

an amendment to the Act was approved. *See P.L. 2021, c. 124.* It provided, among other things:

The authorities granted to the [D]irector by the Local Finance Board pursuant to this section shall extend to any and all actions that, in the exclusive discretion of the [D]irector, may help stabilize the finances, restructure the debts, or assist in the financial rehabilitation and recovery of the municipality in need of stabilization and recovery. Notwithstanding the provisions of any other law, rule, regulation, or contract to the contrary, except for the provisions of Title 11A, Civil Service as may be applicable to actions taken after the effective date of P.L.2021, c.124, the [D]irector shall have the authority to take any steps to stabilize the finances, restructure the debts, or assist in the financial rehabilitation and recovery of the municipality in need of stabilization and recovery

See P.L. 2021, c. 124, sec. 2. On July 23, 2021, Falcone, alluding to the June 24, 2021 amendment to the Act, requested that her appeal proceed before the Commission. In response, the petitioners' appeals were reopened for the Commission's review.

Upon its review, the Commission dismissed the appeals. The Commission noted that the petitioners had been advised, almost *two years* before Falcone's request to have her appeal proceed before the Commission, that the Commission had "no jurisdiction" to determine these appeals. At that point, the petitioners should have sought resolution in an appropriate alternate forum. However, there was no evidence that they did so. Rather, it appeared that the petitioners were awaiting the restoration of the Commission's authority over civil service employment for Atlantic City employees. This did not, however, excuse their lack of pursuit of their claims. Accordingly, the Commission declined to review the appeals on the merits. *See In the Matters of Stacey Falcone and Frank Timek* (CSC, decided September 22, 2021).¹

In her request for reconsideration, postmarked December 2, 2021, Falcone states her belief that "the facts of the case are more important than the length of time it took to render a decision."

In his request for reconsideration, Timek proffers that rather than closing the appeals in August 2019 for lack of jurisdiction, the Commission could have forwarded the appeals to the Office of Administrative Law (OAL) or other forum for resolution. He states that legal counsel advised him that the only avenue available to him was to pursue civil litigation. Timek claims, however, that he could not afford to pursue such litigation, which, according to him, would have cost more than \$25,000. He maintains that litigation is not a fair comparison to the due process provided by the

¹ The decision was issued to the parties on September 24, 2021.

Commission or the OAL. He also contends that any ruling he may have obtained through litigation may not even have been enforceable.²

In response, Atlantic City, represented by John Dominy, Esq., notes that on November 9, 2016, the Local Finance Board (LFB), located within DCA's Division of Local Government Services, assumed and reallocated to, and vested exclusively in the Director, any of the functions, powers, privileges, and immunities of the governing body of Atlantic City set forth in any statute, regulation, ordinance, resolution, charter, or contract to which the municipality was a party that were, or may have been, substantially related to the fiscal condition or financial rehabilitation and recovery of the municipality. *See P.L. 2016, c. 4, sec. 5.* The authorities granted to the Director by the LFB extended to any and all actions that, in the exclusive discretion of the Director, may help stabilize the finances, restructure the debts, or assist in the financial rehabilitation and recovery of the municipality. *Id.* Notwithstanding the provisions of any law, rule, regulation, or contract to the contrary, the Director had the authority to take any steps to stabilize the finances, restructure the debts, or assist in the financial rehabilitation and recovery of the municipality. *Id.* Atlantic City emphasizes that this authority included:

unilaterally appointing, transferring, or removing employees of the municipality in need of stabilization and recovery, including, but not limited to, department heads and division heads, as the case may be, but excluding appointed officials who have obtained tenure in office; *provided, however, that the provisions of Title 11A, Civil Service, shall not apply to any employment action under this paragraph;*

Id. Atlantic City argues that one of the broad implications of the State's takeover was that Atlantic City ceased to be bound by the Commission and the Civil Service Act. Subsequently, DCA entered into the MOU with this agency. Atlantic City highlights the following language in the MOU:

- “[T]he Director is exercising his statutory authority to take employment actions without regard to the provisions of Title 11A, Civil Service”
- “As of November 9, 2016, the [Civil Service Commission] acknowledges that, subject to the [Act], the [Civil Service Commission] lacks jurisdiction to review any actions brought against [Atlantic] City pertaining to compliance with or alleged violations of Title 11A, Civil Service, and the regulations promulgated thereunder.”

² Timek further claims to be representing Falcone's interests. However, there is no evidence in the record that Timek is an attorney, authorized union representative, or authorized appointing authority representative. *See N.J.A.C. 4A:2-1.1(e).* Accordingly, Timek has no authority to represent Falcone.

