

SUPERIOR COURT OF NEW JERSEY
CUMBERLAND, GLOUCESTER, SALEM VICINAGE



RICHARD J. GEIGER
JUDGE

COURTHOUSE
BRIDGETON, NJ 08302
(856) 453-4690
FACSIMILE (856) 453-4592

June 30, 2016

John G. Carr, Esquire
Cresse and Carr, Esquires
39 Cooper Street, Box 357
Woodbury, New Jersey 08096

Ned Rogovoy, Esquire
782 S. Brewster Road, Unit A6
Vineland, New Jersey 08361

Re: Robert R. Hulitt, Sr., vs. Fairfield Township, etc.
Docket No. CUM-L-841-14

Dear Counsel:

Enclosed is the Opinion issued by the court today. Mr. Carr is to prepare a judgment reflecting the court's ruling after conferring with Mr. Rogovoy regarding calculation of the amounts awarded.

Very truly yours,

RICHARD J. GEIGER, J.S.C.

RJG BARB
Enclosure

ROBERT R. HULITT, SR.,)	SUPERIOR COURT OF NEW JERSEY
)	LAW DIVISION – CIVIL PART
Plaintiff)	CUMBERLAND COUNTY
)	
v.)	DOCKET NO. CUM-L-841-14
)	
FAIRFIELD TOWNSHIP,)	Civil Action
etc,)	
)	OPINION
Defendant)	

The court conducted a one-day bench trial in this matter on June 27, 2016, took the matter under advisement, and now issues this Opinion pursuant to *Rule* 1:6-2(f).

PROCEDURAL HISTORY

Hulitt filed a six count Complaint on October 21, 2014. The Complaint alleges the following causes of action: (a) that his termination as Code Enforcement/Zoning officer was unlawful and without just cause in violation of his right to due process, for which he demands judgment for unpaid compensation, interest, costs of suit and reasonable attorneys’ fees (count one); (b) that he was not compensated appropriate wages for serving as the Township’s zoning officer, housing rental code officer, land use secretary, construction secretary, timekeeper and 9-1-1 coordinator, for which he demands judgment for unpaid compensation, interest, costs of suit and reasonable attorneys’ fees (count two); (c) that he was not adequately compensated for serving as Township Administrator, for which he demands judgment for unpaid compensation, interest, costs of suit and reasonable attorneys’ fees (count three); (d) that he was never compensated for 179 hours unused sick

leave, five weeks of unused vacation leave and two days unused personal leave, for which he demands judgment for unpaid compensation, interest, costs of suit and reasonable attorneys' fees (count four); (e) that he was improperly docked 14 hours salary for being paid for lunch time which was later voided, but not reimbursed, for which he demands judgment for unpaid compensation, interest, costs of suit and reasonable attorneys' fees (count five); and (f) that the actions of the Township were intentional and with malice, for which he demands judgment for punitive damages, interest, costs of suit and reasonable attorneys' fees (count four).

The Township filed an Answer to the Complaint on December 18, 2014. The Answer included twenty-seven affirmative defenses.¹ No dispositive motions were filed by either party. The Discovery End Date was October 14, 2015. Neither party claims any additional discovery was needed.

ANALYSIS

Three witnesses testified: plaintiff, Robert R. Hulitt, Sr. ("Hulitt"), Lewis N. Thompson, an expert for the plaintiff in the field of municipal clerks and business administrators, and Benjamin A. Byrd, Sr. ("Byrd") for the defendant, Fairfield Township ("the Township"). Mr. Byrd is currently the Mayor of the Township, and was a Township Councilman during the events in question. Fourteen plaintiff's exhibits (P-1 to P-14) and seven defense exhibits (D-2 to D-8) were admitted into evidence. The parties waived opening statements, but presented closing statements. The parties also submitted pre-trial memoranda. At the conclusion of the closing arguments the court took matter under

¹ The court notes that many of the affirmative defenses related to negligence issues, and were thus totally inapplicable to this matter. The assertion of affirmative defenses that have nothing to do with the case is inappropriate.

advisement. After careful consideration of the evidence, lack of evidence and argument of counsel, the court, sitting as the factfinder without a jury, makes the following findings of fact.

Hulitt began his employment by the Township in March 2006. He was terminated from his position as Code Enforcement/Zoning Officer effective March 12, 2014. During those eight years, Hulitt served in a number of positions including Code Enforcement/Zoning Officer, Township Administrator, Housing Officer, 9-1-1 Coordinator and Construction Secretary. He also claims to have served as Township Municipal Clerk.

