STATE OF NEW JERSEY

In the Matter of Malcolm Jones South Orange, Department of Public Safety	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC DKT. NO. 2020-708	:	Hearing Denied

ISSUED: OCTOBER 25, 2019 (SLK)

Malcolm Jones, a former Police Officer with South Orange, represented by Ashley V. Whitney, Esq., requests that his removal effective December 10, 2018, be reversed. In the alternative, he requests that this matter be transmitted to the Office of Administrative Law (OAL) as a contested case.

By way of background, Jones began his working test period as a South Orange Police Officer on December 8, 2017. On July 17, 2018, during his working test period, Jones received notice that he was the subject of two internal affairs complaints related to a July 10, 2018 motor vehicle accident and a call for overtime on or around July 13, 2018. Jones advised South Orange, by letters dated July 30 and 31, 2018, that he obtained counsel for these matters. On November 30, 2018, South Orange issued Jones a Preliminary Notice of Disciplinary Action (PNDA) immediately suspending him with pay and seeking his removal for various administrative charges and violation of departmental rules and regulations. On that same day, Jones' former counsel advised South Orange that he pled "not guilty" and requested a departmental hearing and discovery.

While awaiting discovery and a departmental hearing, by letter dated December 10, 2018, South Orange served Jones a 12-month progress report and terminated his employment for unsatisfactory performance upon conclusion of his working test period, effective December 8, 2018. Jones' appeal of his release at the end of the working test period was received by this agency on January 2, 2019, and

transmitted to the OAL on January 28, 2019 as a contested case. In a December 20, 2018 letter, Jones' former counsel advised South Orange that Jones no longer wished to retain the firm for his appeal.[1] Thereafter, South Orange issued a January 3, 2019 Final Notice of Disciplinary Action (FNDA) removing him effective December 10, 2018 for various administrative charges and violations of departmental rules and regulations. The FNDA indicated that Jones did not request a departmental hearing.[2]

On March 6, 2019, during his proceedings regarding his working test period appeal at the OAL, South Orange issued a new FNDA (form 31-C) that was specific to law enforcement as it learned that the January 3, 2019 FNDA used the general form (form 31-B) inadvertently.[3] Jones indicates that this was the first time that he learned that South Orange denied his request for a departmental hearing on his disciplinary charges and initiated separate charges. Thereafter, Jones retained counsel and his appeal of his removal to the Civil Service Commission (Commission) based on disciplinary charges was postmarked September 6, 2019.

In his request, Jones argues that the January 3, 2019 FNDA should be dismissed because he was no longer a South Orange employee as he was terminated on December 10, 2018 at the conclusion of his working test period and, therefore, he argues South Orange no longer had jurisdiction to remove him for discipline. Jones asserts that once he was terminated, he could not be removed again. He indicates that if he wins his working test period appeal, South Orange can then issue disciplinary charges.

In the alternative, Jones argues that if the January 3, 2019 FNDA is not dismissed, it should be consolidated with his working test period appeal, which has already been transmitted to the OAL. Jones argues that since the FNDA was issued after he appealed his release at the end of his working test period and requested a departmental hearing after receiving the PNDA, due process requires that his appeal of the FNDA be considered timely. Further, even if the Commission determinates that Jones needed to separately appeal the FNDA, good cause exists to relax the rules and consider his appeal of the January 3, 2019 FNDA timely. Jones cites *In the Matter of Gemma Matthews* (MSB, decided October 24, 2007) as a case where the former Merit Systems Board allowed a disciplinary action to proceed where the appellant appealed the first FNDA, but did not appeal a subsequent FNDA, as the Merit System Board indicated that it was clear that the appellant intended to contest disciplinary charges following her removal. Jones argues that

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[1] Jones' former counsel's December 20, 2018 letter acknowledges that his termination at the conclusion of his working test period was unrelated to the disciplinary hearing. The letter indicates that Jones was copied.

[2] Jones disputes this claim and indicates that he intended to proceed on a *pro se* basis at the departmental hearing.

[3] As Jones did not complete his working test period, he was not considered to have achieved permanent status as a Police Officer, thus, the 31-C was not required. *See N.J.A.C.* 4A:2-2.13(a).

