

authority improperly removed the appellant "as a result of such 'waiver' ". Upon its *de novo* review of this matter, the Commission does not agree.

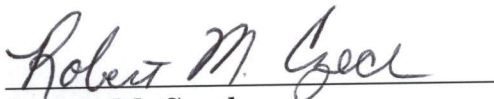
While a departmental-level hearing is an important procedural protection afforded to Civil Service employees, it is only an initial step in the procedural protections afforded to such employees. In this regard, employees are given the discretion to waive a departmental-level hearing without any abrogation of their rights to thereafter appeal a FNDA issued based on the waiver of a departmental hearing. In this matter, it appears that the ALJ disregarded the portion of the FNDA issued where it indicated that the appointing authority upheld the charges and removal of the appellant and rather, focused on the fact that the appointing authority indicated that the departmental hearing was "deemed" to be waived. While it was improper for the appointing authority to have "deemed" the appellant's departmental hearing waived, in doing so, and issuing the FNDA upholding the underlying charges, it appropriately afforded the appellant the ability to appeal that action to the Commission, an opportunity she took advantage of. Once the timely appeal of the appellant's removal from employment was transmitted by the Commission to the OAL, the **only** issues that should have been explored were the actual alleged substantive charges and specifications lodged against the appellant and whether the penalty imposed based on those alleged infractions was proper.

It is a well-settled principle that procedural deficiencies at the departmental level which are not significantly prejudicial to an appellant are deemed cured through the *de novo* hearing received at the OAL. See *Ensslin v. Township of North Bergen*, 275 N.J. Super. 352, 361 (App. Div. 1994), *cert. denied*, 142 N.J. 446 (1995); *In re Darcy*, 114 N.J. Super. 454 (App. Div. 1971). In this case, since the Commission granted the appellant a hearing on the merits of the allegations against her, there is no indication of significant prejudice. Accordingly, the Commission remands this matter back to the OAL for a hearing.

ORDER

The Commission orders that this matter be remanded to the OAL for further proceedings as set forth above.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6TH DAY OF JUNE, 2017



Robert M. Czech

Chairperson

Civil Service Commission

Inquiries
and
Correspondence

Director
Division of Appeals & Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachments



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 06715-16
AGENCY DKT. NO. 2016-3834

**IN THE MATTER OF SHIRLEY SHAY,
SUSSEX COUNTY DEPARTMENT
OF HUMAN SERVICES,**

Gary A. Kraemer, Esq., for petitioner (Daggett & Kraemer, attorneys)

James T. Prusinowski, Esq., for respondent (Trimboli & Prusinowski, attorneys)

Record closed: December 19, 2016

May 11, 2017

BEFORE **LEELAND S. MCGEE, ALJ:**

STATEMENT OF THE CASE

The Sussex County Department of Health and Human Services (Respondent or County) brings a major disciplinary action against Shirley Shay (Shay or Petitioner). Petitioner appeals the determination that respondent was unable to proceed with a disciplinary hearing because Petitioner's attorney refused to recuse himself from representing Petitioner due to a conflict of interest. Further, Petitioner appeals the determination that she waived her right to a departmental hearing by way of such refusal. Finally, Petitioner appeals the determination to terminate her as a result of the "waiver" of her right to a departmental hearing.

PROCEDURAL HISTORY

On December 1, 2015, respondent served petitioner with a Preliminary Notice of Disciplinary Action (PNDA) that noted an immediate removal. Petitioner requested an internal disciplinary hearing, which was not held. On April 17, 2016, a Final Notice of Disciplinary Action (FNDA) was approved and served upon Petitioner by way of certified mail. The FNDA sustained the charges and the removal was upheld. Petitioner filed a timely request for an appeal of the FNDA.

On May 3, 2016, the New Jersey Civil Service Commission, Division of Appeals and Regulatory Affairs, transmitted the within matter to the Office of Administrative Law (OAL), for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On June 6, 2016, a prehearing conference was held. A subsequent prehearing conference was held on June 28, 2016, at which time a procedural schedule was established. On July 22, 2016, the parties filed a Joint Statement of Undisputed Facts. On July 28, 2016, Respondent filed a Notice of Motion to Disqualify Petitioner's counsel and supporting Brief. On August 11, 2016, Petitioner filed an Answer to the Motion. On August 25, 2016, Respondent filed a Reply to the Answer. In September 2016, additional submissions were filed and Oral Argument was heard on October 26, 2016.

