B-6

STATE OF NEW JERSEY

In the Matter of Donald Gourdine,
Jersey City

CSC Docket No. 2011-5022

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

Layoff Rights Appeal

ISSUED: APR - 2 2015 (CSM)

Donald Gourdine, a former Supervising Security Guard with Jersey City, appeals the attached determination of his layoff rights by the Division of State and Local Operations (SLO).[1]

By way of background, Jersey City submitted a layoff plan to SLO to lay off employees throughout its various departments on June 30, 2011. The plan was approved and notices were required to be sent to the affected employees. On June 15, 2011, SLO issued a letter to the appellant advising him of his layoff rights. Specifically, the appellant was advised that he had demotional displacement rights to the title of Security Guard in a position being held on a provisional basis by Roberto Santiago. However, the appellant refused his demotional title right and he was laid off effective June 30, 2011.

On appeal to the Civil Service Commission (Commission), the appellant states that he has served in the Security Guard title series for over 20 years and based on his seniority, he should have been offered lateral title rights to the Supervising Security Guard position held by Carol Pasquale.

It is noted that the appellant appealed the good faith of his layoff and the matter was referred to the Office of Administrative Law (OAL) for a hearing. However, the appellant failed to appear for the hearing and the matter was

[1] SLO is now the Division of Agency Services. The second page of the determination is not on file and cannot be located.

dismissed. *See In the Matter of Frances DeMaio, et al., Jersey City* (CSC, decided March 6, 2013).

According to agency records, the appellant was permanently appointed as a Security Guard on October 28, 1985 in the Department of Public Works and transferred to the Department of Administration on October 31, 1994. On July 3, 1995 he was laid off and on August 24, 1999 he was appointed as a Security Guard from a special reemployment list. On October 16, 2001 he was permanently appointed as a Senior Security Guard and on May 3, 2005 he was permanently appointed as a Supervising Security Guard. With respect to Pasquale, agency records reflect that she appointed a Building Maintenance Worker on August 25, 1986 and was laid off on October 13, 1989. Pasquale was appointed from a special reemployment list as a Building Maintenance Worker on May 6, 1995 and a Laborer on June 22, 2001. She was returned to her prior title of Building Maintenance Worker on September 3, 2002 and was appointed as a Security Guard on September 15, 2003 and a Supervising Security Guard on December 5, 2005.

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 in determining layoff rights and the appellant must specify a remedy.

Pursuant to *N.J.A.C.* 4A:8-2.6(a)2, a determination of rights appeal is based on a claim that an employee's layoff rights or seniority were determined and/or applied incorrectly. It is noted that the determination of lateral and demotional rights is based on a comparative analysis of Commission job specifications and application of *N.J.A.C.* 4A:8-2.1(a) and (b). *N.J.A.C.* 4A:8-2.1(a) defines a lateral title right as the right of a permanent employee to exercise displacement rights against an employee in the layoff unit holding a title determined to be the same or comparable to the employee's affected title.

N.J.A.C. 4A:8-2.2(a) states that employees shall be ranked, for purposes of exercise of layoff rights, in order of seniority. *N.J.A.C.* 4A:8-2.2(d)6 states that lateral title rights shall be provided to the position held by the permanent employee with the least seniority.

N.J.A.C. 4A:8-2.4(a) states, in pertinent part, that seniority is the amount of continuous permanent service in a jurisdiction, regardless of title and is based on total calendar years, months, and days in continuous permanent service. *N.J.A.C.* 4A:8-2.4(f) states that employees reappointed from a special reemployment list shall be considered as having continuous service for seniority purposes; however, the time

elapsed between the layoff and reappointment shall be deducted from the employee's seniority.

In the present matter, SLO improperly determined that the appellant did not have a lateral title right to the Supervising Security Guard title held by Pasquale. As previously noted, the appellant was permanently appointed on October 28, 1985 and Pasquale was permanently appointed on August 25, 1986. However, it appears that the appellant's appointment from the special reemployment list to the title of Security Guard in August 1999 was not considered when title rights determinations were being made. Thus, his seniority from October 28, 1985 to his layoff effective July 3, 1995 was not included as part of the seniority calculation for the subject layoff. When considering this time, the appellant has greater seniority than Pasquale and he should have been provided the opportunity to exercise lateral title rights to Supervising Security Guard.

