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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Justine Branham

CSC Docket No. 2011-312
OAL Docket No. CSV 9462-10

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ISSUED: **DEC 18 2015** (NFA)

The appeal of Justine Branham, a Police Officer with the City of Newark (Newark), of her six working day suspension, on charges, was heard by Acting Director and Chief Administrative Law Judge Laura Sanders (ALJ), who rendered her initial decision on October 28, 2015, dismissing the appeal. No exceptions were filed by the parties.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on December 16, 2015, adopted, on other grounds, the ALJ's recommendation to dismiss the appeal.

DISCUSSION

The appellant was suspended for six working days on charges relating to her alleged insubordination. Specifically, it was alleged that on May 10, 2010, the appellant did not follow a direct order of her Lieutenant. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing. Subsequently, the appellant filed a suit against Newark in Superior Court alleging that she had been discriminated against. Included as one of the incidents she claimed were based on discrimination was the subject disciplinary action. On November 11, 2013, the parties settled the Superior Court matter. At the OAL, Newark argued that the appellant's appeal of her six working day suspension should be dismissed based on the release she signed in the above-referenced settlement.

In her initial decision, the ALJ set forth the terms of the settlement, which, among other things, indicated that the appellant released claims she may have had against Newark. However, the ALJ concluded that since neither the OAL nor the Commission could enforce the Superior Court settlement or remand the issue back to the Superior Court for clarification regarding the settlement, the appellant's appeal should be dismissed.

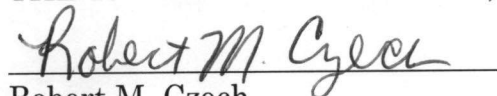
While the ALJ's dismissal of the matter is clearly appropriate, the Commission disagrees with the reason for the dismissal. Specifically, the OAL and/or the Commission certainly do have the ability to determine whether a duly executed settlement's terms **impact** a disciplinary appeal, regardless of the origin of the settlement. Upon review, the settlement is explicitly clear that the appellant releases her challenge of the subject disciplinary matter. In this regard, her initial complaint included the May 10, 2015 incident as one of her counts. Moreover, the appellant knowingly and voluntarily signed the settlement which released "[a]ny and all claims of any type . . . arising from an incident . . . which is the subject matter of the Complaint" Therefore, her appeal before the Commission is rendered moot. In essence, the settlement's terms serve as *res judicata* for the current matter. Finally, the Commission notes that if the appellant is seeking to challenge the *actual terms* of the settlement or its *validity*, she must do so in the forum where the settlement was entered into, namely, the Superior Court.

ORDER

The Commission dismisses the appeal without prejudice and affirms the six working day suspension imposed against Justine Branham.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 16TH DAY OF DECEMBER, 2015



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals & Regulatory Affairs
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 09462-10

AGENCY DKT. NO. 2011-312

**IN THE MATTER OF JUSTINE BRANHAM,
CITY OF NEWARK—POLICE DEPARTMENT.**

Alfred V. Gellene, Esq., for appellant Justine Branham (Fusco & Macaluso Partners, LLC, attorneys)

Corinne E. Rivers, Assistant Corporation Counsel, for respondent City of Newark Police Department (Willie Parker, Corporation Counsel)

Record Closed: October 7, 2015

Decided: October 28, 2015

BEFORE **LAURA SANDERS**, Acting Director and Chief ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Police officer Justine Branham (appellant) appeals a six-day suspension effective August 6, 2010, through August 13, 2010, imposed on grounds of insubordination, responsibility for own actions, and obedience to orders. The Preliminary Notice of Disciplinary Action was served on June 18, 2010. Following a departmental hearing on July 20, 2010, appellant was served with the Final Notice of Disciplinary Action by the City of Newark Police Department (respondent, or the "City") on July 29, 2010. By an appeal dated July 26, 2010, Officer Branham timely requested a fair hearing from the

Civil Service Commission, which transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on September 1, 2010. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On May 25, 2011, Officer Branham filed a complaint against the City of Newark in the Superior Court of New Jersey, alleging that she had been subject to discriminatory treatment in assignments, harassment, and retaliation, in violation of the New Jersey Law Against Discrimination. It was docketed as ESX-L-4386-11. At the parties' request, Administrative Law Judge Richard McGill entered orders of inactivity pending resolution of the Superior Court case.

