

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0742-12T3

JOHN J. BUONANNO,

Plaintiff-Appellant,

v.

BOROUGH OF ELMWOOD PARK,
TOWNSHIP OF ROCHELLE PARK
and RICHARD BOLAN,

Defendants-Respondents.

Argued May 6, 2014 – Decided August 12, 2014

Before Judges Fisher and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-8091-10.

John J. Segreto argued the cause for appellant (Segreto, Segreto & Segreto, attorneys; Mr. Segreto, on the brief).

Brian T. Giblin argued the cause for respondent Borough of Elmwood Park (Mr. Giblin, on the brief).

Joseph J. Rotolo, attorney for respondent Township of Rochelle Park, joins in the brief of respondent Borough of Elmwood Park.

PER CURIAM

In this action in lieu of prerogative writs, plaintiff appeals the trial court's denial of his request to invalidate a Shared Services Agreement (SSA) between defendant Borough of Elmwood Park and defendant Township of Rochelle Park, pursuant to the Uniform Shared Services and Consolidation Act, N.J.S.A. 40A:65-1 to 65-35, and void Elmwood Park's decision to terminate him.¹ We reverse and remand, and transfer the matter, in part, to the Civil Service Commission (Commission).

I

In 1998, plaintiff was appointed the Building Inspector/Construction Code Official/Zoning Officer for Elmwood Park. Later that same year he was also appointed Municipal Department Head of its Building Department. Plaintiff worked in these positions until he was laid off in 2010. Although never appointed as the Construction Official, plaintiff also served in this capacity from 1998 to 2010. While employed by Elmwood Park, plaintiff was a member of the Elmwood Park Volunteer Fire Department and held an Exempt Fireman's Certificate. At the time plaintiff was terminated, he was earning \$78,806 per year.

In 2008, defendant Richard Bolan, the Construction Official/Building Inspector/Zoning Official for Rochelle Park,

¹ Defendant Rochelle Park did not file a brief and presumably is not taking a position on the alleged invalidity of the SSA.

commenced serving as Elmwood Park's conflicts Building Inspector/Code Enforcement Officer/Zoning Officer while maintaining his position with Rochelle Park. At his deposition², Bolan testified that after he commenced this latter position, he inspected properties in Elmwood Park owned by Richard Trawinski, one of Elmwood Park's councilmen, in 2008 and possibly in 2009. Trawinski, a self-described builder, engineer and developer, testified that Bolan issued building permits to him in 2008, 2009 and 2010 for property he owned in Elmwood Park. In April and June 2010, Bolan also issued building permits to Trawinski for property he owned in Rochelle Park.

In April 2010, Bolan learned that his position with Rochelle Park was going to become part time; specifically, his hours were to be reduced to twenty per week. Bolan had been earning \$88,988 per year in his full-time position, \$10,182 more per year than plaintiff. In May 2010, Trawinski began urging other council members that Elmwood Park enter into a SSA with Rochelle Park, in which they would agree that one person perform all of the Building Department services for both municipalities. The proposed arrangement was that such person spend twenty hours a week in each municipality.

² No witnesses testified at the trial other than the clerk of Elmwood Park. The evidence consisted of various documents and deposition transcripts plaintiff introduced into evidence.

Aware Elmwood Park and Rochelle Park were considering entering into a SSA, plaintiff told the Elmwood Park council on June 17, 2010 that he was willing to reduce his hours to twenty per week. Councilman Frank Caramagna, who opposed entering into the SSA because Elmwood Park would save more money by reducing plaintiff's hours than by entering into the SSA, testified that Trawinski "tried so hard" to get plaintiff laid-off and the SSA executed by both municipalities.

On June 17, 2010, the Elmwood Park council voted in executive session to lay-off plaintiff; Trawinski was one of the council members who voted in favor of plaintiff's termination. On June 28, 2010, plaintiff received an "Individual Notice of Layoff" which stated that he was laid off "for reasons of economy and efficiency and the entrance into a shared services agreement with another local agency."

On July 22, 2010, Rochelle Park and Elmwood Park entered into a SSA, which stated they agreed to share the same Construction Official, Building Subcode Official and Zoning Official. The person appointed was to work twenty hours per week for each municipality, and each municipality was required to contribute \$55,666.83 per year to that person's annual salary and benefits. Before signing the SSA, the governing body of each municipality passed a resolution stating Bolan was to be

the person to serve as the shared Construction Official, Building Subcode Official and Zoning Official under the SSA. Trawinski voted in favor of Elmwood Park's resolution.

Although plaintiff's lay-off notice stated that one of the reasons he was terminated was due to the economy, the Elmwood Park Council adopted an ordinance in December 2010 that gave retroactive raises to all of its employees for 2010. In 2011, the Council adopted another ordinance giving an additional raise to its employees.

Elmwood Park is a civil service community, making its hiring decisions subject to the review and approval of the Commission. N.J.A.C. 4A:4-1.10(a). The combined job title Building Inspector/Construction Code Official/Zoning Officer, one of the titles plaintiff held from 1998 to 2010, is not recognized by the Commission. The position Municipal Department Head is a recognized job title but is an unclassified position. An unclassified position is one in which one cannot attain tenure. N.J.A.C. 4A:1-1.3. At the time plaintiff was terminated, he did not have and could not have attained tenure under the Civil Service Act (Act), N.J.S.A. 11A:1-1 to 12-6, in either one of these two positions, as one was not even recognized by the Commission and the other was an unclassified position.

