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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 39
NASSAU COUNTY

In the Matter of the Application of JOHN BALTZER.

Petitioner.

Sequence No.: 004
Index No.: 011727/92

For a judgment Pursuant to Article 78 of the CPLR

- against -

THE NASSAU COUNTY CIVIL SERVICE COMMISSION and THE COUNTY OF NASSAU.

Respondents.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	X
Replying Affidavits	X

Upon reading the papers submitted and due deliberation having been had herein, motion by respondents, The Nassau County Civil Service Commission and The County of Nassau, for summary judgment pursuant to CPLR 3212 dismissing the verified petition of petitioner, John Baltzer, is granted in part and denied in part.

On a motion for summary judgment, the moving party bears the initial burden of making a *prima facie* showing setting forth evidentiary facts to establish his or her cause of action or defense sufficiently to entitle him or her to judgment as a matter of law; and anything less requires a denial of the motion even where the opposing papers are insufficient. (See: Greenberg v. Manlon Realty, Inc., 43 AD2d 968; Holtz v. Niagara Mohawk Power Corporation, 147 AD2d 857; Coley v. Michelin Tire Corp., 99 AD2d 795, 796; Lamberta v. Long Island Rail Road, 51 AD2d 730, 731.) The facts are not in dispute and thus the court turns to the issues of law raised.

There are two issues here, namely: (1) whether the respondents incorrectly calculated petitioner's length of employment in not counting the time Baltzer was employed as a Laborer I

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under the Emergency Employment Act and thus violated the Civil Service Law and the Collective Bargaining Agreement in effect between the parties; and (2) whether the respondents violated the doctrine of legislative equivalency under the 1995 case of Torre v. County of Nassau (86 NY2d 421) by failing to abolish Baltzer's title through legislative ordinance or acted in bad faith in terminating petitioner's employment.

With respect to the aforementioned first issue, the relevant undisputed facts are as follows: 1) Petitioner entered the temporary employ of the Nassau County Department of Recreation and Parks under the title of "Laborer" on April 27, 1972 pursuant to the Federal Emergency Employment Act of 1971 in the nature of a temporary appointment and that said employment was probationary for a period of six months; 2) that the federal government provided funding for that employment and gave rise to a limited appointment for the petitioner as a Laborer I for the Nassau County Department of Recreation and Parks for a period of two years; and 3) that petitioner's temporary employment as a Laborer I continued from the first day of employment on April 27, 1972 through September 6, 1973 after which, as per Nassau County's letter to him of August 20, 1973, he was permanently appointed by Nassau County as a Laborer I with a probationary period of eight weeks. In short, from April 27, 1972 through September 6, 1973, petitioner was on a temporary appointment with the respondents.

Respondents then argue that the time spent by petitioner as a temporary employee under his initial Laborer I appointment, pursuant to the Federal Emergency Employment Act of 1971, spanning from April 27, 1972 through September 6, 1973 (i.e., 16 months and 10 days) cannot be included in his overall employment time for purposes of retention standing as a matter of law. They argue that the statutory scheme of Section 80 of the Civil Service Law mandates that a civil service employee's retention date for layoff purposes be determined from the date of the original permanent appointment – not temporary appointment.

Civil Service Law, section 80(1) provides, in pertinent part, as follows:

> "Where, because of economy, consolidation or abolition of functions, curtailment of activities or otherwise, positions in the competitive class are abolished or reduced in rank or salary grade, suspension or demotion, as the case may be among incumbents holding the same or similar positions shall be made in the inverse order of original appointment on a permanent basis in the classified service * * *." (emphasis added.)

Section 80(2) similarly provides that:

> " * * * the original appointment of an incumbent shall mean the date of his first appointment on a permanent basis in the classified service * * * ." (emphasis added.)

An exception to that statute occurs when, as provided further in subdivision 2 thereof, the

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temporary time is wedged in between two periods of permanent appointment. Section 80(2) provides, in pertinent part, as follows:

> "A period of employment on a temporary or provisional basis, or in the unclassified service, immediately preceded and followed by permanent service in the classified service, shall not constitute an interruption of continuous service ..."

