

B-37



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Umar Salahuddin,
Atlantic City

CSC Docket No. 2016-427

Court Remand

ISSUED: **AUG 03 2015** (SLK)

The Appellate Division, Superior Court of New Jersey, reversed and remanded the attached determination of the Civil Service Commission (Commission), *In the Matter of Umar Salahuddin, et al., Atlantic City* (CSC, decided September 18, 2013), which denied the appellant's appeal that his demotion in lieu of layoff to the title of Community Service Aide was not in good faith.

By way of background, the appellant was demoted in lieu of layoff from his permanent title of Assistant Youth Opportunity Coordinator to Community Service Aide effective May 27, 2010. Upon the appellant's appeal of the good faith of his layoff to the Commission, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In his initial decision, the Administrative Law Judge (ALJ) determined that the appellant was demoted within the context of the general 2010 layoff as an act of political retaliation by Mayor Lorenzo Langford. Therefore, the ALJ concluded that the appellant's layoff was done in bad faith and he recommended that the demotion be reversed. (See attached initial decision).

However, in its *de novo* review of the record, while the Commission found that there was sufficient evidence in the record to support the ALJ's credibility determination regarding Langford, it determined that the appellant had not demonstrated that his layoff was not taken for purposes of economy since the domino effect as a result of the appellant's demotion resulted in a savings of \$32,627.62. Accordingly, the Commission found that the appointing authority's

action in demoting the appellant to the title of Community Service Aide was justified and dismissed the appellant's appeal. (See attached final decision).

Subsequently, the appellant appealed the Commission's decision to the Appellate Division, which reversed and remanded the matter for the purpose of reinstating the findings of the ALJ and awarding counsel fees. *See In the Matter of Umar Salahuddin, Atlantic City*, Docket No. A-1278-13T2 (App. Div. July 13, 2013). (Copy attached).

ORDER

The Civil Service Commission finds that the layoff of the appellant was not justified and therefore, reverses that action and upholds the appeal of Umar Salahuddin. Since the layoff has been reversed, the appellant is entitled to mitigated differential back pay, benefits, seniority and reasonable counsel fees pursuant to *N.J.A.C. 4A:2-1.5* for the period from May 27, 2010, the date of the appellant's demotion until July 1, 2015, the date of his retirement.¹ The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*.

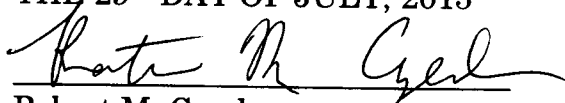
It is further ordered that counsel fees should be awarded to the appellant as the prevailing party pursuant to *N.J.A.C. 4A:2-2.12*. The appellant shall provide proof of income earned and an affidavit or services to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2-2.10* and *N.J.A.C. 4A:2-2.12*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees.

The parties must inform the Commission, in writing, if there is any dispute as to back pay or counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R. 2:2-3(a)(2)*.

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

¹ The appellant's demotion and retirement dates are as indicated in his County and Municipal Personnel System (CAMPS) record.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 29th DAY OF JULY, 2015



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachments

c: Richard L. Press, Esq.
Steven S. Glickman, Esq.
Umar Salahuddin
Elizabeth A. Davies, DAG
Kenneth Connolly
Joseph Gambino

A 3



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Umar Salahuddin,
et al., Atlantic City

CSC Docket Nos. 2010-3600 and
2011-343
OAL Docket No. CSV 6737-10

ISSUED: OCT 02 2013 (CSM)

The appeal of Umar Salahuddin, Assistant Youth Opportunity Coordinator with Atlantic City,¹ of the good faith of his demotion in lieu of layoff to the title of Community Service Aide effective May 27, 2010, was heard by Administrative Law Judge Bruce M. Gorman (ALJ), who rendered his initial decision on April 30, 2013. Exceptions were filed on behalf of the appointing authority and cross-exceptions were filed on behalf of the appellant.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on September 18, 2013, accepted the Findings of Fact as contained in the attached initial decision but did not adopt the recommendation to reverse the demotion in lieu of layoff. Rather, the Commission upheld the appellant's demotion to the title of Community Service Aide.

