

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND
CIVIL SERVICE COMMISSION

In the Matter of

STATE OF NEW JERSEY,
DEPARTMENT OF CORRECTIONS,

JOINT ORDER

Respondent,

-and-

PERC Docket No. CO-2015-042

IFPTE LOCAL 195,

Charging Party,

-and-

MARCIA DAVIS, MOUNTAINVIEW
YOUTH CORRECTIONAL FACILITY,
DEPARTMENT OF CORRECTIONS.

OAL Docket No. CSV 14106-14
Agency Docket No. 2015-788

Appearances:

For the Respondent, John J. Hoffman, Acting Attorney
General (Nicole M. DeMuro, of counsel)

For the Charging Party, Oxfeld Cohen, attorneys (Arnold
Shep Cohen, of counsel)

DECISION

Appellant Marcia Davis filed an appeal with the Civil Service Commission (CSC) from a determination of the State of New Jersey, Department of Corrections (DOC), to terminate her employment. IFPTE, Local 195 filed an unfair practice charge with the Public Employment Relations Commission (PERC) alleging that Davis was terminated in violation of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The CSC appeal was transmitted to the Office of Administrative Law

(OAL) for hearing and a Complaint on the unfair practice charge was issued by the PERC Director of Unfair Practices on the allegations that the employer violated N.J.S.A. 34:13A-5.4a(1) and a(3).^{1/}

On March 13, 2015, the DOC filed a motion for Consolidation and Predominant Interest Determination, arguing that the CSC should have the predominant interest. On March 24, the IFPTE filed a brief in support of consolidation, but argued that PERC should have the predominant interest.

Having independently evaluated the record and considering the ALJ's Order, the CSC at its meeting on November 18, 2015 and the Chair of PERC, acting pursuant to the authority delegated her by the full Commission, on November 12, 2015 determined that the two cases should be consolidated consistent with our approach in similar cases. PERC's unfair practice jurisdiction is exclusive. PERC shall have the predominant interest and the case should be processed in accordance with the following:

JOINT ORDER

The Civil Service Commission appeal and the Public Employment Relation Commission unfair practice complaint are

^{1/} These provisions prohibit public employers, their representatives or agents from: "1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. . . . [and] (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."


consolidated for hearing before the ALJ. The ALJ will first offer recommended findings of fact and conclusions of law to both PERC and the CSC disposing of all issues in controversy through a single initial decision under N.J.A.C. 1:1-17.8(a); and

Upon transmittal of the initial decision to both agencies, the underlying record will be forwarded to PERC to determine whether Davis engaged in protected activity under the New Jersey Employer-Employee Relations Act and whether that activity, if protected, was a substantial or motivating factor in the termination; and

PERC's decision and the complete record will then be sent to the CSC which will then determine whether the disciplinary action was for legitimate business reasons and was otherwise warranted under Civil Service laws; and

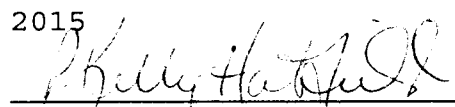
If appropriate, the matter will be returned to PERC for its consideration of whether specialized relief is warranted under its Act.

DECISION RENDERED BY THE
 [REDACTED] CIVIL SERVICE
 COMMISSION ON NOVEMBER 18,
 2015



 Robert M. Czech, Chairperson
 Civil Service Commission

DECISION RENDERED BY THE
 PUBLIC EMPLOYMENT RELATIONS
 COMMISSION ON NOVEMBER 12,
 2015



 P. Kelly Hatfield, Chair
 Public Employment Relations
 Commission



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER OF CONSOLIDATION
AND DETERMINATION OF
PREDOMINANT INTEREST

**IN THE MATTER OF MARCIA DAVIS,
MOUNTAINVIEW YOUTH CORRECTIONAL
FACILITY, DEPARTMENT OF CORRECTIONS.**

OAL DKT. NO. CSV 14106-14
AGENCY DKT. NO. 2015-788

and

**STATE OF NEW JERSEY,
DEPARTMENT OF CORRECTIONS,**

PERC DKT. NO. CO-2015-042
(CONSOLIDATED)

Respondent,

and

IFPTE LOCAL 195,

Charging Party.

