

In the Matter of Evelyn Laccitiello and Michelle Jones, City of Newark
CSC Docket Nos. 2010-672 and 2010-673
(Civil Service Commission, decided October 7, 2009)

Evelyn Laccitiello, Tax Assessor, and Michelle Jones, Tax Collector, with the City of Newark, petition the Civil Service Commission (Commission) for a stay of their temporary layoffs on September 8, 2009, October 9, 2009, November 2, 2009 and December 28, 2009. Since these matters concern the same issues, they have been consolidated herein.

By way of background, on March 25, 2009, the Commission adopted an emergency rule in accordance with *N.J.S.A. 52:14B-4(c)*. The new rule, *N.J.A.C. 4A:8-1.1A*, codified a mechanism for implementing temporary layoffs. On that same date, the Commission also approved the concurrent proposal of the provisions of the emergency rulemaking, in accordance with *N.J.A.C. 1:30-6.5(d)*.

At a special meeting on May 22, 2009, the Commission adopted the proposed amendments to *N.J.A.C. 4A:8-1.1*¹ and proposed new rule *N.J.A.C. 4A:8-1.1A*, with technical changes. See *N.J.A.C. 1:30-6.3*. Specifically, *N.J.A.C. 4A:8-1.1A* provides in part:

- (a) An appointing authority in State or local service may institute a temporary layoff for economy, efficiency or other related reasons. A temporary layoff shall be defined as the closure of an entire layoff unit for one or more work days over a defined period or a staggered layoff of each employee in a layoff unit for one or more work days over a defined period. A temporary layoff shall be considered a single layoff action even though the layoff of individual employees takes place on different days during the defined period. The defined period shall be set forth by the appointing authority in its temporary layoff plan; however, in a staggered layoff, the maximum period to stagger one day off shall not exceed 45 days.
- (b) A temporary layoff pursuant to (a) above may, with the approval of the Chairperson or a designee, be subject to limited exceptions when necessary to ensure continued public health, safety and

¹ Amendments to *N.J.A.C. 4A:8-1.1* had been adopted as part of both the emergency rulemaking and the concurrent rule proposal. These provisions did not specifically pertain to temporary layoffs but concerned layoffs in general, and were mainly technical in nature. However, these provisions also added, in accordance with *N.J.S.A. 11A:8-1(i)*, language stating that no employee who is on a military leave of absence for active service in the U.S. Armed Forces in time of war or emergency will be subject to any layoff action.

welfare, including, but not limited to, child protection, law enforcement, fire safety and care for prisoners, patients and other residents in the care or custody of the State.

* * *

- (d) A temporary layoff plan shall be submitted to the Chairperson of the Civil Service Commission or a designee in accordance with *N.J.A.C.* 4A:8-1.4 at least 15 days prior to the issuance of temporary layoff notices or such other period as permitted by the Chairperson or a designee. The temporary layoff plan shall describe the implementation of the temporary layoff, including the specific day(s) on which the layoff unit will be closed, any exceptions pursuant to (b) above and, if staggered, the reasons for not closing the entire layoff unit on a specific day and the staffing plan for implementing a staggered temporary layoff . . .

* * *

- (f) This temporary layoff rule, *N.J.A.C.* 4A:8-1.1A, shall expire on June 30, 2010.

Several employee unions challenged the validity of the rule. In *In the Matter of Emergency Temporary Layoff Rule*, Docket No. A-3626-08T2 (App. Div. April 17, 2009), the Appellate Division upheld the validity of the rule with respect to a temporary layoff of all employees in a layoff unit, subject to exemptions to ensure public health and safety, but stayed the portion of the rule that permitted staggered temporary layoffs pending further proceedings. In view of the April 17, 2009 Appellate Division opinion, the Commission also stayed the provisions of subsections (a) and (d) of *N.J.A.C.* 4A:8-1.1A that related to staggered layoffs for a period of 45 days from the date of the filing of the Notice of Adoption with the Office of Administrative Law, in order to permit any interested party to seek review of the rule in the Appellate Division. Thereafter, at its meeting of June 24, 2009, due to pending matters not yet resolved, the Commission extended this stay of the staggered temporary layoff portion of the rule another 45 days to August 24, 2009. See *In the Matter of N.J.A.C. 4A:8-1.1A, Temporary Layoffs* (CSC, decided June 24, 2009).