DISCUSSION

On March 12, 2010, the appointing authority submitted a layoff plan to this agency indicating that managerial and administrative duties being performed by incumbents in various managerial/supervisory titles were being performed by other

¹ Regina Armstrong, Gary Baker, Hariann Bernstein, Lois Braithwaite, Dona Gaskill, Shermaine Gunter-Gary, John Imfeld, Gwendolyn Lewis, Keith Mills, and Lawton Nelson also appealed the good faith of their layoffs. However, by individual letters dated August 8, 2011, these appellants withdrew their appeals. Therefore, the ALJ's initial decision only addresses the appeal of Umar Salahuddin. It is noted that the Commission acknowledged the withdrawal of the appeals at its meeting on September 18, 2013.

employees and were redundant or were non-essential functions. As a result, employees in the Departments of Public Safety, Health and Human Services, Revenue and Finance, and Administration would be subject to layoff. By implementing efficiencies through the layoff, the appointing authority indicated that it would realize savings of approximately \$2,700,000. The Division of State and Local Operations (SLO)² reviewed and approved the layoff plan on April 12, 2010 and issued title rights determination letters to the impacted employees on May 17, 2010. SLO advised the appellant that he had demotional title rights to the Community Service Aide title and that his name would be placed on the applicable special reemployment lists. It is noted that the appellant did not file a title rights appeal at the time of the layoff. Upon the appellant's appeal of the good faith of his layoff to the Commission, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In his initial decision, the ALJ determined that the appellant was demoted within the context of the general 2010 layoff as an act of political retaliation by Mayor Lorenzo Langford. In this regard, although the demotion of the appellant to Community Service Aide resulted in a \$3,300 savings, the ALJ found that this savings was negated shortly thereafter by the appointment of Michael Bailey, a political supporter of Langford, to the previously vacant position of Youth Opportunity Coordinator at a net salary increase of \$4,090. Thus, the ALJ concluded that the delay of hiring Bailey was an effort to provide legitimacy to the layoff and the appellant's demotion was not to accomplish economy. Rather, the hiring of Bailey effectively continued the appellant's position, but with a person friendlier to Langford. Indeed, the ALJ observed that if the appointing authority were interested in saving money, it would not have hired Bailey, but, as testified by Ronald Cash, Director of Health and Human Services, he and Langford's brother-in-law, Wilbur Banks, would have performed the appellant's duties. Moreover, the position of Youth Opportunity Coordinator was transferred out of the Department of Health and Human Services into the Department of Public Safety, while the vacant position of Assistant Youth Opportunity Coordinator, as well as Community Service Aide, remained in the Department of Health and Human Services. The ALJ found that the only possible conclusion for the transfer of this position to the Department of Public Safety was to insulate Bailey from an effort by the appellant to compete for the position.

The ALJ indicated that the above conclusion was buttressed by Langford's equivocation on the witness stand that undercut his credibility. For example, Langford asserted that he had no recollection of the identity of his opponents in the 2009 primary and general elections, but then admitted that he did in fact know who they were. Further, Langford claimed to have no knowledge that the appellant had supported his opponent, Martin Small, in the 2009 primary, then delineated a history of the appellant's political activity, culminating in the appellant's support

² Now, the Division of Classification and Personnel Management (CPM).

for Small in 2009. Additionally, Langford asserted that he was not aware that the appellant supported Scott Evans against him in the 2008 election, denied knowledge of the appellant's salary reduction despite the fact that he signed the document reducing his salary, and that he had no knowledge that Bailey, a personal and professional friend, had been promoted to Youth Opportunity Coordinator. Langford also contended that he had no knowledge of the "hit list" of people who were going to be laid off, which was reported in a local newspaper, despite the fact that his press aide, Kevin Hall, testified that he reviewed the contents of the newspaper with Langford daily. The ALJ concluded that the sum of Langford's testimony that he had no knowledge of anything that went on during the 2010 layoff process was incredible and unbelievable.