The aforementioned exception does not apply under the facts in this case. Rather, here, the record shows that petitioner began as a temporary appointment under the Federal Emergency Employment Act of 1971 on April 27, 1972 and then began a series of permanent appointments subsequent to that date, commencing September 7, 1973 and ending on the day of his termination on February 6, 1992.

Indeed, as a matter of law, temporary appointments cannot ripen by the mere passage of time into a permanent appointment, and they are exempt from civil service requirements for appointment. (See: Matter of Montero v. Lum, 68 NY2d 253; 258-260; Matter of Poss v. Kern, 263 App. Div. 320; Matter of Barnes v. BOCES, 172 Misc2d 402, 407-408.) Temporary appointments are not entitled to any advantage secured by the period of tenure. (See: Van Dyke v. Educ. Dept., 144 AD2d 85, app den 74 NY2d 607; Mtr Pollack v. Bahou, 102 AD2d 286, 293.)

In addition, the movants have demonstrated that Section 2-6 of the parties' Collective Bargaining Agreement does not operate to override the foregoing statutory scheme which explicitly excludes temporary time in the calculation of time worked for layoff purposes. Contrary to the petition, Section 2-6 of the Collective Bargaining Agreement does not address retention rights of the petitioner or anyone else. Rather, Sec. 2-6 falls under the "Definition" Section 2 and merely defines the contract term "original date of employment" and expressly states that all the definitions are "For purposes of this Agreement" only. Thus, by the Agreement's own terms, the definition of "original Date of Employment" contained in Sec. 2-6 of the Collective Bargaining Agreement is limited to the internal construction of that agreement; it certainly was not intended to override the statutory criteria for terms which require "original appointment on a permanent basis in the classified service". [Civil Service Law, sec. 80(1).]

Furthermore, the petitioner is incorrect to infer that the Collective Bargaining Agreement somehow alters or supercedes the express provisions of Civil Service Law section 80 with regard to layoffs being made in the inverse order of original permanent appointment. It is axiomatic that parties to a contract cannot do away with the mandates of affirmative provisions of law. (See: Cit of Newburgh v. Potter, 168 AD2d 779, app den 78 NY2d 857; Matter of Union Free School District No. 2 of the Town of Cheektowaga v. Nyquist, 38 NY2d 137.) Sections 80 and 80-a of the Civil Service Law governing the order of layoffs and demotions of positions in the competitive class and of positions in the non-competitive class in the inverse order of original appointment on a permanent basis in the classified service reflect a legislative imperative that cannot be bargained away by a contract. (See: Plattsburgh Distributing Company, Inc. v.

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Hudson Valley Wine Company, 108 AD2d 1043, 1046.)

In any event, the movants have further shown that petitioner's Collective Bargaining Agreement, by its language, explicitly adopts the statutory scheme of Civil Service Law, Section 80. For example, see the following sections of the Collective Bargaining Agreement:

> "Section 12-1 Seniority will be based on the original date of employment with the County for all employees, unless otherwise required by law."
>
> "Section 12-2 * * * This shall not be construed as superceding or amending the Civil Service Law, nor the rules, regulations or determination of the Nassau County Civil Service Commission."
>
> "Section 14-1 All layoffs in non-competitive and labor class positions shall follow the plan set forth in Section 80-a of the Civil Service Law, notwithstanding that such section applies only to non-competitive class employees in State Service."

The reference in Section 12-2 of the Collective Bargaining Agreement to rules and regulations of the Nassau County Civil Service Commission concerns Rule XXXVI entitled Layoff and Disciplinary Actions. Subdivision 1(e) of the Rule provides, in pertinent part, as follows:

> "(e)(i) Permanent Service, for the purpose of this rule, shall start on the date of the incumbent's original appointment on a permanent basis in the classified service."
>
> * * *
>
> "(e)(iii) Temporary or provisional service preceding the original permanent appointment does not count."

