

In the Matter of Michael Morris

CSC Docket No. 2013-2927

(Civil Service Commission, decided September 4, 2013)

The City of Trenton (Trenton), represented by Vincent M. Avery, Esq., petitions the Civil Service Commission (Commission) for reconsideration and a stay of the attached final administrative decision, rendered on April 3, 2013, in which the Commission rescinded the layoff of Michael Morris and ordered that he be returned with seniority and benefits to the position of Senior Security Guard. Additionally, Morris, represented by Jack A. Butler, Esq., petitions the Commission for enforcement of the April 3, 2013 decision, and also requests back pay and counsel fees.

As background, Morris, a Senior Security Guard with Trenton's Recreation and Natural Resource Department, was laid off effective September 16, 2011 pursuant to a layoff plan. Morris appealed, claiming his title rights had been violated. He contended that Robert Mendez was hired as a part-time provisional Senior Security Guard on March 24, 2011 but that he was working as a full-time Senior Security Guard. He also asserted that James Moses had been hired as a Senior Security Guard in 2011. Morris claimed that he should have had title rights to the positions occupied by Mendez and Moses as he had more seniority than both of these employees. Further, Morris argued that Trenton was attempting to circumvent Civil Service layoff rules by keeping Mendez in a part-time provisional title while he performed the duties of a full-time Senior Security Guard. Trenton, despite numerous opportunities and requests, did not submit any arguments for the Commission to review other than the employment history for Moses and Mendez.

In reviewing the matter, the Commission, in the attached decision, initially found that Morris had not raised any bad faith arguments or provided any evidence of bad faith concerning his *current* layoff effective September 16, 2011. All of his bad faith arguments concerned the layoff that occurred in November 2010 and thus, any such arguments were untimely. *See N.J.A.C. 4A:8-2.6(b)*. With regard to the September 16, 2011 layoff, the Commission found that Morris had not been properly laid off. It determined that the seasonal appointment of Mendez exceeded the six month limit for employment in a temporary position. *See N.J.S.A. 11A:4-13(c)*. It also found that Mendez was still employed and per Morris' undisputed allegations, performing the same duties that Morris performed. Therefore, the Commission found that Trenton improperly utilized a seasonal position where a permanent appointment appeared to be needed. Accordingly, the Commission ordered the temporary appointment of Mendez be terminated and the appointment of Morris from the special reemployment list for Senior Security Guard. In this regard, the Commission ordered the immediate reinstatement of Morris with back pay accruing from the 31st day after the decision date. No other remedies were ordered.

In the present matter, Trenton takes exception with the Commission's statement that it had been contacted numerous times but failed to respond. It argues that its counsel was never contacted nor provided with a copy of Morris' appeal. Additionally, it claims that the notice letter was not sent to its Business Administrator but to a Mayor's Aide. Further, it asserts that the only person contacted by the Commission's staff was a low level human resources employee. Trenton argues that the Commission should have contacted its counsel or a higher level official to obtain a proper response. Moreover, Trenton argues that it cannot comply with the Commission's order in the prior decision because Mendez is serving as a Seasonal Security Guard, not as a Senior Security Guard. It maintains that a Seasonal Security Guard is different than a Senior Security Guard in that incumbents are paid hourly, are not part of the pension system, and do not receive any health benefits. Trenton claims that the Commission was under the mistaken belief that Mendez was serving as a Senior Security Guard when he was not. In addition, it contends that it has taken steps to remedy its error concerning seasonal employees working in such titles in excess of six months.

In response, Morris contends that Trenton had clear and ample time to respond to his appeal. In this regard, he asserts that Trenton was affirmatively involved in providing information to the Commission as it did provide employment records for Mendez and Moses. Additionally, Morris argues that Trenton created a *de facto* permanent position for Mendez. He argues that Mendez was a seasonal hourly employee on paper only. Morris contends that a review of Mendez's earnings, which he submits, shows that Mendez worked substantial over-time and in fact earned more than Morris would have in the same time period. Further, Morris asserts that Trenton has not met the standard for reconsideration or a stay.

Furthermore, Morris argues that the Commission should reconsider its determination not to grant him back pay or counsel fees based on new information. In this regard, Morris submits a certification from former Trenton Business Administrator William Guhl, which indicates that in July 2010, he had a conversation with the Trenton Mayor in which the Mayor stated that he wanted to reward Mendez for political contributions and wanted to lay off Morris from his supervisory position so he could install his own person. Guhl explained that such actions would violate Civil Service rules. Morris claims that after Guhl's resignation, the Mayor followed through with his plan. Further, Morris claims that the statements it submitted from former Trenton employee Maria Richardson should not be limited to the prior lay off action as the Commission found. Morris claims that the statement the Mayor made declaring the he would "fire every motherfucking ranger before I bring that nigger back" demonstrates the animus the Mayor had for him. This animus clearly extended to the next layoff action and shows the Mayor's intent on removing him at any cost. Finally, Morris requests that if the Commission finds insufficient evidence to support bad faith, he be

granted a hearing at the Office of Administrative Law on the issue of Trenton's motivation.

