

In the Matter of Town of Harrison Layoff

CSC Docket No. 2010-2934

(Civil Service Commission, decided April 14, 2010)

The Harrison Civil Service Employees Association (HCSEA), represented by Craig S. Gumpel, Esq., petitions the Civil Service Commission (Commission) for a stay of the layoff of employees in the Town of Harrison (Town).

By way of background, on January 19, 2010, Mayor Raymond J. McDonough submitted a layoff plan to the Division of State and Local Operations (SLO), proposing the layoff of 46 employees for reasons of economy and efficiency. This layoff plan included four employees from the Town's Board of Health. The layoff plan described the Town's poor economic condition, based primarily on the elimination of aid under the Special Municipal Aid (SMA) program and the added burden of deferred payment obligations to the Police and Firemen's Retirement System (PFRS). The Mayor noted that the Town received \$5.3 million in SMA funds in 2009, but this aid was being eliminated in its entirety in 2010. Additionally, the Town was required by the Department of Community Affairs to defer PFRS payments in 2009, resulting in an obligation of \$1.5 million in 2010. The layoff plan also detailed actions it took, pursuant to *N.J.A.C. 4A:8-1.2*, to lessen the possibility of layoffs, including implementing a hiring freeze, exploring shared services arrangements with neighboring jurisdictions, and considering the possibility of furloughs. Despite these measures, the Mayor reported that the Town was still faced with a significant budget deficit, requiring a reduction in force. The layoff plan also detailed numerous meetings held with all affected collective bargaining units. SLO reviewed and approved the layoff plan, with an effective date of April 5, 2010. It is noted that affected employees received the required 45-day notice of the layoff on February 19, 2010, and determinations regarding employees' layoff rights were forwarded to all affected employees on March 22, 2010.

In a resolution passed on March 2, 2010, the Town Council stated that "Mayor Raymond J. McDonough is hereby recognized, appointed, approved, confirmed and ratified as the Appointing Authority for the Town of Harrison pursuant to the Civil Service Act and the rules and regulations promulgated thereunder." The Town Council further stated that "[t]he January 19, 2010 Layoff Plan is hereby approved, ratified and confirmed." Similarly, on March 15, 2010, the Town's Board of Health passed a resolution, noting that it was the appointing authority for its employees, pursuant to *N.J.S.A. 26:3-19*. The Board of Health recognized that the Mayor had submitted a layoff plan to SLO on January 19, 2010, targeting four of its employees. The resolution approved the proposed layoffs of three of those employees, a Clerk, Laborer, and Graduate Nurse, Public Health. However, it found that the position of Registered Environmental Health Specialist,

which had been targeted in the layoff, was required to be filled pursuant to *N.J.A.C. 8:52-7A.2*, and it did not affirm the layoff of the incumbent in this position. On March 16, 2010, the Mayor notified SLO that the Town was rescinding the proposed layoff of the incumbent in the title of Registered Environmental Health Specialist.

In the instant petition, HCSEA challenges the layoffs of 17 of the targeted employees. The HCSEA contends that the Mayor did not have the legal authority to propose or effectuate the layoff of these employees. First, the HCSEA argues that the Town Council, not the Mayor, is vested with the authority to appoint and remove employees. It asserts that *N.J.S.A. 40A:62-6(b)* provides that the Town Council may appoint and remove any officer, including any subordinate officer, other than those officers excepted by law, and *N.J.S.A. 40A:62-6(b)3* gives the Town Council the power to create such offices and positions as it deems necessary. The NCSEA also emphasizes that general law, via *N.J.S.A. 40A:9-9*, provides that the governing body of a municipality may appoint and provide for the appointment of officers, agents, and employees. Thus, the HCSEA maintains that the Town Council is the "appointing authority" for the Town, and it, not the Mayor, had the authority to submit a layoff plan to SLO and implement layoffs of employees in the Town.

The HCSEA recognizes that the Town Council passed a March 2, 2010 resolution delegating its appointing authority responsibilities to the Mayor. However, the HCSEA argues that, by law, the Town Council is prohibited from delegating this authority to the Mayor. It contends that *N.J.S.A. 40A:62-7* only permits a Town Council to delegate its powers, functions and duties to an administrator. The HCSEA also maintains that *N.J.S.A. 40A:62-7* requires that such a delegation be accomplished via ordinance, not by resolution as was the case here. Moreover, even if the Town Council was able to delegate its power to the Mayor via resolution, the HCSEA contends that it did not do so in a timely manner. It emphasizes that the layoff plan was submitted on January 19, 2010, and it was approved by SLO on February 18, 2010; however, the Town Council's resolution was not passed until March 2, 2010. Finally, the HCSEA argues that the Mayor lacks the authority to lay off employees of the Town's Board of Health. Therefore, the HCSEA requests that the Commission rescind the proposed layoff as it was not legally implemented.

