

*In the Matter of Douglas Romary, et al., City of Paterson*  
CSC Docket No. 2013-201  
**(Civil Service Commission, decided April 23, 2014)**

Douglas Romary, Ronald Van Wolde, Ronald Altmann,<sup>1</sup> and Stephen Iacuzzo, Police Sergeants; Patrick Lenoy and Angel Vargas, Police Officers; and Edwin Rodriguez, a Police Lieutenant with the City of Paterson, represented by Joseph S. Murphy, Esq., appeal the determination of their layoff rights.<sup>2</sup>

By way of background, in 2011, the City of Paterson submitted a layoff plan to the former Division of State and Local Operations (SLO) which proposed to affect 125 Police Officers, 28 Police Sergeants, and six Police Lieutenants. The layoff plan was approved and notices were sent to the affected employees. By letters dated April 1, 2011, SLO informed Romary, Van Wolde, Altmann, Iacuzzo, Lenoy, and Vargas that they would be demoted in lieu of layoff to Police Officer positions effective April 18, 2011. Similarly, Rodriguez was advised that he would be demoted in lieu of layoff to a Police Sergeant position effective April 18, 2011. The appellants were also told that they would be placed on applicable special reemployment lists. On November 29, 2011, the appellants filed a complaint with the Superior Court of New Jersey, Law Division, challenging the manner in which SLO calculated their seniority during the layoff and how it ranked them on the special reemployment list. The appellants also moved for summary judgment. In response, the Civil Service Commission (Commission) filed a cross-motion to dismiss and transfer the complaint to the Commission for a determination. The appellants argued that their demotions violated their civil rights and Article VII, Section 1, Paragraph 2, of the New Jersey Constitution, which states:

Appointments and promotions in the civil service of the State, and of such political subdivisions as may be provided by law, shall be made

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<sup>1</sup> Altmann previously requested that the Civil Service Commission provide him with an earlier appointment date as a Police Sergeant, as he claimed that he served as a “*de facto*” Police Sergeant prior to his regular appointment. He also maintained that his placement on the special reemployment list at the time of the April 18, 2011 layoff should be adjusted accordingly. However, the Civil Service Commission denied his request, finding, among other things, that his appeal was untimely and the law did not entitle “*de facto*” employees to any rights flowing from the Civil Service Act. See *In the Matter of Ronald Altmann* (CSC, decided December 5, 2012).

<sup>2</sup> This matter was held in abeyance pending the appellants’ appeals in various courts regarding the jurisdiction of the Commission in this case. Six of the appellants and Rodriguez had been demoted in lieu of layoff from their Police Sergeant and Police Lieutenant positions, respectively, effective April 18, 2011. However, during the pendency of the appeals, Romary and Van Wolde were re-appointed as Police Sergeants, effective October 29, 2012, from the Police Sergeant, City of Paterson, special reemployment list. Similarly, Altmann and Iacuzzo were re-appointed as Police Sergeants on November 15, 2013. Lenoy and Vargas remain as Police Officers. Moreover, Rodriguez was re-appointed from the special reemployment list for Police Lieutenant, City of Paterson, effective November 15, 2013.

according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive; except that preference in appointments by reason of active service in any branch of the military or naval forces of the United States in time of war may be provided by law.

The appellants maintained that, in administering the layoff, SLO incorrectly applied an unconstitutional method of using total permanent seniority in the jurisdiction, regardless of title, in breaking the tie among the officers who had been appointed on the same day to their respective Police Sergeant or Police Lieutenant positions rather than considering the scores earned on the Police Sergeant or Police Lieutenant examinations. *See N.J.A.C. 4A:8-2.4(b)3*. The appellants also alleged that any subsequent appointments from the special reemployment list would then have the effect of restoring individuals who scored lower on the promotional examination, as the laid off eligibles would be recalled in reverse order of demotion. Upon its review, the Superior Court denied the appellants' motion for summary judgment,<sup>3</sup> but it granted the Commission's cross-motion by order dated July 13, 2012.<sup>4</sup> On August 15, 2012, the appellants filed an appeal of that order to the Superior Court of New Jersey, Appellate Division. However, on October 10, 2013, the Appellate Division affirmed the Superior Court's order, stating that "[i]t was wholly proper for the trial court to grant the Commission's motion for an opportunity to consider this claim in the first instance." It indicated that the "order will permit the Commission, which has expertise, to explain its approval of the layoff plan in question and its reasons for accepting or rejecting plaintiffs' contrary view of what our constitutionally mandated merit and fitness system requires." *See Douglas Romary, Ronald Van Wolde, Edwin Rodriguez, Stephen Iacuzzo, Ronald Altman[n], Patrick Lenoy and Angel Vargas v. City of Paterson and Paterson Police Department and the Civil Service Commission and State of New Jersey*, Docket No. A-6241-11T3 (App. Div. October 10, 2013). The court found that administrative remedies had not been exhausted since the Commission did not have an opportunity to review the appellants' claims. It is noted that the appellants also did not file an appeal of the good faith of their demotions in lieu of layoff pursuant to *N.J.S.A. 11A:8-4* and *N.J.A.C. 4A:8-2.6(a)1*. Thereafter, on October 29, 2013, the appellants petitioned the Supreme Court of New Jersey for certification of the judgment of the Appellate Division. However, the petition for certification was denied on February 19, 2014. *See Douglas Romary, supra, cert. den.*, \_\_\_ *N.J.* \_\_\_\_ (2014). It is noted that the appellants were given an opportunity to submit additional information to the Commission after their petition for certification was denied.

