STATE OF NEW JERSEY

In the Matter of Tihani Fullard, Camden County	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
	:	Administrative Appeal
CSC Docket No. 2019-1949	:	

ISSUED: AUGUST 1, 2019 (HS)

Tihani Fullard, a former Public Safety Telecommunicator with Camden County (County), represented by James Katz, Esq., appeals her resignation in good standing, effective January 4, 2019.

On appeal to the Civil Service Commission (Commission), the appellant presents the following narrative. On January 3, 2019, while the appellant was off-duty driving her own vehicle, she was stopped by the Stratford Police and charged with speeding, driving while intoxicated (DWI) and a disorderly persons offense related to possession of a small amount of marijuana in the back seat of her car.[1] Later that day, Robin Blaker, Director of Public Safety for the County, called her and indicated that she needed to meet with him the next morning at the Communications Center. During the call, he never said anything about a drug test or that her employment with the County was in jeopardy. On the morning of January 4, 2019, the appellant met with Blaker; James Jankowski, Chief Public Safety Telecommunicator; and Jill Bishop, Public Safety Telecommunicator, a Communications Center employee and Trustee of Communications Workers of America (CWA) Local 1014, the appellant's union. Blaker indicated that the appellant had the following choices: take and pass a drug test that morning but she would be removed from employment if she refused or failed that test, or else she could resign her position immediately and nothing further would be mentioned of the incident. The appellant was never given any reason why the Communications

[1] The appellant advises that the DWI charge was dismissed, the speeding ticket was reduced to reckless driving and the marijuana possession charge will be dismissed upon completion of a conditional discharge program.

Center was subjecting her to a drug test or why it needed to be done that morning. During the meeting, nobody indicated that her speech, behavior or appearance evidenced any impairment. During the appellant's conversation with Blaker, she was never told that under the County's drug testing policy, if she failed the test, she would be permitted to seek evaluation and treatment through a "Substance Abuse Professional" (SAP) and upon successful completion, return to work. Rather, she was specifically told that if she tested positive on the test that morning, she would be removed. Since the appellant was told that she would be removed if she did not pass the required drug test, she was extremely concerned that this removal would follow her the rest of her working life. The appellant was never advised that she could leave the facility to meet with an attorney or make this decision later that day or at another time. Based on the options presented to her, the appellant believed that her only option was to resign immediately on January 4, 2019, and she did so.[2] On January 7, 2019, her union's attorney requested that the County rescind her resignation. On January 8, 2019, the appellant indicated in a letter to the County that she was rescinding her resignation. However, the County has not agreed to a rescission.

The appellant maintains that she resigned under duress. The appellant contends that although an employee in a safety-sensitive position may be subject to drug testing in the absence of reasonable suspicion, it is equally well-established that an existing civilian employee like herself who does not occupy a safety-sensitive position is not subject to such testing in the absence of individualized, reasonable suspicion. The County, according to the appellant, did not have a legal right to require her to submit to a drug test. It did not have reasonable suspicion to subject her to its drug testing protocols, and she had not engaged in any aberrant behavior that warranted such testing. That she had been charged 48 hours earlier with speeding, DWI and possession of a small amount of marijuana did not authorize the County to subject her to such testing, particularly when at the time of the incident, she was operating her own private vehicle, was off-duty and not engaged in any County-related business. She was also not subject to random testing. Additionally, the appellant argues that the circumstances under which she was required to make her choice did not represent a knowing and voluntary waiver. In support, she submits the certified statements of herself and Karl Walko, President of CWA Local 1014, and the County's drug testing policy.