Arnold Shep Cohen, Esq., for appellant Marcia Davis (Oxford, Cohen, attorneys)

Nicole M. DeMuro, Deputy Attorney General, for respondent Department of Corrections (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

BEFORE ROBERT BINGHAM II, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant Marcia Davis (Davis) appealed a removal from employment by respondent Mountainview Youth Correctional Facility (Mountainview), Department of Corrections (DOC). The Civil Service Commission (CSC) transmitted the matter to the Office of Administrative Law (OAL), where it was filed on October 30, 2014, as a contested case. On September 3, 2014, Davis's union filed an unfair-practice charge, on her behalf against the DOC, with the Public Employment Relations Commission (PERC), which issued an unfair-practices complaint on December 12, 2014.¹ By letter dated January 16, 2015, PERC directed the parties to file a motion for consolidation and a determination of predominant interest in light of the civil service appeal (Ex. R-M). On March 13, 2015, respondent DOC filed with the OAL a motion to consolidate the civil service and PERC matters and to find that the CSC has the predominant interest. On March 24, 2015, Davis filed a legal brief in support of consolidation, but argued therein that PERC should have the predominant interest.

FACTUAL DISCUSSION

The DOC's motion to consolidate arises from separate disciplinary actions that Mountainview took against Davis, and her union's complaint of retaliation. Initially, Mountainview removed Davis from her position as a communications operator on May 8, 2012, but Davis successfully appealed and was reinstated by the CSC on February 26, 2014 (Ex. I at 2).²

Next, by Preliminary Notice of Disciplinary Action (PNDA) dated July 16, 2014, and Final Notice of Disciplinary Action (FNDA) dated October 7, 2014, Mountainview removed Davis from her position as a communications operator on charges of insubordination, conduct unbecoming a public employee, and other sufficient cause (Ex. R-C). The charges resulted from an incident on July 13, 2014, wherein Davis allegedly cursed at and defied her supervisor, who had (1) requested that Davis correct errors on

¹ On January 15, 2015, the DOC filed an answer and separate defenses (Ex. R-L.).

² The charges giving rise to that removal are not included in the papers.

an assignment sheet she completed, and (2) directed her to hire extra officers to cover a third shift. (Ibid.) This disciplinary action is the basis for the instant appeal.

Finally, by PNDA dated August 15, 2014, and FNDA dated September 2, 2014, Mountainview imposed a thirty-day suspension on charges of conduct unbecoming a public employee, and other sufficient cause, based upon allegations of harassment of a female co-worker, specifically, referring to her as a "bald-headed bitch" (Exs. R-D and R-E). However, on October 2, 2014, the DOC withdrew the charge and dismissed the suspension (Ex. R-F).

On September 3, 2014, the International Federation of Professional and Technical Engineers, AFL-CIO, Local 195, (Local 195) filed an unfair-practice charge with PERC on Davis's behalf, and it amended that charge on December 8, 2015 (Exs. R-J, R-K). According to the charge, Davis served as a shop steward for Local 195 while holding her title as communications operator. Davis "actively represented her members as a shop steward, filing numerous grievances, and attending many Union/Management meetings." (Ibid.) Allegedly, "[i]n retaliation for her union activity and for pursuing her Civil Service appeal over her removal, Ms. Davis was twice disciplined without cause by the DOC." (Ibid.) The charge further alleges that "[o]nly because [the thirty-day suspension] violated the one year discipline provision in the Labor Agreement [between Local 195 and the DOC], the discipline was reduced to a written reprimand" and that "these disciplines also are contrary to a no retaliation clause of a 2014 Settlement Agreement of two major disciplines." (Ibid.) As relief, Local 195 seeks, among other things, an order: (1) declaring that the DOC has engaged in unfair practices, (2) voiding Davis's removal and written reprimand, and (3) reinstating Davis to her position with full benefits, back pay, seniority and all other emoluments of employment. (Ibid.)

On December 12, 2014, PERC issued an unfair-practices complaint finding that the allegations, if true, may constitute unfair practices and providing that "formal proceedings shall commence to provide the parties an opportunity to litigate relevant legal and factual issues" (Ex. R-K). On January 15, 2015, the DOC filed an answer and separate defenses, denying any infringement or interference with appellant's rights and any retaliation or discrimination against her (Ex. R-L). The DOC asserts that at all times

it acted in good faith and on the basis of legitimate governmental and business justifications. (ibid.)