On November 18, 2016, the undersigned issued an Order Reversing the decision of Respondent to terminate Petitioner and remanded the matter to the Respondent for a hearing. On November 28, 2016, Respondent filed a Request for Interlocutory Review to the Director of the Office of Administrative Law. On December 1, 2016, Petitioner filed an Answer to the Request. On December 13, 2016, Respondent filed a Reply to the Answer. On December 19, 2016, the Director of the Office of Administrative Law issued an Order Denying Request for Interlocutory Review and the record closed.

FINDINGS OF FACT

On July 22, 2016, the parties filed a Joint Statement of Undisputed Facts. Therefore, I **FIND** the following to be the **FACTS** of this case:

1. On or about December 1, 2015, Sussex County (the appointing authority) served a Preliminary Notice of Disciplinary Action seeking the removal of the Petitioner, Shirley Shay, from her position as a bus driver with the County Transportation Program. (A true and accurate copy of the Preliminary Notice of Disciplinary Action was attached in the Stipulation as "Exhibit A.")
2. The Petitioner disputed the allegations in the Preliminary Notice, and submitted a timely request for a hearing. (A true and accurate copy of correspondence from Gary Kraemer, Esq. dated December 1, 2015, was attached in the Stipulation as "Exhibit B.") The hearing request also requested that the County furnish relevant documentary evidence in discovery. (*ibid.*)
3. On January 20, 2016, a hearing was scheduled for February 9, 2016. (A true and accurate copy of correspondence from James Prusinowski, Esq. dated January 20, 2016, was attached in the Stipulation as "Exhibit C.") No discovery material had been furnished at that point.
4. On January 28, 2016, James Prusinowski, Esq. sent a letter to Petitioner's counsel (Mr. Kraemer) suggesting that the firm of Daggett & Kraemer be disqualified because it was also representing Carol Novrit, the Sussex County Director of the Division of Social Services, in a separate lawsuit filed against the County of Sussex. (A true and accurate copy of correspondence from James Prusinowski, Esq. dated January 28, 2016, was attached in the Stipulation as "Exhibit D.")
5. Ms. Novrit currently has a complaint pending in Superior Court against the County making various allegations concerning her employment with the County, including a claim that the County failed to promote her to the position of County Business Administrator. Ms. Novrit is represented by George Daggett of the law firm of Daggett & Kraemer. Mr. Kraemer is not an attorney for the Novrit litigation against the County and has not met with Ms. Novrit regarding the specifics of the litigation.
6. As the Division Director, Ms. Novrit oversees the operations for Transit and the bus drivers.

7. In this capacity, Ms. Novrit was involved in review of the factual claims that led up to the disciplinary action being preferred against Ms. Shay and in requesting that disciplinary action be taken against Ms. Shay. Specifically, during the internal investigation of charges against Ms. Shay, John Jackson, Program Coordinator for Sussex County Skylands Ride, performed the initial fact gathering. He presented the information to Ms. Novrit, for administrative decision, as indicated in the memorandum drafted by Ms. Novrit regarding the investigation and request/recommendation for disciplinary action to be taken. (A true and accurate copy of a memorandum from Ms. Novrit dated November 20, 2015, was attached in the Stipulation as "Exhibit E.") As indicated in the memo, Ms. Novrit reviewed documents and information related to Ms. Shay's alleged actions. Based upon this review, Ms. Novrit requested that disciplinary action be taken against Ms. Shay.
8. Ms. Novrit personally met with Ms. Shay on December 1, 2015, in her office in Newton, New Jersey. Ms. Shay, Ms. Novrit, and Mr. Jackson were present for the meeting. In the course of the meeting Ms. Shay received her termination notice and the Preliminary Notice of Disciplinary Action. The parties disagree regarding the content of the discussion on December 1, 2016. The County contends that Ms. Novrit questioned Ms. Shay about her job performance and/or failure to perform her duties properly, which are the subject of this disciplinary action. The County also contends that Ms. Shay initially responded by claiming that she had completed all trips as indicated in the driver's manifest, but then, when Ms. Shay was confronted with conflicting GPS, she stated that the passenger in question requested to be dropped off at different locations. Finally, the County contends that Ms. Shay offered to call that passenger and "straighten things out." Ms. Shay contends that no interview or interrogation took place prior to Ms. Novrit handing her the Preliminary Notice and telling her that she was being terminated. The County plans to rely upon the information it contends was presented to Ms. Shay and by Ms. Novrit during the alleged interview as part of its case in chief to support the disciplinary charges it has preferred. The County has identified Mr. Jackson and Ms. Novrit as necessary witnesses for Ms. Shay's hearing.