Following a settlement of the Superior Court matter on November 11, 2013, the parties contacted Judge McGill, which resulted in a case-management conference and an agreement to address the matter on summary decision. Given the age of the case, and ALJ McGill's involvement in several other complex and pressing matters, the case was reassigned to the undersigned. The City filed a motion for summary decision on December 30, 2014, and the motion in opposition was filed on April 11, 2015. Following a conference call, a proposed settlement was reached; however, no further word on the settlement has been received, despite repeated contacts from the OAL.

FACTUAL DISCUSSION

While the parties agree that a settlement was reached in the Superior Court, and that the settlement resulted in the payment of \$80,000 to the appellant, the current dispute concerns the scope of the Superior Court settlement. Specifically, the City asserts that appellant's waiver, which was signed on the date of the settlement, included any further right to appeal the six-day suspension, such that the City has won the six-day suspension, and need not return any other funds or expunge the discipline from Officer Branham's record. Paragraph 1 of the Release states:

1. **RELEASE**. I release and give up any and all claims and rights which I may have against you. . . . I specifically release the following claims:

Any and all claims of any type, nature or description, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensation . . . arising from an incident . . . which is the subject matter of the Complaint filed in the Superior Court of New Jersey, Essex County, bearing Docket No. ESX-L-4386-11.

[Resp't Br., Ex. D.]

The respondent notes that the complaint included as "incidents . . . to build a padded, erroneous discipline record" a number of dates and events, including "5/17/10—Lieutenant Caruso falsely charged Branham with Insubordination, Responsibility for own Actions, Obedience to Orders because she requested to speak to Captain Reilly about her situation and scheduled union activity." (Resp't Br., Ex. C.) Since the May 17 incident is the subject of the six-day suspension, the City contends that Officer Branham gave up any further right to pursue that claim in return for the payment of the settlement amount.

Counsel for appellant (which is not the same counsel representing appellant in the Superior Court matter) contends that the voir dire conducted on the record as part of the settlement included the following words, "Officer Branham, you understand that this is a full and final settlement and you cannot come back to court for this lawsuit again once we settle this?" (Appellant's Br., Ex. A, Tr. at page 6, lines 20 to 26.) Appellant contends that the lawsuit is not the same thing as the OAL matter, and, therefore, the OAL matter was not resolved. Counsel also contends that Officer Branham could not waive her right to a hearing in the OAL matter without consultation with the firm representing her at the OAL, which is Fusco & Macaluso, LLC. It points to R. 1:11-2, the general rule of Superior Court governing withdrawal or substitution of attorneys, which in pertinent part provides:

(a) Generally. Except as otherwise provided by R. 5:3-5(d) (withdrawal in a civil family action),

(1) prior to the entry of a plea in a criminal action or prior to the fixing of a trial date in a civil action, an attorney may withdraw upon the client's consent provided a substitution of attorney is filed naming the

substituted attorney or indicating that the client will appear pro se. If the client will appear pro se, the withdrawing attorney shall file a substitution. An attorney retained by a client who had appeared pro se shall file a substitution. If a mediator has been appointed, the attorney shall serve a copy of the substitution of attorney on that mediator simultaneously with the filing of the substitution with the court, and

(2) after the entry of a plea in a criminal action or the fixing of a trial date in a civil action, an attorney may withdraw without leave of court only upon the filing of the client's written consent, a substitution of attorney executed by both the withdrawing attorney and the substituted attorney, a written waiver by all other parties of notice and the right to be heard, and a certification by both the withdrawing attorney and the substituted attorney that the withdrawal and substitution will not cause or result in delay.

