

In the Matter of Michael Morris, City of Trenton

CSC Docket No. 2012-1733

Civil Service Commission, decided April 3, 2013)

Michael Morris, a Senior Security Guard with the City of Trenton's Recreation and Natural Resource Department, represented by Jack A. Butler Esq., appeals the attached determination of his layoff rights by the Division of State and Local Operations (SLO).¹

By way of background, Trenton submitted a plan to SLO to lay off employees in various departments including the Recreation and Natural Resource Department. The plan was approved and notices were required to be sent to the affected employees. On September 7, 2011, SLO issued a letter to the appellant advising him of his layoff rights. In that letter, SLO advised appellant that he had no displacement rights and would be laid off effective September 16, 2011. The appellant was laid off and his name was placed on the appropriate special reemployment lists. Further, the record evidences that the appellant, who was previously a Supervising Security Guard, had accepted a demotional title right to Senior Security Guard in a prior layoff action initiated in November 2010.

In the instant appeal, the appellant contends that his title rights were violated. He claims that Robert Mendez was hired as a part-time provisional Senior Security Guard on March 24, 2011. He also alleges that James Moses was also hired as a Senior Security Guard. Additionally, the appellant claims that Mendez was paid as a full-time employee. In support of this contention, the appellant submits copies of Mendez's pay statements. The appellant claims that he should have had title rights to the positions occupied by Mendez and Moses as he had more seniority than both of these employees. In this regard, the appellant indicates that his employment began in 2004. Further, the appellant argues that the appointing authority is attempting to circumvent Civil Service layoff rules by keeping Mendez in a part-time provisional title while he performs the duties of a full-time Senior Security Guard. Moreover, the appellant argues that his layoff was in bad faith. In this regard, the appellant provides a witness statement concerning the prior November 2010 layoff action and derogatory comments made by the Mayor regarding the appellant. This witness statement also indicated the rate of pay for Mendez as a "Seasonal" Security Guard.

The appointing authority, despite numerous opportunities and requests, did not submit any arguments for the Civil Service Commission to review. However, it did provide the employment history for Moses and Mendez which had not been

¹ SLO is now the Division of Classification and Personnel Management.

entered into the County and Municipal Personnel System (CAMPS) as required.² The appointing authority indicated that Moses had worked as a Seasonal Security Guard from April 21, 2011 until October 1, 2012. It also indicated that Mendez was hired as a Supervising Security Guard on July 9, 2010 and separated from this position on September 23, 2011. Mendez was then hired as a Seasonal Security Guard on May 24, 2011 and is still employed in that capacity.

CONCLUSION

In an appeal of this nature, it must be determined whether SLO properly applied the uniform regulatory criteria found in *N.J.A.C. 4A:8-2.1 et seq.*, in determining layoff rights. It is an appellant's burden to provide evidence of misapplication of these regulatory criteria. *N.J.A.C. 4A:8-2.1(a)* provides that a lateral title right means the right of a permanent employee to exercise displacement rights as set forth in *N.J.A.C. 4A:8-2.2* against an employee in the layoff unit holding a title determined to be the same or comparable to the affected title of the employee. *N.J.A.C. 4A:8-2.1(b)* states that a demotional title right means the right of a permanent employee to exercise displacement rights as set forth in *N.J.A.C. 4A:8-2.2* against an employee in the layoff unit holding a title determined to be lower than but related to the affected title of the employee. *N.J.A.C. 4A:8-2.2(d)* lateral and demotional title rights shall be provided to a position held by a provisional employee who does not have permanent status in another title.

Initially, the Commission notes that the appellant did not raise any bad faith arguments or provide any evidence of bad faith concerning his *current* layoff effective September 16, 2011. All of his bad faith arguments concern the November 2010 layoff. Thus, any such arguments are untimely. *See N.J.A.C. 4A:8-2.6(b)*.

With regard to the present layoff, it is noted that SLO correctly determined the appellant's layoff rights based on the information it had at the time. However, in reviewing the matter now, it is clear that the appellant was not properly laid off. *N.J.S.A. 11A:4-13(c)* provides that temporary appointments may be made to temporary positions established for a period aggregating not more than six months in a 12-month period as approved by the Commission. These positions include, but are not limited to, seasonal positions. Thus, it is clear that a seasonal position is a temporary appointment and the appointment of Mendez exceeds these limits. Further, Mendez is still employed and per the appellant's undisputed allegations, performing the same duties that the appellant performed. Based on the foregoing, the Commission finds that the appointing authority has improperly utilized a seasonal position where a permanent appointment appears to be needed. Therefore, the Commission orders the temporary appointment of Mendez be terminated.

² There is evidence that the Division of Classification and Personnel Management's predecessor required only a bi-annual reporting of seasonal employees.

Further, the appointment of the appellant from the special reemployment list for Senior Security Guard is ordered. SLO should reconstruct his personnel record accordingly.

With regard to remedy, *N.J.A.C.* 4A:2-1.5(b), in all appeals other than disciplinary and good faith layoff appeals, allows back pay and/or counsel fees to be granted as a remedy where an appointing authority has unreasonably failed or delayed to carry out an order of the Commission or where the Commission finds sufficient cause based on the particular case. A finding of sufficient cause may be made where the employee demonstrates that the appointing authority took adverse action against the employee in bad faith or with invidious motivation. *See e.g., In the Matter of Anthony Hearn*, 417 *N.J. Super.* 289 (App. Div. 2010). *See also, In the Matter of Kathryn E. Clark*, Docket No. A-5548-93T2 (App. Div. April 28, 1995), *cert. denied*, 142 *N.J.* 457 (1995).

In evaluating the underlying merits of the appellant's case, the Commission finds that other sufficient cause is not evident in this case. The record does not evidence that the original determination of layoff rights for appellant was done in bad faith or with invidious motivation. Therefore, the instant matter is akin to administrative error and generally, no vested or other rights are accorded by an administrative error. *See Cipriano v. Department of Civil Service*, 151 *N.J. Super.* 86 (App. Div. 1977); *O'Malley v. Department of Energy*, 109 *N.J.* 309 (1987); *HIP of New Jersey v. New Jersey Department of Banking and Insurance*, 309 *N.J. Super.* 538 (App. Div. 1998). Therefore, based on the specific merits of this case, sufficient cause has not been established for an award of back pay or counsel fees.

Finally, to maintain a complete and accurate record of Civil Service employees and to ensure that Civil Service laws and regulation are adhered to, the Commission orders that the appointing authority enter all temporary appointments, such as seasonal employees, into CAMPS. Further, the Commission recommends that the Division of Classification and Personnel Management remind all local jurisdictions that all temporary appointments, such as seasonal employees, are to be entered into CAMPS.

ORDER

Therefore, it is ordered that this appeal regarding the determination of layoff rights be granted and Michael Morris's layoff be rescinded and he be returned with seniority and benefits to the position of Senior Security Guard, which is currently held by Robert Mendez, from a special reemployment list effective September 17, 2011. The appellant is not entitled to any other remedies, such as back pay or counsel fees. However, if appellant is not reinstated within 30 days of the date of

issuance of this decision, he shall be entitled to differential back pay beginning on the 31st day to the date of actual reinstatement.

It is further ordered that Robert Mendez be removed from his seasonal Security Guard position.

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