

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4TH DAY OF NOVEMBER, 2020

Deirdre L. Webster Cobb

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING

RESPONDENT'S MOTION FOR

SUMMARY DECISION

OAL DKT. NO. CSV 07638-18

AGENCY DKT. NO. 2018-3244

**MARK THOMPSON, DEPARTMENT OF
HUMAN SERVICES, WOODBINE
DEVELOPMENTAL CENTER.**

William A. Nash, Esq., for appellant, Mark Thompson (Nash Law Firm, LLC, attorneys)

Dipti Dedhia, Deputy Attorney General, for respondent, Department of Human Services, Woodbine Developmental Center (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: September 25, 2020

Decided: October 6, 2020

BEFORE DOROTHY INCARVITO-GARRABRANT, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Mark Thompson, appeals from his resignation not in good standing effective February 9, 2018, which arose from a Final Notice of Disciplinary Action (FNDA), dated April 13, 2018, substantiating that appellant abandoned his job as a result of absences from work as scheduled without permission for five consecutive days in violation of

Administrative Order 4:08-A 3.1, and resigned not in good standing in violation of N.J.A.C. 4A:2-6.2(b).

In the instant appeal, an initial prehearing conference was held on November 13, 2018, at which time appellant's counsel requested that this matter be placed on the inactive list to allow appellant to resolve some external issues. The DAG had advised appellant's counsel that a pending Preliminary Notice of Disciplinary Action (PNDA), dated April 13, 2018, was being converted to an FNDA. (R-E.) The FNDA was to be served on the appellant directly. (R-E.) An Order, dated November 20, 2018, was entered admitting this matter to the inactive list for six months. Subsequently, an Order, dated May 23, 2019, was entered continuing placement of this matter on the inactive list for an additional six months.

A prehearing conference was held on October 30, 2019. At that time, respondent advised that it had filed a motion for summary decision dismissing the instant appeal as moot, because appellant had failed to appeal a separate subsequent FNDA, dated November 14, 2018, which had resulted in his removal from his job. On January 24, 2020, appellant filed opposition to the motion for summary decision. On February 7, 2020, respondent filed a reply to appellant's opposition.

FACTUAL DISCUSSION AND LEGAL ARGUMENTS

Findings of Fact

Based upon a review of the evidence presented, I **FIND** the following as **FACT**:

Appellant was employed as a Therapy Aide at the Woodbine Developmental Center. He was employed in this capacity since November 21, 2009. (R-A.)

Relative to this instant matter, appellant was served with a PNDA, dated February 16, 2018, charging him with abandoning his job as a result of absences from work as scheduled without permission for five consecutive days in violation of Administrative Order 4:08-A 3.1, and resigning not in good standing in violation of N.J.A.C. 4A:2-6.2(b). (R-B.) A

FNDA, which affirmed the charges, was issued on April 13, 2018, and the appellant was resigned not in good standing effective February 9, 2018. (R-C.) Appellant filed the instant appeal at the Office of the Administrative Law (OAL) on May 29, 2018.

While those events were occurring, respondent served appellant with a separate PNDA, dated May 16, 2018, charging him with violations of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and N.J.A.C. 4A:2-2.3 (a)(12), other sufficient cause, for which respondent sought appellant's removal from his job. (R-D.) The disciplinary charges arose from appellant's alleged involvement in a domestic incident, as a result of which appellant was criminally charged with violations of N.J.S.A. 2C:13-2(a) Criminal Restraint, N.J.S.A. 2C:12-3(b) Terroristic Threats, N.J.S.A. 2C:39-5(d) Unlawful Possession of a Weapon, N.J.S.A. 2C:39-4(d) Possession of a Weapon for an Unlawful Purpose, and N.J.S.A. 2C:12-1(a)(3) Simple Assault. The domestic incident occurred on February 8, 2018. Respondent then issued a FDNA, dated November 14, 2018, which removed appellant from his position effective February 10, 2018. The FDNA was served on appellant on November 16, 2018, by certified mail. (R-F.) It was received and signed for at appellant's mother's home. (A-1.) Appellant and his fiancé, A.W.,¹ admitted they received the FNDA on November 16, 2018, contemporaneous with its service. (A-2.) Appellant had twenty days from his receipt to appeal.

No competent evidence existed to demonstrate that an appeal of the November 14, 2018 FDNA removing appellant from his job was perfected, or even filed. Appellant did not take any actions to confirm that the Civil Service Commission received his appeal and that it was perfected, after he allegedly mailed it. Appellant did not appeal the November 14, 2018 FDNA. Appellant was removed from his job effective February 10, 2018. (R-F.)

¹Appellant's fiancé is referred to by her initials, A.W., for confidentiality reasons. A review of the PNDA, dated May 16, 2018 and the FDNA, dated November 14, 2018, reflect that A.W. was the alleged victim of the domestic dispute.