9. Ms. Novrit authored the memorandum to Sarah Balzano, Administrator of the Department of Social Services, dated November 20, 2015, that triggered Ms. Shay's termination. (Exhibit E.)
10. Ms. Novrit, is the Director for the Division of Social Services, the highest position within the Division. The County has identified her as part of its control group and anticipates that Ms. Novrit will attend the OAL hearing as the County representative, as she has done for other employees charged with disciplinary action in her Division.
11. In a telephone conversation between Mr. Kraemer and Mr. Prusinowski, Mr. Kraemer said that he saw Ms. Novrit at the County reorganization meeting on January 1, 2016. In addition to exchanging pleasantries it was mentioned that the disciplinary charges had been preferred against Ms. Shay and Mr. Kraemer was representing Ms. Shay in the case. At that time, Mr. Kraemer stated that he did not believe a conflict existed based upon Ms. Novrit being represented by his firm and his representation of Ms. Shay in the disciplinary action.
12. Mr. Kraemer responded to Mr. Prusinowski's letter of January 28, 2016, with a letter dated February 4, 2016, indicating that allegations of a conflict of interest are insufficient, and that in order to assess the assertion of conflict properly, counsel would need to review the discovery materials that had been previously requested (but still not provided). He would also need a proffer of expected testimony from Ms. Novrit to gauge whether the asserted conflict was real or fanciful. (A true and accurate copy of correspondence from Gary Kraemer, Esq. dated February 4, 2016, was attached in the Stipulation as "Exhibit F".)
13. The hearing date of February 9, 2016, was adjourned pending resolution of the alleged conflict issue. (A true and accurate copy of correspondence from James Prusinowski, Esq. dated February 5, 2016, was attached in the Stipulation as "Exhibit G".)
14. On February 25, 2016, the County provided a response to Mr. Kraemer, setting forth the factual basis for its claim that a conflict of interest precludes Mr. Kraemer's participation in this matter. (A true and accurate copy of correspondence from James Prusinowski, Esq. dated February 25, 2016, was attached in the Stipulation as "Exhibit H".) Specifically, the County explained that a fatal conflict of interest is present where an attorney has to cross-examine a

client of his firm. In support of its claim that Ms. Novrit is a necessary witness in this matter, the County produced Ms. Novrit's memorandum regarding the charges and investigation leading up to the disciplinary charges. (Exhibit E.) In light of the conflict of interest, the County deemed it was not permissible to provide the discovery requested by Mr. Kraemer.

15. On March 10, 2016, Mr. Kraemer wrote to Mr. Prusinowski, urging that from both factual and legal standpoints the conflict asserted by the appointing authority was baseless. (A true and accurate copy of correspondence from Mr. Kraemer, Esq. dated March 10, 2016 was attached in the Stipulation as "Exhibit I.")
16. There was no reply from Mr. Prusinowski or further communication between counsel.
17. Due to the parties' disagreement regarding whether an impermissible conflict of interest exists, the County took the position that it was unable to proceed with the disciplinary hearing. On April 7, 2016, the County served the Final Notice of Disciplinary Action upon Shay, which stated that she "waived her right to a departmental hearing by way of her counsel refusing to recuse himself based upon an actual non-waivable conflict of interest." (A true and accurate copy of the Final Notice of Disciplinary Action dated April 5, 2016, was attached in the Stipulation as "Exhibit J.")
18. The Appointing Authority provided no prior notice to Petitioner that a decision to continue with Mr. Kraemer as her attorney would be deemed a waiver of her right to the hearing she had requested on the disciplinary charges.
19. This appeal followed.
20. Mr. Kraemer has informed the Court that he will no longer be part of the firm Daggett & Kraemer as of September 1, 2016. Mr. Kraemer has also stated that his office would remain in the same building, which is owned by Mr. Daggett, and Mr. Kraemer plans to lease office space from Mr. Daggett.
21. Counsel for the parties stipulate that for the purpose of the instant motion that the exhibits attached hereto are true and accurate copies of the originals.
22. On or about September 1, 2016, Kraemer submitted a copy of the State of New Jersey Business Registration Certificate indicating the business registration for his new law firm of Kraemer & Corazza; a copy of the New Jersey Division of Revenue Request for Registration Information indicating a change in business

ownership from Daggett & Kraemer to Kraemer and Corazza; a copy of the letterhead for Kraemer & Corazza; a copy of the State of New Jersey Business Registration Certificate indicating the business registration of the Law Offices of George T. Daggett; and a copy of the letterhead of the firm of Law Offices of George T. Daggett.