In response, the Town, represented by Paul J. Zarbetski, Town Attorney, contends that the Mayor has always been considered the appointing authority. The Town argues that, notwithstanding this position, it complied with SLO's request to have the Board of Health and Town Council ratify the Mayor's actions in submitting the layoff plan. The Town recognizes that, in *In the Matter of the Borough of Roselle Appointing Authority* (CSC, decided December 2, 2009), the Commission determined that the Borough Council is the appointing authority for jurisdictions operating under the Borough form of government. The Town argues that, even if that decision

is extended to apply to jurisdictions operating under the Town form of government, municipalities affected by the *Roselle* decision were given six months to come into compliance with the decision. In addition, the Town asserts that, if the Town Council is the appointing authority, it properly delegated that authority to the Mayor in the March 2, 2010 resolution, and it maintains that it has the ability to do so. It also contends that there is no law to support the HCSEA's "legal theory" that such a designation had to be achieved via ordinance, not resolution. Finally, the Town asserts that, should the HCSEA be successful in its challenge and a delay in the reduction in force be achieved, it will be forced to submit a new layoff plan, which will necessarily target additional employees in order to realize additional cost savings occasioned by the delay in the effective date of the layoff.

CONCLUSION

N.J.A.C. 4A:1-1.3 defines "appointing authority" as "a person or group of persons having power of appointment and removal." *N.J.S.A.* 40A:62-5(b) and (c) provide that, in a Town form of government, the Mayor shall be the head of the municipal government and shall have all those powers placed in the Mayor by general law. *N.J.S.A.* 40A:62-6(b)3 provides that the Town Council may:

[C]reate such offices and positions as it may deem necessary. The officers appointed thereto shall perform the duties required by law and the ordinances of the council.

N.J.S.A. 40A:62-6(b)5 provides that the Town Council may remove any officer of the municipality, other than those officers excepted by law, for cause. *N.J.S.A.* 40A:62-6(c) provides that the Town Council shall have all of the executive responsibilities of the municipality not placed in the office of the Mayor by general law or the law governing the Town form of government.

In addition, general law provides that, except where otherwise provided, the governing body of a municipality may appoint and provide for the appointment of officers, agents, and employees as may be required for the execution of the powers conferred upon the governing body. *See N.J.S.A.* 40A:9-9. *N.J.S.A.* 40A:9-161 provides that, in non-Civil Service jurisdictions, an employee who has tenure in office may not be removed except upon written charges, which shall be filed with the governing body. The governing body is given the authority to prescribe rules and regulations for the conduct of a hearing on the charges prior to removal.

It is clear from the above statutory scheme that the Town Council is the appointing authority for the Town of Harrison. The Town Council is vested with the power to appoint and remove employees of the Town, as well as the authority to create the offices and positions it deems necessary. It follows that the Town Council has the sole authority to eliminate positions and offices from the Town for reasons

of economy and efficiency. Thus, HCSEA correctly argues that the Mayor is not statutorily empowered to act as the Town's appointing authority.

In addition, *N.J.S.A.* 40A:62-7(a) provides that the Town Council may, by ordinance, delegate all or a portion of the executive responsibilities of the municipality to an *administrator*, who shall be appointed pursuant to *N.J.S.A.* 40A:9-136. The HCSEA contends that, pursuant to this statute, the Town Council's March 2, 2010 resolution, which purported to delegate its power to appoint and remove employees to the Mayor, was unlawful. Based on the unambiguous language of *N.J.S.A.* 40A:62-7(a), the Town Council is only authorized to delegate its responsibilities to an administrator, not the Mayor, and such action must be taken via ordinance. Thus, the Town is advised to ensure that future employment actions are taken by the appropriate appointing authority.

Similarly, *N.J.S.A.* 26:3-19 provides that a local board of health may employ such personnel as it may deem necessary to carry into effect the powers vested in it, and it shall fix the duties and compensation of every appointee. Thus, the Town's Board of Health, not the Mayor, is the appointing authority for its employees.

However, it does not follow that the layoff plan submitted by the Mayor and the resultant layoffs were illegally effectuated. Initially, it must be recognized that the submission of a layoff plan to SLO does not equate to any employment action. A layoff plan is a proposal submitted by a State or local government entity for review to ensure compliance with Civil Service law and rules. The layoff plan does not effectuate any reductions in force. Indeed, the initial layoff plan is often altered and amended by the submitting jurisdiction, as a result of the jurisdiction's own initiative as well as the Commission's review, prior to the actual implementation of any layoffs of public employees. While *N.J.A.C.* 4A:8-1.4(a) provides that the plan shall be submitted by the appointing authority, the submission of a layoff plan by some other authorized representative of the appointing authority is not fatal, so long as the actual employment actions contemplated by the layoff plan are taken by the appointing authority. Thus, the Commission finds no basis to invalidate the January 19, 2010 layoff plan submitted by the Mayor, since that plan did not unlawfully effectuate any employment action.