Based on the testimony of the witnesses, as well as Langford's admission that he "does not get mad, he gets even," the ALJ determined that the 2010 layoff offered him a perfect opportunity to get even with the appellant for his contrary political activity. At the same time, demoting the appellant provided the opportunity for Langford to appoint a political ally, Bailey, to Youth Opportunity Coordinator. As additional cause to seek the appellant's demotion, the ALJ noted that Langford was aware that the appellant engaged in many speaking events, which gave him extensive contact with the general public and put him in a position to influence those who heard him speak. Thus, given his political opposition to Langford, the appellant's extensive interaction with the general public was not desirable to Langford and his demotion would limit any potential political impact. Therefore, the ALJ concluded that the appellant's layoff was done in bad faith and he recommended that the demotion be reversed.

In its exceptions to the initial decision, the appointing authority underscores that the financial circumstances it faced in 2010 required it to implement multiple layoffs. As a result of this budget crisis, the department heads and directors of the various departments compiled a list of titles it determined were not necessary. This resulted in the appellant's demotion and a decrease in his salary of \$3,221.60. The appointing authority underscores that the \$3,221.60 reduction in the appellant's salary was not the only savings realized as a result of selecting the Assistant Youth Opportunity Coordinator title for layoff. Specifically, the domino effect caused by the appellant "bumping down" into the Community Service Aide title resulted in two other employees being "bumped" or displaced. Consequently, the total savings as a result of selecting the Assistant Youth Opportunity Coordinator position for layoff was in fact \$32,627.62. Regarding the manner in which the employees were selected for inclusion in the 2010 layoff, although Langford approved the layoff list, he did not create it or select the impacted employees. Rather, the various department directors selected the positions to be included in the 2010 layoff and at no point did Langford direct, recommend, or suggest who should be included. In this regard, the appointing authority underscores that Scott testified that there was no single decision maker as to who would be included in the layoff and that

Langford had very little involvement in the process. Moreover, the appellant's division director, Ronald Cash, indicated that he identified the appellant's title for inclusion in the layoff and he did not have any discussion with Langford about the recommendation.

With respect to the appointment of Bailey, the appointing authority states that he was provisionally appointed to Youth Opportunity Coordinator in October 2011, a different fiscal year than when the layoff took place in 2010, and economic conditions had improved. More significantly, Bailey was not appointed as a Youth Opportunity Coordinator in the Department of Public Safety "shortly after" the appellant was demoted from his position. Rather, following the May 2010 layoffs, the appointing authority operated without an Assistant Youth Opportunity Coordinator for approximately 18 months without incident. Thereafter, in October 2011, Bailey, who has more seniority and a higher level of education than the appellant, was appointed. As such, Bailey's \$4,090 salary increase in a different fiscal year had no impact on the savings realized in the 2010 budget as a result of the appellant's demotion. Additionally, the appointing authority states that there was no evidence that Bailey was a political supporter of Langford or that the Youth Opportunity Coordinator position was transferred out of the Department of Health and Human Services to the Department of Public Safety. Finally, the appointing authority argues that the ALJ's credibility determinations concerning Langford's testimony are flawed since he did not recite specific findings of fact in the initial decision.

In response, the appellant states that the ALJ's decision did not deprive the Commission of any meaningful review and it essentially addresses the findings of fact in the legal discussion portion of the decision. Further, the appellant states that the ALJ's finding that Langford's testimony was not credible is supported by the record and that the conclusion that he was targeted for layoff due to political retaliation, not economic necessity, is correct. Moreover, the salary savings achieved by his layoff was minimal and the appointing authority has not explained how it could fill the Youth Opportunity Coordinator position when the appellant is on the special reemployment list. Additionally, the appellant maintains that the ALJ properly concluded that Bailey was a Langford supporter and that the delay in Bailey's provisional appointment was done in order to provide legitimacy to the action of laying him off.