In response, the County, represented by Anne E. Walters, Assistant County Counsel, disputes the appellant's recounting of the facts and offers the following narrative. On January 3, 2019, Blaker and Bishop contacted the appellant and told her to report to the Communications Center on the morning of January 4, 2019. Blaker informed the appellant that the Stratford incident was the reason for the meeting. On January 4, 2019, Blaker, Bishop and Jankowski met with the appellant. Blaker requested that the appellant submit to a drug test based on the

[2] The resignation has not been entered into the County and Municipal Personnel System.

interaction with the Stratford Police the night before, and stated that if she refused, she would be disciplined in accordance with County policy. Bishop asked if she and the appellant could discuss the matter in private, and they went to Bishop's office. Further, the County was advised by the appellant's attorney that the appellant also spoke to her mother, a Sheriff's Officer in the County, during this time period on the phone. Bishop and the appellant then returned and stated that the appellant wished to resign her position with the County. Blaker asked the appellant if the decision to resign was voluntary and not coerced by anyone, and she stated "yes." Blaker also asked the appellant if she was sure of her decision, and she stated "yes." Blaker and Jankowski wished the appellant good luck.

The County denies that the appellant resigned under duress. It maintains that she was, at all relevant times, represented by Bishop. According to the County, even if the appellant had either refused the test or had tested positive, she would not have been summarily removed by the County. Specifically, its drug testing policy states that an employee who tests positive for drugs or alcohol "will be given the name and number of the [SAP] for referral to treatment." The policy anticipates a return to duty after compliance with SAP recommendations, including completion of any treatment and counseling programs. The County states that there is no provision stating that an employee who tests positive for drugs or refuses a drug test will be removed. It asserts that the appellant received annual training on County policies and cannot contend that she was unfamiliar with the County's drug testing policies. The County also maintains that the contemplated drug test was reasonable given the appellant's arrest and the safety-sensitive nature of her position. In support, the County submits the certified statements of Jankowski and Blaker.

In reply, the appellant disputes the County's account of events and reiterates that her resignation should be rescinded as it was the result of duress. Alternatively, the appellant requests that this matter be referred to the Office of Administrative Law for a hearing if the Commission concludes there are material factual issues in dispute. In support, the appellant submits her supplemental certified statement.

CONCLUSION

Initially, appeals of this nature are treated as reviews of the written record. *See N.J.S.A.* 11A:2-6b. Hearings are granted in those limited instances where the Commission determines that a material and controlling dispute of fact exists that can only be resolved through a hearing. *See N.J.A.C.* 4A:2-1.1(d). For the reasons explained below, no material issue of disputed fact has been presented that would require a hearing. *See Belleville v. Department of Civil Service,* 155 *N.J. Super.* 517 (App. Div. 1978).

N.J.A.C. 4A:2-6.1(d) allows an employee to appeal a resignation in good standing if the resignation was the result of duress or coercion. In this regard, an appellant has the burden of proving by a preponderance of the evidence that the resignation was the result of duress or coercion on the appointing authority's part.

In New Jersey, the law concerning the concept of duress has been extensively examined. As stated by Administrative Law Judge Robert S. Miller and affirmed by the former Merit System Board in *In the Matter of Dean Fuller* (MSB, decided May 27, 1997):