Even assuming, *arguendo*, that the layoff plan was the legal means to actually terminate targeted employees, the subsequent ratification of the plan by the appropriate appointing authorities cured any deficiency. Although, as noted above, the Town Council is prohibited from delegating its responsibilities as the appointing authority to the Mayor, it may ratify past actions taken by the Mayor in that role. Specifically, on March 2, 2010, the Town Council passed a resolution, which "approved, ratified and confirmed" the Mayor's January 19, 2010 layoff plan. Likewise, on March 15, 2010, the Board of Health passed a resolution approving of the layoff of three of the four Board of Health employees identified in the layoff

plan. As noted previously, the proposed layoff of the fourth employee, a Registered Environmental Health Specialist, was then removed from the layoff plan. In *Grimes v. City of East Orange*, 288 N.J. Super. 275, 279-280 (App. Div. 1996), the Appellate Division stated:

The ability to ratify depends upon whether the act in question was *ultra vires*, as distinguished from *intra vires*. *Bauer v. City of Newark*, 7 N.J. 426, 434, 81 A.2d 727 (1951). Acts that are *ultra vires* are void and may not be ratified, while *intra vires* acts may be. *Id.* An act is *ultra vires* if the “municipality [was] utterly without capacity” to perform the act. *Ibid.* (emphasis added). On the other hand, an *intra vires* act is one that is merely “voidable for want of authority.” *Ibid.* Thus, where, for example, a contract is entered into by “an unauthorized agency” but the municipality has the power to enter into such contracts, the contract may later be ratified by the municipal body having the power in the first instance to make the contract. *DeMuro v. Martini*, 1 N.J. 516, 522, 64 A.2d 351 (1949). The principle is equally applicable to appointments of employees. *See Certulo v. Byrne*, 31 N.J. 320, 330, 157 A.2d 297 (1960) (suggesting that the prosecutor had the power to ratify the appointment of plaintiff to the position of legal assistant to the prosecutor where the appointment had been improperly made by the Board of Freeholders). This is the general rule recognized throughout the country. *See McQuillin, Municipal Corporations*, § 12.175.10 at 19 (3rd ed. 1991) (the proper appointing authority may ratify and adopt an unauthorized appointment to an office or place in public employment).

See also, Casamasino v. City of Jersey City, 158 N.J. 333 (1999). Here, it is clear that any action taken by the Mayor with regard to terminating employees based on economy and efficiency was *intra vires*, since it was merely “voidable for want of authority.” Thus, his actions could be ratified by the entity properly possessing the authority to effectuate layoffs of Town employees, *i.e.*, the Town Council and the Board of Health.

Finally, it is settled that “ratification must be made with the same formalities required for the original exercise of the power.” *McQuillin, Municipal Corporations*, § 13.47 at 879 (3rd ed. 1991). *See also, Grimes, supra* at 280; *Edgewater Park v. Edgewater Park Housing Auth.*, 187 N.J. Super. 588 (Law. Div. 1982). Initially, the layoff plan itself did not formally effectuate any employment action. Thus, the Town Council’s ratification of that plan via resolution was appropriate. *See McQuillin, Municipal Corporations*, § 15.02 at 59 (revised 3rd ed. 1996) (“[A] resolution, generally speaking, is simply an expression of an opinion or mind concerning some particular item of business coming within the legislative body’s cognizance, ordinarily ministerial in character and relating to the administrative

business of a municipality”). In any event, *N.J.S.A.* 40A:62-6(b)3 empowers the Town Council to create such offices and positions as it may deem necessary. As noted previously, it follows that the Town Council may abolish offices and positions it no longer seeks to fill. “[W]here a statute fails to indicate whether the power should be exercised by ordinance or resolution, it may be done by either means.” *Fraser v. Township of Teaneck*, 1 *N.J.* 503, 507 (1949). Here, *N.J.S.A.* 40A:62-6(b)3 does not specify the means by which the Council must create or abolish positions; thus, the passage of a resolution was appropriate.

Accordingly, although the HCSEA correctly argues that the Town Council and the Board of Health are the appointing authorities for the targeted employees, the Commission finds that the submission of the layoff plan by the Mayor and subsequent ratification by the appropriate appointing authorities cured any deficiency. As such, the layoff plan was valid, and any action taken in furtherance of the plan was appropriate.

ORDER

Therefore, it is ordered that this petition be denied.