his working test period appeal as well as his request for a departmental hearing following the issuance of the PNDA indicated that he always intended to contest the disciplinary charges. Jones also cites *In the Matter of Janice Sanford* (MSB, decided August 12, 2003) to support his argument that good cause exists to relax the 20-day time period to appeal and consider his appeal timely. In *Sanford*, the appellant was removed after issuing a first FNDA, which she appealed and was transmitted to the OAL as a contested case. Subsequently, she received a second FNDA which she did not appeal. The Merit Systems Board denied the appointing authority's request for reconsideration and found that a hearing was warranted because her failure to timely appeal a subsequent FNDA was after a prior timely appeal. Here, Jones argues that the same circumstances are present as he reasonably believed that his he did not need to appeal the FNDA as he had already been terminated, the matter had been transmitted to the OAL, and he only learned during the OAL proceedings that he could be separately terminated based on the FNDA. Further, once he learned of this information, he timely sought counsel. Jones believes good cause has been established and he should not be prejudiced when these matters can easily be consolidated. Similarly, Jones cites cases where the Appellate Division has relaxed the 20-day requirement to file an appeal due to equitable reasons as he asserts that he did not sleep on his rights to appeal. Instead, he timely appealed his working test period termination and, after receiving the PNDA, he requested a departmental hearing and discovery. It was only due to his inability to afford counsel that he ended up proceeding on a *pro se* basis, which has led to this situation. Further, South Orange had notice that he was contesting his removal based on these actions. Therefore, Jones argues that it would be a miscarriage of justice to not allow his case to proceed due to a mechanistic application of the 20-day time period.

In reply, South Orange, represented by Arthur R. Thibault, Jr., Esq., presents that its removal of Jones for discipline on January 3, 2019 was separate from his failure to successfully complete his working test period and valid. It cites cases to highlight that these two paths for removal are separate matters that may be pursued simultaneously. South Orange states that Jones has not presented any cases that would indicate otherwise. It argues and cites cases to support its position that the 20-day period to appeal a removal set forth in a FNDA is jurisdictional and cannot be relaxed except where an appointing authority fails to issue the FNDA to the employee. In this case, Jones' appeal of his removal was filed on September 5, 2019, which is more than seven months after the FNDA was served. Further, South Orange asserts that "good cause" cannot be a basis to relax the 20-day statutory requirement to appeal a removal. It distinguishes cases that Jones presents where the Commission relaxed the 20-day requirement as it argues that those cases did not involve appeals of disciplinary action and there was no jurisdictional statutory timeline where the individual was required to appeal. Additionally, even if "good cause" could be considered to toll the 20-day time period for appeal, South Orange argues that there is no "good cause" as Jones was not diligent in pursuing his appeal rights. It highlights that Jones' former counsel acknowledged that the

termination at the conclusion of Jones' working test period was separate from the disciplinary matter. Further, South Orange contends that Jones' former counsel rescinded the request for a departmental hearing and returned discovery and Jones did not contact it expressing his disagreement with his former counsel. Moreover, the FNDA clearly indicated the importance of filing an appeal within 20 days and Jones did not reach out to South Orange nor the Commission if he needed clarification. Further, while it still would have been untimely, South Orange presents that Jones did not even file an appeal within 20 days of the re-issue of the FNDA in March. Finally, South Orange argues that due process does not require the Commission to consolidate Jones' disciplinary appeal with the pending working test period appeal. It reiterates that Civil Service rules clearly indicate that a working test period removal for unsatisfactory performance is separate from a removal for discipline. South Orange cites cases where an appellant appealed the removal for failing the working test period, but failed to appeal the removal for discipline and the Commission found that the working test period appeal was moot due to the appellant's failure to timely appeal the removal. In summary, South Orange argues that the Commission should find that Jones' appeal of his discipline is untimely and, consequently, his working test period appeal should be dismissed.

CONCLUSION

N.J.S.A. 11A:2-15 provides that appeals of disciplinary charges shall be made to the Commission no later than 20 days from receipt of the final written determination of the appointing authority. *N.J.A.C.* 4A:2-2.8(a) provides that an appeal from a FNDA must be filed within 20 days or receipt by the employee.

N.J.A.C. 4A:1-1.2(c) states that the Commission may relax a rule for good cause in order to effectuate the purposes of Title 11A, New Jersey Statutes.

In this matter, a review of the record indicates that on November 30, 2018, Jones received a PNDA informing him that he was immediately suspended pending his removal on various administrative charges and violations of departmental rules and regulations. On that same day, Jones, through his former counsel, advised South Orange that he was "not guilty" and requested a departmental hearing and discovery. Thereafter, Jones' working test period as a Police Officer ended on December 8, 2018 and, on December 10, 2018, he received notice that he was being terminated for unsatisfactory work performance. On December 20, 2018, Jones' formal counsel advised South Orange that it was no longer representing Jones. This letter acknowledged that the disciplinary matter and the working test period terminations were "unrelated." Further, the letter indicated that Jones was copied. This agency received Jones' working test period appeal on January 2, 2019. Subsequently, South Orange issued a January 3, 2019 FNDA removing him on administrative charges and violating departmental rules and regulations. The FNDA was sent certified mail and delivered to Jones on January 8, 2019. Jones did

not file an appeal concerning the January 3, 2019 FNDA. On January 28, 2019, this agency transmitted Jones' working test period appeal to the OAL as a contested case. On March 6, 2019, South Orange sent Jones a revised FNDA using form 31-C as it came to its attention that the January 3, 2019 FNDA was issued using the wrong form. On appeal, Jones indicates that it was only after he received the March 6, 2019 FNDA did he realize that his request for a departmental hearing was denied. Further, Jones states that it was only after receiving the March 6, 2019 FNDA did he realize that South Orange intended to seek a dismissal of his case, alleging that this matter was moot because he failed to file an additional and separate appeal regarding the January and March FNDAs. Thereafter, Jones obtained new counsel and his appeal of the January and March FNDAs was postmarked September 6, 2019.