On April 29, 2009, Township Administrator and Clerk Richard J. DeVillasanta wrote to then Deputy Mayor advising that Hulitt's "combined" positions were Code Enforcement Officer, Housing Officer and Zoning Officer, for which he received a salary of \$27,302.60 (Exhibit D-5).

Hulitt produced W-2s issued to him by the Township for the years 2007 through 2013 (Exhibit P-10). The W-2s demonstrate that he was paid the following annual salaries: \$19,351.31 in 2007; \$26,251.98 in 2008; \$27,262.21 in 2009; \$28,413.96 in 2010; \$29,043.45 in 2011; \$26,680.87 in 2012; and \$34,334.74 in 2013.

The Township passed Ordinance No. 10-2012 fixing the salaries and wages of its officers and employees (Exhibit P-12). The Ordinance set the salary range for Township Administrator from \$35,000 to \$60,000, and for Township Clerk from \$25,000 to \$50,000 (Exhibit P-12).

The term of office of the municipal administrator shall be at the pleasure of the governing body." *N.J.S.A.* 40A:9-137. However, *N.J.S.A.* 40A:9-138 provides:

The municipal administrator may be removed by a 2/3 vote of the governing body. The resolution shall become effective 3 months after its adoption by the governing body. The governing body may provide that the resolution shall have immediate effect; provided, however, that the governing body shall cause to be paid to the administrator forthwith any unpaid balance of his salary and his salary for the next 3 months following the adoption of the resolution.

[*N.J.S.A. 40A:9-138.*]

Due to the illness of Township Administrator Richard J. DeVillasanta, Hulitt was informally temporarily appointed Township administrator effective July 1, 2009, to be "in charge of running day to day operations for the Township" (Exhibit P-9). He was "directed" by then Mayor Marion Kennedy, Jr. "to make decisions and formulate a plan to make the township accountable in all areas of operation" (Exhibit p-9).

Apparently, the Township did not contemporaneously pass a resolution authorizing the temporary appointment. Instead, the appointment was initially handled verbally (Exhibit P-9), then discussed at a Township "Action Meeting," resulting in a "verbal" resolution placed on the record on March 16, 2010. The Township subsequently passed Resolution No. 70-2010 appointing Hulitt as temporary Administrator during the absence of Mr. DeVillasanta. The Resolution indicates that the appointment was made "nunc pro tunc" to March 16, 2010.

Hulitt's appointment during the earlier time period from July 1, 2009 to March 15, 2010 was implemented informally, without the authorizing resolution required by statute. *See N.J.S.A. 40A:9-137* ("Appointment to the office of municipal administrator shall be made by the mayor or chief executive officer of the municipality with the advice and consent of the governing body."). To be sure, Hulitt actually served in that capacity, carrying out the duties and responsibilities of Township Administrator. The Township does not dispute same.

Hulitt continued to serve as temporary Township Administrator until his temporary appointment was terminated effective December 31, 2010. The Township appointed Joseph Veight to serve as Township Administrator effective January 1, 2011.

Hulitt claims that although he continued to be paid for serving as the Code Enforcement/Zoning Officer and ancillary positions, he received no additional compensation for serving as Township Administrator from July 1, 2009 through December 31, 2010, a period of 549 days. The Township does not dispute that Hulitt received no additional compensation for serving as temporary Township Administrator. Hulitt seeks an award of damages for unpaid salary during that period for both positions. In addition, he seeks an award of damages for unpaid income for the three months after his termination pursuant to *N.J.S.A. 40A:9-138*, adding an additional 90 days as to his salary as Township Administrator.

The court finds that Hulitt is entitled to recover unpaid compensation for serving as temporary Township Administrator for time period of July 1, 2009 through December 31, 2010, a period of 549 days, and the additional 90 days for the period January 1, 2011 to March 31, 2011 pursuant to *N.J.S.A. 40A:9-138*.

The annual salary range for Township Administrator is set by ordinance at \$35,000 to \$60,000 (Exhibit P-12). Hulitt had no prior experience as a Township Administrator, had no formal training as a Township Administrator, and was only serving in a temporary capacity as a Township Administrator. Given these circumstances, the court finds that the minimum salary of \$35,000 per year should be utilized in calculating the amount of recoverable unpaid compensation. Accordingly, Hulitt is awarded compensation for his

services as temporary Township Administrator for 639 days at the salary of \$35,000 per year, which calculates to \$61,273.97.²

COMPENSATION AS TEMPORARY TOWNSHIP CLERK

Mr. DeVillasanta also served as Township Clerk. Noticeably absent from the record in this matter is any evidence that Hulitt was appointed acting Township Clerk. Neither the letter (Exhibit P-9), the verbal resolution, or the formal resolution mention the position of Township Clerk or the appointment of Hulitt to that position. Hulitt has produced no evidence that the Township ever appointed him temporary or acting Township Clerk.