N.J.S.A. 11A:8-4 and *N.J.A.C. 4A:8-2.6(a)1* 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. When a local government has abolished a position, there is a presumption of good faith and the burden is on the employee to show bad faith and that the action taken was not for purposes of economy. *Greco v. Smith*, 40 *N.J. Super.* 182 (App. Div. 1956); *Schnipper v. North Bergen Township*, 13 *N.J. Super.* 11 (App. Div.

1951). As the Appellate Division further observed, "That there are considerations other than economy in the abolition of an office or position is of no consequence, *if, in fact, the office or position is unnecessary, and can be abolished without impairing departmental efficiency.*" *Schnipper, supra* at 15 (emphasis added). The question is not whether the plan or action actually achieved its purpose of saving money, but whether the motive in adopting a plan or action was to accomplish economies or instead to separate a public employee without following *N.J.A.C. 4A:8-1 et seq.* Thus, a good faith layoff exists if there is a logical or reasonable connection between the layoff decision and the personnel action challenged by an employee. Additionally, it is within an appointing authority's discretion to decide how to achieve its economies. *See Greco, supra.* Further, if the appellant establishes a *prima facie* case, *i.e.*, rebutting the presumption of the good faith basis for the layoff, the appointing authority then assumes the burden of providing preponderating evidence that the layoff would have occurred even when there is evidence of a dual motive. Finally, if the appointing authority provides preponderating evidence of a legitimate business reason, the burden shifts back to the appellant to establish that the legitimate business reason was a mere pretext used to remove the appellant without complying with Civil Service law and rules *i.e.*, bad faith. In this regard, an appeal must fail even in the face of a showing of dual motives, such as economy and efficiency and ill will, if the presumptions of economy and efficiency cannot be overcome. *See e.g., Matter of Bridgewater Tp., 95 N.J. 235 (1984); See also Wright Line, 251 NLRB 1083 (1980).*

Upon a review of this matter, the Commission finds nothing in the record to demonstrate that the appellant's demotion was for reasons other than economy or efficiency. The Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D., 149 N.J. 108 (1997).* "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See In re Taylor, 158 N.J. 644 (1999) (quoting State v. Locurto, 157 N.J. 463, 474 (1999)).* Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Board appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence or was otherwise arbitrary. *See N.J.S.A. 52:14B-10(c); Cavalieri v. Public Employees Retirement System, 368 N.J. Super. 527 (App. Div. 2004).* In this case, the ALJ specifically found that Langford's testimony lacked any credibility. While the Commission finds that there is sufficient evidence in the record to support the ALJ's credibility determination regarding Langford, the appellant has not demonstrated that his layoff was not taken for purposes of economy.

Initially, there is absolutely no evidence in the record that Langford authored the "hit list" to target political opponents for layoff. While he may have been aware of the individuals who were being targeted based on Hall's testimony that he reviewed the newspaper with Langford on a daily basis, this does not establish that Langford composed the "hit list." There is also no evidence that Langford specifically targeted the appellant's position for layoff. In this regard, Scott's testimony that the targeting of positions for layoff was done as a group process, starting with department directors and human resources, and that ultimately, the department directors proposed the layoffs, is un rebutted. Although Langford, as Mayor, approved these recommendations, his final approval of his department head recommendations does not demonstrate that he targeted the appellant's position for demotion in retaliation for his past political opposition. Significantly, the appellant's demotion did result in salary savings of \$32,627.62 for the 2010 budget year because of the domino effect such actions cause in the workplace with respect to positions of other employees. Therefore, the appellant's demotion resulted in more than a token savings. Moreover, the savings realized by the appellant's demotion in 2010 was not cancelled out by Bailey's promotion to the Youth Opportunity Coordinator title in 2011, in a different department, 18 months after the 2010 layoff. As noted in the appointing authority's exceptions, this movement had no impact on the savings that needed to be achieved to address the budget gap during the year of the layoff. Further, the appellant would not have had special reemployment rights to the Youth Opportunity Coordinator title since it is a higher level title than Assistant Youth Opportunity Coordinator. Thus, the filling of the Youth Opportunity Coordinator position in a different department 18 months after the subject layoff does not evidence that the appointing authority acted in bad faith.