[Emphasis added.]

Appellant's counsel argues that since the firm of Wendy L. Elovich, P.A., represented Officer Branham in the Superior Court matter, and no substitution of attorney with regard to the OAL matter was ever filed, and no one conferred with Fusco & Macaluso about the OAL matter, no waiver of the OAL matter could or did occur. Further, counsel contends that if the settlement specifically included the OAL case, the settlement had to lay that out clearly, since the OAL case was not otherwise before the Superior Court.

LEGAL ANALYSIS

The threshold question is whether the Civil Service Commission has jurisdiction to decide the matter. At the base of the controversy lies the interpretation of the Superior Court settlement. If the Superior Court settlement addressed all the claims, there is nothing left for the Commission to decide.

The policy reason for deferring to the primary jurisdiction of an administrative agency is to enable the decision to be made by "the forum or body which, on a comparative scale, is in the best position by virtue of its statutory status, administrative

competence and regulatory expertise to adjudicate the matter.” Boss v. Rockland Elec. Co., 95 N.J. 33, 40 (1983) (quoting Hinfey v. Matawan Reg'l Bd. of Educ., 77 N.J. 514, 531–32 (1978)). Thus, the doctrine of primary jurisdiction will apply where “the case is properly before the court, but agency expertise is required to resolve the questions presented.” Boldt v. Correspondence Mgmt., Inc., 320 N.J. Super. 74, 83 (App. Div. 1999).

The sole issue here is whether the settlement did or did not include the six-day suspension. Determining whether it did or not requires an understanding of Superior Court practice in cases involving claims not otherwise before the Superior Court. Essentially, respondent is demanding that the Commission enforce its settlement by dismissing the appeal. Enforcement of Superior Court settlements rests with the Superior Court. Further, while the OAL has general authority concerning representation before the OAL (N.J.A.C. 1:1-5.1), including conduct of lawyers (N.J.A.C. 1:1-5.3), counsel for appellant grounds one of his arguments in a rule that governs representation in Superior Court. Whether the Superior Court would generally require a substitution in situations such as the current matter is not within the special expertise of the Civil Service Commission.

Further, as the Third Circuit has explained, Longo v. First Nat'l Mortg. Sources, 523 Fed. Appx. 875, 878 (3d Cir. 2013):

In New Jersey there is a strong public policy in favor of settlements. See Nolan v. Lee Ho, 120 N.J. 465, 577 A.2d 143, 146 (N.J. 1990). “Consequently, . . . courts have refused to vacate final settlements absent compelling circumstances.” Id. “[A]n agreement to resolve a matter will be enforced as long as the agreement addresses the principal terms required to resolve the dispute.” Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C., 421 N.J. Super. 445, 24 A.3d 802, 807 (N.J. Super. Ct. App. Div. 2011). However, courts will not enforce a settlement “where there appears to have been an absence of mutuality of accord between the parties or their attorneys in some substantial particulars, or the stipulated agreement is incomplete in some of its material and essential terms.” Bistricher v. Bistricher, 231 N.J. Super. 143, 555 A.2d 45, 47 (N.J. Super. Ct. Ch. Div. 1987) (quotation marks and citation omitted).

Whether one views it as a request to enforce a settlement, or as a matter of interpreting Superior Court rules and practice for the purpose of determining whether any contract existed in this matter, the current dispute centers on the question of what exactly the Superior Court did. In numerous cases, the Civil Service Commission has declined to exercise its authority where the matter concerned violation of a private contract between the parties.

Therefore, I **CONCLUDE** that the matter should be dismissed for lack of subject-matter jurisdiction, as neither the OAL nor the Civil Service Commission has authority to remand the matter to the Superior Court for clarification.

ORDER

The appellant's claim is **DISMISSED WITHOUT PREJUDICE**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 28, 2015
DATE

Laura Sanders
LAURA SANDERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency:

October 28, 2015

Date Mailed to Parties:

October 28, 2015

/caa