Nevertheless, it cannot be ignored that the appellant was afforded the opportunity to exercise demotional title rights, albeit erroneously, to the title of Security Guard held by Santiago at the time of the layoff which he declined. Clearly, due to an error, the appellant was not advised that he had lateral rights to Supervising Security Guard. However, the only action that the appellant took to mitigate his situation was to not accept the erroneous title right he was offered to remain employed and to file an appeal with the Commission. Given the unique circumstances of this case, and in balancing the competing interests of the parties, the rescission of the tenured status of an otherwise innocent party (Pasquale) after this period of time to provide a remedy to the appellant is not warranted. Additionally, correction of a good faith layoff error such as that at issue is not retroactive in its effect. Therefore, in order to provide some remedy to the appellant, his name should remain the special reemployment list for Supervising Security Guard and he should be offered the next available position in that title. Additionally, if he is appointed from the special reemployment list, he should be given a retroactive date of appointment to July 1, 2011 for record and seniority purposes only. *See In the Matter of Annette Hanley* (CSC, decided July 21, 2010) *aff'd on reconsideration* (CSC, decided January 19, 2011) (Due to a good faith error in title rights determination, Commission ordered appellant's name be placed on the special reemployment list and considered for the next available position with a retroactive date of appointment for record and seniority purposes only).

However, the Commission finds that the appellant is not entitled to back pay. In non-disciplinary appeals, such as an appeal of title rights determinations, the standard for determining whether an appellant is entitled to back pay is governed by *N.J.A.C.* 4A:2-1.5(b). That rule provides, in pertinent part, that back pay for appeals that are not based on disciplinary action or the challenge of the good faith of a layoff "may be granted...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.

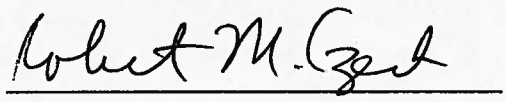
In this case, there is no evidence of bad faith or invidious motivation. Rather, due to an administrative error, the appellant's appointment from an earlier special reemployment list was overlooked when seniority calculations were being made for the determination of title rights in the subject layoff. Additionally, the appellant has not presented any evidence of bad faith and he declined to be employed by the appointing authority in another title during the entire time this matter was being reviewed by the Commission. Therefore, the appellant is not entitled to back pay.

ORDER

Therefore, it is ordered that this appeal be granted in part and if Donald Gourdine is appointed from the special reemployment list for Supervising Security Guard, his appointment shall be recorded as the acceptance of a lateral title right in lieu of layoff effective July 1, 2011, but he would not be entitled to back pay.

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
THE 1ST DAY OF APRIL, 2015



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Attachment

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Received
JUL - 5 2012
By CSC/SLO

Robert M. Czech
Chair/Chief Executive Officer

June 15, 2011

REVISED LETTER

Mr. Donald Gourdine
100 Myrtle Avenue
Jersey City, NJ 07305

RE: Layoff from your permanent position of Supervising Security Guard, Jersey City Department of Administration effective close of business of June 30, 2011.

Dear Mr. Gourdine:

In accordance with the provisions of N.J.S.A. 11A:8-1 et seq., your layoff from the title of Supervising Security Guard has been recorded. Your name will be placed on the Special Reemployment List for your current permanent title and for other titles that may be deemed appropriate. In addition, it has been determined you have a demotional displacement right to the following title:

- Title Name: Security Guard
- Held provisionally by: Mr. Roberto Santiago

If you refuse the displacement right, you must advise the Appointing Authority and send a signed statement of refusal to the New Jersey Civil Service Commission by close of business June 28, 2011 (at least two (2) days before the effective date of this layoff action). Refusal of the demotional displacement right will result in being laid off and your name will be retained on the Special Reemployment List(s) for future employment consideration.

Special Reemployment Lists will be certified, subsequent to the effective date of layoff, against employees serving on a provisional basis. If there are no such employees, your name will remain on the Special Reemployment List(s) for certification against future vacancies or provisional employees. Please note it is the responsibility of each employee whose name is placed on a Special Reemployment List to advise the Civil Service Commission of any present or future change of name or address. Failure to do so may result in not receiving a future employment opportunity or possible removal from the list.

You may appeal whether the Appointing Authority acted in good faith in instituting this layoff plan. The burden of proof in such appeals is on the part of the appellant. Such appeals must specify the grounds of your appeal and must be received within twenty (20) days of your receipt of this notice. Please be advised, pursuant to P.L. 2010 C.26, effective July 1, 2010 there shall be