Hulitt had no formal training or certifications for the position of municipal clerk. His testimony did not establish that he carried out the role of Township Clerk during the time period in question.

The exhibits and testimony fall short of establishing that Hulitt was appointed temporary or acting Township Clerk. The evidence also falls short of proving that he served in that capacity. His claim for compensation for that position is denied.

COMPENSATION AS CODE ENFORCEMENT/ZONING OFFICER FOR REMAINDER OF CALENDAR YEAR 2014

Hulitt continued to serve as Code Enforcement/Zoning Officer until he was terminated by a majority vote of the Township Committee, effective March 12, 2014 (Exhibit P-1). Hulitt claims that the Township lacks good cause for his termination. He seeks an award of damages for lost wages for the remainder of his one-year appointment, *i.e.*, from March 13, 2014 through December 31, 2014, a period of 294 days.

² \$35,000 x 639 days ÷ 365 days/year = \$61,273.97.

The Township contends that Hulitt acknowledged that he understood that “Fairfield Township is an ‘at-will employer,’ that he was hired as an “at-will” employee and “not for a fixed term or definite period and may be terminated at the will of either party, with or without cause, and without prior notice.” (Exhibit D-2). The Township also relies upon its Personnel Policies and Procedures Manual (Exhibit D-3), which expressly provides: “Neither this manual nor any other Fairfield Township guidelines, policies or practices create an employment contract. Employment with Fairfield Township may be terminated at any time with or without cause or reason by the employee of Fairfield Township.” (Exhibit D-3 at 17). However, Hulitt appears to have been appointed annually as Township Code Enforcement/Zoning Officer for one-year terms. See Township Resolution No. 84-2006 (“**Now, Therefore,** be it resolved that Robert Hewlitt (sic) be, and hereby is appointed to the position of Code Enforcement Officer of the Township of Fairfield for the Year 2006.”). Hulitt testified that he was appointed to a one-year term for 2014. A one-year appointment is fundamentally different than appointment to serve at the pleasure of the governing body in an at-will position. Accordingly, Hulitt is entitled to compensation for the remainder of calendar year 2014 unless the Township can establish that he was terminated for sustainable good cause.

The Township contends that it had sufficient good cause to terminate Hulitt as a result of his unauthorized scribing of Township check No. 105 in the amount of \$508.16 made payable to Edward Kimley (Exhibit P-5). The check reimbursed Mr. Kimley for the unused portion of the escrow deposit relating to a land use application. The Township does not contend that Mr. Kimley was not entitled to a refund in that amount. Nor does it contend that Hulitt gained any personal financial benefit from scribing the check. Instead,

The Township claims that Hulitt was not authorized to scribe the check, and that the check should have been prepared by the Planning Board Secretary.

The Township further argues that Hulitt had a prior disciplinary history, which included a written reprimand and two-day suspension. Applying the well-settled doctrine of progressive discipline, the Township contends that it had sufficient good cause to terminate Hulitt as a result of the alleged unauthorized check scribing incident. *See West New York v. Bock*, 38 N.J. 500, 523 (1962).

The record demonstrates that Hulitt was given a *Rice* notice pursuant to *Rice v. Union Cty. Reg. High School Bd. of Educ.*, 155 N.J. Super. 64, 73-74 (App. Div. 1977), *certif. denied*, 76 N.J. 238 (1978), for the hearing, gave Hulitt the opportunity to respond in writing to the charge, conducted a hearing which Hulitt attended and participated in, and otherwise afforded Hulitt adequate due process.

Hulitt contends that the check was prepared at the direction of the Township's Chief Financial Officer ("CFO"), in accordance with a Purchase Order and Voucher ultimately approved, to be paid at a Township meeting. While the Township denies that its CFO authorized Hulitt to scribe the check, the Township did not produce the CFO as a witness. The check was signed by the Mayor and Vice-Mayor, not Hulitt (Exhibit P-5). Indeed, Hulitt was not even an authorized signatory for Township checks.

