

In the Matter of William Hendrickson and Thomas Van Gorder, Vernon Township
CSC Docket Nos. 2012-1772 and 2012-1773
(Civil Service Commission, decided January 23, 2013)

William Hendrickson, a Fire Prevention Specialist, and Thomas Van Gorder, a Fire Official, appeal their separation from employment with Vernon Township (Township). Since the matters involve similar issues, they have been consolidated herein.

By way of background, Hendrickson and Van Gorder had been serving permanently with Vernon Township on a part-time basis since August 31, 2009 and October 20, 2005, respectively. The appellants then separated from employment effective October 14, 2011. Their County and Municipal Personnel System (CAMPS) records reflect resignations in good standing on that date. The appellants appealed their separations, indicating that they were laid off from their positions. Upon receipt of the appeals, the Division of Classification and Personnel Management (CPM) was contacted regarding the CAMPS information. CPM advised that, according to the appointing authority, the appellants' resignations were entered "in error." What apparently occurred was that the appellants were offered interviews for a new position, which they did not receive and resulted in their separation from employment. It is noted that this agency did not receive a layoff plan or copies of notices of layoff from the appointing authority.

On appeal to the Civil Service Commission (Commission), the appellants maintain that the appointing authority falsely reported that they had resigned, but in actuality, it improperly laid them off from their positions. They argue that it was not likely a clerical error since the appointing authority submitted the information on two different sets of records. The appellants allege that the appointing authority submitted false information intentionally in order to circumvent Civil Service rules regarding layoffs and replace the appellants with two politically appointed employees. In this regard, the appellants present Payroll Change Notice forms, which reflect that they were laid off from their positions effective October 14, 2011. Moreover, Hendrickson submits documentation regarding his receipt of unemployment benefits and contends that he would not be eligible for these benefits if he resigned. He also explains that the Mayor informed him that Vernon Township was considering hiring a full-time Fire Official and requested his resume. Hendrickson interviewed for the position. He discussed salary options and staffing concerns with the Mayor and the Township Administrator, who were conducting the interview. As for Van Gorder, he states that he was not offered an interview. He explains that it was only after he requested an answer regarding the replacement of the full-time secretary who had resigned in 2011 did the Township Administrator indicate that the Mayor was considering a full-time Fire Official and a meeting

would be scheduled to discuss the matter further. Van Gorder claims that he was never notified of a meeting or that Hendrickson was interviewing for the position.

Moreover, the appellants explain that on October 14, 2011, they reported to the Mayor's office and were told that it would be their last day of employment since their positions would be filled by the new Fire Official and "that there was no cause for termination other than layoff due to the elimination of [their] position[s]." The appellants assert that they did not receive the required notice of layoff and contend that the appointing authority did not follow proper layoff procedures, including obtaining approval from this agency for the layoff and considering their layoff rights. They note that they were replaced by the full-time Fire Official, as well as a part-time "Fire Inspector,"¹ and the salaries of these employees far exceed "the costs associated with [the appellants'] employment." Further, the appellants indicate that the Mayor in a regular council meeting was questioned about the replacement of fire prevention personnel and responded that the appellants were "both offered the position," but that he appointed an individual who he felt was the best choice for the position. The appellants dispute the Mayor's statement and challenge the good faith of their layoffs.

In response, the appointing authority, represented by Richard W. Wenner, Esq., submits a certification from the Township Administrator, stating that Vernon Township has been "faced with unprecedented budgetary constraints in recent years, and has been forced to reduce overhead in order to meet its budgetary constraints." It explains that the Fire Prevention Bureau had been staffed with the appellants and a full-time secretary, who was needed since the appellants were only serving on a part-time basis. The secretary resigned in 2011 and the appointing authority realized that if a full-time Fire Official were hired, without replacing the secretary, it could achieve significant savings. The appointing authority asserts that the appellants were notified weeks in advance that a secretary would not be re-hired and their part-time positions would be eliminated in favor of a full-time unclassified Fire Marshal. It states that Van Gorder was offered an interview for the full-time position, but he declined presumably because he has a full-time position in Bergen County. Additionally, the appointing authority verifies that Hendrickson was interviewed, but was not selected due to his request for a high salary and a secretary. Thus, it maintains that there was sufficient justification to have appointed David Tynan, Jr., to the position. It is noted that CAMPS reveals that Tynan was appointed, effective October 17, 2011, to the unclassified position of Municipal Department Head for the Public Safety Department in Vernon Township.