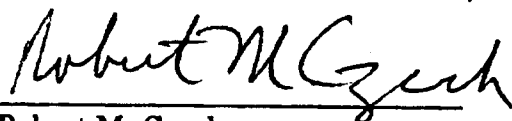
Accordingly, the evidence demonstrates that the appellant's position was targeted for legitimate budgetary reasons. *See e.g., In the Matter of Bergen County Layoff*, Docket No. A-5281-03T5 (App. Div. July 15, 2005) (The Appellate Division upheld the elimination of the position of Assistant Tax Administrator for Bergen County and found that it was based on legitimate budgetary reasons. The appellant, who was laid off, was replaced by a "Confidential Assistant" who performed substantially the same duties. The appellant argued that he was targeted because of his political affiliation. However, the court found that the appellant did not present any evidence that he was targeted for layoff based on his political affiliation). Moreover, the circumstances presented, viewed in the most favorable light for the appellant, do not overcome the establishment of actual economies demonstrated by the appointing authority and, therefore, any evidence of an alternate bad faith motive for the appellant's demotion is unsustainable. *See e.g., Matter of Bridgewater Tp.*, *supra*; *Wright Line*, *supra*. Accordingly, the appellant's demotion to Community Service Aide is upheld.

ORDER

The Civil Service Commission finds that the appointing authority's action in demoting the appellant to the title of Community Service Aide was justified. Therefore, the Commission upholds that action and dismisses the appellant's appeal.

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 ON
THE 18TH DAY OF SEPTEMBER, 2013**



Robert M. Czech
Chairperson
Civil Service Commission

**Inquiries
and
Correspondence**

Henry Maurer
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1278-13T2

IN THE MATTER OF
UMAR SALAHUDDIN, ATLANTIC CITY.

Submitted May 19, 2015 – Decided July 13, 2015

Before Judges Guadagno and Leone.

On appeal from the New Jersey Civil Service
Commission, Docket Nos. 2010-3600 and 2011-
343.

Law Offices of Richard L. Press &
Associates, attorneys for appellant Umar
Salahuddin (Richard L. Press, on the briefs).

Ruderman & Glickman, P.C., attorneys for
respondent City of Atlantic City (Steven S.
Glickman, of counsel and on the brief).

John J. Hoffman, Acting Attorney General,
attorney for respondent New Jersey Civil
Service Commission (Elizabeth A. Davies,
Deputy Attorney General, on the statement in
lieu of brief).

PER CURIAM

Umar Salahuddin appeals from the final administrative
action of the Civil Service Commission (Commission) upholding
his demotion by the City of Atlantic City (City) from the
position of Assistant Youth Opportunity Coordinator (AYOC) to
Community Service Aide. The Commission chose not to adopt the

well-reasoned and comprehensive decision of Administrative Law Judge (ALJ) Bruce M. Gorman finding that Salahuddin's demotion was done in bad faith. Because we find that the Commission's determination was not supported by sufficient, credible evidence in the record, we reverse and remand.

I.

Salahuddin began his employment with the City in 1983 as the mayor's Youth Program Director. In 1985, his title was changed to AYOC, where he oversaw the employment and hiring of youth. In 2001, Lorenzo Langford was elected mayor.

In 2005, Langford ran for reelection and was opposed by Robert Levy in the Democratic primary. Salahuddin actively supported Levy and even walked door-to-door with him. During the campaign, Salahuddin encountered Langford on several occasions.

Levy won by a large margin but resigned in October 2007. Scott Evans was then sworn in to serve the remainder of Levy's term. Salahuddin enjoyed a good relationship with Evans. In 2008, a special election was held and Evans lost the Democratic nomination to Langford, who went on to win the election to serve the remainder of Levy's term. Salahuddin was not involved in that campaign.

In the 2009 Democratic primary, Langford was opposed by Marty Small. Salahuddin supported Small, and Langford testified that he was aware of this support. Ultimately, Langford prevailed in the primary and the general election.