Hulitt did not file an action in lieu of prerogative writs to contest his removal, which was effective March 12, 2014. Instead, he filed this action of October 21, 2014, more than seven months after his termination. *See R. 4:69-6(a)*. However, the Township did not raise this issue during trial. Moreover, while the Township argued in its pre-trial memorandum that Hulitt's back pay claim was barred by failing to serve a tort claim notice, in this context

the back pay claim is not a claim under the Tort Claims Act. Therefore, Hulitt was not required to serve a tort claim notice.

Based on the evidence adduced during the trial, the court finds that the Township has not established good cause for the termination. Hulitt is awarded damages for his lost income for the 294-day period from March 13, 2014 through December 31, 2014, at his salary rate of \$19.55 per hour.

**COMPENSATION FOR VACATION LEAVE, SICK LEAVE,
PERSONAL LEAVE AND DOCKED HOURS**

Plaintiff claims he is owed an award of damages for 179 hours of unused sick leave, five weeks of unused vacation leave, two days of unused personal leave, and 14 hours back pay for time he was unjustifiably docked. Hulitt's positions were not subject to a collective bargaining agreement, or within the classified civil service. Instead, the Township's Personnel Manual (Exhibit D-3) controlled employee vacation leave, sick leave and personal leave. The Personnel Manual contains several relevant governing provisions affecting employee leave.

Township employees accrue vacation leave at the rate of five days per year in their first full calendar year, ten days per year in their second through fourth years, and fifteen days per year after completing five full years of employment (Exhibit D-3 at 25). Employees may add their unused vacation leave to their allowance for the following year, but if the vacation days "are not used in the second year, they will be forfeited." (Exhibit D-3 at 26). Hulitt seeks compensation for five weeks of unused vacation leave. Since he began working for the Township in 2006, he had been employed for more than five full years during 2012, 2013 and 2014. Accordingly, he accrued 15 days or three weeks of vacation leave each year and is thereby eligible for compensation for up to 30 days or six

weeks of unused vacation leave. The Township did not contest the amount of Hulitt's unused vacation leave. Accordingly, Hulitt is awarded compensation for 25 days or five weeks unused vacation leave.

Township employees accrue personal leave at the rate of three personal days per year (Exhibit D-3 at 26). Unused personal days are forfeited at the end of each calendar year (Exhibit D-3 at 26). Hulitt seeks compensation for two days unused personal leave. Although Hulitt was terminated effective March 14, 2014, the Personal Manual does not indicate that personal days are prorated for any partial years. As a result, Hulitt is awarded compensation for two days of unused personal leave.

Hulitt seeks compensation for 179 hours of unused sick leave. The Township's employees accrue sick leave at the rate of ten personal days per calendar year (Exhibit D-3 at 26). "At the end of each calendar year, an employee's unused sick time is added to the allotment for the following year to a maximum of thirty (30) days. Employees shall be paid for one-half of their total accumulated unused sick time at the time they retire from employment." (Exhibit D-3 at 26). Accordingly, since accumulated sick leave is limited to thirty days, and employees are only compensated for one-half of their accumulated unused sick leave, Hulitt is limited to compensation for fifteen days of unused sick leave.

Hulitt also claims he is entitled to compensation for 14 hours back pay for time he was unjustifiably docked by the Township. On this record, the court finds there was no basis to dock him for those 14 hours. Plaintiff is awarded compensation for the 14 docked hours at \$19.55 per hour.

The award for compensation for reinstated docked time, unused vacation leave, sick leave and personal leave shall be calculated at the rate of \$19.55 per hour.

CLAIMS FOR AN AWARD OF ATTORNEYS' FEES AND COSTS OF SUIT

The law is well-settled that but for narrowly defined exceptions, New Jersey follows the so-called American rule, that is, that parties bear their own attorneys' fees. Pressler & Verniero, *Current N.J. Court Rules*, comment 1 on R. 4:42-9. Attorneys' fees and costs of suit are only awarded to prevailing parties if authorized by statute, court rule or contract. R. 4:42-9(a).

Hulitt does not claim that he is entitled to an award of attorneys' fees pursuant to any court rule, contractual term or fee-shifting statute. Accordingly, Hulitt's claim for an award attorneys' fees and costs of suit is dismissed since there is no legal basis to award that relief in this matter.