In July 2009, the State of New Jersey and several State employee unions entered into Memoranda of Agreement (MOAs) setting forth a system of “unpaid furlough days” intended to supplant the temporary layoff program for represented civilian employees. Accordingly, each of the MOAs stated, in pertinent part:

In recognition of the parties' negotiated agreement on self directed unpaid leave days (furlough days) . . . and the substantial personnel savings realized as a result of such agreement in FY 2010; and in further recognition that the furlough regulation, *N.J.A.C. 4A:8-1.1A*, adopted by the Civil Service Commission (CSC) on May 22, 2009, expires on June 30, 2010 and is currently the subject of legal challenge and appeal, the State believes that the furlough regulation is no longer necessary and should be rescinded. Therefore, the State and the Union shall jointly request that the Civil Service Commission rescind *N.J.A.C. 4A:8-1.1A* as soon as possible following ratification of this MOA.

As a result, the Commission proposed *N.J.A.C. 4A:8-1.1A* for repeal and granted a stay of *N.J.A.C. 4A:8-1.1A* pending the repeal of the rule. *See In the Matter of N.J.A.C. 4A:8-1.1A, Temporary Layoffs* (CSC, decided August 5, 2009).

Thereafter, local appointing authorities were advised of the impact that the stay of *N.J.A.C. 4A:8-1.1A* would have on their layoff plans. Specifically, they were advised that the ability of an appointing authority to temporarily close an entire layoff unit (*i.e.*, department or agency) preceded and existed independently of *N.J.A.C. 4A:8-1.1A* as determined by the Appellate Division in a 1994 decision. *See In the Matter of Department of Personnel Employees*, Docket No. A-4617-92T3 (App. Div. May 9, 1994). Consequently, as long as the temporary layoff was accomplished through the complete closure of an entire layoff unit in accordance in *N.J.A.C. 4A:8-1 et seq.*, the temporary layoffs were permissible under Civil Service law.

In the instant matter, since Newark's plan was for department-wide shut downs, the Division of State and Local Operations reviewed and approved its plans. As a result, all affected employees were provided with 45-day notices of the dates for the department-wide shut downs. It is noted that the initial 45-day notices did not include the City Clerk's Office since the Division of State and Local Operations had not yet received written confirmation that the City Clerk (a separate appointing authority, as discussed below) had agreed to the temporary layoff. Subsequently, written confirmation was provided and amended 45-day notices were approved, which included the City Clerk's Office as one of the departments involved in the temporary layoff.

In the instant petitions, Laccitiello and Jones argue that *N.J.S.A. 40A:9-165* prohibits a municipality from laying off an employee whose salary is set by *N.J.S.A. 40A:9-165*. In this regard, *N.J.S.A. 40A:9-165* provides in part:

The governing body of a municipality, by ordinance, unless otherwise provided by law, shall fix and determine the salaries, wages or compensation to be paid to the officers and employees of the

municipality, including the members of the governing body and the mayor or other chief executive, who by law are entitled to salaries, wages, or compensation.

Salaries, wages or compensation fixed and determined by ordinance may, from time to time, be increased, decreased or altered by ordinance. No such ordinance shall reduce the salary of, or deny without good cause an increase in salary given to all other municipal officers and employees to, any tax assessor, chief financial officer, tax collector or municipal clerk during the term for which he shall have been appointed. Except with respect to an ordinance or a portion thereof fixing salaries, wages or compensation of elective officials or any managerial, executive or confidential employee as defined in section 3 of the "New Jersey Employer-Employee Relations Act" P.L.1941, c.100 (C.34:13A-3), as amended, the ordinance shall take effect as provided therein. In municipalities wherein the provisions of Title 11 (Civil Service) of the Revised Statutes are in operation, this section shall be subject thereto . . .

Therefore, the appellants claim that they cannot be temporarily laid off as it would result in a reduction of their salaries, which is not permissible under *N.J.S.A. 40A:9-165*.