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<sup>3</sup> The appellants also filed a motion for injunctive relief, seeking to enjoin any appointment until the motion for summary judgment was decided.

<sup>4</sup> The appellants requested a stay of this order. However, the Superior Court denied the request, stating that if the Superior Court, Appellate Division, grants the appellants' leave to appeal, the matter would automatically be stayed.

In the instant matter, the appellants maintain that the Commission “should not be deciding whether its own regulations are constitutional.” They rely on their arguments submitted in court, asserting that the provisions of *N.J.A.C. 4A:8-2.4, et seq.*, are contrary to the mandate of the State Constitution that Civil Service promotions be based on “merit and fitness” and “as far as practicable, by examination.” In that regard, the appellants contend that they should not have been demoted in lieu of layoff because they scored higher on their respective examinations for Police Sergeant and Police Lieutenant than individuals who were appointed on the same day as them but were not demoted based on their total permanent seniority with the City of Paterson, regardless of title. Furthermore, the appellants submit that because their demotions were unconstitutional, the rankings on the special reemployment list are not accurate. In that regard, they state that an appointment from the special reemployment list would constitute “an illegal bypass as the officer would likely be reinstated ahead of the [appellants] despite having received lower scores.” Moreover, while the appellants acknowledge that Romary, Van Wolde, Altmann, Iacuzzo, and Rodriguez have since been restored to their pre-layoff rank, they request rescission of their demotion, differential back pay, the right to take a Police Lieutenant examination (as applicable to the Police Sergeant appellants), and an award of counsel fees. In addition, the appellants request the “immediate re-appointment” of Lenoy and Vargas to Police Sergeant positions since they remain demoted in lieu of layoff as Police Officers.

### CONCLUSION

It is initially noted that the primary jurisdiction of the Commission in this matter or the appropriateness of the Superior Court’s order to transfer this matter to the Commission is no longer at issue. The appellants have had the opportunity to present their dispute to the Appellate Division and the Supreme Court, and their appeal and petition for certification were denied. Therefore, the Commission will now proceed to address the appellants’ claims.

With regard to the issues to be decided by the Commission, the Appellate Division noted that the Commission would have an opportunity to explain its approval of the layoff plan in this matter. However, to the extent that this refers to the actual layoff plan, the appellants did not file an appeal challenging the good faith of their demotions in lieu of layoff, pursuant to *N.J.S.A. 11A:8-4* and *N.J.A.C. 4A:8-2.6(a)1*. These statutory and regulatory provisions provide that good faith appeals may be filed based on a claim that the appointing authority laid off or demoted the employee in lieu of layoff for reasons other than economy, efficiency or other related reasons. The appellants also did not raise such claims in their Superior Court complaint. Therefore, a review of the layoff plan in that regard is barred. However, as evident by the submissions of the appellants to the courts and the Commission, the appellants are challenging their layoff rights. Accordingly, 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. Specifically, the appellants maintain that SLO applied an unconstitutional tie-breaker when determining the order of demotions in lieu of layoff.

*N.J.A.C. 4A:8-2.4(b)* provides that, for police and fire titles in State and local service, seniority for purposes of this chapter is the amount of continuous permanent service in an employee's current permanent title and other titles that have (or would have had) lateral or demotional rights to the current permanent title. Seniority shall be based on total calendar years, months and days in title regardless of work week, work year or part-time status. This type of seniority is commonly referred to as title seniority. Additionally, *N.J.A.C. 4A:8-2.4(b)3* provides that, if two or more employees in a police or fire title have equal seniority, the tie shall be broken in the order of priority set forth in **(h) below, except that the fifth tie-breaking factor shall give priority to the employee with greater continuous permanent service, regardless of title.** The type of seniority referenced in the fifth tie-breaker for police and fire titles is known as jurisdiction seniority. The fifth tie-breaker for all other employees states:

5. The employee with greater non-continuous permanent service, regardless of title, shall have priority;

Further, the sixth tie-breaker provides that:

6. The employee who ranked higher on the same eligible list for the title shall have priority;

In the instant matter, the appellants are serving in police titles. Thus, their layoff rights were initially determined based on service in their permanent title of Police Sergeant, or in Rodriguez's case, based on his permanent title of Police Lieutenant, at the time of the layoff. *See N.J.S.A. 11A:8-1(b)* and *N.J.A.C. 4A:8-2.4(b)*. However, since individuals were appointed on the same day, it was necessary to apply a tie-breaker. The appellants do not dispute the application or the constitutionality of the first through the fourth tie-breaker. However, they essentially challenge the order of the fifth and sixth tie-breaker. Specifically, the appellants argue that the employee who ranked higher on the same eligible list for the title (sixth tie-breaker) should have priority over the employee with greater continuous permanent service, regardless of title (fifth tie-breaker for police titles). They maintain that the State Constitution mandates this methodology. The Commission disagrees. The State Constitution directs that appointments and promotions be based on competitive examinations, as far as practicable. In this case, there is no question that the appellants achieved their positions by competitive examination. However, there is no constitutional or legislative

mandate that layoffs or demotions in lieu of layoff shall proceed in the order argued by the appellants. Indeed, *N.J.S.A.* 11A:8-1(b) provides the framework for the fifth tie-breaker. The Legislature has expressed that layoffs should proceed in inverse order of **continuous permanent service**. *N.J.S.A.* 11A:8-1(b) states that:

Permanent employees in the service of the State or a political subdivision shall be laid off in inverse order of seniority. As used in this subsection, “seniority” means the length of **continuous permanent service** in the jurisdiction, regardless of title held during the period of service, except that for police and firefighting titles, “seniority” means the length of **continuous permanent service** only in the current permanent title and any other title that has lateral or demotional rights to the current permanent title. Seniority for all titles shall be based on the total length of calendar years, months and days in continuous permanent service regardless of the length of the employee's work week, work year or part-time status. [Emphasis added.]

Therefore, SLO's application of the fifth tie-breaker in implementing the City of Paterson's April 18, 2011 layoff advances the express and implied policies of the Legislature. Moreover, the former Merit System Board (Board)<sup>5</sup> previously responded to similar arguments raised by the public. In that regard, in 1996, when the Board proposed a rule amendment that title seniority would determine the order of layoffs and demotions in lieu of layoff among public safety employees,<sup>6</sup> a commenter asked whether jurisdiction seniority would be used “ahead of placement on the promotional list as a tie-breaker on the special reemployment list for employees who were promoted on the same day.” A concern was raised that “this, in effect, would work to the detriment of some officers since they are promoted in groups, even though they receive different ranks on a promotional list.” The Board responded that “for many years, up to May 15, 1995, when title seniority was used for all employees, jurisdiction seniority was ahead of list ranking as a tie-breaking factor. The Board believes that for public safety employees, jurisdiction seniority should remain ahead of list ranking as a tie-breaking factor. As stated above, overall experience is certainly valuable for any position. Although the Board agrees, in adopting the proposed amendment, that length of employment should not

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<sup>5</sup> On June 30, 2008, Public Law 2008, Chapter 29 was signed into law and took effect, changing the Board to the Commission, abolishing the Department of Personnel and transferring its functions, powers and duties primarily to the Commission.

<sup>6</sup> Title seniority governed police and fire layoffs and demotions except for a one-year period from May 15, 1995 to June 3, 1996. Following the May 15, 1995 layoff rule change to jurisdiction seniority, there was an outpouring of requests from public safety organizations and individuals to restore title seniority. Following publication of a proposed rule amendment, overwhelming support was demonstrated for returning to a title seniority system for police and fire personnel.

be utilized as the primary factor in determining order of layoff or demotion among public safety employees, jurisdiction seniority has sufficient value to serve as an important factor in breaking ties in title seniority.” *See* 28 *N.J.R.* 2841(a).

Based on the foregoing, the appellants have not presented convincing arguments that constitutional and legislative mandates have been ignored in their case. Indeed, the application of this regulatory scheme has recently been upheld by the Appellate Division. *See In the Matter of Michael DiPascale, City of Camden*, Docket No. A-3587-11T1 (App. Div. April 1, 2014). Therefore, the appellants have not met their burden of proving a misapplication of the regulatory criteria in determining their layoff rights. As such, they have not demonstrated that the rankings on the special reemployment list for their respective titles are inaccurate. Accordingly, there is not a sufficient basis to grant the appellants any of the relief they seek.

### **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.