Moreover, the appointing authority responds that since it offered the appellants the opportunity to interview for the full-time Fire Marshal position, their rights were not violated. Furthermore, it asserts that the appellants were laid off in

¹ There is no Civil Service title of Fire Inspector.

good faith and for reasons of economy. It notes that the annual cost savings for hiring Tynan and one *per diem* Fire Inspector, Richard Bardyszewski,² without re-hiring a secretary is in excess of \$40,000. It also dismisses the suggestion to increase inspection fees to generate extra revenue to justify operational costs. Therefore, the appointing authority maintains that it has presented “clear and legitimate reasons” for the appellants’ layoffs and the appellants have failed to satisfy their burden of proof.

The appellants reply that the Fire Prevention Bureau was “obviously understaffed at the time of their layoff” pursuant to the standards of the Uniform Fire Code. In addition, there has been no competitive examination for the new hires after the layoff, nor did the Mayor obtain the consent of the Township Council in hiring these employees in violation of the Township’s ordinance. They also claim that Tynan has a substantially higher salary than Van Gorder and has medical benefits as a full-time employee, which increases the costs of his employment. Moreover, Van Gorder responds that he is a Firefighter and has a flexible work schedule which could have allowed him to serve full-time as the Fire Official. However, he was not offered the position, which he would not likely have refused. Additionally, Van Gorder asserts that the Mayor and the Township Administrator told him that when a *per diem* position became available, he would be contacted. However, Van Gorder was never contacted despite the fact that the appointing authority filled the *per diem* position. The appellants also highlight the fact that the *per diem* employee was hired when the appointing authority declared that there would only be one Fire Marshal to “solely staff the Bureau.” They note that Tynan is not actually “full-time in the office.” He works part-time in the field. Furthermore, the appellants reiterate that the appointing authority has submitted false official records in violation of the law. In that regard, they allege that the appointing authority circumvented Civil Service rules “under the guise of a departmental reorganization” in laying them off without the approval of this agency.

In response, the appointing authority emphasizes that Tynan’s position of Fire Marshal is unclassified. Therefore, it was not obligated to advertise for the position or hold competitive examinations. Moreover, the appointing authority contends that the appellant’s arguments concerning the Township Council’s consent to appoint the employees is irrelevant for purposes of their Civil Service appeals. In that regard, it reiterates that since the position at issue is unclassified, the appointment is not governed by Civil Service rules.

² There is no record of Bardyszewski’s appointment in CAMPS. However, Hendrickson submits an email, dated December 27, 2011, from the appointing authority in response to his request under the Open Public Records Act that indicates that Bardyszewski is the “most recent employee in the Fire Prev. office.” “His salary is \$15.00/hour [and] . . . [h]e works 16 hours per week.”

The appellants further respond that the Uniform Fire Code defines the terms Fire Official to include Fire Marshal and the two terms are used interchangeably in many municipalities throughout the State. Similarly, they maintain that the terms Fire Inspector and Fire Prevention Specialist are interchangeable. Moreover, they assert that the duties of a Fire Official and Fire Inspector in the Uniform Fire Code are similar to the duties set forth in the Civil Service job specifications for Fire Official and Fire Prevention Specialist, respectively. They point to the fact that the Township Attorney, Township Administrator, and Mayor also used the titles interchangeably and for them to now argue that the titles are different is suspect. The appellants submit a copy of a letter, dated December 13, 2011, from the Mayor to the Division of Fire Safety that Tynan “was appointed to the position of Fire Official on October 17, 2011 . . . [and to] remove Thomas Van Gorder’s name from your records” Additionally, they present that the salary ordinance approved in 2012 reflects one position in the Fire Prevention Bureau as the Fire Official with a salary range of \$60,000 to \$70,000. Thus, the appellants maintain that the positions of Fire Official and Fire Marshal in the Township are the same. The appellants emphasize that the appointing authority failed to submit supporting documentation to demonstrate that the titles of Fire Official and Fire Marshal are somehow different to warrant the latter’s unclassified designation.