Based on this record, Jones' appeal of the January and March 2019 FNDAs is untimely. Jones was made aware that his release at the end of his working test period and the disciplinary matter were unrelated as acknowledged in his former counsel's December 20, 2019 letter. In this regard, Jones' statement that he only realized after he received the March 6, 2019 FNDA that his request for a departmental hearing was denied and that the disciplinary matter required a separate appeal is unpersuasive. Finally, even if Jones' explanation as to why he did not timely appeal the January 3, 2019 FNDA was accepted, no explanation has been provided why he waited until September 2019 to appeal the March 6, 2019 FNDA, which was well after the 20-day statutory time limit.

Concerning the cases that Jones presents, this matter is distinguishable. Initially, it is noted that this matter involved both removal for discipline and a release for failing his working test period. The cases Jones cites involve an initial issuing of a FNDA for removal based on discipline and then a subsequent FNDA for additional reasons for removal based on discipline. As the burden of proofs are different for discipline and working test period appeals, Jones' appealing his working test period did not clearly indicate that he was appealing his discipline. See *N.J.A.C.* 4A:2-1.4(a) and *N.J.A.C.* 4A:2-4.3(b). Additionally, in *Matthews, supra*, the former Merit System Board found that it was reasonable that the appellant thought the first and second FNDAs would be consolidated as she asserted that this was what she was told, she had been in close communication with her union representative and she was assured that everything was being done for her removal, and the charges for the separate FNDAs were the same. In this matter, Jones has not indicated that he was told that the matters would be consolidated. In fact, as stated above, his former counsel's letter indicated that the discipline and working test period were unrelated. Further, South Orange's notice to Jones that he was being released at the end of his working test period indicates that he had unsatisfactory performance as set forth in his 12-month progress report, while the FNDAs outline specific administrative charges and violations of

department rules and regulations. As such, unlike in *Matthews*, the charges against Jones were not the same in the two separate notices.

Regarding *Sanford, supra*, the Merit Systems Board found that the appointing authority had the right to issue a second removal action even though it had already removed the appellant as the action was based upon conduct while employed. This supports that South Orange had jurisdiction to issue a FNDA for discipline even after it had already released Jones at the end of his working test period as the charges indicated on the FNDAs were based upon conduct while he was employed. Additionally, the Commission found that Sanford never received the PNDA and FNDA for the second action, which is why it allowed her appeal concerning the second FNDA to proceed at the OAL. Here, Jones did not contend that he never received the PNDA or the FNDAs for the second action. Moreover, South Orange's date of removal listed on the FNDAs as December 10, 2018 are inaccurate. Jones was immediately suspended on November 30, 2018 and released at the end of the working test period on December 8, 2018. Thus, his last day on South Orange's payroll was December 8, 2018 and his FNDAs should have reflected that as the date of his disciplinary removal. Regardless, this procedural deficiency in no way affords Jones any rights or entitlement to a remedy.

Further, in reference to Jones' argument that for equitable reasons, the 20-day timeframe should be tolled to avoid unnecessary harm that does not advance the purposes of Civil Service, for the reasons outlined above, Jones was on notice or should have been on notice that the discipline and working test period were two separate matters that required two separate appeals within 20-days of receipt of those notices. Instead, he waited nearly nine months from the January 3, 2019 FNDA and six months from the revised March 6, 2019 FNDA to file an appeal. Therefore, there are no grounds for equitable relief. Moreover, the timeframes outlined in *N.J.S.A.* 11A:2-15 are jurisdictional and cannot be relaxed. *See Borough of Park Ridge v. Salimone*, 21 *N.J.* 28, 46 (1956); *See also Mesghali v. Bayside State Prison*, 334 *N.J. Super.* 617 (App. Div. 2000), *cert. denied*, 167 *N.J.* 630 (2001); *Murphy v. Department of Civil Service*, 155 *N.J. Super.* 491, 493 (App. Div. 1978).

Finally, since Jones is being denied a hearing on his removal on disciplinary charges, his appeal of his release at the end of his working test period is, in essence, moot. This is true since even if he were successful in his working test period appeal, he cannot be reinstated to employment as this determination regarding his removal on disciplinary charges is a final administrative action. As such, upon receipt of this decision, South Orange is advised to present a motion to OAL to dismiss Jones' pending working test period appeal.

ORDER

The Civil Service Commission denies that appellant's requests to reverse the removal and for a hearing and dismisses the appeal.

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 23rd DAY OF OCTOBER, 2019

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