When Langford took office in 2008, Salahuddin noticed a change in their relationship. Although he had attended regular meetings with all prior mayors, Langford excluded him from all meetings. Salahuddin testified that Langford stopped speaking with him and would "walk right past [him] as if [he] didn't exist." Although Mayor Evans had increased Salahuddin's salary from \$54,725.96 to \$63,482.12 in 2008, Langford reduced it back to the former amount upon taking office.

Believing he was the victim of political retaliation, Salahuddin filed complaints through his union and the City's affirmative action officer. In his September 25, 2009 complaint to the City's affirmative action officer, Salahuddin alleged that the scope of his job duties was decreased, he was removed from his office and placed in a "storage room with no phone or computer," and had been targeted for write-ups and improper discipline. The City did not conduct an investigation.

In November 2009, Salahuddin was advised that his use of a City-issued cell phone would be discontinued even though he used the phone for work-related matters on nights and weekends.

In February 2010, Salahuddin received an unsigned document containing a list of ten people who had opposed Langford. The list bore the heading "As per the Mayor" and contained Salahuddin's name. On May 17, 2010, Salahuddin was served with a notice of layoff. Because of his seniority, he did not lose his job but was demoted to the position of Community Service Aide, and his salary was further decreased to \$53,693.40.

Salahuddin testified that nine out of the ten people on the document, which was referred to at trial as the "hit list," were impacted by the May 2010 layoffs. According to Salahuddin, the only person not affected was Shermaine Gunter-Gary because her demotion would have displaced a Langford appointee.

Several news articles related to the layoffs were admitted into evidence before the ALJ. The articles identify most of the people on the list as political adversaries of Langford who were the targets of the City's proposed budget cuts. Langford's press secretary testified that he discussed one of these articles, dated March 5, 2010, with Langford. In the article, Langford was quoted as saying he "doesn't get mad, he gets even." At the hearing, Langford admitted to making that statement.

At the time of the layoffs, the City had to account for approximately \$16.5 million in additional expenses in the 2010

budget, which included \$4 million in increased wages, \$3.5 million in increased pension costs, and a deficit of approximately \$9 million from 2009. The City was required under State law to close the 2009 budget gap in its 2010 budget.

After taking into account the City's revenue sources, there was still an approximate gap of \$9.5 million between revenue and expenditures in the 2010 budget. As a result, Michael Stinson, the City's Director of Revenue and Finance, testified that layoffs were necessary. The 2010 layoffs saved the City approximately \$3.6 million.

In October 2011, the City appointed Michael Bailey to the title of Youth Opportunity Coordinator, a position with virtually identical job duties to Salahuddin's former position of AYOC. Langford knew Bailey personally and professionally. Salahuddin was not permitted to apply for the position because the promotional announcement was not open to the department in which he worked.

The ALJ found that Salahuddin's demotion was done in bad faith. He explained that the demotion resulted in savings to the City of only \$3,300, the salary difference between the AYOC position and Community Service Aide position. The ALJ also found that Bailey's appointment was further evidence of bad faith, explaining that "the design in demoting [Salahuddin] was

not to accomplish economy, but, to the contrary, was to effect the removal of [Salahuddin]" and replace him "with a new and friendlier person filling the slot."

Finally, ALJ Gorman found Langford's testimony "incredible and unbelievable." The judge highlighted a few examples, including Langford's initial claim that he was not aware that Salahuddin had supported Small, but later admitted that he was aware of Salahuddin's political activities, including his support for Small; that Langford denied that he was aware of Salahuddin's salary reduction but later admitted to signing a document reducing his salary; and that Langford denied that he knew of Bailey's appointment despite being a personal and professional friend.

The Commission did not adopt the ALJ's recommendation and instead upheld Salahuddin's demotion. The Commission found "nothing in the record to demonstrate that [Salahuddin's] demotion was for reasons other than economy or efficiency." The Commission relied on the City's exceptions to ALJ Gorman's initial decision in noting that the total savings realized by demoting Salahuddin equaled \$32,627.62, because one other person was demoted and one was displaced. The Commission also found that there was no evidence that Langford authored the hit list or that he specifically targeted Salahuddin. Because Salahuddin

failed to provide sufficient evidence to establish a bad faith motive in light of the City's economic difficulties, the Commission found that the City's action demoting him was justified.