> Duress is a force, threat of force, moral compulsion, or psychological pressure that causes the subject of such pressure to become overborne and deprived of the exercise of free will. *Rubenstein v. Rubenstein*, 20 *N.J.* 359, 366 (1956) . . . This test is subjective, and looks to the condition of the mind of the person subjected to coercive measures, not to whether the duress is of "such severity as to overcome the will of a person of ordinary firmness." [*Shanley & Fisher, P.C. v. Sisselman*, 215 *N.J. Super.* 200, 212 (App. Div. 1987)] (citation omitted). Therefore, "the exigencies of the situation in which the alleged victim finds himself must be taken into account." *Id.* at 213, *quoting Ross Systems v. Linden Dari-Delite, Inc.,* 35 *N.J.* 329, 336 (1961).
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> However, a party will not be relieved of contractual obligations "in all instances where the pressure used has had its designed effect, in all cases where he has been deprived of the exercise of his free will and constrained by the other to act contrary to his inclination and best interests." *Wolf v. Marlton Corp.*, 57 *N.J. Super.* 278, 286 (App. Div. 1959). Rather, "the pressure must be wrongful, and not all pressure is wrongful." *Rubenstein, supra* at 367. Further, "it is not enough that the person obtaining the benefit threatened intentionally to injure . . . provided his threatened action was legal . . ." *Wolf, supra* at 286, *quoting* 5 Williston, Contracts (rev. ed. 1937), § 1618, p. 4523.
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> It is a "familiar general rule . . . that a threat to do what one has a legal right to do does not constitute duress." *Wolf, supra* at 287. "A 'threat' is a necessary element of duress, and an announced intention to exercise a legal right cannot constitute a threat." *Garsham v. Universal Resources Holding, Inc.,* 641 *F. Supp.* 1359 (D.N.J. 1986). Thus, as long as the legal right is not exercised oppressively or as a means of extorting a settlement, the pressure generated by pursuit of that right cannot legally constitute duress. *See generally, Great Bay Hotel & Casino, Inc. v. Tose*, 1991 W.L. 639131 (D.N.J. 1991) (unrep.) and citations therein.

In this matter, the appellant maintains that on January 4, 2019, she resigned from her position as a Public Safety Telecommunicator under duress after being informed that she could resign or else be removed if she refused or failed a drug test. However, even assuming this was the choice the appellant faced and considering the record in the light most favorable to her, she does not provide any substantive evidence that establishes that the County exerted any pressure on her in this regard. The appellant's decision to resign was a personal choice and her belief that she would have been removed from employment, absent evidence of force or intimidation, does not constitute illegal duress. *See In the Matter of Nyanate Senyon* (CSC, decided September 6, 2017); *In the Matter of Sean Nally* (CSC, decided December 2, 2009); *In the Matter of Claudia Grant* (MSB, decided June 8, 2005). Although the appellant complains that she could not consult an attorney, the appellant did not have an entitlement to attorney consultation under the circumstances. *See Mira Shah v. Union County Human Services,* Docket No. A-2772-99T2 (App. Div. October 8, 2004) (Neither the United States nor the New Jersey Constitution guarantee a right to counsel to parties in civil or administrative proceedings). *See also, David v. Strelecki,* 51 *N.J.* 563 (1968, *cert. denied,* 393 *U.S.* 933 (1968) ("[I]t is equally clear that the special rules attaching to criminal proceedings do not extend to administrative hearings"). However, it should not be ignored that a Trustee of the appellant's own union was present for the meeting on January 4, 2019, and the appellant does not assert that she was prevented from consulting that individual. Further, the County, as the employer, had the right to seek to discipline the appellant if it believed it had sufficient cause to do so. This right is in place irrespective of whether such discipline would ultimately be upheld. In that regard, had the appellant actually been removed, she would have had the right to appeal her removal utilizing the appropriate disciplinary appeal procedures and could have raised any of the other arguments she has raised here in such disciplinary proceedings.

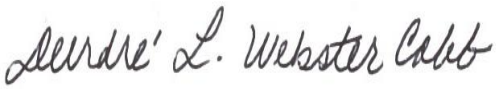
In addition, a request to rescind a resignation *prior to* its effective date may be consented to by an appointing authority. *See N.J.A.C.* 4A:2-6.1(c). However, the appellant's attempts to rescind on January 7 and 8, 2019 came *after* the January 4, 2019 effective date of her resignation, and the County, in its discretion, was not required to accept the rescission. Accordingly, the appellant has failed to demonstrate that her resignation in good standing was the result of duress or coercion by the County or that it had an obligation to rescind. Therefore, the appellant has not sustained her burden of proof in this matter.

ORDER

Therefore, it is ordered that this appeal be denied. Additionally, the Division of Agency Services is ordered to update the personnel record of Tihani Fullard, consistent with this decision.

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 31ST DAY OF JULY, 2019



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