



**STATE OF NEW JERSEY**

**DECISION OF THE  
CIVIL SERVICE COMMISSION**

In the Matter of Vitaly Smirnov,  
Department of the Treasury

Request for a Stay

CSC Docket No. 2019-3357

**ISSUED: AUGUST 2, 2019 (HS)**

Vitaly Smirnov, a former Senior Investment Analyst with the Department of the Treasury, represented by John Kuhn Bleimaier, Esq., petitions the Civil Service Commission (Commission) for a stay of his removal.

By way of background, on February 1, 2019, the appointing authority issued the petitioner a Preliminary Notice of Disciplinary Action (PNDA), charging him with chronic or excessive absenteeism or lateness, conduct unbecoming a public employee, and other sufficient cause. Specifically, it was alleged that the petitioner was arriving to work late and leaving early without notifying his supervisor and that he was falsifying his timesheet by recording late arrivals and early departures as “Work” rather than charging the appropriate leave time. The PNDA recounted that between March 1, 2018 and August 30, 2018, there were 98 separate instances, totaling 135 hours, where the petitioner failed to properly record his absences from the workplace. As a result, he was paid monies to which he was not entitled. The PNDA proposed a penalty of removal. A departmental hearing was held, and the appointing authority issued the petitioner a Final Notice of Disciplinary Action removing the petitioner, effective May 10, 2019.<sup>1</sup>

In his request, the petitioner argues that he was removed on the basis of a personnel office error and failure of communication. He maintains that his supervisors found his performance to have been satisfactory at all times and did not

<sup>1</sup> The petitioner appealed his removal to the Commission, and the appeal was referred to the Office of Administrative Law for a hearing as a contested case.

want him to be removed. One State office granted him intermittent leave to provide care to his terminally ill mother. At the same time, another office proposed removing him because of a perceived problem stemming from this selfsame family medical crisis. Because this administrative error on the part of the State is well documented and obvious, the petitioner suggests that he has a clear likelihood of success on the merits. The petitioner contends that there is a danger of immediate and irreparable harm to him in the absence of a stay. His family, including two school age children, has no health insurance if his employment is discontinued. He is also unable to make his next mortgage payment. The petitioner also states that he exhausted his personal savings when he made a payment of \$8,181.12, at the State's request, ostensibly to settle this matter. The petitioner further argues that there is a complete absence of any injury to the State if this petition is granted as he was performing valuable professional employment at the time of his removal. In the absence of his removal, the State need not hire and train a replacement for him. Additionally, the petitioner asserts that justice is always in the public interest. Thus, staying an erroneous removal is in the public interest. In this case, his role as a key witness in litigation also renders the grant of this petition in the public interest. While the petitioner's appearance as a witness may obviously be secured by way of subpoena, his credibility on the witness stand would be hopelessly compromised by a removal for cause, even if that removal were later to be reversed by the Commission.

In addition, the petitioner alleges that the hearing officer who conducted the departmental hearing stated that he never agreed to hear an administrative disciplinary matter unless, on preliminary review, he found the State's case to be reasonable. The petitioner maintains that it is inappropriate that the hearing officer apparently formed an opinion prior to hearing the case. Additionally, the petitioner states that the hearing officer's summary of the presentations in his report was incomplete. He thus contends that the departmental hearing fell well short of the appropriate level of due process.

In response, the appointing authority requests that this petition be denied. The appointing authority states that during the departmental hearing, the petitioner admitted to the following facts: his work hours were 8:30 a.m. to 4:30 p.m.; he did not have approval to work from home; he did not have approval to flex his work schedule; and he was not always in the office during his scheduled work hours. All employees, the appointing authority maintains, are expected to adhere to their assigned shift. By failing to report to work for the entirety of his shift and falsely reporting that he did, the appellant received \$8,181.12 that he was not entitled to. The appointing authority argues that regardless of intent, the petitioner's actions constituted theft, falsification, conduct unbecoming a public employee and violation of the public trust. It maintains that there is a definitive public interest in the denial of this petition. Specifically, the petitioner's position was within the Division of Investment (Division). He was responsible for

multibillion dollar investments that were part of the State's investment portfolio for the Pension Fund (Fund). While the Division is responsible for investing the Fund, the Fund's stakeholders are the employees of the State. By allowing the petitioner to continue to work, the appointing authority asserts, its integrity, and the integrity of the Division and the Fund, would be called into question. According to the appointing authority, the public would not have faith that the Fund is being properly managed when one of its investors was found to have falsified documents and stolen from the State. The amount of money procured via the falsification of timesheets, in the appointing authority's view, does not matter. It is, rather, the fact that the petitioner was found guilty of these actions. The petitioner's actions were inexcusable regardless of his length of employment or the rationale behind his actions. Furthermore, the appointing authority states that the petitioner's actions have resulted in a complete lack of trust in his investing of the Fund.

### CONCLUSION

*N.J.A.C.* 4A:2-1.2(c) provides the following factors for consideration in evaluating a petition for a stay:

1. Clear likelihood of success on the merits by the petitioner;
2. Danger of immediate or irreparable harm;
3. Absence of substantial injury to other parties; and
4. The public interest.

Initially, the information provided in support of the instant petition does not demonstrate a clear likelihood of success on the merits. A critical issue in any disciplinary appeal is whether or not the petitioner's actions constituted wrongful conduct warranting discipline. The Commission will not attempt to determine such a disciplinary appeal on the written record without a full plenary hearing before an Administrative Law Judge who will hear live testimony, assess the credibility of witnesses, and weigh all the evidence in the record before making an initial decision. Likewise, the Commission cannot make a determination on whether the petitioner's penalty of removal was inappropriate without the benefit of a full hearing record before it. Since the petitioner has not conclusively demonstrated that he will succeed in having the underlying charges dismissed as there are material issues of fact present in the case, he has not shown a clear likelihood of success on the merits. The petitioner has also not shown that he is in danger of immediate or irreparable harm if this petition is not granted. While the Commission sympathizes with his situation, the harm that he is experiencing is financial in nature and, as such, can be remedied by the granting of back pay should he prevail in his appeal. Further, based on the petitioner's alleged conduct, it would potentially be harmful to the appointing authority, as well as the public at large, to allow an individual facing such serious disciplinary charges to be returned to employment without the benefit of a *de novo* hearing at the Office of Administrative

Law (OAL). It is appropriate to note here that even assuming the petitioner did not receive an appropriate level of due process in his departmental hearing, as he alleges, procedural deficiencies at the departmental level that are not significantly prejudicial 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). Accordingly, there is no basis for a stay in this matter.

### ORDER

Therefore, it is ordered that the petitioner's request for a stay be denied.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 31<sup>ST</sup> DAY OF JULY, 2019



Deirdre L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Christopher S. Myers  
Director  
Division of Appeals and Regulatory Affairs  
Written Record Appeals Unit  
Civil Service Commission  
P.O. Box 312  
Trenton, New Jersey 08625-0312

- c. Vitaly Smirnov  
John Kuhn Bleimaier, Esq.  
Douglas J. Ianni  
Kelly Glenn