23. On or about September 2, 2016, Respondent objected to submissions not contained in the original Joint Stipulation of Undisputed Facts. On or about September 6, 2016, Kraemer submitted a response to the objection. On or about September 30, 2016, Kraemer submitted a copy of a Substitution of Attorney filed in the Superior Court wherein the Law Offices of George T. Daggett was substituted for withdrawing attorney, Daggett and Kraemer. No Substitution of Attorney was filed in the present case.

DISCUSSION

The civil service laws “are designed to promote efficient public service, not benefit errant employees. The welfare of the people as a whole, and not exclusively the welfare of the civil servant, is the basic policy underlining the statutory scheme.” State-Operated School Dist. Of City of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). Public employees’ rights and duties are governed and protected by the provisions of the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, and the regulations promulgated pursuant thereto, N.J.A.C. 4A:1-1.1 to 4A:2-6.2. An appointing authority may only discipline an employee for incompetency, inefficiency or failure to perform duties; inability to perform duties; neglect of duty; or other sufficient cause. N.J.A.C. 4A:2-2.3(a)

The New Jersey Civil Service Law protects classified employees from arbitrary dismissal and other onerous sanctions. Prosecutor’s Detectives and Investigators Ass’n v. Hudson County Bd. of Freeholders, 130 N.J. Super. 30, 41 (App. Div. 1974); Scancarella v. Dep’t of Civil Serv., 24 N.J. Super. 65, 70 (App. Div. 1952). The law provides relief to civil service employees from public employers who may attempt to deprive them of their rights. Prosecutor’s, supra, 130 N.J. Super. at 41. To this end, the law is liberally construed. Mastrobattista v. Essex County Park Comm’n, 46 N.J. 138, 147 (1965). Consistent with this policy of civil service law, there is a requirement that in

order for a public employee to be fined, suspended or removed, the employer must show just cause for its proposed action. The Merit System Board is charged with the duty of ensuring that the reasons supporting disciplinary action are sufficient and not arbitrary, frivolous, or "likely to subvert the basic aim of the civil service program." Prosecutor's, supra, 130 N.J. Super. at 42 (quoting Kennedy v. Newark, 178 N.J. 190 (1959)).

Before an employee may be disciplined, he/she must be served with a Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and a statement of facts to support the charges prior to imposing major discipline. Specificity of the factual allegations is not merely a technical requirement, but rather a fundamental attribute of due process. Fabian v. Town of N. Bergen, CSV 3198-97, Initial Decision (August 24, 2998), adopted, MSB (October 14, 1998), <http://njlaw.rutgers.edu/collections/oal/>. Specifically, N.J.A.C. 4A:2-2.5 provides:

(a) An employee must be served with a Preliminary Notice of Disciplinary Action setting forth the charges and statement of facts supporting the charges (specifications), and ***afforded the opportunity for a hearing prior to imposition of major discipline***, except:

1. An employee may be suspended immediately and prior to a hearing where it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services. An employee who has been appointed on or after September 1, 2011, who does not have a principal residence in New Jersey and who has not received a residency exemption in accordance with P.L. 2011, c. 70, within one year of appointment, is defined by that statute as illegally holding and unqualified for employment, and therefore subject to immediate suspension as unfit for duty. However, a Preliminary Notice of Disciplinary Action with opportunity for a hearing must be served in person or by certified mail within five days following the immediate suspension.

2. An employee may be suspended immediately when the employee is formally charged with a crime of the first, second or third degree, or a crime of the fourth degree on the job or directly related to the job. See N.J.A.C. 4A:2-2.7.

If sufficient cause is established, then a determination must be made on what is a reasonable penalty. In attempting to determine if a penalty is reasonable, the employee's past record may be reviewed for guidance in determining the appropriate penalty for the current specific offense. The concept of progressive disciplinary action is described in West New York v. Bock, 38 N.J. 500 (1962). In Bock, the Court found the six-month suspension of a town fireman, on charges of being tardy three times in the previous four weeks, was a proper penalty. Furthermore, Bock explains an appropriate remedy should be related to the employee's past record including service ratings, promotions, commendations, and "formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated by having been called to employee's attention or admitted by him." Id. at 186. This Court has also found "the purpose of the imposition of penalty in a Civil Service proceeding is threefold. It is designed to deter, rehabilitate and punish the wrongdoer." Forand v. S. Woods State Prison, CSV 6334-99, Initial Decision (May 24, 2000), adopted, Comm'r (August 4, 2000), <<http://njlaw.rutgers.edu/collections/oal/final/csv06334-99.pdf>>.

An appeal concerning violations of N.J.A.C. 4A:2-2.5, maybe presented to the Civil Commission through a petition for interim relief. N.J.A.C. 4A:2-2.5(e). Upon the filing of an appeal, a party to the appeal may petition the Civil Service Commission for a stay or other relief pending final decision of the matter. N.J.A.C. 4A:2-1.2. Further, an application for emergency relief shall be made directly to the agency head and *may not* be made to the Office of Administrative Law. N.J.A.C. 1:1-12.6 (emphasis added).