Although provided the opportunity, Trenton did not respond to Morris' claims as set forth above.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding. Based on the above regulations, Trenton has not presented a sufficient basis for reconsideration.

Initially, the Commission notes that the initial notice of Morris' appeal was sent to whom the Commission believed was Trenton's Business Administrator at the time of the appeal. Notices of appeals of layoff title rights matters are generally sent to an appointing authority and not directly to the appointing authority's counsel. While Trenton claims that the notice letter was addressed to a Mayor's Aide, it provides no explanation as to why the Mayor's Aide did not forward this matter to the Business Administrator for a response. It is not incumbent upon Commission staff to ensure that whatever protocols established by a specific appointing authority to respond to such appeals are followed. Further, Commission staff properly contacted Trenton's human resource office for information to request a response. Nevertheless, the present matter provides an opportunity for Trenton's counsel to address Morris' arguments on appeal and its arguments on reconsideration will be addressed by the Commission.

Trenton asserts that it cannot comply with the Commission's order because Mendez is serving as a Seasonal Security Guard and not as a Senior Security Guard. The Commission is not persuaded. Mendez was employed year-round, not for any particular "season." Thus, the record evidences that Mendez was serving as a seasonal employee on paper only. It is clear that Trenton's intent was to keep Mendez permanently in the Security Guard position. Additionally, the fact that a seasonal employee does not receive health benefits or pension credit is not determinative in this matter. Trenton's use of a seasonal employee in such a manner is an obvious attempt by Trenton to circumvent Civil Service laws and rules by utilizing an employee with no status when a permanent civil service employee should have been utilized. Had the information provided by Trenton on reconsideration been provided in the original matter, the Commission would not have classified the present situation as a mere administrative error. It is clear that Trenton was purposefully violating Civil Service laws and regulations. Moreover,

whether Trenton classified Mendez as a Seasonal Security Guard or Senior Security Guard is irrelevant. It is clear that he was serving as a Senior Security Guard. Trenton has not denied that Mendez performed such duties. Therefore, the Commission denies Trenton's request for reconsideration and a stay, and orders that Michael Morris' layoff be rescinded and he be returned with seniority and benefits to the position of Senior Security Guard from a special reemployment list effective September 17, 2011.

In addition, Morris requests back pay and counsel fees based on new information. The new information is a certification from former Trenton Business Administrator Guhl, which indicates that the Mayor wanted to reward Mendez with a position for his political contributions and that he wanted Mendez to be Morris' superior. Trenton has not disputed this claim or any of Morris' claims of bad faith. In this regard, the Commission notes that *N.J.A.C. 4A:2-1.5(b)*, in all appeals other than disciplinary and good faith layoff appeals, allows back pay and/or counsel fees to be granted as a remedy where an appointing authority has unreasonably failed or delayed to carry out an order of the Commission or 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. *See e.g., In the Matter of Anthony Hearn*, 417 *N.J. Super.* 289 (App. Div. 2010). *See also, In the Matter of Kathryn E. Clark*, Docket No. A-5548-93T2 (App. Div. April 28, 1995), *cert. denied*, 142 *N.J.* 457 (1995). In the present matter, the Commission finds that Trenton did in fact take adverse action against Morris in bad faith and/or with invidious motivation. The record evidences that Trenton purposefully violated Civil Service laws and rules to place Mendez in a position which should have been Morris'. Further, the certifications of Guhl and Richardson show a clear animus towards Morris and a desire to give Mendez a position at any cost. Again, Trenton has not denied any of these claims. Therefore, based on these particular circumstances, the Commissions find the awarding of back pay and counsel fees is appropriate. Thus, Morris is entitled to back pay from September 16, 2011 to the date of his actual reinstatement.

ORDER

Therefore, it is ordered that Trenton' request for reconsideration be denied and that Trenton immediately reinstate Morris to the title of Senior Security Guard. In the event that Trenton has not made a good faith effort to comply with this decision within 10 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 11TH day from the issuance of this decision, and continuing for each day of continued violation, up to a maximum of \$10,000.

Further, the Commission orders that Morris be granted back pay, benefits and seniority from September 16, 2011, through the date of his actual reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. The Commission further awards reasonable counsel fees pursuant to *N.J.A.C. 4A:2-2.12*. Proof of income earned and an affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of Morris to Trenton 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/or counsel fees. However, under no circumstances should Morris' reinstatement be delayed pending resolution of any potential back pay and/or counsel fees dispute.

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