LEGAL ANALYSIS AND CONCLUSION

The Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, and its implementing regulations, N.J.A.C. 4A:1-1.1 to 10-3.2, serve to “establish a personnel system that provides a fair balance between managerial needs and employee protections for the effective delivery of public services.” N.J.A.C. 4A:1-1.1. The statutory and regulatory scheme is designed to “encourage and reward meritorious performance by employees in the public service and to retain and separate employees on the basis of the adequacy of their performance.” N.J.S.A. 11A:1-2(c). An employee may be subject to major discipline, including removal and lengthy suspensions, for numerous reasons, including “conduct unbecoming a public employee,” “insubordination,” and “other sufficient cause.” N.J.A.C. 4A:2-2.2(a); N.J.A.C. 4A:2-2.3(a); N.J.S.A. 11A:2-20. An employee may appeal major disciplinary action to the Civil Service Commission and the Commission may refer the matter to the OAL for a hearing. N.J.A.C. 4A:2-2.8 and -2.9(b); N.J.S.A. 11A:2-6, -13, -15. If a hearing results in a reversal of a disciplinary penalty, the employee may be awarded back pay, benefits, seniority, reasonable attorney fees, and restitution of a fine. N.J.S.A. 11A:2-22; N.J.A.C. 4A:2-2.10(a).

Under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 to -43 (“NJEER” or “the Act”), and the regulations promulgated thereunder, N.J.A.C. 19:10-1.1 et seq., public employers are prohibited from “interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the act” and “[d]iscriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act.” N.J.S.A. 34:13A-5.4(a)(1), (3). Any public employee or his or her representatives may file with PERC a charge that a public employer has engaged in an unfair labor practice. N.J.S.A. 34:13A-5.4(c); N.J.A.C. 19:14-1.1 to -1.2.

I. Consolidation

A party may move to consolidate a case that has been transmitted to the OAL with any other contested case involving common questions of fact or law between identical parties or between any party to the filed case and any other person, entity or agency. N.J.A.C. 1:1-17.1. In ruling upon such a motion, an administrative law judge (ALJ) shall consider the following:

1. The identity of parties in each of the matters;
2. The nature of all the questions of fact and law respectively involved;
3. To the extent that common questions of fact and law are involved, the saving in time, expense, duplication and inconsistency which will be realized from hearing the matters together and whether such issues can be thoroughly, competently, and fully tried and adjudicated together with and as a constituent part of all other issues in the two cases;
4. To the extent that dissimilar questions of fact or law are present, the danger of confusion, delay or undue prejudice to any party;
5. The advisability generally of disposing of all aspects of the controversy in a single proceeding; and
6. Other matters appropriate to a prompt and fair resolution of the issues, including whether a case still pending in an agency is contested or is ripe to be declared contested.

[N.J.A.C. 1:1-17.3.]

Here, as set forth below, the standards under N.J.A.C. 1:1-17.3 weigh in favor of consolidation.

1. The identity of the parties in each matter

In the civil service matter, Davis is the appellant. In the PERC matter, Local 195 is the charging party that filed the unfair-practice charge on Davis's behalf. The DOC is the respondent in both matters.

2. The nature of the questions of law and fact

In the civil service matter, Davis appeals her October 7, 2014, removal on charges of insubordination, conduct unbecoming a public employee, and other sufficient cause. In the PERC matter, Local 195 alleges that “[i]n retaliation for her union activity and for pursuing her Civil Service appeal over her [May 8, 2012] removal, Ms. Davis was twice disciplined without cause by the DOC,” including her October 7, 2014, removal and a written reprimand. Thus, in the civil service matter the issues are whether Davis committed the alleged acts or omissions and, if so, whether Mountainview appropriately imposed the discipline of removal. Regarding the unfair-practice charge, the issues are whether protected conduct was a substantial or motivating factor in the adverse action, and whether the DOC's action was taken for legitimate governmental or business reasons and not in retaliation for the protected activity. While the civil service matter is limited to an appeal of Davis's removal, and the PERC matter raises an additional allegation with respect to a written reprimand, each matter will necessarily involve consideration of similar questions of law and fact with respect to the circumstances surrounding the major discipline imposed on Davis, as well as her disciplinary history, and whether the appointing authority retaliated against Davis for her union activities.³ See W. New York v. Bock, 38 N.J. 500, 523–24 (1962) (holding that an employee's disciplinary history “may be resorted to for guidance in determining the appropriate penalty for the current specific offense”); see also Winters v. N. Hudson

