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STATE OF NEW JERSEY

In the Matter of Paul Williams,
Department of Human Services

CSC Docket No. 2015-404
OAL Docket No. CSV 11721-13

**DECISION OF THE CIVIL SERVICE COMMISSION**

**ISSUED:** SEP - 4 2014 (CSM)

Greystone Park Psychiatric Hospital (Greystone), Department of Human Services, represented by Christopher M. Kurek, Deputy Attorney General, requests interlocutory review of an oral order of Administrative Law Judge Irene Jones (ALJ) pursuant to *N.J.A.C.* 1:1-14.10(a).

In the attached letter dated August 21, 2014, the parties were informed that the Civil Service Commission (Commission) would conduct interlocutory review. The parties were also given the opportunity to submit additional arguments pursuant to *N.J.A.C.* 1:1-14.10(d).

By way of background, Paul Williams, a Human Services Technician with Greystone, represented by Raymond L. Hamlin, Esq., was removed effective July 6, 2013 on charges of physical or mental abuse of a patient, client, resident or employee, inappropriate physical contact or mistreatment of a patient, client, resident or employee, conduct unbecoming a public employee, other sufficient cause, neglect of duty, and violation of a rule, regulation, policy, procedure, order or administrative decision. Specifically, the appointing authority asserted that on October 17, 2012, the appellant pushed patient D.S. violently to the floor and he falsified an incident report. The appellant appealed his removal to the Commission and the case was transmitted to the Office of Administrative Law (OAL) for a hearing where it was assigned to ALJ Jones.

In a pre-hearing order dated October 15, 2013, the ALJ directed that initial discovery be completed by October 31, 2013, with responses due by November 30,

2013, and a second round of discovery, if any, be completed by December 7, 2013 with responses due by December 20, 2013. The pre-hearing order also indicated that the hearing was scheduled for January 6, 10, and 13, 2014. However, due to an oversight by counsel for the appointing authority, the items requested in the second round of discovery by the appellant (which consisted of a surveillance video, incident and investigative reports, and still photos) were not forwarded to appellant's counsel until December 30, 2013. The appellant's counsel received the requested discovery on January 2, 2014, two business days prior to the initial hearing date. Therefore, the appellant filed a motion to bar the use of the appointing authority's late discovery at the January 6, 2014 hearing, which was denied by the ALJ.

During the January 13, 2014 hearing, the appellant sought information concerning if the alleged victim had other incidents of violence or had assaulted other employees and patients, which the appointing authority did not disclose in its answers to interrogatories, claiming that information was subject to Health Insurance Portability and Accountability Act (HIPAA) regulations. The ALJ determined that the information sought by the appellant was relevant, had no correlation with HIPAA, and instructed the appointing authority to provide information on that issue which had not been provided in discovery. Accordingly, the parties entered into a consent order permitting the disclosure of that information The ALJ also permitted the appellant to identify any additional witnesses who may be relevant to that disclosure of information. Therefore, since this discovery was not immediately available, no witnesses were called to testify and the appointing authority did not begin its case at the January 13, 2014 hearing.

In compliance with the additional discovery consent order, the appointing authority provided the requested documents relating to incidents involving D.S. and his alleged assaults on employees and other residents by letter dated March 6, 2014. At that time, the appointing authority named two additional witnesses to be called at the hearing, one of which was Thomas Shaffer, a Training Technician 4 at Greystone. Subsequently, during a telephone conference on May 19, 2014 rescheduling the hearing for August 5, 2014 and August 6, 2014, the appellant indicated that he would likely have three additional witnesses he intended to call that were not previously identified. At the August 5, 2014 hearing, the appointing authority requested the production of Shaffer as a witness on the subject of training of staff in dealing with patients who become aggressive or assaultive toward other patients or staff. The appellant objected, arguing that Shaffer was not listed as a potential witness in the pre-hearing order. In an oral ruling on August 5, 2014, which is the subject of this interlocutory request for review, the ALJ denied the production of Shaffer as a witness.