The position of Construction Official is recognized by the Commission; it is also deemed a "competitive" position under the Act. Generally, an employee may attain tenure in a competitive job by taking the examination administered by the Commission for the position, scoring sufficiently high enough in comparison to competitors, and satisfactorily completing a working test period. N.J.S.A. 11A:4-13(a). Before one can take an examination, however, one must be provisionally appointed by the subject political subdivision. N.J.S.A. 11A:4-13(b). Although plaintiff performed – and Elmwood Park benefitted from his providing – the services of a Construction Official, Elmwood Park never appointed plaintiff provisionally or advised the Commission he was acting in this capacity. Plaintiff never had the chance to take the examination, and thus was not tenured in this position, either, when he was terminated.

On appeal, plaintiff argues that when Elmwood Park entered into the SSA, Councilman Trawinski had a conflict of interest given his relationship with Bolan, necessitating that the SSA be set aside and his positions with Elmwood Park reinstated. Plaintiff also argues that various laws protected him from being terminated, also mandating that his positions be restored.

II

A

Under the common law public officials are to "perform their duties free from any personal or pecuniary interests that may affect their judgment." Barrett v. Union Twp. Comm., 230 N.J. Super. 195, 200 (App. Div. 1989). Further, "it is not simply the existence of a conflict that may be cause to overturn an action of a public official, but also the appearance of a conflict." Randolph v. City of Brigantine Planning Bd., 405 N.J. Super. 215, 226 (App. Div. 2009). Municipal officials must "'avoid conflicting interests that convey the perception that a personal rather than the public interest might affect decision-making on matters of concern. Officials must be free of even the potential for entangling interests that will erode public trust in government actions.'" Id. at 226-27 (quoting Thompson v. City of Atlantic City, 190 N.J. 359, 374 (2007)).

Disqualification is required when the officials' "direct or indirect private interests may be at variance with the impartial performance of their public duty." Randolph, supra, 405 N.J. Super. at 225 (citing Aldom v. Borough of Roseland, 42 N.J. Super. 495, 501 (App. Div. 1956)).

In addition to the common law, the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 to -22.25, is to be considered when

determining whether a conflict exists. Shapiro v. Mertz, 368 N.J. Super. 46, 52 (App. Div. 2004). The Ethics Law expanded what constitutes a conflict of interest. Ibid. Not only may personal or financial "interests" but also personal or financial "involvement" may create a conflict of interest. Id. at 53. N.J.S.A. 40A:9-22.5(d) states:

No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

[Emphasis added.]

In 2008, 2009 and 2010, Bolan was issuing permits to Trawinski for property he owned in Elmwood Park. In April 2010, Bolan learned his full-time position with Rochelle Park was going to become part-time. In April and June 2010, Bolan issued permits to Trawinski for property he owned in Rochelle Park. In May, June and July 2010, Trawinski advocated and then voted in favor of a resolution that authorized Elmwood Park to enter into a SSA with Rochelle Park which made Bolan the shared Construction Official, Building Subcode Official and Zoning Official for both municipalities.

Trawinski's vote to layoff plaintiff and to vote in favor of a resolution that put Bolan back into a full-time position

may well have been innocent and well-meaning. But there was an appearance of a conflict and that was all that mattered.

Trawinski was a developer in both municipalities and Bolan was issuing permits to him for his properties. Given Trawinski's and Bolan's business interactions, there existed a perception that, in exchange for getting permits from Bolan, Trawinski encouraged the Elmwood Park council to lay-off plaintiff and pass a resolution that made Bolan the shared Construction Official, Building Subcode Official and Zoning Official under the SSA, thereby restoring Bolan to a full-time job.

Adding to the perception that Trawinski may have deviated from his obligation to perform his official duties free from any pecuniary or personal involvement that may have affected his judgment is the fact that Elmwood Park did not have anything to gain by entering into the SSA under the circumstances.

Plaintiff, who earned approximately \$10,000 less per year than Bolan, was willing to work only twenty hours a week. The cost to the municipality to pay plaintiff to work twenty hours a week would have been less than paying Bolan to work the same number of hours under the SSA. The goal of entering into a SSA is to provide property tax relief, see N.J.S.A. 40A:65-2(d); here, Elmwood Park would have saved more money had it not entered into

the SSA but had instead opted to retain plaintiff and reduce his hours to twenty per week.

The fact the other council members may not have had a conflict does not salvage the actions taken by the council, as Trawinski may have affected how the other members voted.

Marlboro Manor, Inc. v. Board of Comm'rs, 187 N.J. Super. 359, 363 (App. Div. 1982). The remedy is that the official action taken – the vote to lay-off plaintiff, the resolution authorizing Elmwood Park to enter into the SSA, and the SSA – must be invalidated. Id. at 362-63. Plaintiff's positions with Elmwood Park as Building Inspector/Construction Code Official/Zoning Officer and Department Head of the Building Department are reinstated. We remand the matter to the trial court for further proceedings to consider plaintiff's claims for an award of back pay, emoluments and attorneys' fees.