- “Any and all [Atlantic] City matters pending before the [Civil Service Commission] for which no Final Agency Decision has been rendered on or before November 9, 2016 shall be withdrawn from each matter’s present forum and returned to . . . Atlantic City for consideration.”

In short, according to Atlantic City, it was no longer a Civil Service municipality as of November 9, 2016; the Commission’s authority and jurisdiction over Atlantic City ceased to exist; and all open matters before the Commission were effectively dismissed. Atlantic City maintains that the petitioners’ bypass appeals were not suspended or placed into an inactive status; rather, they were withdrawn as the Commission no longer had statutory authority. Atlantic City notes that the petitioners initiated their bypass appeals in 2016, but during their pendency, Atlantic City ceased to be governed by the Commission and the Civil Service Act. All parties, according to Atlantic City, were expressly informed of this in the August 14, 2019 correspondence.

Atlantic City argues that Timek has not met the standard for reconsideration. It maintains that Timek’s suggestion that the Commission could have forwarded his appeal to the OAL or other forum for resolution is not true as the OAL derives its authority from the transmitting agency. *See N.J.S.A. 52:14B-1 to -15.* As the Commission lacked jurisdiction, the OAL had no other independent jurisdiction or authority to hear and adjudicate the appeal, according to Atlantic City. Atlantic City adds that it is appropriate to apply the doctrine of laches. Specifically, it argues that Timek’s opportunity to pursue a remedy elsewhere was triggered on receipt of the August 14, 2019 correspondence or, arguably, even earlier on November 9, 2016. Atlantic City contends that Timek’s position, that he had no other avenues *comparable* to the Commission, appears to be predicated solely on the cost of pursuing other avenues for relief, not on the fact that other avenues did not exist. In Atlantic City’s view, pursuing his matter in the civil courts was an option, yet Timek made the affirmative decision not to do so and consciously chose to do nothing. Timek, according to Atlantic City, chose to wait with the hope that Atlantic City one day might return to the jurisdiction of the Commission so he could revisit his matter in a less costly forum, despite having been informed that his matter was closed. However, Atlantic City maintains, the matter was not stayed, put on hold, or held in abeyance as the Act and MOU speak of no such thing; rather, the pendency of Timek’s appeal was terminated by the MOU under the authority of the Act.

Atlantic City argues that Falcone’s request for reconsideration is untimely as it was filed more than 45 days after she received the Commission’s prior decision. Nevertheless, it maintains that Falcone has offered no new evidence or argument that a clear material error occurred. Atlantic City adds that it is appropriate to apply the doctrine of laches in Falcone’s case as well.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding that would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding. A review of the record reveals that reconsideration is not justified.

On November 9, 2016, the LFB assumed and reallocated to, and vested exclusively in the Director, any of the functions, powers, privileges, and immunities of the governing body of Atlantic City set forth in any statute, regulation, ordinance, resolution, charter, or contract to which the municipality was a party that were, or may have been, substantially related to the fiscal condition or financial rehabilitation and recovery of the municipality. The authorities granted to the Director by the LFB extended to any and all actions that, in the exclusive discretion of the Director, may help stabilize the finances, restructure the debts, or assist in the financial rehabilitation and recovery of the municipality. The Director's authority included unilaterally appointing, transferring, or removing employees without regard to the Civil Service Act. Subsequently, DCA and this agency entered into the MOU. In the MOU, this agency acknowledged that, subject to the Act, it lacked jurisdiction to review any actions brought against Atlantic City pertaining to compliance with or alleged violations of the Civil Service Act and the regulations promulgated thereunder. The MOU also explicitly provided:

Any and all [Atlantic] City matters pending before the CSC for which no Final Agency Decision has been rendered on or before November 9, 2016 shall be withdrawn from each matter's present forum and returned to . . . Atlantic City for consideration.

By letter dated August 14, 2019, the petitioners were advised that the Commission had "no jurisdiction" to determine their bypass appeals in light of the MOU and that the matters were considered "closed."

In the prior decision, the Commission dismissed the petitioners' bypass appeals on the basis that they failed to seek resolution in an appropriate alternate forum in the nearly two years between the August 14, 2019 letter, advising of the Commission's lack of jurisdiction, and Falcone's request to have her appeal proceed before the Commission. Timek's argument that civil litigation was cost-prohibitive has no bearing on that conclusion. Moreover, the cost of civil litigation cannot change the terms of the Act and the MOU, which divested the Commission of jurisdiction to determine the petitioners' appeals, and does not excuse Timek's failure to pursue his claim in an appropriate alternate forum as the Commission ceased to be the appropriate forum. Additionally, Timek's contention that any ruling he may have obtained through litigation may have been unenforceable is speculative. Further, his argument that the Commission could have transmitted his appeal to the OAL instead

of closing the matter for lack of jurisdiction is unpersuasive as the OAL's jurisdiction over a matter is derivative of the Commission's. *See N.J.A.C. 1:1-3.1(a)* (providing that a contested case shall be commenced in the State agency with appropriate subject matter jurisdiction) and *N.J.A.C. 1:1-3.2(a)* (providing, in pertinent part, that the OAL shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the OAL). Thus, as the Commission lacked jurisdiction to determine the petitioners' appeals in light of the Act and the MOU, it likewise lacked the power to transmit the appeals to the OAL.