In the present case, the County served Petitioner with a PNDA seeking her removal from her position as a bus driver with the County Transportation Program on December 1, 2015. Petitioner submitted a timely request for a hearing and a hearing was scheduled for February 9, 2016. Both parties, collectively, decided to adjourn the February 9, 2016, hearing date in order to resolve the alleged conflict issue. The letter requesting the adjournment stated "I hope to have these procedural issues resolved shortly and the parties will contact you at that point to schedule a new date for the hearing." (Respondent's brief, Exhibit G.) However, due to the parties' disagreement regarding whether an impermissible conflict of interest existed, Respondent took the position that it was unable to proceed with the disciplinary hearing. On April 7, 2016, the

County served Petitioner the FNDA, which stated that Petitioner had waived her right to a departmental hearing by way of her counsel refusing to recuse himself based upon a non-waivable conflict of interest.

As stated above, pursuant to N.J.A.C. 4A:2-2.5, an employee must be afforded the opportunity to have a hearing prior to imposition of major discipline. The only exception is if the employee is unfit for duty or would be a hazard to any person if permitted to remain on the job or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services. Here, this was not the case. The parties, agreed to adjourn the hearing in order to resolve the conflict issue. However, the County unilaterally decided that Petitioner waived her right to a hearing by way of her counsel refusing to recuse himself. This is not an exception to the right to have a hearing as proscribed by N.J.A.C. 4A:2-2.5.

The factual basis for issuing the Final Notice of Disciplinary Action (FNDA) was,

The subject employee waived her right to a departmental hearing by way of her counsel refusing to recuse himself based upon an actual non-waivable conflict of interest due to concurrent representation of the County's witness.

The County objected to counsel's representation of the subject employee because of the conflict of interest by correspondence dated January 28, 2016, and February 25, 2016. By letter date[d] March 10, 2016, the subject employee's counsel refused to withdraw from representation. Therefore, the departmental hearing is deemed waived.

The facts that formed the basis for terminating Petitioner had nothing to do with Petitioner's conduct. It was not related to the specifically enumerated bases for imposing major discipline pursuant to N.J.A.C. 4A:2-2.3(a). The factual basis articulated in the FNDA does not comport with any of the exceptions to an employee's right to an opportunity for a departmental hearing. Further the penalty of "termination" is not a reasonable penalty to impose upon an employee for the facts set forth in the FNDA. I am not persuaded that the purpose of the imposition of a penalty in a Civil Service proceeding has been met in this case: "to deter, rehabilitate and punish the wrongdoer." Forand, supra, CSV 6334-99, Initial Decision (May 24, 2000), adopted, Comm'r (August 4, 2000),

<<http://njlaw.rutgers.edu/collections/oal/final/csv06334-99.pdf>>. The “wrongdoer” in the present case is not Petitioner. There is absolutely no connection between the purpose for issuing the FNDA and the penalty imposed upon Petitioner. Additionally, the County did not provide any notice to Petitioner that her decision to continue with Mr. Kraemer as her attorney would be deemed a waiver of her right to the hearing that she requested on the disciplinary charges.

I note that Director Sanders denied Respondent’s request for Interlocutory Review in part because, in the second paragraph of the Request, Respondent acknowledged that it does not challenge that, under the Rules of Professional Conduct, Petitioner’s attorney is not prohibited from representing her.

Petitioner had a right to a hearing before the FNDA was issued and such right was not afforded to her.

CONCLUSIONS

For the foregoing reasons, I **CONCLUDE** that Respondent improperly determined that Petitioner waived her right to a departmental hearing by way of her attorney’s failure to recuse himself.

I further **CONCLUDE** that Respondent improperly terminated Petitioner from her employment as a result of such “waiver.”

I further I **CONCLUDE** that Respondent improperly denied Petitioner the right to a departmental hearing prior to issuing the Final Notice of Disciplinary Action.

I further **CONCLUDE** that the appropriate procedure was for Petitioner was to seek interim relief from the Civil Service Commission regarding the conflict of interest issues.

ORDER

ORDER

Based upon the foregoing, it is hereby **ORDERED** that the determination to terminate Petitioner in this matter be and hereby is **REVERSED**.

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, P.O. 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.

May 11, 2017 _____
DATE


LELAND S. MCGEE, ALJ

Date Received at Agency:

May 11, 2017 _____

MAY 12 2017



Date Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr