

*In the Matter of James Anderson, Township of Berkeley*  
CSC Docket No. 2013-1033  
**(Civil Service Commission, decided September 18, 2013)**

James Anderson, a Building Inspector with the Township of Berkeley, represented by Susan E. Di Maria, Esq., appeals his placement on a temporary unpaid leave effective February 9, 2009.

By way of background, the appellant was permanently appointed on a part-time hourly basis to the title of Building Inspector effective September 1, 2006. By memorandum dated February 9, 2009, the appellant was notified that due to financial circumstances, he was being placed on an “unpaid leave” from Berkeley effective that same date. According to the appellant’s County and Municipal Personnel System (CAMPS) record, he is still an active employee with Berkeley.

In an appeal dated September 19, 2012, the appellant states that since he was placed on an “unpaid leave,” he has never been asked to return to work. The appellant also states that he was never asked and did not consent to be placed on a “temporary unpaid leave.” Additionally, he asserts that Berkeley never submitted a layoff plan to the Civil Service Commission (Commission) for approval, considered alternatives to layoff prior to placing him on an “unpaid leave,” and has never informed him of his final employment status. Moreover, he claims that Berkeley has since hired other, younger Building Inspectors, and that one of the other two employees who was also placed on temporary “unpaid leave,” Robert Schlichting, has not returned to employment. However, the appellant asserts that Berkeley appointed John K. Gerrity as a part-time Building Inspector on July 5, 2009 and another inspector named “Dave” approximately three months after he was placed on “unpaid leave.” The appellant provides a memorandum dated July 5, 2009 to Berkeley’s Personnel Officer indicating that Gerrity was appointed part-time as a Building Inspector. Therefore, the appellant argues that he was unilaterally laid off by Berkeley without the required 45-day notice and without prior Commission approval of a layoff plan. Accordingly, the appellant requests that the matter be transmitted for a hearing to the Office of Administrative Law (OAL) and that he be reinstated and receive back pay and counsel fees.

Although provided the opportunity on two occasions, the appointing authority has not submitted any information for the Commission to review in this matter.

A review of agency records indicates that Berkeley did not submit a layoff plan in support of its February 9, 2009 action. Agency records also indicate that Schlichting is still an active employee but there is no record of an appointment of any kind for Gerrity.

## CONCLUSION

*N.J.S.A.* 11A:8-4 specifically states that a permanent employee who is laid off or demoted in lieu of layoff shall have a right to appeal the good faith of such layoff or demotion and that appeals must be filed within 20 days of the final notice of such layoff or demotion. *See also N.J.A.C.* 4A:8-2.6(b).

*N.J.A.C.* 4A:2-1.1(b) provides that unless a different time period is stated, an appeal must be filed within 20 days after either the appellant has notice or should have reasonably known of the decision, situation or action being appealed.

Although the appellant presents a substantive challenge to being placed on an “unpaid leave,” he has failed to provide any explanation for the three year and seven month delay in the filing of his appeal. In this regard, it is noted that the time frame governing appeals of the good faith of a layoff are jurisdictional and cannot be relaxed by the Commission. Moreover, even if such appeals were not jurisdictional, there would be no basis on which to relax the provisions of *N.J.A.C.* 4A:2-1.1(b) or *N.J.A.C.* 4A:8-2.6(b). The purpose of the time limitation is not to eliminate or curtail the rights of appellants, but to establish a threshold of finality. In the instant case, it is clear that the appellant’s appeal is untimely. Initially, in his appeal submission, the appellant admits that in February 2009, he was verbally told by Gary Swirczinski, the Berkeley Township Code Official, that he was being laid off. Significantly, the appellant admitted that he requested written confirmation and was provided the February 9, 2009 memorandum indicating that he was being placed on a temporary unpaid leave. Further, the appellant became aware that Berkeley appointed Gerrity to the position in July 2009 and provided a memorandum from the appointing authority confirming this appointment. Therefore, it is clear that the appellant was aware of his situation at least by the end of 2009 but there is no documentation that he ever pursued the matter with either Berkeley or filed an appeal with the Commission until September 19, 2012. Moreover, the appellant has failed to provide any explanation for the delay in the filing of his appeal. As such, his appeal is untimely and is being dismissed on that basis.

However, Berkeley’s actions in this matter must be addressed. There is no provision in Civil Service law or rules providing for a “temporary unpaid leave” that can be unilaterally imposed on an employee by an appointing authority. Rather, 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:-1.1(a). Since there is no provision for an involuntary “temporary unpaid leave” under Civil Service law or rules, the appellant was laid off by Berkeley. Accordingly, the appellant’s CAMPS record should be revised to reflect that he was laid off effective February 9, 2009.

One additional matter warrants discussion. *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 effected, 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 that it is legally obligated to do. If the information is lacking, this agency may take such remedial action as requiring 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 serviced 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 the affected employees, to afford the 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, Berkeley completely failed to follow the established layoff procedures. It did not submit a layoff plan to this agency for approval prior to what was essentially the appellant's layoff, which delineated the reasons for the layoff, the projected date of the layoff, the number of positions effected, the names of the employees to be affected, and the explanation of all alternative and pre-layoff

actions that had been taken and considered. Berkeley has not rebutted any of the appellant's assertions that it failed to meet its statutory and regulatory duties. Although the appellant's appeal has been dismissed on the grounds of timeliness, the Commission cannot ignore the matter of compliance with Civil Service law and rules. Not submitting a layoff plan for approval by this agency and undertaking what is essentially a unilateral layoff action is an egregious violation of Civil Service law and rule.

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 law 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. February 2, 1989).* In this case, the Commission is disturbed by Berkeley's egregious non-compliance with the procedural requirements for a layoff and orders it to comply with all Civil Service law and rules. This lack of compliance is further exacerbated by Berkeley's lack of response to the Commission's inquiries about this matter. Under these circumstances, it is appropriate to fine Berkeley \$5,000 for its actions and omissions in this case. Further, Berkeley is strongly cautioned to ensure that it follows Civil Service law and rules in the future.

### **ORDER**

Therefore, it is ordered that this appeal be dismissed as untimely and James Anderson's CAMPS record amended to reflect his layoff effective February 9, 2009. It is further ordered that Berkeley Township be fined in the amount of \$5,000 and that it remit that amount no later than 30 days after the date of this decision.

If at any time, Berkeley Township does not adhere to the timeframe for remitting the fine imposed, it will be subject to additional fines of \$100 per day for each day of non-compliance up to a maximum of \$10,000.

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