The movants have also shown by the April 25, 1973 Memorandum of the New York State Department of Civil Service addressed to all Municipal Civil Service Agencies regarding the Public Employment Program Phase Down ("PEP"), successor to the Emergency Employment Administration, that municipal civil service agencies should be aware and recognize the PEP employment receives no civil service recognition and that in seeking a permanent appointment, the individual is to be treated like any other person seeking that job. Same is reflected by the following language in the next to last paragraph on page 2 of said Memorandum:

> "While you should give all due consideration to PEP participants in their attempts to gain regular unsubsidized appointments, you must remember that the Civil Service Law is still in full force and effect for all regular positions in your governmental jurisdiction. This means that PEP participants will have to be treated just like any other candidate applying for a position with your agency."

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Petitioner has erroneously invoked the case of Nassau Chapter of Civil Service Employees' Association, Inc. v. County of Nassau, (53 NY2d 559) for the mistaken suggestion that the respondents must include petitioner's first sixteen months of service with the County for purposes of determining his original date of hire for retention purposes. The movants have shown that that case merely dealt with the issue of whether CETA (Comprehensive Employee and Training Act – USC Title 29, Sec. 801 et seq, successor to the Emergency Employment Act of 1971 formerly US Code Title 42, Sec. 4871 et seq), employees were considered "employees" under the Collective Bargaining Agreement and, thus, entitled to participate in a contractual graded salary plan and be credited with their previous service in federally funded employment programs. Neither that case, nor any other relevant to this issue, has controverted the principle that Emergency Employment Act and CETA jobs were temporary and employees placed in those positions were not per se Civil Service employees. (See: Nassau Ch. CSEA v. Nassau, 53 NY2d 559; Cromer v. County of Nassau, 54 AD2d 927; Papa v. Ravo, 70 AD2d 59.) Indeed, the Court of Appeals in Nassau Ch. CSEA v. Nassau, supra, stated at p. 566:

> "Under the Federal scheme, civil service appointees may not be adversely affected by employment of persons in CETA-funded positions. They may not be laid off, discharged or replaced by CETA workers, or be denied promotion opportunities or other employment benefits because of the CETA-funded positions (see US Code, tit 29, §823, subd [c], par [1]; subd [d])."

That, too, demonstrates that Emergency Employment Act services cannot be credited in civil service employment; that civil service retention rights cannot be gained through such employment.

Petitioner has been unable to raise a genuine issue in opposition to the foregoing. Since this Court's scope of review in this CPLR Article 78 proceeding is limited to determining whether or not the determination by the respondents that the petitioner's initial time as a temporary employee may not be included in his overall employment time for purposes of retention standing, the Court finds that the record supports the respondents' determination herein as not being arbitrary or capricious or unreasonable; and, therefore, partial summary judgment is granted dismissing (a) that part of the Petition which seeks a judgment that the respondents' failure to count Baltzer's time spent as a Laborer I (EEA) toward his retention standing was a violation of Civil Service Law sections 80(2) and 80-a, existing case law, and section 2-6 of the Collective Bargaining Agreement; and (b) dismissing that part of the Petition which seeks a judgment determining that the respondents' failure to credit Baltzer for Laborer I (EEA) time makes their decision as to the petitioner's retention arbitrary, capricious and an abuse of discretion.

With respect to the remaining issue, the court finds that there are not enough facts to determine whether petitioner was initially appointed to his position by an ordinance and/or whether he was discharged pursuant to an ordinance. Thus, the court cannot determine at this time whether to apply the doctrine of legislative equivalency under the 1995 decision of Torre v.

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County of Nassau (86 NY2d 421) to the petitioner's termination as an employee. In addition, the petitioner further alleges that petitioner's termination was not made in good faith. The delay herein in raising these issues was not caused by petitioner and cannot be said to prejudice respondents. Therefore, this Court deems the petition amended to include such *nunc pro tunc*. However, with regard thereto, there are issues of fact which require a trial. Accordingly, the branch of the motion seeking dismissal of that part of the amended petition which seeks a judgment that the respondents violated the legislative equivalency doctrine or acted in bad faith in terminating the petitioner and for reinstatement and back pay and benefits is denied. Such requires a trial.

The matter is hereby set down for trial on March 25, 2002 before the Calendar Control Part (CCP) at 9:30 a.m.

So Ordered.

A.J.S.C.

Dated: January 31, 2002

ENTERED
FEB 22 2002
NASSAU COUNTY
COUNTY CLERK'S OFFICE