In the instant request for interlocutory review, the appointing authority presents that Shaffer's testimony is relevant and pivotal in its case against the

appellant as it will pertain to the training of staff in dealing with patients who become aggressive or assaultive toward other patients or staff. In this regard, it states that no witnesses were called and the hearing did not begin in January 2014 because the appellant requested documents related to other incidents involving D.S. where he became physically aggressive or assaultive toward other staff or patients. Upon its production of this information on March 6, 2014, the appointing authority indicates that it named two additional witnesses to be called at the hearing, one of which was Shaffer. However, at the August 5, 2014 hearing, the appellant objected to the production of Shaffer since he was not listed as a witness in the pre-hearing order. Although the appointing authority advised the ALJ that Shaffer was identified in response to the additional discovery request on March 6, 2014, the ALJ did not permit Shaffer to testify on the basis that the appellant had numerous witnesses and the hearing would not be completed during the two days of hearings that were scheduled and that it was not appropriate to add witnesses on an *ad hoc* basis.

As to the basis for its request, the appointing authority states that OAL rules that govern hearings are to be construed, in part, to achieve just results, and that an ALJ has wide discretion to decide whether to amend the witness list. Further, even assuming it violated the discovery rule by not providing Shaffer's name 10 days prior to the initial January 6, 2014 hearing date, not every discovery violation should result in the exclusion of the testimony of that witness. In this case, Shaffer was identified as a witness five months before the actual hearing began, which was acknowledged by the ALJ. The appointing authority underscores that courts have wide discretion in deciding the appropriate sanction for a breach of discovery rules, as long as the sanction is "just and reasonable." *See Wymbs v. Township of Wayne,* 163 *N.J.* 523 (2000). In *Wymbs,* the Court highlighted factors that would strongly urge a trial judge in the exercise of his/her discretion, to suspend the imposition of sanctions when the testimony in question is pivotal to the case of the party offering the testimony. These factors are (1) the absence of a design to mislead; (2) absence of the element of surprise if the evidence is admitted, and (3) the absence of prejudice which would result from the admission of the evidence.

In the instant case, the appointing authority argues that the factors outlined in *Wymbs, supra,* are satisfied as there was no intent to mislead the appellant because he was advised of the appointing authority's intent to call Shaffer five months before the August 5, 2014 hearing date. Further, there would be no element of surprise since the appellant entered into evidence the same correspondence identifying Shaffer as a potential witness. Finally, the appointing authority maintains that it would be prejudiced if Shaffer's testimony was not permitted, particularly since it stipulated that D.S. was involved in past aggressive and assaultive incidents. Thus, it states that Shaffer's testimony is crucial to show that the appellant received extensive training regarding how to respond to aggressive or assaultive patients in ways that are designed to protect patients from becoming

injured, preserve staff-patient relationships, and to show that any physical contact with a patient is to be an option of last resort. However, preventing the presentation of this evidence thwarts the appointing authority's legitimate interest in preventing the abuse of patients at its facilities.

In response, the appellant states that he did not receive the appointing authority's second round of discovery until two business days prior to the initial January 6, 2014 hearing date, which reduced the time period he could have reviewed that information. Although he sought to bar the appointing authority's use of this late discovery, the ALJ denied his motion but deemed that certain information concerning D.S.'s prior incidents of violence was discoverable. Thus, the ALJ required the appointing authority to produce all information relevant to that issue and permitted him to identify witnesses which may be relevant to the disclosure of that information. The appellant emphasizes that the consent order did not permit the re-opening of discovery to identify additional items of discovery or witnesses. In this regard, he notes that the appointing authority initially identified nine witnesses who could have been called and that it defies logic that the appointing authority was unaware of issues of training if it was part of its reasoning for removing the appellant. Further, the appellant states that the fact that the appointing authority identified Shaffer in its March 6, 2014 letter does not resolve the fact that he was not identified as a witness during the initial period of discovery. Finally, the appellant states that the hearing in this matter has concluded and interlocutory review of a case should only occur during the pendency of a hearing.

