

In the Matter of Rose Ann Fischer, County of Hudson
CSC Docket No. 2013-2482
(Civil Service Commission, decided November 20, 2013)

Rose Ann Fischer, represented by Peter J. Cresci, Esq., appeals Hudson County's decision to remove her from the position of Superintendent of Weights and Measures.

By way of background, as the result of a classification review, the appellant was provisionally appointed, pending open competitive examination procedures,¹ to the title of Assistant County Superintendent of Weights and Measures, effective September 26, 1988 and received a regular appointment effective December 15, 1989. The appellant was then provisionally appointed, pending promotional examination procedures, to the title of Deputy Superintendent of Weights and Measures, effective November 10, 1997. As a result of the provisional appointment, an examination was announced with a closing date of January 21, 1998. However, since the appellant was the only applicant, she received a regular appointment, effective April 9, 1998, pursuant to *N.J.A.C. 4A:4-2.7*. Subsequently, the appellant was provisionally appointed to the title of Superintendent of Weights and Measures, effective October 9, 2000. As a result of this provisional appointment, an examination was announced with a closing date of March 21, 2001. Again, since the appellant was the only applicant, she received a regular appointment, effective July 5, 2001, pursuant to *N.J.A.C. 4A:4-2.7*.

In 2013, the appointing authority filed suit in Superior Court of New Jersey, Law Division, arguing that the appellant was not the duly appointed Superintendent of Weights and Measures. Thereafter, in a March 18, 2013 order, the Honorable Christine Farrington granted the appointing authority's request for declaratory judgment, finding that the appellant was not the duly appointed Superintendent of Weights and Measures due to her failure to meet the statutory criteria set forth in *N.J.S.A. 51:1-43* and *N.J.S.A. 51:1-53*. Generally, these statutes provide that the governing bodies of the counties shall appoint a county superintendent who, upon a resolution of those bodies, shall hold office during good behavior. In a March 19, 2013 letter to the appellant's attorney, the appointing authority stated that:

. . . it has been judicially determined that [the appellant] is not the statutorily appointed head of Weights and Measures for Hudson County. Consequently, the County will be appointing an individual to serve in that position. Therefore, effective immediately, [the

¹ The appellant's appointment was recorded as being provisional, pending open competitive examination procedures, since her permanent title was the non-competitive title of Clerk Typist.

appellant] shall no longer serve in that position. I suggest that [the appellant] contact the County Personnel Department to determine what employment position may be available for her in the County.

It further indicated that while it did not need to “provide a basis for its action” since she was not duly appointed to the position of Superintendent of Weights and Measures, she should be advised that her “performance was unacceptable” in several ways. For example, it indicated that she refused to cooperate with an investigation related to her inappropriate conduct toward employees in her department and that she refused to obey direct orders given to her concerning the operation of the office.

On appeal to the Civil Service Commission (Commission), the appellant argues that the appointing authority is attempting to circumvent Civil Service law and regulations by removing her from her position as Superintendent of Weights and Measures, which she has held for 13 years. Finally, she asserts that in order to do so, the appointing authority claimed it could not find the Freeholder Resolution from 2000, appointing her to the position.

In response, the appointing authority, represented by Cindy Nan Vogelman, Esq., initially asserts that although the Department of Weights and Measures is under the auspices of the Sheriff’s Department, the appellant had refused to report to the Sheriff with respect to staff assignments and reporting relationships, she refused to participate in investigations and she directed her staff to refrain from participating in the investigations. As a result of the appellant’s behavior, the functioning of the Department of Weights and Measures was impacted. Moreover, the appointing authority maintained that it was unable to find any Resolution by the Board of Chosen Freeholders approving the appellant’s appointment to the title of Superintendent of Weights and Measures. Consequently, the appointing authority maintains that it filed a complaint with the Superior Court for declaratory judgment that the appellant was not the duly appointed Superintendent of Weights and Measures. It notes that although the appellant was represented during that matter, she failed to produce any Resolution approving her appointment to the title of Superintendent of Weights and Measures. Accordingly, the Judge issued a decision, finding that the appellant was not the duly appointed Superintendent of Weights and Measures. Furthermore, the appointing authority maintains that despite providing the appellant with ample opportunities to do so, she has failed to contact it to “inquire about alternate employment” since she can no longer serve as the Superintendent of Weights and Measures.

