



STATE OF NEW JERSEY

In the Matters of F.B., *et al.*,
West Orange

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

CSC Docket Nos. 2023-963, *et al.*

Request for Enforcement
Request for Stay

ISSUED: May 3, 2023 (HS)

F.B., J.D., D.K., J.N., and S.R., Fire Fighters; and S.G. and C.R., Fire Captains, all with the West Orange, represented by Craig S. Gumpel, Esq., request enforcement of the Civil Service Commission (Commission) decision rendered on October 12, 2022, which ordered that they be granted back pay as set forth in the decision. West Orange, represented by Kenneth A. Rosenberg, Esq., petitions the Commission for a stay of the decision, pending the outcome of its appeal to the Superior Court, Appellate Division. These matters have been consolidated herein.

As background, West Orange placed the employees on unpaid leaves of absence, commencing October 23, 2021. In *In the Matters of F.B., et al., Township of West Orange* (CSC, decided March 2, 2022), the Commission decided that the employees had actually been subjected to disciplinary action when they were placed on unpaid leave and noted that none of the disciplinary rules in Chapter 2 of Title 4A of the New Jersey Administrative Code were observed. As the employees had been disciplined without any of the requisite procedural safeguards, the Commission instituted a remedy. Specifically, the employees were to receive back pay, benefits, and seniority from October 23, 2021, until whichever of the following occurred first: the employees were reinstated to duty; the employees were properly immediately suspended without pay (*See N.J.A.C. 4A:2-2.5*); or disciplinary action was properly imposed upon issuance of Final Notices of Disciplinary Action. The employees were reinstated to duty on March 25, 2022. Subsequently, West Orange argued that the mitigation provisions of *N.J.A.C. 4A:2-2.10* should be applied to the back pay award. The Commission rejected that argument but noted that if West Orange was compelled by other law, such as the law governing unemployment compensation, to deduct

amounts from the back pay award, it could do so. See *In the Matters of F.B., et al., Township of West Orange* (CSC, decided October 12, 2022). Therefore, the Commission ordered that the employees be awarded back pay, as set forth in its decision, within 30 days of the October 12, 2022 issuance date of the decision. The Commission also ordered that a fine be assessed against West Orange in the amount of \$100 per day beginning on the 31st day from the issuance of the decision and continuing for each day of continued violation up to a maximum of \$10,000, in the event that West Orange failed to make a good faith effort to comply with the order within the prescribed timeframe.

On October 21, 2022, West Orange filed an appeal with the Appellate Division that sought review of the March 2, 2022 and October 12, 2022 decisions. On October 25, 2022, West Orange filed the instant request for stay pending the outcome of the Appellate Division appeal. Prior to the Commission's rendering a decision on the instant stay request, West Orange, on November 10, 2022, applied for permission to file an emergent motion in the Appellate Division seeking a stay of the October 12, 2022 decision pending the outcome of the Appellate Division appeal. On November 10, 2022, the court granted the application and directed West Orange to deliver its emergent motion no later than November 18, 2022. The court also granted an emergent stay of the October 12, 2022 decision pending its disposition of the emergent motion. On November 29, 2022, the court issued its order on the emergent motion denying West Orange's request for a stay pending its appeal. Specifically, the court stated:

Without prejudice to the merits panel's ultimate disposition of the appeal and based on the submissions presented on the emergent application, we deny the Township's request for a stay. Reviewing the facts presented through the prism of the factors set forth in *Crowe v. DeGioia*, 90 N.J. 126 (1982), we conclude the Township has not demonstrated a reasonable probability of success on the merits. See *Garden State Equality v. Dow*, 216 N.J. 314, 320 (2013) (application for a stay requires consideration of the soundness of the underlying ruling and the effect of a stay on the parties and the public).

Accordingly, the Township's application for a stay is denied and the emergent stay is dissolved.

On December 23, 2022, West Orange filed a motion in the Appellate Division to accelerate its appeal that sought review of the March 2, 2022 and October 12, 2022 decisions. On December 26, 2022, the employees filed the instant request for enforcement. On January 10, 2023, West Orange paid the employees the back pay awarded to them in the October 12, 2022 decision. On January 17, 2023, the Appellate Division denied West Orange's motion to accelerate.

Request for Stay

In the instant request for stay, West Orange maintains that all requisite stay factors in *N.J.A.C.* 4A:2-1.2(c) are present here.

In response, the employees argue that the stay request is moot because the Commission cannot grant any further relief to West Orange in the form of a stay based on West Orange's payment of the back pay. The employees also contend that the Appellate Division's denial of West Orange's stay application renders the instant matter *res judicata* and that the Commission is without authority to act *ex post facto* on the stay sought by West Orange.

Request for Enforcement

In the instant request for enforcement, the employees acknowledge that the amounts paid to them in back pay are acceptable. However, they maintain that the Commission should still order costs, charges, and fines; award counsel fees for the instant enforcement request and interest on the back pay award; and recommend criminal prosecution of West Orange's Business Administrator because West Orange engaged in egregious, bad faith conduct and unreasonably delayed its compliance with the Commission's October 12, 2022 decision. In addition, the employees seek an award of damages for the adverse tax consequences of the back pay being paid in 2023 rather than 2022. They state that had the back pay been paid in 2022, it would have been primarily credited towards a large part of the unpaid leave of absence period. The employees note that courts have found that the damages provision of the New Jersey Law Against Discrimination (LAD) requires successful litigants to be compensated for the negative tax consequences of receiving a lump sum award. They also note that the National Labor Relations Board, in enforcing the National Labor Relations Act (NLRA), has ordered similar relief.¹

In response, West Orange states that it had numerous telephone discussions with the employees regarding the payment of back pay including, but not limited to, on or around December 2, 2022, December 8, 2022, and December 15, 2022 during which time West Orange advised that it was exploring its appeal rights. On January 6, 2023, the newly elected Mayor advised the employees by letter that West Orange would be paying out the back pay notwithstanding the ongoing litigation surrounding same. West Orange maintains that the employees' enforcement request should be rejected. It contends that there is no basis to order costs, charges, or fines; award counsel fees and interest; or recommend criminal prosecution as West Orange did not act in bad faith or unreasonably delay compliance given that it has paid out the back pay even though it exercised its rights to appeal to the Appellate Division and seek a stay and engaged in negotiations to resolve this matter since its inception.