In addition, the appellants claim that the Township Administrator did not accurately portray Vernon Township’s financial status to the Commission. In this regard, they present that the ordinance governing employee salaries was approved in 2012 and provides for substantial pay increases, including a 67% pay raise for the Mayor. Further, they submit a newspaper article where the Mayor reported that Vernon Township is in a financial position that allows for no property tax increases. Additionally, the appellants indicate that there are sufficient funds available in the Fire Prevention Trust Fund. Thus, the appellants contend that the Township Administrator’s statements in his certification regarding the financial state of the Township are not credible. Furthermore, they indicate that the former secretary’s income should not be considered in the analysis of cost savings since the secretary’s duties are currently handled by other administrative personnel within the Township, whose salaries are not budgeted for in the Fire Prevention Bureau. Additionally, Hendrickson maintains that he did not demand a higher salary or additional staff. Rather, in his interview, he discussed a negotiable salary figure and the results of the Division of Fire Safety’s audit that concerned staffing issues. Hendrickson also notes that he was candid about outside employment intentions and that he had applied for positions as an adjunct professor.

The appointing authority responds that the appellants were given only one opportunity to reply to its submission.³ Thus, it requests that the appellants’

³ The parties were given the opportunity to submit additional information within 20 days of notice of the appeals.

additional responses be disregarded. Nonetheless, it submits that while the titles of Fire Official and Fire Marshal are interchangeable in regard to the Uniform Fire Code, “they are most definitely not interchangeable in regard to Civil Service classifications.” It reiterates that the Fire Marshal position is unclassified. Further, the appointing authority explains that where the term Fire Official was used instead of Fire Marshal to refer to Tynan’s title, “same should be given no weight . . . [as it] was clearly a typographical error.” In support of its position that Tynan is serving in an unclassified position, the appointing authority presents a CAMPS Active Employee Listing which shows that Tynan is in the unclassified position of Municipal Department Head. Moreover, the appointing authority maintains that, in not re-hiring a secretary, it saved thousands of dollars and disputes the appellant’s characterization of the Township’s financial status. In addition, it contends that it was within its rights not to offer Hendrickson a position when he was actively seeking employment as an adjunct professor.

In reply, the appellants request that their submissions be considered since it was not their intention to disregard instructions, which they note did not limit the number of responses allowed. Further, the appellants state that it is clear that the appointing authority’s use of the titles of Fire Marshal and Municipal Department Head “are obvious ploys . . . to circumvent [C]ivil [S]ervice laws.” However, Van Gorder notes that as the Fire Official, he also served as the Municipal Department Head. Additionally, he submits that unclassified appointments pursuant to Civil Service rules are in fact reviewed and approved by this agency and that it is a crime of the fourth degree to knowingly violate Civil Service rules. The appellants request back pay from the date of their layoff and also ask that they be afforded their appropriate title rights.

Lastly, the appointing authority states that “the Township has chosen to rely on the law and certifications; whereas Mr. Van Gorder has chosen to rely on rhetoric, hearsay statements, and unfounded conspiracy theories.” It requests that the Commission render the appropriate response to the appellants’ appeals.

CONCLUSION

Initially, the appointing authority requests that the appellants’ responses after their first response not be considered. However, while parties are given the opportunity to submit additional information within 20 days of notice of an appeal, they are not restricted to only one submission. In order for the Commission to make a reasoned decision in the matter, the Commission must review a complete record. Although parties are discouraged from merely reiterating their prior arguments for the sake of responding, the parties are permitted to reply to new issues presented in each individual submission. This allows parties a full opportunity to present their positions to the Commission. Accordingly, based on the foregoing, the appellants’ responses, as well as the appointing authority’s replies, will be considered.