The appointing authority argues that although the appellant has attempted to claim that the Commission has jurisdiction over her employment status, she cannot do so now, since she failed to challenge the jurisdiction of the Superior Court during the pendency of this matter and she did not appeal the Superior Court’s

decision. Moreover, the doctrines of collateral estoppel and *res judicata* prohibit the Commission from rendering a decision that would be at odds with the Superior Court's decision. In this regard, the appointing authority argues that since the issue in the matter before the Commission is the identical issue that the Superior Court's decision concerned, *i.e.*, the appellant's status as Superintendent of Weights and Measures, the Commission is barred from rendering a decision that is different from the Superior Court's decision. Therefore, it argues that the appellant's appeal should be dismissed.

It is noted that personnel records indicate that the appellant is currently in the title of Superintendent of Weights and Measures. It is further noted that she is currently on a paid personal leave.

CONCLUSION

Initially, it is settled that collateral estoppel may apply and preclude the relitigation of an issue where:

1. The issue to be precluded is identical to the issue decided in the first proceeding;
2. The issue was actually litigated in the prior action, that is, there was a full and fair opportunity to litigate the issue in the prior proceeding;
3. A final judgment on the merits was issued in the prior proceeding;
4. Determination of the issue was essential to the prior judgment; and
5. The party against whom issue preclusion is asserted was a party to or in privity with a party to the prior proceeding.

See In re Estate of Dawson, 136 N.J. 1, 20 (1994); *Selective Ins. Co. v. McAllister*, 327 N.J. Super. 168, 173-74 (App. Div. 1999), *cert. denied*, 164 N.J. 188 (2000); *Pivnick v. Beck*, 326 N.J. Super. 474, 485 (App. Div. 1999), *aff'd*, 165 N.J. 670 (2000); *In the Matter of Darren Nance* (CSC, decided November 7, 2012); *In the Matter of Jane Lyons* (MSB, decided May 9, 2007); *In the Matter of Joseph Wallace* (MSB, decided November 4, 2004). Clearly the tenets of collateral estoppel and *res judicata* apply in this matter since the Superior Court issued a determination that the appellant had not been properly appointed to the title of Superintendent of Weights and Measures. Thus, even though it is plausible that the appointing authority only challenged the legitimacy of the appellant's appointment based on her alleged misconduct in order to circumvent her Civil Service protections, the Commission is estopped from addressing her status as a Superintendent of Weights

and Measures.² However, since the appellant's appointment as Superintendent of Weights and Measures was found to be invalid by the Superior Court, then she must be returned to her permanent title of Deputy Superintendent of Weights and Measures. Consequently, since the appellant is considered to have underlying permanent status as a Deputy Superintendent of Weights and Measures, there was no need for her to "contact" the appointing authority to "inquire about alternate employment." Accordingly, a thorough review of the record indicates that the appellant's appeal is to be denied and her personnel record is to be corrected to reflect her appointment as Superintendent of Weights and Measures as provisional and her return to her permanent title of Deputy Superintendent of Weights and Measures, effective the date of this decision, subject to the limitation below. In this regard, should the position of Deputy Superintendent not be available or is currently encumbered, the appointing authority must implement layoff procedures pursuant to *N.J.A.C. 4A:8-1.1, et seq.* Finally, should the appointing authority believe that the appellant engaged in any improper actions and seek her removal from employment, it must follow the disciplinary procedures outlined in *N.J.A.C. 4A:2-2.1, et seq.*

ORDER

Therefore, it is ordered that this appeal be denied and that the appellant's personnel record be corrected to reflect her appointment as Superintendent of Weights and Measures was provisional and that she was returned to her permanent title of Deputy Superintendent of Weights and Measures, effective the date of this decision.

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

² It is noted that the appellant's service as a Superintendent of Weights and Measures should be recorded as being provisional. In this regard, since the Superior Court determined that she was not properly appointed, her appointment cannot be considered permanent. Nevertheless, since she actually served in and performed the duties of the title, her service must be considered provisional. *See N.J.A.C. 4A:4-1.5.*