³ The issue regarding the subsequent minor discipline may be moot. First, the parties give differing accounts of the DOC's disciplinary actions with respect to the alleged “bald-headed bitch” incident. The DOC and Davis (and Local 195) both state in their motion papers that the charges and thirty-day suspension were ultimately withdrawn; however, in the PERC matter, Local 195 asserts that Davis was nonetheless issued a written reprimand. If the charges were withdrawn and no written reprimand was issued, then the issue would appear to be moot because there likely would be no relief to which Local 195 would be entitled with respect to that issue.

Reg'l Fire and Rescue, 212 N.J. 67, 74 (2012) (putting "users of the public employment system of employee discipline on notice that integration of employer-retaliation claims should be anticipated and addressed where raised as part of the discipline review process").⁴

3. To the extent that common questions of fact and law are involved, the saving in time, expense, duplication and inconsistency which will be realized from hearing the matters together and whether such issues can be thoroughly, competently, and fully tried and adjudicated together with and as a constituent part of all other issues in the two cases

Here, consolidation would result in the saving of time and expense, and avoid duplication and inconsistency, because the matters share common questions regarding Davis's removal, disciplinary history, and retaliation by the appointing authority. These common questions could be fully tried and adjudicated together.

4. To the extent that dissimilar questions of fact or law are present, the danger of confusion, delay or undue prejudice to any party

There does not appear to be a risk of any confusion, delay, or undue prejudice to any party if the matters are consolidated. There are common facts and proofs in each matter and the parties agree that the matters should be consolidated.

5. The advisability generally of disposing of all aspects of the controversy in a single proceeding

The consideration of all aspects of the controversy in a single proceeding (the single- or entire-controversy doctrine) is generally advisable because, as stated above, both matters arise from disciplinary action taken by the DOC against Davis. The PERC matter involves an additional issue because Davis therein seeks an order "voiding" not only her removal, but also an alleged written reprimand she received as a result of an incident that is not necessarily part of the civil service appeal; however, there is no

⁴ Thus, the fact that the claims in the civil service matter are governed by the Civil Service Act and its implementing regulations, while the claims in the PERC matter are governed by the NJEER Act, should not impede consolidation.

- apparent reason why this aspect of the controversy could not be considered as part of a single proceeding involving both the civil service and PERC matters. Additionally, consolidation is preferable in consideration of the DOC's reliance on public funds for its litigation of these matters.

6. Other matters appropriate to a prompt and fair resolution of the issues, including whether a case still pending in an agency is contested or is ripe to be declared contested

The civil service and PERC matters may also be consolidated because N.J.A.C. 1:1-17.1(b) provides that candidate cases for consolidation include those already filed with the OAL, those commenced in an agency but not yet filed with the OAL, and those commenced in any agency and not required to be filed with the OAL under N.J.S.A. 52:14F-8. Here, the civil service matter has been filed with OAL; the PERC matter has been declared to be contested and it is ripe for consolidation under N.J.A.C. 1:1-17.1(b) because PERC has determined that the allegations, if true, may constitute unfair practices and that "formal proceedings shall commence to provide the parties an opportunity to litigate relevant legal and factual issues." Moreover, PERC directed the parties to file motions to consolidate at the OAL in light of the civil service matter.

Since the standards under N.J.A.C. 1:1-17.3, as applied to the civil service and PERC matters, support consolidation of the two matters in a single proceeding, I **CONCLUDE** that the appellant's civil service appeal pending in the OAL and Local 195's PERC complaint should be consolidated.

II. Predominant Interest

When a motion to consolidate involves multiple State agencies that are asserting jurisdiction, the ALJ shall determine which agency, if any, has the predominant interest in the conduct and outcome of the matter by applying the following factors:

1. Whether more than one agency asserting jurisdiction over a common issue has jurisdiction over the issue, and if

more than one agency has jurisdiction, whether the jurisdiction is mandatory for one of the agencies;

2. Whether the common issue before the two agencies is, for either agency, the sole, major or dominant issue in dispute and whether its determination would either serve to moot the remaining questions or to affect substantially their resolution;

3. Whether the allegations involve issues and interests which extend beyond the immediate parties and are of particular concern to one or the other agency;

4. Whether the claims, if ultimately vindicated, would require specialized or particularized remedial relief available in one agency but not the other;

5. Whether the common issue is clearly severable from the balance of the controversy and thus will permit non-duplicative factual and legal determinations by each agency.