The instant matter involves a dispute as to the appropriateness of the appellants' separation from employment. Personnel records were entered that reported the appellants' resignations in good standing. However, the appellants maintain that they were laid off from their positions and submit documentation in that regard. The appointing authority does not dispute the appellants' layoffs and freely acknowledges that the Township's financial state led to a reorganization of the Fire Prevention Bureau, which necessitated the abolishment of the appellants' positions. Vernon Township is a Civil Service jurisdiction and is governed by the Civil Service Act and the rules promulgated thereunder. The appellants achieved permanent status in their respective Civil Service titles and are afforded protections against arbitrary and capricious employment actions. A review of this matter reveals that the appointing authority's actions were in violation of statutory and regulatory provisions regarding layoffs.

In that regard, permanent employees may be laid off for economy, efficiency or other related reasons. *See N.J.S.A. 11A:8-1a and N.J.A.C. 4A:8-1.1(a)*. Additionally, *N.J.A.C. 4A:8-1.1(b)* provides that this agency shall determine seniority and shall designate lateral, demotional and special reemployment rights for all career service titles prior to the effective date of the layoff and have such information provided to all affected parties. Furthermore, pursuant to *N.J.A.C. 4A:8-1.4(a)*, an appointing authority must provide this agency with a layoff plan at least 30 days prior to the issuance of layoff notices. The layoff plan must include, among other things, the reason for the layoff, the projected effective date of the layoff, details regarding positions, titles and employees to be affected, alternatives to layoff and pre-layoff actions taken, and a summary of consultations with affected negotiations representatives. Through this plan, this agency ensures that the appointing authority provides all of the required information and has done everything it is legally obligated to do. If the information is lacking, this agency may take such remedial action as requiring the submission of supplemental information or the implementation of alternatives to layoff or pre-layoff actions. *See N.J.A.C. 4A:8-1.4(d)*.

Moreover, *N.J.A.C. 4A:8-1.6(a)* provides that:

No permanent employee or employee serving in a working test period shall be separated or demoted as a result of a layoff action without having been served by the appointing authority, at least 45 days prior to the action, with a written notice personally, unless the employee is on a leave of absence or otherwise unavailable, in which case by certified mail. If service is by certified mail, the 45 days shall be counted from the first date of notice by the United States Postal Service to addressee. A notice shall also be conspicuously posted in all affected facilities of the layoff unit. A copy of the notice served on

employees shall be provided to the [Civil Service Commission] and affected negotiations representatives. *See also, N.J.S.A. 11A:8-1(a).*

For every day the layoff notice is late, the affected employee receives a day of mitigated back pay. This is because the purpose of the 45-day notice is to allow sufficient time for the agency to determine appropriate layoff entitlements and to so notify both the employer and affected employees, to afford affected employees the opportunity to seek new employment and to provide them with what, in effect, is 45 days' severance pay. *See Amodio v. Civil Service Commission*, 81 *N.J. Super.* 22 (App. Div. 1963); *In the Matter of Joseph Bonner, City of Bayonne* (Commissioner of Personnel, decided December 15, 1989).

In the instant matter, the appointing authority failed to follow the established layoff procedures. It did not submit a layoff plan to this agency for approval prior to the appellants' layoffs, which delineated the reason for the layoff, the projected date of the layoff, the number of positions affected, the names of employees to be affected, and the explanation of all alternative and pre-layoff actions that had been taken and considered. Moreover, the appellants did not receive the required notice of layoff. The appointing authority's assertion that the appellants were notified weeks in advance that a secretary would not be re-hired and their part-time positions would be eliminated in favor of a full-time Fire Marshal is insufficient to meet the statutory and regulatory requirement for notice. In that regard, the appointing authority has not shown that it provided the appellants with written notice of their layoffs at least 45 days prior to the effective date of the appellant's layoffs on October 14, 2011. There is also no showing that affected negotiations representatives were given notice. Indeed, this agency did not receive a copy of any notice at that time.