II.

The scope of our review of an administrative agency's determination is limited. In re Herrmann, 192 N.J. 19, 27 (2007). We focus on three inquiries:

(1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

[Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995).]

A reviewing court or agency head is not permitted to reject or modify findings of fact as to the credibility of lay witnesses unless those findings are "'arbitrary, capricious, or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.'" In re Snellbaker, 414 N.J. Super. 26, 36 (App. Div. 2010) (quoting N.J.S.A. 52:14B-10(c)). An agency that rejects or modifies any factual finding "shall state with particularity the reasons for rejecting the findings

and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record." N.J.S.A.

52:14B-10(c).

There is a presumption of good faith when a municipality abolishes a position due to economic reasons. Greco v. Smith, 40 N.J. Super. 182, 189 (App. Div. 1956). The burden is on the petitioner to show that the municipal action was done in bad faith. Ibid. However, "[t]he abolition of a position in the municipal service, or the discharge of the person occupying that position, must not be merely colorable or a device for circumventing the employee's civil service protection while retaining his position in substance." Id. at 190-91.

The ALJ made several findings in support of his conclusion that Salahuddin's demotion was for reasons other than the economy or efficiency:

The essential underpinning of any layoff plan is the premise that it will save money. Yet in the case of appellant, no true savings was achieved. The demotion of appellant from the position of Assistant Youth Opportunity Coordinator to Community Service Aide ostensibly resulted in a \$3,300 savings. But that savings was negated shortly thereafter by the appointment of Michael Bailey to the previously vacant position of Youth Opportunity Coordinator at a net salary increase of \$4,090. The totality of the testimony from the sundry witnesses established beyond question that Bailey was a Langford supporter.

.

The political nature of Bailey's appointment is highlighted by the fact that his position as Youth Opportunity Coordinator was transferred out of the Department of Health and Human Services and into the Department of Public Safety, while the vacant position of Assistant Youth Opportunity Coordinator, as well as appellant's current position of Community Service Aide, remained in the Department of Health and Human Services. The only possible conclusion is that Bailey's position was transferred to the Department of Public Safety in an attempt to insulate him from attack from below, specifically, an effort by appellant to compete for the position.

.

Given appellant's lengthy history of political opposition to Mayor Langford, appellant's extensive interaction with the general public was not desirable to Mayor Langford. By demoting appellant, Mayor Langford effectively limited appellant's potential political impact.

Any time a general layoff is required by a municipality, the elected officials involve[d] confront the temptation to use that layoff for political purposes. In this case, I am satisfied that Mayor Langford succumbed to that temptation. The presence on the layoff list of other political opponents . . . only buttresses that conclusion.

The ALJ, who had the opportunity to observe Langford "carefully" during his testimony, made comprehensive credibility determinations:

Mayor Langford presents as intelligent and articulate. He has an outstanding record in the political arena. He rose from the ranks to defeat an extremely popular incumbent Mayor in James Whelan, a man who ultimately won election to the State Senate. He was defeated for re-election in 2005 by a coalition of forces, and his career appeared to be over. But he fought back and won re-election in 2008 and again in 2009. He has demonstrated over a [twenty-year] career that he is an extremely able politician.

Yet on the witness stand, Mayor Langford attempted to assert only the vaguest recollection of his various political opponents. Similarly, he denied active participation in the layoff process and only minimal recollection of what actions were taken during the layoff. His purported passivity in this process fails to coincide with his past history as a talented and resilient politician. For that reason, his assertions of ignorance both of his opponents and of what was done to them defy belief. I am satisfied that Mayor Langford knew exactly what was happening during the layoff and was fully aware that certain former political opponents were suffering penalty. I CONCLUDE that his testimony to the contrary was incredible and unbelievable.

The Commission acknowledged its obligation to defer to this determination and "that there is sufficient evidence in the record to support the ALJ's credibility determination regarding Langford." Nevertheless, the Commission found that there was "nothing in the record to demonstrate that [Salahuddin's] demotion was for reasons other than economy or efficiency."