In response, Newark, represented by Mellissa Layla Longo, Assistant Corporation Counsel, contends that it followed proper procedures for the temporary layoffs and that its actions were made in good faith and were for reasons of economy and efficiency due to the financial crisis facing not only it, but the nation. Newark asserts that the temporary layoff plan is a cost savings measure in an effort to balance the budget and reduce expenditures. Additionally, Newark argues that the inclusion of Laccitiello and Jones is not contrary to *N.J.S.A. 40A:9-165*. Specifically, Newark argues that if it were to exempt Laccitiello and Jones from the temporary layoff, then it would be in violation of Civil Service law and rules which require the inclusion of everyone within the department. Newark argues that if Laccitiello and Jones are not included in the temporary layoff plan, then the entire tax department would have to be exempt, thus resulting in less savings than anticipated. Furthermore, Newark argues that if Laccitiello and Jones were allowed to be exempt from the layoff, it would affect Newark's ability to "get buy-in[s]" from other departments. For example, the City Clerk did not have to participate in the temporary layoffs. However, once apprised of the "dire financial circumstances and consequences of inaction," the City Clerk agreed in writing to be included in the temporary layoff plan. Newark also notes that the City Clerk is included in *N.J.S.A. 40A:9-165*, yet still acquiesced because the City Clerk realized the good faith efforts of Newark to balance the budget and wanted to assist with the same.

In response, Laccitiello reiterates that she cannot be temporarily laid off since to do so would result in a reduction of her salary which is impermissible under *N.J.S.A. 40A:9-165*. See *Association of Municipal Assessors of New Jersey v. Township of Mullica*, 225 *N.J. Super* 475 (1988) (Court found that pursuant to *N.J.S.A. 40A:9-165*, Tax Assessor was entitled to salary increases received by other employees).

Jones argues that Newark acknowledged that the City Clerk is exempt, but it ignores the fact that the position of Tax Collector and Tax Assessor fall under the same statute. In this regard, Laccitiello argues that since Newark admitted that the “City Clerk is included in *N.J.S.A. 40A:9-165* (municipal clerk) as exempt” then since the Tax Collector is also referenced in *N.J.S.A. 40A:9-165*, she too is exempt. Laccitiello also argues that Newark’s claim that there are no exemptions within a department is untrue since the City Clerk was given the opportunity not to be furloughed because he is exempt while all other employees in the department were required to be furloughed. Jones also claims that it is obvious that she was not afforded the option of choosing to participate like the City Clerk was allowed to do.

Moreover, Jones disagrees with Newark’s assertion that if they are exempt, then the entire department would also have to be exempt. In this regard, she asserts that her title of Tax Collector is a “Statutory and Licensed individual Official [position] whose duties are regulated and mandated” by the State. Moreover, she maintains that nowhere in *N.J.S.A. 40A:9-165* does it reference that the entire office falls under the “guise, rules and requirements of the position of ‘Municipal Tax Collector’.”

Further, Jones asserts that she filed the instant appeal because she was denied the salary adjustments via cost-of-living increases granted to non-uniform employees. Moreover, she declares that she would “absolutely not have a problem with the City of Newark’s plan of implementing the ‘temporary layoff/furlough’ had [she] been granted the same salary adjustments as all others. It is noted that Laccitiello submits a June 16, 2009 memorandum from herself and Jones to the appointing authority claiming that they have not received the same increases as other employees since 2006 and that this was in violation of *N.J.S.A. 40A:9-165*.

CONCLUSION

N.J.A.C. 4A:2-1.2(c) provides the following factors for consideration in evaluating petitions for interim relief:

1. Clear likelihood of success on the merits by the petitioner;
2. Danger of immediate or irreparable harm;
3. Absence of substantial injury to other parties; and
4. The public interest.

In the instant matter, the appellants argue that *N.J.S.A. 40A:9-165* prohibits Newark from laying them off since their salaries are set by *N.J.S.A. 40A:9-165*. However, the Commission does not agree. In this regard, it is initially noted that there is nothing in *N.J.S.A. 40A:9-165* which prohibits an individual holding one of the listed titles from being laid off. Rather, *N.J.S.A. 40A:9-165* merely provides, in part, that unless otherwise provided by law, a municipality shall fix and determine the salaries, wages or compensation to be paid to its officers and employees by ordinance and that “no such ordinance shall reduce the salary of, or deny without good cause an increase in salary given to all other municipal officers and employees to, any tax assessor, chief financial officer, tax collector or municipal clerk” during their appointed term. However, *N.J.S.A. 40A:9-165* also provides that it is subject to Title 11A in municipalities wherein the provisions of Title 11A are in operation. *N.J.S.A. 40A:9-165* does not provide any special protections to the Tax Assessor or Tax Collector, both of whom are considered unclassified employees pursuant to Title 11A, other than to indicate that once appointed, no ordinance may be issued to reduce their salaries, and that if others in the municipality are given an increase, then absent good cause to deny them such an increase, they must also receive the increase.² Moreover, although the appellants argue that the court’s decision in *Association of Municipal Assessors of New Jersey v. Township of Mullica, supra*, prohibits Newark from including them in the temporary layoff, it is noted that the court merely found that pursuant to *N.J.S.A. 40A:9-165*, the Tax Assessor was entitled to salary increases received by other employees. Therefore, since Newark is not changing their salaries by ordinance, *N.J.S.A. 40A:9-165* does not prohibit their temporary layoff. Moreover, the temporary layoff does not affect the appellants’ base salaries which are set by an ordinance. Consequently, the inclusion of the appellants in the temporary layoff plan does not violate *N.J.S.A. 40A:9-165*.

Additionally, as noted above, *N.J.S.A. 40A:9-165* provides that it is subject to Title 11A in municipalities wherein the provisions of Title 11A are in operation. In *In the Matter of Temporary Layoffs, City of Newark and the Newark Public Library*, (CSC, decided October 7, 2009), the Commission found that based on *N.J.A.C. 4A:8-1.1 et seq.*, and the Appellate Division’s decision in a 1994 decision, the temporary layoffs undertaken by Newark were appropriate. In this regard, the Appellate Division in *In the Matter of Department of Personnel Employees*, Docket No. A-4617-92T3 (App. Div. May 9, 1994), found that the complete shut-down of the Department of Personnel (DOP)³ to attain a \$2,223,871 budget reduction was not

² With regard to the appellants’ allegations that they have not received the same increases as other employees, it is noted that the Commission does not have the authority to review questions concerning salary for local employees, other than to determine that they are not paid a salary below the minimum or above the maximum established for the salary range. Therefore, the appellants’ claims that they have not received any salary increases will not be addressed in this decision. See *N.J.S.A. 11A:3-7d* and *N.J.A.C. 4A:3-4.1(a)2*.

³ On June 30, 2008, Public Law 2008, Chapter 29 was signed into law and took effect, changing the Merit System Board to the Civil Service Commission, abolishing the Department of Personnel and

made in bad faith nor did it violate any Civil Service law or rule. In so finding, the Appellate Division determined that a layoff could encompass a temporary cessation of an employer's operations or temporary suspension of employment. Further, it found that since the entire department was shut down, the normal "layoff" rights of employees were not affected. It is also noted that in *In the Matter of Emergency Temporary Layoff Rule*, Docket No. A-3626-08T2 (App. Div. April 17, 2009), the Appellate Division upheld the validity of a temporary layoff of all employees in a layoff unit, subject only to exemptions to ensure public health and safety. Therefore, the ability to lay off all employees in a layoff unit would include any unclassified employees, including the Tax Assessor and Tax Collector. Consequently, since *N.J.S.A.* 40A:9-165 does not specifically prohibit the ability of an appointing authority from laying off its employees or officers, the municipality has the authority to close the entire department for a temporary layoff, which would include the Tax Assessor and Tax Collector.

With regard to the appellants' arguments concerning the City Clerk, it is noted that Newark operates under a mayor-council form of local government. Under the Faulkner Act, *N.J.S.A.* 40:69A-1 *et seq.*, there is a separation of powers between the Council and the Mayor, and the City Clerk is appointed and employed by the Council. *See N.J.S.A.* 40:69A-38. Therefore, the City Clerk must agree to be included in the temporary layoff plan. However, the positions of Tax Assessor and Tax Collector are not positions that the Council has the authority to fill and therefore, unlike the City Clerk, their agreement is not necessary to be included in the temporary layoff. *See N.J.S.A.* 40A:9-141 and *N.J.S.A.* 40A:9-146.

Finally, *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 municipality 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. However, in the instant matter, the appellants do not dispute the good faith of the layoff. Moreover, Newark argues, without contradiction by the appellants, that the temporary layoffs are necessary to balance the budget and reduce expenditures due to the financial crisis facing not only it, but the nation. Therefore, there is no need to transmit these matters to the Office of Administrative Law for a hearing, and the denial of the stay serves as the final disposition of these appeals.

transferring its functions, powers and duties primarily to the Civil Service Commission. In this decision, the former names will be used to refer to actions which took place prior to June 30, 2008.

ORDER

Therefore, it is ordered that these requests for a stay and appeals be denied.

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