Therefore, it is ordered that the appointing authority submit a layoff plan to CPM within 20 days of receipt of this decision, detailing the reasons for the October 14, 2011 layoff of the appellants, as well as submitting the required information outlined in *N.J.A.C. 4A:8-1.4(a)*. Additionally, since the appellants did not receive written notice of their layoffs, it is ordered that the appointing authority compensate the appellants with 45 days' pay. Should CPM disapprove the layoff plan or find that the appellants' layoffs were improper based on their title rights, the appointing authority is ordered to immediately reinstate the appellants to their positions or the positions to which they are entitled with mitigated back pay commensurate with the title, applicable benefits, and seniority from the time they were separated on October 14, 2011 to the date of their reinstatement. However, if CPM approves the layoff plan and determines that the appellants did not have any

displacement rights,⁴ the appellants shall be deemed laid off from their positions, effective October 14, 2011, and their CAMPS records shall be amended accordingly. CPM shall also forward the layoff determinations to the Division of Appeals and Regulatory Affairs (DARA) and the appellants, based on their current claims, shall be afforded a hearing at the Office of Administrative Law on the good faith of the layoff pursuant to *N.J.A.C. 4A:8-2.6(a)1* and *N.J.A.C. 4A:2-1.1(d)*. The appellants will have an opportunity at the hearing to challenge the actions of the appointing authority.

Although the Commission is permitting the appointing authority to correct the procedural errors present in these matters, the Commission advises the appointing authority that it may be subject to fines if it is determined after a hearing that the layoffs were conducted in bad faith or if there are future egregious violations. In this regard, the Commission is specifically given the power to assess compliance costs and fines against an appointing authority, including all administrative costs and charges, as well as fines of not more than \$10,000, for noncompliance or violation of Civil Service laws or rules or any order of the Commission. *N.J.S.A. 11A:10-3*; *N.J.A.C. 4A:10-2.1(a)2*. See *In the Matter of Fiscal Analyst (M1351H)*, Newark, Docket No. A-4347-87T3 (App. Div. 1989). In this case, the Commission is disturbed by the appointing authority's admission that it laid off the appellants from their positions, yet failed to comply with any of the procedural requirements for layoff and to submit accurate records to reflect its actions. The appointing authority also did not explain how an error in the appellants' CAMPS records could have occurred, when it is clear that the appointing authority intended to subject the appellants to a layoff based on its responses to their appeals. Pursuant to *N.J.A.C. 4A:10-1.1(d)*, no person shall make any false statement or perform any fraudulent act in connection with any examination, certification, appointment or other personnel transaction under the provisions of Title 11A, New Jersey Statutes, and Title 4A, New Jersey Administrative Code. Furthermore, the Commission is troubled by the appointments of Tynan and Bardyszewski. The appointing authority admits that Tynan is serving as a Fire Marshal, yet it reported to this agency that he is a Municipal Department Head. Moreover, Bardyszewski's appointment was not reported to this agency, and there is an allegation that he is performing Hendrickson's former duties. Accordingly, the Commission orders the appointing authority to comply with Civil Service law and rules.

ORDER

Therefore, it is ordered that Vernon Township submit a layoff plan to CPM for approval and determination of layoff entitlements to CPM regarding the October

⁴ A review of the title rights of a Fire Official reveals no lateral title rights, but it has demotional title rights to the Supervising Fire Prevention Specialist and Fire Prevention Specialist titles. As for the Fire Prevention Specialist title, it has no lateral or demotional title rights to any title.

14, 2011 layoff of William Hendrickson and Thomas Van Gorder from their positions of Fire Prevention Specialist and Fire Official, respectively, within 20 days of receipt of this decision. It is further ordered that the appointing authority pay the appellants 45 days' pay for its failure to provide them with adequate notice of the layoff. Additionally, if the appellants' layoffs are not approved by CPM, the appointing authority is directed to immediately reinstate the appellants to their former positions or to the positions to which they are entitled with mitigated back pay commensurate with the title, applicable benefits, and seniority from the time they were separated on October 14, 2011 to the date of their reinstatement. Alternatively, if the appellants' layoffs are approved by CPM, their CAMPS record shall be amended accordingly and CPM shall forward layoff determinations to DARA in accordance with this decision.

In the event that the appointing authority has not made a good faith effort to comply with this decision within 20 days of issuance of this decision, the Commission orders that a fine be assessed against the appointing authority in the amount of \$100 per day, beginning on the 21st day from the issuance of this decision, and continuing for each day of continued violation, up to a maximum of \$10,000.