The Commission's conclusion is based on the absence of proof that Langford actually "composed" the hit list or "specifically targeted" Salahuddin's position for layoff. This finding ignores the uncontested record evidence that the hit list bore the heading "As per the Mayor" and was comprised primarily of Langford's political enemies who were impacted by the layoffs. Moreover, Langford's press secretary admitted to discussing a newspaper article identifying persons on the hit list with Langford, and Langford admitted to saying that he "doesn't get mad, he gets even." This compelling evidence of political retaliation is in no way diminished by lack of proof that Langford personally drafted the hit list.

Furthermore, in discussing Bailey's appointment to a position nearly identical to Salahuddin's previous position, the Commission ignores Bailey's status as a political ally of Langford. Moreover, the Commission fails to acknowledge the significance of moving the Youth Opportunity Coordinator position to a department different from Salahuddin's, thereby preventing him from competing for the position. As the ALJ recognized, "Bailey's position was transferred to the Department of Public Safety in an attempt to insulate him from attack from below, specifically, an effort by [Salahuddin] to compete for the position."

Additionally, Langford was aware that as AYOC, Salahuddin engaged in "a lot of speaking." Langford knew that Salahuddin spoke at rallies, funerals, and other events. The ALJ noted that Salahuddin had "extensive contact with the general public and was in a position to influence those who heard him speak." The ALJ found that Salahuddin's extensive contact with the public was not desirable to Langford given Salahuddin's "lengthy history of political opposition." Thus, "Langford effectively limited [Salahuddin's] potential political impact" by demoting him.

Although the City was facing economic difficulties at the time of the layoffs, Salahuddin presented ample evidence to demonstrate that he was demoted in bad faith. The economic situation cannot be used as a "device for circumventing [Salahuddin's] civil service protection while retaining his position in substance." Greco, supra, 40 N.J. Super. at 190-91. Given that Salahuddin's position was functionally retained when Bailey became the new Youth Opportunity Coordinator, it appears that the City used the economic layoffs as an opportunity to punish political opponents.

The totality of the evidence strongly suggests that Salahuddin was targeted due to his political opposition to Langford. To conclude that there is "nothing in the record" to

support a finding of political retaliation ignores compelling record evidence and is so "wide of the mark" that reversal is warranted. See Fernandez v. Bd. of Review, 304 N.J. Super. 603, 606 (App. Div. 1997).

Finally, the Commission relied on evidence outside of the record when it concluded that the City saved \$32,627.62 due to Salahuddin's demotion. This information was contained in the City's exceptions to the ALJ's decision. "A final decision shall include findings of fact and conclusions of law, separately stated and shall be based only upon the evidence of record at the hearing" N.J.S.A. 52:14B-10(d). Although it can be inferred that the savings realized by the demotion amounted to more than just \$3,300 (the salary difference between Salahuddin's former and current positions), any finding as to the specific amount is purely speculative.

Salahuddin seeks counsel fees pursuant to N.J.S.A. 11A:2-22 and counsel fees for this appeal pursuant to Rule 2:11-4. N.J.S.A. 11A:2-22 permits the Commission to "award back pay, benefits, seniority and reasonable attorney fees to an employee as provided by rule." The Commission "shall award partial or full reasonable counsel fees incurred in proceedings before it and incurred in major disciplinary proceedings at the departmental level where an employee has prevailed on all or

substantially all of the primary issues before the Commission."

N.J.A.C. 4A:2-2.12. On remand, the Commission shall enter an appropriate award of counsel fees.

With respect to counsel fees for this appeal, according to Rule 2:11-4, "An application for a fee for legal services rendered on appeal shall be made by motion supported by affidavits as prescribed by R. 4:42-9(b) and (c), which shall be served and filed within 10 days after the determination of the appeal." The issue of counsel fees for this appeal shall not be considered until such an application has been made.

The Commission's determination is reversed and the matter is remanded for the purpose of reinstating the findings of the ALJ.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION