTON TOWNSHIP

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003312-16T1
MOTION NO. M-006142-17
BEFORE PART E
JUDGE(S): CARMEN MESSANO
FRANCIS J VERNIOIA

MOTION FILED: 04/26/2018 BY: NEW JERSEY CIVIL SERVICE
COMMISSION
ANSWER(S) 05/09/2018 BY: MICHAEL CHASE
FILED:

SUBMITTED TO COURT: May 14, 2018

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS, ON THIS
15th day of May, 2018, HEREBY ORDERED AS FOLLOWS:


MOTION BY RESPONDENT

CROSS MOTION FOR REMAND GRANTED

SUPPLEMENTAL:

The remand shall be completed by no later than July 16, 2018. Appellant, Irvington, may thereafter file an amended Notice of Appeal, if it deems that to be necessary based on the order following remand within 10 days thereafter. In any event, appellant's brief is due 45 days after the decision on remand if filed and served. No further extensions shall be granted.

FOR THE COURT:



CARMEN MESSANO, P.J.A.D.

B 258



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Michael Chase,
Irvington Township

Request for Interim Relief

CSC Docket No. 2016-2987

ISSUED: FEB 23 2017 (HS)

Michael Chase, a former Police Chief, requests interim relief regarding his separation from employment with Irvington Township.

By way of background, the petitioner received a regular appointment to the title of Police Chief, effective July 8, 2004.¹ In December 2012, the petitioner was served with multiple Preliminary Notices of Disciplinary Action. The departmental hearing ended in October 2015. The hearing officer rendered the disposition on the disciplinary charges in February 2016 and recommended a penalty of removal. Effective March 11, 2016, the petitioner was removed on the disciplinary charges.²

On or about January 12, 2016, the Township Council adopted an ordinance consolidating the police, fire and parking divisions within a new Public Safety Department and abolished the title of Police Chief. By letter dated January 15, 2016, the petitioner was informed that his position was abolished pursuant to the ordinance and he was instructed to "return all Chief of Police related equipment, which includes your service weapons, badges and any other relevant material" on January 19, 2016.

¹ Agency records indicate the appellant received a regular appointment to the title of Police Officer, effective January 6, 1975; Police Sergeant, effective July 28, 1981; Police Lieutenant, effective December 18, 1989; Police Captain, effective March 1, 1991; Deputy Police Chief, effective June 30, 1998; and provisionally to the title of Police Chief, effective November 26, 2003.
² His appeal of the disciplinary removal is pending.

On February 5, 2016, the appointing authority submitted a layoff plan to the Division of Agency Services (Agency Services), proposing the layoff of the petitioner, effective May 11, 2016, based on the above-noted ordinance. On February 26, 2016, Agency Services approved the layoff plan. On April 12, 2016, the appointing authority rescinded the planned layoff.

In the instant request, the petitioner maintains that he was improperly separated from employment on January 19, 2016. In support, he submits a determination from the New Jersey Department of Labor and Workforce Development, Unemployment and Disability Insurance Services finding that his position was eliminated as of January 19, 2016, among other documents.

In response, the appointing authority, represented by Susan E. Volkert, Esq., contends that the Civil Service Commission (Commission) is collaterally estopped from entering interim relief such as a return to service with a continuation of pay. In this regard, it notes that the petitioner already applied for an order in Superior Court to reverse the effect of the disciplinary proceeding determinations and the ordinance, and that application was denied. The appointing authority asserts that the Court determined that any relief sought by the petitioner would be addressed via monetary damages and the fact that any challenge to the reduction in force must be made administratively through the Commission. As such, the petitioner cannot "forum shop" for an injunction and seek from the Commission a re-litigation of the decision already made. In support, the appointing authority submits a copy of the Court's order, which states that the appointing authority's Motion to Dismiss/Motion for Summary Judgment was granted, "the Court having reviewed the papers submitted and for good and sufficient cause."

In addition, the appointing authority contends that the petitioner has not presented a case for interim relief. In this regard, it maintains that the petitioner has not demonstrated a reasonable probability of ultimate success on the merits, there is an adequate remedy at law so there can be no irreparable injury, and the public interest is in its favor and against the granting of interim relief. Specifically, it argues that the law is well-settled that a township has the authority to reduce in force and notes that the Township Council enacted an ordinance in January 2016 that created a Public Safety Department, consolidated leadership of the fire and police departments and abolished the Police Chief position. On February 26, 2016, this agency approved its layoff plan based on the ordinance with an effective date of May 11, 2016. The appointing authority maintains that this matter is resolvable by money damages, of which back pay is a form. Further, the appointing authority argues that the petitioner's disciplinary removal is another compelling reason to deny interim relief. In this regard, it maintains that any review of the township's reduction in force is moot in light of the disciplinary removal. It also notes that the disciplinary charges are severe but that the petitioner is entitled to his "full panoply" of due process rights in his appeal of his disciplinary removal.