Although provided the opportunity, the parties did not submit any additional information for the Commission to review in this matter.

## CONCLUSION

Upon a review of the record, the Commission finds that the appointing authority's request for interlocutory review should be granted, and the oral order of the ALJ should be reversed.

*N.J.A.C.* 1:1-13.2(a)8 states, in pertinent part, within 10 days after the conclusion of the prehearing conference, the judge shall enter a written order addressing discovery matters remaining to be completed and the date when the discovery shall be completed for each mode of discovery to be utilized. *N.J.A.C.* 1:1-13.2(b) provides that any party may, upon written motion filed no later than five days after receiving the prehearing order, request that the order be amended to correct errors. *N.J.A.C.* 1:1-13.2(c) states that the prehearing order may be amended by the judge to accommodate circumstances occurring after its entry date. Unless precluded by law, a prehearing order may also be amended by the judge to conform the order with the proofs. *N.J.A.C.* 1:1-10.4(e) provides that parties shall

complete all discovery no later than 10 days before the first scheduled evidentiary hearing or by such date ordered by the judge.

In the instant matter, the appointing authority seeks to present a witness who would provide testimony on the subject of training of staff in dealing with patients who become aggressive or assaultive toward other patients or staff. At the commencement of the hearing on August 5, 2014, the ALJ did not permit the production of this witness, Shaffer, ostensibly, on the grounds that he was not identified as a potential witness in compliance with the discovery process outlined in the prehearing order. However, as demonstrated by the appointing authority's submissions, Shaffer's testimony regarding the training of staff in dealing with aggressive or assaultive patients is potentially pivotal to its case, particularly in light of the fact that the ALJ reopened discovery in order to obtain information related to prior incidents involving D.S. and his alleged assaults on employees and others. In this regard, *N.J.A.C.* 1:1-10.1(a) provides that the purpose of discovery is to facilitate the disposition of cases by streamlining the hearing and enhancing the likelihood of settlement or withdrawal. These rules are designed to achieve this purpose by giving litigants access to facts which tend to support or undermine their position or that of their adversary. Thus, establishing how staff is trained to deal with such patients, particularly if it is alleged that the patient at issue has a history of assaults on employees, could tend to support or undermine either the position of the appellant or the appointing authority. Therefore, the appointing authority's identification of Shaffer as a witness in March 2014 after discovery was reopened was appropriate. Regardless, even assuming the appointing authority violated *N.J.A.C.* 1:1-13.2(a)8, it must be emphasized that, in providing for the review of matters in an administrative forum, "[t]he Legislature's intent [was] not to impose the procedural requirements of courts of law on hearings before administrative agencies." *In the Matter of William Kallen*, 92 *N.J.* 14, 25 (1983). In accordance with this principle, the procedural standards applicable at an OAL proceeding are more liberal in their construction than those governing practice in a court of law.

Nevertheless, a review of the case law applying the relevant New Jersey Court Rules is instructive in the instant matter. In *Wymbs, supra,* the New Jersey Supreme Court addressed the issues presented when a party seeks to introduce the testimony of a previously undisclosed witness at trial.

> When faced with a surprise witness, possible sanctions to be explored by the trial court include granting a continuance or declaring a mistrial with or without an award of fees to the surprised party. . . Another option is to exclude the testimony if such an outcome is just and reasonable. . . However, when the testimony in question is 'pivotal' to the case of the party offering the testimony, a court should seek to avoid exclusion where possible. . . Factors that would 'strongly urge' the trial judge, in the exercise of his discretion, to suspend the

> imposition of sanctions are (1) the absence of a design to mislead, (2) absence of the element of surprise if the evidence is admitted, and (3) absence of prejudice which would result from the admission of the evidence. *Wymbs, supra* at 543-544.