¹ Subsequently, the employees withdrew their request for interest on the back pay award and damages for the adverse tax consequences of the back pay paid in 2023. However, they reemphasized their belief that all of the other requests for enforcement should be granted by the Commission.

CONCLUSION

Request for Stay

N.J.A.C. 4A:2-1.2(c) provides the following factors for consideration in evaluating a petition for stay:

1. Clear likelihood of success on the merits by the petitioner;
2. Danger of immediate or irreparable harm;
3. Absence of substantial injury to other parties; and
4. The public interest.

Also, *N.J.A.C.* 4A:2-1.2(f) allows a party, after receiving a final administrative decision by the Commission and upon filing an appeal to the Appellate Division, to petition the Commission for a stay pending the decision of the Appellate Division. *See also, N.J. Court Rules 2:9-7.*

N.J. Court Rules 2:9-7, in turn, provides that on or after the filing with the Appellate Division of a notice of appeal or of a notice of motion for leave to appeal from a State administrative agency or officer, a motion for ad interim relief or for a stay of the decision, action, or rule under review shall be made in the first instance to the agency whose order is appealed from and, if denied, to the Appellate Division.

A review of the record finds that following West Orange's receipt of the October 12, 2022 Commission decision, West Orange filed an appeal to the Appellate Division seeking review of that decision and the March 2, 2022 Commission decision. West Orange also filed the instant request for stay pending the outcome of the Appellate Division appeal. Prior to the Commission's rendering a decision on the instant stay request, West Orange, in the Appellate Division, sought a stay of the October 12, 2022 decision pending the outcome of the Appellate Division appeal. The court having already entertained and denied West Orange's stay request, the Commission will simply follow the court's decision and accordingly dismiss the instant request for stay.

Request for Enforcement

N.J.A.C. 4A:10-2.1(a) provides that where there is evidence of a violation of or noncompliance with Title 11A, New Jersey Statutes, or Title 4A, New Jersey Administrative Code, the Commission shall conduct an investigatory hearing or other review, as appropriate. If a violation or noncompliance is found, the Commission may:

1. Issue an order of compliance;
2. Assess costs, charges, and fines not to exceed \$10,000;
3. Order the appointment of an eligible from an outstanding list;

4. In State service, consolidate personnel functions;
5. Initiate a civil action in the Superior Court;
6. Recommend criminal prosecution; or
7. Take other appropriate action pursuant to law or rule.

N.J.A.C. 4A:2-1.5(b) provides that back pay, benefits, and counsel fees may be awarded in disciplinary appeals and where a layoff action has been in bad faith. *See N.J.A.C.* 4A:2-2.10. In all other appeals, such relief may be granted where the 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.

Upon review, the Commission finds no basis in the record for an order of enforcement. Following the Commission's October 12, 2022 decision, West Orange promptly filed an appeal on October 21, 2022, with the Appellate Division that sought review of the March 2, 2022 and October 12, 2022 decisions. West Orange promptly filed its request for stay with the Commission on October 25, 2022. West Orange then proceeded directly to the Appellate Division and there sought a stay of the October 12, 2022 decision. On November 10, 2022, the court granted an emergent stay of the October 12, 2022 decision that was not dissolved until November 29, 2022. After the emergent stay was dissolved, West Orange apparently had telephone discussions with the employees in December 2022 regarding the payment of back pay. On December 23, 2022, West Orange filed a motion in the Appellate Division to accelerate its appeal that sought review of the March 2, 2022 and October 12, 2022 decisions. On January 6, 2023, the Mayor advised the employees that West Orange would pay out the back pay notwithstanding the ongoing litigation surrounding same. On January 10, 2023, West Orange paid the employees the back pay awarded to them in the October 12, 2022 decision, and the employees have confirmed here that the amounts disbursed are acceptable. On this record, the Commission cannot find that West Orange was proceeding in bad faith following the issuance of the October 12, 2022 decision. Rather, it is clear that West Orange was vigorously pursuing a variety of legal avenues and remedies, as was its right, including appealing to the Appellate Division, seeking stays at both the Commission and court levels, and moving to accelerate its appeal in the Appellate Division. After the emergent stay was dissolved, West Orange kept a line of communication open with the employees and ultimately did pay out the back pay award. Neither can the Commission find that West Orange's compliance was delayed to an *unreasonable* degree. In this regard, it is noted that the Mayor's notice to the employees that they would receive their back pay came on January 6, 2023, 38 days after the emergent stay was dissolved and while the motion to accelerate was still pending, and that the back pay was then paid out four days later. Therefore, the Commission declines to assess costs, charges, or fines; award counsel fees for the instant enforcement request; or recommend criminal prosecution of West Orange's Business Administrator.

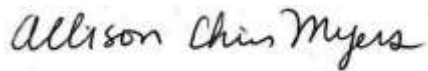
ORDER

Therefore, it is ordered that West Orange's request for stay be dismissed.

It is further ordered that the employees' request for enforcement 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 3RD DAY OF MAY, 2023



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