CONCLUSION

In this matter, the petitioner maintains that he was separated from employment on January 19, 2016. Documentation in the record supports the petitioner's position. Specifically, the January 15, 2016 letter advised the petitioner that his position was abolished pursuant to the Township Council's ordinance and instructed him to "return all Chief of Police related equipment, which includes your service weapons, badges and any other relevant material" on January 19, 2016. In addition, the petitioner presents a determination from the New Jersey Department of Labor and Workforce Development, Unemployment and Disability Insurance Services that found that his position was eliminated as of January 19, 2016. The appointing authority acknowledges that the Township Council adopted an ordinance in January 2016 that, among other things, abolished the Police Chief position but notes that this agency, on February 26, 2016, approved a layoff plan based on the ordinance with a May 11, 2016 effective date. Irvington Township is a Civil Service jurisdiction and is governed by the Civil Service Act and the rules promulgated thereunder. The petitioner achieved permanent status in his Civil Service title and is afforded protection against arbitrary and capricious employment actions. A review of this matter reveals that the appointing authority's actions were contrary to statutory and regulatory provisions regarding layoffs.

In that regard, permanent employees may be laid off for economy, efficiency or other related reasons. See *N.J.S.A. 11A:8-1a* and *N.J.A.C. 4A:8-1.1(a)*. Additionally, *N.J.A.C. 4A:8-1.1(c)* provides that this agency shall determine seniority and shall designate lateral, demotional and special reemployment rights for all career service titles prior to the effective date of the layoff and have such information provided to all affected parties. Furthermore, pursuant to *N.J.A.C. 4A:8-1.4(a)*, an appointing authority must provide this agency with a layoff plan at least 30 days prior to the issuance of layoff notices. The layoff plan must include, among other things, the reason for the layoff, the projected effective date of the layoff, details regarding positions, titles and employees to be affected, alternatives to layoff and pre-layoff actions taken, and a summary of consultations with affected negotiations representatives. Through this plan, this agency ensures that the appointing authority provides all of the required information and has done everything it is legally obligated to do. If the information is lacking, this agency may take such remedial action as requiring the submission of supplemental information or the implementation of alternatives to layoff or pre-layoff actions. See *N.J.A.C. 4A:8-1.4(d)*.

Moreover, *N.J.A.C. 4A:8-1.6(a)* provides that:

No permanent employee or employee serving in a working test period shall be separated or demoted as a result of a layoff action without having been served by the appointing authority, at least 45 days prior

to the action, with a written notice personally, unless the employee is on a leave of absence or otherwise unavailable, in which case by certified mail. If service is by certified mail, the 45 days shall be counted from the first date of notice by the United States Postal Service to addressee. A notice shall also be conspicuously posted in all affected facilities of the layoff unit. A copy of the notice serviced on employees shall be provided to [this agency] and affected negotiations representatives. *See also, N.J.S.A. 11A:8-1(a).*

For every day the layoff notice is late, the affected employee receives a day of mitigated back pay. This is because the purpose of the 45-day notice is to allow sufficient time for the agency to determine appropriate layoff entitlements and to so notify both the employer and affected employees, to afford affected employees the opportunity to seek new employment and to provide them with what, in effect, is 45 days' severance pay. *See Amodio v. Civil Service Commission*, 81 N.J. Super. 22 (App. Div. 1963); *In the Matter of Joseph Bonner, City of Bayonne* (Commissioner of Personnel, decided December 15, 1989).

In this matter, the appointing authority did not follow the established layoff procedures. It improperly separated the petitioner from employment on January 19, 2016 before submitting its layoff plan to this agency and receiving approval of that plan. Nevertheless, the record also reflects that the petitioner was removed on disciplinary charges effective March 11, 2016 and that the appointing authority ultimately rescinded the planned layoff in April 2016. In light of the foregoing, it is appropriate that the petitioner be granted relief in the form of back pay from the time he was separated on January 19, 2016 to the effective date of his removal on disciplinary charges, March 11, 2016.³ The appointing authority is advised that it may be subject to fines if there are future egregious procedural violations. In this regard, the Commission is specifically given the power to assess compliance costs and fines against an appointing authority, including all administrative costs and charges, as well as fines of not more than \$10,000, for noncompliance or violation of Civil Service law or rules or any order of the Commission. *N.J.S.A. 11A:10-3; N.J.A.C. 4A:10-2.1(a)2. See In the Matter of Fiscal Analyst (M1351H), Newark*, Docket No. A-4347-87T3 (App. Div. 1989).

³ If the petitioner is reinstated as a result of his disciplinary appeal and the appointing authority wishes to lay off the petitioner at that time, the appointing authority must follow Civil Service law and rules concerning layoffs.

ORDER

Therefore, it is ordered that the appointing authority compensate the petitioner with back pay from the time he was separated on January 19, 2016 to the effective date of his removal on disciplinary charges, March 11, 2016.

In the event that the appointing authority has not made a good faith attempt to comply with this decision within 30 days of its issuance, the Commission orders that a fine be assessed against the appointing authority in the amount of \$100.00 per day, beginning on the 31st day of the issuance of this decision, continuing for each day of violation up to the maximum amount of \$10,000.00.

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 22ND DAY OF FEBRUARY, 2017**



Robert M. Czech
Chairperson
Civil Service Commission

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and
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