As for Falcone's request for reconsideration, the request is untimely. Even setting aside that issue, the mere statement of belief that "the facts of the case are more important than the length of time it took to render a decision" constitutes neither new evidence that would change the outcome nor a showing of a clear material error.

Accordingly, the petitioners have not met the standard for reconsideration as they have not shown that a clear material error has occurred or presented new information that would change the outcome.

ORDER

Therefore, it is ordered that these requests for reconsideration be denied.

This is the final administrative determination in these matters. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF JUNE 2022

Deirdre L. Webster Cobb

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Chairperson
Civil Service Commission

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Attachment

c: Stacey Falcone (2022-1430)
Frank Timek (2022-1088)
Alexis Waiters
John Dominy, Esq.
Division of Agency Services
Records Center

I understand . . . [Atlantic City] has been suspended from our [S]tate[']s [C]ivil [S]ervice [C]ommission due to . . . the [Act]. I also recognize my . . . appeal has been put on hold due to the same circumstance.

There are current negotiations for Atlantic City to be reintroduced to the [C]ivil [S]ervice [C]ommission[.] [W]hether we will be successful still remains to be seen. I only ask you file the attached paperwork . . . with my case so that if/when my appeal is resumed it can be used for consideration in its outcome.

In a letter dated August 14, 2019, the appellants were advised that the Civil Service Commission (Commission) had “no jurisdiction” to determine these appeals in light of the MOA and that the matters were considered “closed.”

An amendment to the Act was approved on June 24, 2021. *See P.L. 2021, c. 124.* It provided, among other things:

The authorities granted to the [D]irector by the Local Finance Board pursuant to this section shall extend to any and all actions that, in the exclusive discretion of the [D]irector, may help stabilize the finances, restructure the debts, or assist in the financial rehabilitation and recovery of the municipality in need of stabilization and recovery. Notwithstanding the provisions of any other law, rule, regulation, or contract to the contrary, except for the provisions of Title 11A, Civil Service as may be applicable to actions taken after the effective date of P.L.2021, c.124, the [D]irector shall have the authority to take any steps to stabilize the finances, restructure the debts, or assist in the financial rehabilitation and recovery of the municipality in need of stabilization and recovery . . .

See P.L. 2021, c. 124, sec. 2. On July 23, 2021, Falcone, alluding to the June 24, 2021 amendment to the Act, requested that her appeal proceed before the Commission. In response, these matters were reopened for the Commission’s review.

CONCLUSION

Upon review, the Commission finds that these appeals must be dismissed. The appellants were advised, almost *two years* before Falcone’s request, that the Commission had “no jurisdiction” to determine these appeals. At that point, the appellants should have sought resolution in an appropriate alternate forum. However, there is no evidence that they did so. In *Atlantic City v. Civil Service Commission*, 3 *N.J. Super.* 57, 60 (App. Div. 1949), the court described the

circumstances in which a delay in asserting rights may be excusable. The court also described the circumstances under which the doctrine of laches should be applied:

Laches in a general sense is the neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done. More specifically, it is inexcusable delay in asserting a right . . . 30 C.J.S. Sec. 112, pp. 520, 521.

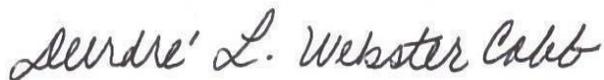
The Court in *Lavin v. Hackensack Bd. of Educ.*, 90 N.J. 145 (1982), added that the length of delay, reasons for delay, and changing conditions of either or both parties during the delay are the most important factors that a court considers and weighs in determining whether to apply laches. Here, it would appear that the appellants were awaiting the restoration of the Commission's authority over civil service employment for Atlantic City employees. This does not, however, excuse their lack of pursuit of their claims. When that authority would be restored could not have been known to the appellants in August 2019. Accordingly, the Commission declines to review these appeals on the merits now.

ORDER

Therefore, it is ordered that these appeals be dismissed.

This is the final administrative determination in these matters. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 22 DAY OF SEPTEMBER, 2021



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

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