IMMUNITY FROM PUNITIVE DAMAGES

Hulitt seeks an award of both compensatory and punitive damages. At common law, public entities were absolutely immune from punitive damages. *Newport v. Fact Concerts*, 453 U.S. 247, 271, 101 S. Ct. 2748, 2762 (1981). "Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious and to deter him and others from similar conduct." *Id.* at 266-67, 101 S. Ct. at 2759. An award of punitive damages against a public entity punishes only the taxpayers, who took no part in the commission of the tort. *Id.* at 267, 101 S. Ct. at 2759. As further explained by the Supreme Court:

Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.

[*Id.* at 267, 101 S. Ct. at 2760.]

To this day, public entities are generally immune from punitive damages. More specifically, the Township is immune from punitive damages “except under civil rights statutes such as the LAD and the Conscientious Employee Protection Act, in furtherance of such statutes’ remedial goals.” *Thigpen v. City of East Orange*, 408 N.J. Super. 331, 344 (App. Div. 2009) (citing *Green v. Jersey City Bd. of Educ.*, 177 N.J. 434 (2003)). Indeed, the Tort Claims Act, N.J.S.A. 59:1-1 to -59:12-3, precludes an award of punitive damages against a public entity. N.J.S.A. 59:9-2(c). Similarly, public entities are immune from punitive damages under 42 U.S.C. § 1983, *Newport, supra*, 453 U.S. at 271, 101 S. Ct. at 2762, and, therefore, under the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to -2. Finally, the Punitive Damages Act, N.J.S.A. 2A:15-5.9 to 5.17, provides that the Act shall not “be construed as creating any claim for punitive damages which is not now available under the law of this State.” N.J.S.A. 2A:15-5.15. Absent a statute specifically abrogating immunity from punitive damages, public entities remain immune from liability for punitive damages.

Hulitt is not proceeding under any statute that authorizes the award of punitive damages against public entities. Accordingly, the Township is immune from punitive damages. In any event, the court further finds that the evidence in this matter would not warrant an award of punitive damages against the Township. Consequently, Hulitt’s claim for an award of punitive damages is dismissed.

IMMUNITY FROM PREJUDGMENT INTEREST

In each of the six counts of his Complaint, Hulitt demands judgment for prejudgment interest. “No interest shall accrue prior to the entry of judgment against a public entity or public employee.” N.J.S.A. 59:9-2(a). A similar provision precludes the

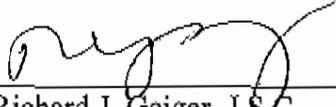
award of prejudgment under Contractual Liability Act except with respect to claims for the construction or installation of improvements to real property. *N.J.S.A.* 59:13-8. Accordingly, Hulitt's claim for an award of prejudgment interest is dismissed.

CONCLUSION

For the reasons stated in this Opinion, plaintiff, Robert R. Hulitt, Sr. is awarded the following damages against defendant, Fairfield Township: (a) compensation for his services as temporary Township Administrator for 639 days totaling \$61,273.97; (b) lost wages as the Township Code Enforcement Officer for the 294-day period from March 13, 2014 through December 31, 2014, at his salary rate of \$19.55 per hour; (c) compensation for 25 days or five weeks unused vacation leave; (d) compensation for fifteen days of unused sick leave; (e) compensation for two days of unused personal leave; and (f) compensation for the 14 docked hours at \$19.55 per hour.

Hulitt's claim for an award of attorneys' fees, costs of suit, punitive damages and prejudgment interest are dismissed. Hulitt's additional claim for unpaid compensation for allegedly serving as temporary Township Clerk is denied.

Counsel for defendant shall prepare a Judgment reflecting the court's ruling after conferring with plaintiff's counsel.



Richard J. Geiger, J.E.C.

Dated: June 30, 2016

HULITT V. FAIRFIELD TOWNSHIP

CALCULATION OF AMOUNTS AWARDED IN JUDGE GEIGER'S OPINION

- (a) \$61,273.97
- (b) $294 \div 7 = 42$ weeks x 5 days per week or 210 days x 6.5 hours per day
or 1365 hours @ \$19.55 per hour = \$26,685.75
- (c) 25×6.5 hours = 162.5 hours x \$19.55 per hour = \$3,176.87
- (d) 15 days x 6.5 hours per day = 97.5 hours x \$19.55 per hour = \$1,906.13
- (e) 2×6.5 hours per day = 13 hours x \$19.55 per hour = \$254.15
- (f) 14 hours x \$19.55 per hour = \$273.70

(a)	\$ 61,273.97
(b)	26,685.75
(c)	3,176.87
(d)	1,906.13
(e)	254.15
(f)	<u>273.70</u>

Total damages \$ 93,570.57