

9. The employee with the higher performance rating during the 12 month period prior to the effective date of the layoff shall have priority over an employee with a lower rating. In local service, the performance rating system must have been approved by the Department of Personnel;

10. The employee with the higher performance rating during the period between 24 months and 12 months prior to the effective date of the layoff shall have priority over an employee with a lower rating. In local service, the performance rating system must have been approved by the Department of Personnel;

11. Other factors as may be determined by the Commissioner.

Amended by R.1990 d.387, effective August 6, 1990.
See: 22 N.J.R. 1300(b), 22 N.J.R. 2263(a).

In (c): added "family" to list of leaves with pay.
Amended by R.1994 d.620, effective December 19, 1994.
See: 26 N.J.R. 3511(a), 26 N.J.R. 5002(b).
Amended by R.1995 d.12, effective January 3, 1995.
See: 26 N.J.R. 4126(a), 27 N.J.R. 145(a).
Amended by R.1995 d.251, effective May 15, 1995.
See: 27 N.J.R. 612(a), 27 N.J.R. 1967(b).

Administrative correction.
See: 27 N.J.R. 3156(a).
Petitions for Rulemaking: Layoffs, Seniority.
See: 27 N.J.R. 4916(a).

Amended by R.1996 d.259, effective June 3, 1996.
See: 28 N.J.R. 1334(a), 28 N.J.R. 2839(a).

In (d) added provision relating to local service.
Amended by R.1996 d.260, effective June 3, 1996.
See: 28 N.J.R. 1441(a), 28 N.J.R. 2841(a).

In (a) excepted police and fire titles, added (b) and recodified former (b)-(g) as (c)-(h).

Amended by R.2000 d.12, effective January 3, 2000.
See: 31 N.J.R. 2827(a), 32 N.J.R. 39(a).

In (b)4, changed N.J.A.C. reference; rewrote (c); and added (i) and (j).
Amended by R.2001 d.420, effective November 19, 2001.
See: 33 N.J.R. 2567(a), 33 N.J.R. 3895(b).

In (a) and (b), added second sentences in the introductory paragraphs; in (h) rewrote the introductory paragraph.

Amended by R.2003 d.304, effective August 4, 2003.
See: 35 N.J.R. 345(a), 35 N.J.R. 3551(b).

Amended N.J.A.C. references throughout; rewrote (c)3; deleted (i) and (j).

Administrative correction.
See: 38 N.J.R. 2686(a).

Amended by R.2007 d.358, effective November 19, 2007.
See: 39 N.J.R. 2680(a), 39 N.J.R. 4923(b).

In the introductory paragraph of (b), inserted the second sentence; in (b)4 and (h)3, updated the N.J.A.C. references; and rewrote the introductory paragraph of (h).

Amended by R.2009 d.41, effective January 20, 2009.
See: 40 N.J.R. 4381(a), 41 N.J.R. 399(b).

In (c)1, updated the N.J.A.C. reference; and in (c)3, deleted "in State service, or the class level in local service," following "class code".

Case Notes

Statute which permitted layoff of permanent public employee superseded statute providing that an injured public employee receiving workers' compensation benefits was to continue on the payroll. *Novak v. Camden County Health Services Center Bd. of Managers*, 255 N.J.Super. 93, 604 A.2d 649 (A.D.1992).

Negotiability of seniority. *State v. State Supervisory Employees Association*, 78 N.J. 54, 393 A.2d 233 (1978).

4A:8-2.5 Reassignments

(a) For a period of 12 months after the service of the layoff notice required by N.J.A.C. 4A:8-1.6(a), no permanent or probationary employee in the layoff unit in a title actually affected by layoff procedures shall be subject to the following types of involuntary reassignments, except as permitted by the Commissioner for good cause:

1. Reassignment to a different shift, unless the reassignment is based on a seniority program;

2. In State service, if employed in the original municipality, reassignment to a different municipality; and

3. In State service, if not employed in the original municipality, reassignment to a different job location.

(b) Specific justification for such involuntary reassignments must be shown by the appointing authority.

(c) During the period described in (a) above, notice of the types of voluntary reassignments listed in (a) above shall be provided to affected negotiations representatives, and appointing authorities should consult with such representatives upon request. Appointing authorities shall conspicuously post notices of opportunities for voluntary reassignment for a period of 10 working days at all work locations.

Amended by R.1995 d.251, effective May 15, 1995.
See: 27 N.J.R. 612(a), 27 N.J.R. 1967(b).
Administrative correction.
See: 27 N.J.R. 3156(a).

4A:8-2.6 Appeals

(a) Permanent employees and employees in their working test period may file the following types of appeals:

1. Good faith appeals, 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. Such appeals shall be subject to hearing and final administrative determination by the Merit System Board (see N.J.A.C. 4A:2-2.9 et seq.); and/or

2. Determination of rights appeals, based on a claim that an employee's layoff rights or seniority were determined and/or applied incorrectly. Such appeals shall be subject to a review of the written record by the Department of Personnel, with a right to further appeal to the Commissioner (see N.J.A.C. 4A:2-1.1(d)).

(b) Good faith and determination of rights appeals shall be filed within 20 days of receipt of the final notice of status required by N.J.A.C. 4A:8-1.6(f). Appeals must specify what determination is being appealed, the reason(s) for the appeal, and the relief requested.

(c) The burden of proof is on the appellant.

Case Notes

Standards of review to be applied by Commission in appeals de novo. *Henry v. Rahway State Prison*, 81 N.J. 571, 410 A.2d 686 (1980).

Initial Decision (2008 N.J. AGEN LEXIS 54) adopted, which found, on conflicting evidence, that a plumbing official's layoff was for economic reasons and not in retaliation for the plumber's "whistle blowing" to the Department of Community Affairs concerning the employer's management practice of understaffing and usurping his authority. In re *Zaccaria*, OAL Dkt. No. CSV 4929-07, 2008 N.J. AGEN LEXIS 561, Final Decision (March 12, 2008).

Principal planner's appeal from the decision to lay him off was dismissed after he failed to prove that the decision was made in bad faith or based on race; the appointing authority's justification of economy for the layoff was amply supported by its prior actions of issuing hiring and spending freezes, terminating provisional employees, eliminating vacant positions, and reducing capital expenditures (adopting 2007 N.J. AGEN LEXIS 201). In re *Brooks*, OAL Dkt. No. CSV 9670-03, 2007 N.J. AGEN LEXIS 1181, Final Decision (May 23, 2007).

Clerk failed to demonstrate that her layoff was in retaliation for maternity leave or a health insurance buy-out; the evidence showed that the lay-off was the result of the appointing authority's cost-cutting measures and the clerk failed to set forth sufficient evidence that the layoff was instituted for a reason other than economic efficiency. In re *Torsiello*, OAL Dkt. No. CSV 3976-05, 2007 N.J. AGEN LEXIS 221, Initial Decision (April 24, 2007), adopted (Merit System Board June 6, 2007).

Despite evidence of the mayor's animus toward a recycling coordinator, the decision to close the municipal recycling bureau was not a bad-faith pretext for removing the coordinator from his position; even if ill will was a factor in the City's decision, the record nevertheless fully supported the conclusion that the City was primarily motivated by a desire to remove itself from the recycling business for reasons of economy and efficiency (rejecting 2006 N.J. AGEN LEXIS 359). In re *Mack*, OAL Dkt. No. CSV 562-05, 2006 N.J. AGEN LEXIS 1118, Final

Decision (December 6, 2006), aff'd per curiam, No. A-2606-06T2, 2008 N.J. Super. Unpub. LEXIS 2302 (App.Div. March 20, 2008).

Where municipal housing authority had been taken over by HUD due to financial problems and questions involving reimbursement, layoffs of certain employees during a privatization effort were found not to have been in bad faith. In re *Blackston*, OAL Dkt. No. CSV 10161-05 (CSV 10515-98 and CSV 805-99 On Remand), 2006 N.J. AGEN LEXIS 406, Initial Decision (July 18, 2006), adopted (Merit System Board Aug. 23, 2006), aff'd, Nos. A-1162-06T2, A-4513-06T2, 2008 N.J. Super. Unpub. LEXIS 300 (App.Div. Aug. 12, 2008).

Department of Personnel approval of a layoff plan is not relevant to a determination of good faith of the layoff plan; the Department merely reviews the plan to make sure that it adheres to the procedural requirements needed for a layoff. In re *Blackston*, OAL Dkt. No. CSV 10515-98 and CSV 805-99 (Consolidated), 2005 N.J. AGEN LEXIS 1043, Merit System Board Decision (November 22, 2005).

Summary decision was properly granted in former water employees' appeal from their layoffs because there was no genuine issue of material fact that the layoffs were the result of economic hardship and the need for efficiency; the question was not whether the layoffs achieved the purpose of saving money, but whether the motive in adopting the layoffs was to accomplish economies or instead to remove a public employee without following merit system law and rules (adopting 2005 N.J. AGEN LEXIS 428). In re *Antoniello*, OAL Dkt. No. CSV 5695-03, 2005 N.J. AGEN LEXIS 1202, Final Decision (October 19, 2005), aff'd per curiam, No. A-1994-05T3, 2007 N.J. Super. Unpub. LEXIS 2931 (App.Div. June 14, 2007).

Building and grounds worker may not appeal alleged bad faith layoff when city did not lay him off. *Granger, et al. v. Department of Buildings and Grounds*, 96 N.J.A.R.2d (CSV) 90.

Determination as to whether layoffs for purposes of economy were made in good faith. *Tyler, et al. v. City of Paterson*, 2 N.J.A.R. 272 (1979). *DiGerolamo v. Borough of Roselle*, 1 N.J.A.R. 1 (1979).