B

As the Elmwood Park council may seek to terminate plaintiff after his reinstatement to these two positions, it is necessary to address other issues he raised. Plaintiff argues he cannot be terminated because he possessed an exempt fireman certificate. N.J.S.A. 40A:14-60 provides in relevant part:

Whenever any person possessing an exempt fireman certificate holds an office, position or employment of the State, or a county or municipality or a school board or

board of education for an indeterminate term, such person shall hold his office, position or employment during good behavior and shall not be removed therefrom for political reasons but only for good cause after a fair and impartial hearing.

First, the provisions of N.J.S.A. 40A:14-60 to N.J.S.A. 40A:14-65 provide tenure to unclassified civil servants who meet the qualifications set forth in these statutes. See Smith v. Board of Chosen Freeholders, 139 N.J. Super. 229 (Law Div. 1976), aff'd, 146 N.J. Super. 45 (App. Div.), certif. denied, 74 N.J. 266 (1977). These two positions are ones in which plaintiff cannot obtain tenure under the Civil Service Act, and plaintiff meets the applicable qualifications set forth in N.J.S.A. 40A:14-60 to N.J.S.A. 40A:14-65. Therefore, plaintiff has tenure under these statutes. But tenure is not absolute; plaintiff can be terminated for good cause after a fair and impartial hearing.

We do note that, contrary to what plaintiff claims, N.J.S.A. 40A:14-65 does not require that there be widespread economic depression or mandatory retrenchment before a municipality can abolish, change the title or reduce the emoluments of any office held by an exempt fireman. See Viviani v. Borough of Bogota, 170 N.J. 452, 454 (2002). A municipality

may abolish a position or office held by an exempt fireman for any good faith economic reason. Ibid.

C

As for the services plaintiff rendered as Construction Official, although all personnel actions in the career service³ are to be forwarded to the Commission for its review and approval, see N.J.A.C. 4A:4-1.10(a), Elmwood Park failed to advise the Commission that plaintiff acted as its Construction Official. Had it done so, the Commission would have likely been compelled to announce and administer an examination for this position because it was a competitive one. See Melani v. County of Passaic, 345 N.J. Super. 579, 586 (App. Div. 2001).

Plaintiff was therefore deprived of the chance to take the examination and, assuming he scored favorably compared to the other competitors, become a tenured Construction Official. There are even more serious implications. "[P]ermitting a municipality to withhold permanent status from an apparently qualified . . . employee by failing to transmit the proper notices to Civil Service, and thereby preventing it from doing its job, also subjects government employment to opportunities for subterfuge and circumvention." Kyer v. City of East Orange,

³ "Career service" means those positions and job titles subject to the tenure provisions of the Civil Service Act. N.J.A.C. 4A:1-1.3.

315 N.J. Super. 524, 532 (App. Div. 1998). After all, one of the underlying purposes of the Act is that the selection and advancement of employees be based on merit, see N.J.S.A. 11A:1-2a and -2c, and not political favoritism.

The remedy here is to do that which the Kyer court ordered under analogous factual circumstances and refer the disposition of this aspect of plaintiff's claim to the Commission. Although the plaintiff in Kyer had been provisionally appointed by the municipality to the position in question and here Elmwood Park did not appoint plaintiff, even provisionally, to the position of Construction Official, this distinction is inconsequential. As found and handled by the Kyer court,

[t]he Department of Personnel^[4] . . . [with its] broad powers to effectuate the legislative purpose enable it to protect the Civil Service System by protecting employees such as plaintiff from falling through the cracks [and] . . . should now do what it would have done had it received the required timely notice from East Orange of plaintiff's provisional appointment, namely, determine her qualifications. . . .

We therefore hold that where, as here, a long-term provisional employee has performed satisfactorily and has failed to achieve permanent status because of the appointing authority's neglect, the Department of Personnel has the authority to retroactively, as it were, determine the employee's qualifications by such methods as

⁴ Effective June 30, 2008, the Commission assumed the duties of the Department of Personnel. N.J.S.A. 11A:11-2b.

it shall in its discretion deem appropriate and to further determine whether, had the inquiry into qualifications been timely made, the employee would have achieved permanency in the normal course of municipal management of its affairs. In making these determinations, the Department shall afford the parties such procedural due process as it shall deem required under the circumstances and shall fashion such remedy as it deems appropriate.

[Supra, 315 N.J. Super. at 533-34.]

As in Kyer, the Commission shall determine plaintiff's qualifications by the methods it deems appropriate and whether, had the inquiry into his qualifications been timely made, plaintiff would have achieved permanency. The Commission shall fashion the remedy it deems appropriate.

After careful consideration of the record, we are satisfied that the remaining arguments lack sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(1)(E).

The determination of plaintiff's status as Construction Official under the Civil Service Act is transferred to the Commission and the judgment of the trial court is reversed and remanded for proceedings consistent with this opinion.

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


CLERK OF THE APPELLATE DIVISION