

B-16



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of April Gould,
Atlantic County

CSC Docket No. 2015-145

Administrative Appeal

ISSUED: ~~MAR~~ 09 2015 (DASV)

April Gould, a Cook with Atlantic County, appeals her temporary separation from employment.

Personnel records indicate that the appellant received a permanent appointment as a Cook effective July 21, 2003. In 2013, she was on a leave of absence¹ and returned to work with light duty restrictions. On December 1, 2013, arrangements had been made for the appellant to be reassigned to the Meadowview Nursing and Rehabilitation Center (Meadowview) as an accommodation for her restrictions. According to the appointing authority, the appellant's work assignments included "assisting in the feeding process" and "performing some stimulation assignments for particular residents." On or about May 22, 2014, the appellant reported to the appointing authority that she had been treated unfairly in 2013 when she was on light duty. Specifically, she asserted that she was told to feed patients instead of remaining in the kitchen and was told not to return to Meadowview after she complained of a resident spitting on her. The latter incident occurred on December 4, 2013. The appellant claimed that she was given a "W-day [unpaid leave] and forced to use vacation time."

In a letter dated June 19, 2014, the appointing authority responded that after a review of the appellant's concerns, it was found that she would be reassigned in order for her not to have further contact with the resident who spat on her. However, at some point, the appellant allegedly stated that she did not want any

¹ The parties indicate that the appellant received Workers' Compensation benefits.

direct patient contact and, on December 7, 2013, she was sent home. The appointing authority indicated that when she reported to work on that day, she "caused a disturbance regarding where [she] would work and where [she] would not work." Therefore, it was recommended that the appellant "receive 7.09 W-time for 12/7 and 8 hours of W-time for 12/8, and 12/9/13 since ample time for reassignment was not possible until evaluation of needs of other areas could be looked at." The appointing authority indicated that the appellant did not file a report regarding the incident with the resident when it was first requested. Had she done so, her reassignment could have been made in a timely manner. It is noted that the appellant submits the report on appeal, which was dated December 11, 2013, stating that it was filed after she had already been moved. As to the appellant's complaint regarding resident feedings, the appointing authority stated that "unlicensed nursing staff are only assigned to the less challenging residents since there are compensatory strategies involved with feeding patients with dysphagia (difficulty in swallowing) concerns. This has been a very successful program of reassignment." Because the appellant did not initially report that she could not handle patient contact, her subsequent refusal was considered insubordinate. Lastly, the appointing authority advised the appellant that she could file or should have filed a grievance under her collective bargaining agreement regarding "work actions," which would include her work schedule and her request to restore her vacation day.

The appellant appeals the appointing authority's June 19, 2014 letter, maintaining that she was retaliated against, treated unfairly, and falsely accused. She also contends that federal and State rules and regulations have been violated since she has not taken an approved training course to feed residents. Moreover, by way of background, the appellant indicates that she was a shop steward and in May 2013, she and the County Administrator were "called" regarding concerns that were raised against the Assistant Food Service Director at the time. She believes that this incident, including a subsequent meeting in August 2013, was the reason that she was retaliated against. Additionally, the appellant explains that she advised the appointing authority about the foregoing, but nothing was resolved and her schedule was changed six or seven times in nine months. She submits a diary of her schedule changes, which includes shift changes and working in the laundry. The appellant notes that when other employees were on Workers' Compensation leave "everything stayed the same." She also contends that she was falsely accused of not reporting the incident with the resident to a supervisor. However, she contends that she advised various individuals and comments that this is "what happens when [you are] put in a situation that you don't know the protocol. I'm not a nurse. I'm a cook. It's a lot of unnecessary excuses made." Moreover, the appellant disputes that she was a disturbance or insubordinate. If she caused such a disturbance, the appellant questions why the police were not called. Further, she states that it would have made no sense for her to tell a manager that she refused to feed the residents. Rather, she maintains that she was uncomfortable feeding

residents after the spitting incident. The appellant submits that she went to work on December 7, 2013 and knew that she was going to feed residents. The appellant requests that she "be made whole." She states that she received "7 hours of W-time and used one vacation day" and questions why she had to use her own time when she was sent home. In support of her appeal, the appellant presents a letter from Eric McGlone, President of the American Federation of State, County, and Municipal Employees (AFSCME) Local 3408, indicating that on December 7, 2013, he spoke with a supervisor about the appellant's work assignment, but the supervisor was unaware of the spitting incident. He advised the supervisor that the appellant felt very uncomfortable feeding the residents. The supervisor responded that she would talk to the Director of Nursing. Thereafter, McGlone received a call from the appellant who stated that she was being sent home because she would be a "liability" according to the supervisor if the appellant did not feel comfortable feeding the residents. McGlone states that the appellant never said that she was refusing to do the job.

In response, the appointing authority, represented by James F. Ferguson, County Counsel, disputes the appellant's allegations for the reasons set forth in its June 19, 2014 letter. Nonetheless, it contends that even if the appellant's claims are true, they do not implicate Civil Service law or rules. In that regard, the appointing authority argues that the appellant's issues involve work schedules, modified duty assignments, and loss of leave time which are governed under the appellant's union contract. It states that the appellant is a member of AFSCME whose contract with Atlantic County has "a comprehensive grievance procedure." Thus, the appointing authority maintains that, to the extent the appellant has a valid claim, her remedy would only be provided through the union contract.

In reply, the appellant reiterates her arguments and emphasizes that her schedule changed numerous times and, unlike other employees who sustained work-related injuries, she did not remain in the kitchen. Only upon receiving the appointing authority's June 19, 2014 letter did the appellant discover that she was falsely being accused of not "accepting redirection as well as being insubordinate and a disturbance." The appellant submits a letter from a certified nurse aide, stating that the appellant "was pleasant and very polite" when she spoke with her. It was not that the appellant did not want to feed the residents, but rather, "she was scared and didn't want anyone to choke." Furthermore, the appellant requests that the Commission review her case since it "would be a disadvantage for [her] to utilize the grievance process." She asserts that the first step is heard by the same manager she accused of retaliation and the final step is heard by the appointing authority. In support of her appeal, the appellant also submits the appointing authority's policy on retaliation and the policies and procedures regarding nursing home nutrition.

CONCLUSION

N.J.A.C. 4A:6-2.1(a) provides that in local service, appointing authorities, subject to applicable negotiations requirements, may establish the hours of work. Furthermore, the Commission does not have jurisdiction to enforce or interpret grievance procedures or other items which are contained in a collective bargaining agreement negotiated between the employer and the majority representative. See *In the Matter of Jeffrey Sienkiewicz, Bobby Jenkins and Frank Jackson*, Docket No. A-1980-99T1 (App. Div., May 8, 2001). Thus, in the instant matter, the appellant's claims regarding her work schedule are not within the purview of the Commission. Her claims in that regard should have been pursued through the grievance process. However, the appellant is a permanent career service employee. As such, she has a vested property right to her employment. By involuntarily separating the appellant from her employment from December 7, 2013 through December 9, 2013, without the benefit of disciplinary procedures, the appointing authority imposed a *de facto* immediate suspension in violation of the provisions of *N.J.S.A.* 11A:2-13 and *N.J.A.C.* 4A:2-2.5(b). Therefore, the matter of her separation falls squarely within the jurisdiction of the Commission.

In that regard, if the employer elects to bar a permanent employee from working involuntarily and without pay, the regulatory scheme in this State requires that prior to withholding of wages, the employee must be afforded oral or written notice of the charges, an explanation of the employer's evidence and an opportunity to review the charges and evidence and to respond. See *N.J.S.A.* 11A:2-13 and *N.J.A.C.* 4A:2-2.5(b). It is obvious that the appointing authority did not comply with these procedures. Moreover, in order to immediately suspend an employee, it must be 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. See *N.J.A.C.* 4A:2-2.5(a)1. In this case, the appellant's claimed insubordination in refusing to have patient contact or her alleged creation of "a disturbance regarding where [she] would work and where [she] would not work" does not indicate that the appellant was a hazard to any person. On the contrary, she was concerned that she was feeding residents² and wanted to avoid any further incident of a resident spitting at her. Additionally, even if the appellant stated that she did not want to have patient contact or that she failed to timely file a report of the spitting incident, the fact that the appointing authority did not have "ample time for reassignment" does not warrant an immediate suspension of the appellant to maintain safety, health, order or effective direction of public services. If reassignment was not possible on

² The job specification for a Cook states that the incumbent, under supervision, prepares and cooks in large quantities and does other-related duties as required. Feeding or other direct care duties are not within the job description. If the appellant continues to perform such out-of-title duties, she may request a position classification review pursuant to *N.J.A.C.* 4A:3-3.9.

December 7, 2013 to accommodate the appellant's light duty restrictions, the appointing authority could have placed her on a leave with pay or permitted her to remain on Workers' Compensation until it either could appropriately accommodate her light duty, or she could return to full duty. Therefore, because the appellant did not have the proper due process under *N.J.S.A. 11A:2-13* and *N.J.A.C. 4A:2-2.5*, she is entitled to relief. Accordingly, the appointing authority is to pay the appellant and/or restore any leave time lost from December 7, 2013 through December 9, 2013.³ It is noted that, since the Commission has granted the appellant's remedy, it is not necessary to determine whether the appellant was subjected to reprisal.⁴ Furthermore, it is emphasized that while particular work assignments and reassignments are given at the discretion of the appointing authority,⁵ the appointing authority should be mindful that reassigned duties should still fall within the parameters of the employee's Civil Service job description and that the employee is properly trained in the reassigned duties. Alternatively, if the restrictions are permanent, the appointing authority should consider a change in the employee's title and position in accordance with Civil Service law and rules, or ultimately, institute removal proceedings through the disciplinary process. As such, it is strongly suggested that the appointing authority review its light duty reassignments.

ORDER

Therefore, it is ordered that appeal be granted. It is further ordered that the appointing authority pay April Gould and/or restore any leave time lost from December 7, 2013 through December 9, 2013.

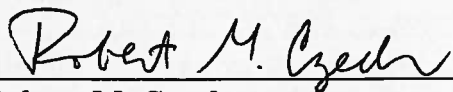
This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

³ It is not clear from the record if the appellant actually utilized vacation leave since the appointing authority's June 19, 2014 letter indicates that the appellant received "7.09 W-time for 12/7 and 8 hours of W-time for 12/8, and 12/9/13."

⁴ *N.J.A.C. 4A:2-5.1(a)* states that an appointing authority shall not take or threaten to take any reprisal action against an employee in the career, senior executive or unclassified service in retaliation for an employee's lawful disclosure of information on the violation of any law or rule, governmental mismanagement or abuse of authority.

⁵ *N.J.A.C. 4A:4-7.2* provides in part that a reassignment is the in-title movement of an employee to a new job function, shift, location or supervisor within the organizational unit. Reassignments shall be made at the discretion of the head of the organizational unit. However, an employee may challenge the good faith of the reassignment pursuant to *N.J.A.C. 4A:4-7.7*.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4TH DAY OF MARCH, 2015



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