[N.J.A.C. 1:1-17.5.]

Here, the standards under N.J.A.C. 1:1-17.5 weigh in favor of the CSC having predominant interest. PERC and the CSC both have jurisdiction over the common issue of whether the DOC properly removed Davis from her position. While PERC “shall have exclusive power . . . to prevent anyone from engaging in any unfair practice,” N.J.S.A. 34:13A-5.4(c), “[n]othing herein shall be construed to deny to any individual employee his rights under Civil Service laws or regulations.” N.J.S.A. 34:13A-5.3. The common issue before the two agencies—whether the DOC acted appropriately in removing Davis—is the sole issue before the CSC, and a major issue in the PERC matter. A determination by the CSC that the DOC acted appropriately in removing Davis from her position would potentially moot any remaining question of whether the DOC acted properly in connection with its subsequent imposition of a thirty-day suspension (which was withdrawn). Thus, the basic dispute primarily involves civil service law, and although a mixed issue of anti-union bias is presented, the latter is not the sole, major, or dominating issue. Hackensack v. Winner, 82 N.J. 1, 34–35 (1980).

Further, the allegations do not involve issues or interests that extend beyond the immediate parties. Also, the claims, if ultimately vindicated, would not require relief available in one agency but not the other. As the Supreme Court noted in Hackensack, PERC and the CSC may grant similar broad remedial relief in employment matters. Hackensack, supra, 82 N.J. at 15 (citations omitted). The CSC may order back pay and restoration of civil service duty and PERC may order restoration of working hours, award back pay, and direct the public employer to cease and desist in its interference with the employees' rights. Ibid. Thus, this factor alone does not resolve the issue of predominant interest. Finally, the common issue of whether the DOC acted appropriately in removing Davis is not clearly severable from the balance of the controversy, so as to permit non-duplicative factual and legal determinations by each agency.

In Hackensack, firefighters claimed that their promotions were withheld because of their union activity, and the Court explained, "the Civil Service Commission has the jurisdiction to consider allegations of improper employment activities when these are asserted in the context of a civil service proceeding directed primarily to compliance with civil service requirements and with the granting of civil service relief." Hackensack, supra, 82 N.J. at 18. According to the Court, the CSC has a "responsibility to ascertain whether the appointing authority acted improperly or exceeded discretion arbitrarily" and its "broad authority includes the right to inquire into the good faith of governmental conduct directly affecting civil service employees." Ibid. Similarly, here, the CSC should "retain[] jurisdiction over claims involving factual allegations of improper employment activity when these allegations are integral aspects of valid civil service complaints, even though, if standing alone, the factual circumstances might constitute an unfair practice." Id. at 25.

In light of the above and having considered the standards under N.J.A.C. 1:1-17.5, as applied to the civil service and PERC matters, I **CONCLUDE** that the Civil Service Commission should have predominant interest in the consolidated matters.

ORDER

Accordingly, the DOC's motion to consolidate is **GRANTED**. I **ORDER** that the unfair-practice complaint presently before the Public Employment Relations Commission and the disciplinary appeal filed before the Civil Service Commission and transmitted to the OAL are hereby **CONSOLIDATED**, and that the PERC matter promptly be transmitted to the OAL for further proceedings consistent with this Order.

I **FURTHER ORDER** that the Civil Service Commission has predominant interest over the consolidated case.

This order may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION** and the **CHAIRMAN OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION** who by law are authorized to make a final decision in this matter. The **CIVIL SERVICE COMMISSION** and the **CHAIRMAN OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION** are encouraged to consult and coordinate with each other before issuing a final order. If the **CIVIL SERVICE COMMISSION** and the **CHAIRMAN OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION** do not adopt, modify or reject this order within forty-five (45) days and unless such time limit is otherwise extended, this recommended order shall be deemed adopted by the **CIVIL SERVICE COMMISSION** and the **CHAIRMAN OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION**.



September 11, 2015

DATE

ROBERT BINGHAM II, ALJ

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