Ultimately, in *Wymbs,* the Court excluded the testimony of a witness, despite the fact that the testimony was "pivotal" to the defense and constituted the only substantive evidence presented for the defense. However, the "surprise" witness in that case presented substantive testimony directly in contradiction to the defendant's answers to interrogatories that it had no knowledge of any individuals who possessed the relevant, substantive information. The Supreme Court found that the plaintiff possessed an intent to mislead the defendant, and that substantial surprise and prejudice resulted from the presentation of the witness' testimony.

In the instant matter, there is no question that the testimony that the appointing authority seeks to introduce is potentially "pivotal" to its charges against the appellant. The disciplinary charges were based on the allegation that the appellant pushed D.S., an allegedly assaultive patient, violently to the floor. The proposed testimony would show what, if any, training the appellant had to respond to aggressive or assaultive patients. Moreover, it is undisputed that the appointing authority's delay in proposing this witness was not occasioned by an intent or design to mislead the appellant or would have resulted in the element of surprise if admitted. In this regard, it must be emphasized that the appointing authority identified Shaffer in response to the appellant's request to re-open of discovery and it is uncontested that the appellant was apprised of this witness five months prior to the commencement of the hearing. Further, the absence of Shaffer's testimony could result in a significant prejudice against the appointing authority, as any abuse of a patient is of the utmost concern.

Finally, emphasis must be placed on the serious nature of the charges against the appellant and the public policy that favors the presentation of a complete record to an administrative agency prior to rendering a final decision. The alleged physical or mental abuse of a patient, client, resident or employee, inappropriate physical contact or mistreatment of a patient, client, resident or employee, falsification, and conduct unbecoming a public employee constitutes a serious breach of rules and regulations and cannot be tolerated. The importance of the development of a complete record prior to rendering a final decision on the merits of the charges is magnified when the charged conduct is so egregious in nature. *See, e.g., In the Matter of Carmen Colon* (MSB, decided April 20, 2005) (Matter of the removal of a Police Officer with the City of Camden remanded to the OAL to allow the testimony of two essential witnesses to be presented); *In the Matter of Franklin Frierson* (MSB, decided May 5, 2004) (Matter of the removal of a Custodial Worker with the Newark School District to the remanded to OAL to allow the testimony of two additional witnesses to be presented).

Therefore, interlocutory review is granted and the ALJ's oral order not permitting the appointing authority to present the testimony of Shaffer is reversed. Moreover, following the presentation of his testimony, the appellant should be afforded an adequate opportunity to present rebuttal testimony and evidence if he wishes.

**ORDER**

Therefore, the Civil Service Commission grants the appointing authority's request for interlocutory review and reverses the August 5, 2014 oral order of the ALJ.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 3RD DAY OF SEPTEMBER, 2014

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries and Correspondence

Henry Maurer
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
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Trenton, New Jersey 08625-0312

Attachment

c: Christopher M. Kurek, DAG
Raymond L. Hamlin, Esq.
Paul Williams
The Honorable Irene Jones, ALJ
Sandra Hlatky

Chris Christie
*Governor*
Kim Guadagno
*Lt.Governor*

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
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Robert M. Czech
*Chair/Chief Executive Officer*

August 21, 2014

**VIA FAX AND REGULAR MAIL**

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Re: Request for Interlocutory Review
Paul Williams v. Greystone Park Psychiatric Hospital, Department of Human Services
CSC Docket No. 2015-404
OAL Docket No. CSV 118721-2013

Dear Messrs. Kurek and Hamlin:

Please be advised that Greystone Park Psychiatric Hospital's request for interlocutory review has been granted in the above matter. Although we have previously received submissions from the parties on this matter, either party may submit additional written arguments. Please submit any additional written arguments by close of business on August 25, 2014 to:

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Sincerely,

p.p. Robert M. Czech
Chairperson
Civil Service Commission

c: The Honorable Irene Jones, ALJ
Sandra Hlatky