Legal Arguments

For respondent

Respondent seeks summary decision in its favor dismissing petitioner's appeal. Respondent contends that the instant appeal should be dismissed because it is moot. City of Hackensack v. Winner, 82 N.J. 1, 29 (1980); Cinque v. NJ Dept. of Corrections, 261 N.J. Super. 242, 243 (App. Div. 1993); Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976); See also, Smith v. Trenton Psychiatric Hospital, OAL Dkt. No. CSV 2940-00; Johnston v. New Lisbon Developmental Center, OAK Dkt. No. CSV 2854-00; Smith v. Juvenile Justice Commission, OAL Dkt. No. CSV 2147-05. Appellant did not appeal the FNDA, dated November 14, 2018, which removed him from his position. The time for that appeal has long passed. As a result, there is no remedy that can be afforded to the appellant in the instant appeal of the disciplinary action, dated April 13, 2018.

In response to appellant's opposition, respondent argued that the affidavits submitted by appellant and A.W. were self-serving and not supported by any documentary evidence. Respondent stated that no appeal has been submitted to the Civil Service Commission.

For appellant

Appellant opposed respondent's motion for summary decision. Appellant maintained that the instant matter should not be dismissed, because he perfected his appeal of the November 14, 2018 FNDA, which removed him from his job. Appellant argued that "[a]n issue is moot when a court's decision, sought in a matter, when rendered can have no practical effect on the existing controversy." (Emphasis by appellant). Deutsche Bank Nat'l Trust Co. v. Mitchell, 422 N.J. Super. 214, 221-222 (App. Div. 2011).

Appellant indicated, in a sworn affidavit, that he perfected an appeal of the FNDA, dated November 18, 2018. (A-2.) Specifically, A.W. retrieved the certified mailed copy of the FNDA, dated November 14, 2018, from appellant's mother's house. (A-1.) His

mother had signed for receipt of the mailing. A.W. stated in her affidavit, that she "immediately" opened the letter and wrote a letter explaining the domestic incident, which led to appellant's arrest and discipline by respondent. She further submitted that she and appellant had spoken "earlier" with their Union President about the appeal. (A-1.) A.W. indicated that she had appellant sign the letter she wrote to appeal the FDNA. Appellant recalled that he and A.W. purchased a money order and mailed the appeal to the Civil Service Commission within the twenty-day required period.

LEGAL DISCUSSION AND CONCLUSIONS

Summary Decision

The respondent seeks relief pursuant to N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c) which provides that "the judgment or order sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (citing Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, at 540, (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 213 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, 477 U.S. at 251-252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214.

Following the Brill standard, after considering all the papers and evidence filed in support and in opposition to respondent's motion for summary decision, I **CONCLUDE** that there are no genuine issues of material fact that require a plenary hearing and that this matter is ripe for summary decision.

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

A review of the relevant Uniform Administrative Procedure Rules (UAPR), and past civil service case law involving appeals of disciplinary actions indicate that the appointing authority must provide due process prior to depriving the employee of his continued employment. In relevant part, "an employee must be served with a PNDA setting forth the charges and statement of facts supporting the charges (specifications) and afforded the opportunity for a hearing prior to imposition of major discipline..." N.J.A.C. 4A:2-2.5(a). Next, "the employee may request a departmental hearing within five days of receipt of the PNDA." N.J.A.C. 4A:2-2.5(c). If the departmental hearing is requested, it "shall be held within 30 days of the PNDA unless waived by the employee or a later date as agreed to by the parties." N.J.A.C. 4A:2-2.5(d). Further, it "shall be held before the appointing authority or its designated representative" and "the employee may be represented by an attorney or authorized union representative." N.J.A.C. 4A:2-2.6 (a) to (b). "Within 20 days of the hearing, or such additional time as agreed to by the parties, the appointing authority shall make a decision on the charges and furnish the employee either by personal service or certified mail with a FNDA." N.J.A.C. 4A:2-2.6 (d). The

employee may appeal this FNDA to the Civil Service Commission “within 20 days of receipt of the Notice.” N.J.A.C. 4A:2-2.8 (a).

There are several civil service cases in which the appointing authority moved for summary decision based on the doctrine of mootness after an employee appealed one, but not all, FNDAs issued. Untimely appeals of FNDAs are “fatal” procedural failures because an “employee is statutorily barred from filing an untimely administrative appeal.” Shaquaya Lane v. Trenton Psychiatric Hospital, CSV 8595-11, Initial Decision (July 27, 2012), <<http://njlaw.rutgers.edu/collections/oal>>, citing N.J.S.A. 11A:2-15; Monice Lawrence v. Montclair State University, OAL Dkt. No. CSV 15428-18, Initial Decision (October 10, 2019).

The twenty-day statutory time limitation for filing an administrative disciplinary appeal is jurisdictional and mandatory. See Borough of Park Ridge v. Salimone, 21 N.J. 28 (1956). In such cases, “it may be extended only by the legislature, not by an agency or the courts.” Mesghali v. Bayside State Prison, 334 N.J. Super. 617, 622 (App. Div. 2000), citing Schaible Oil Co. v. New Jersey Dep’t of Env’tl. Protection, 246 N.J. Super. 29, 31, 586 A.2d 853 (App Div.). See also Tialynn Johnson v. Department of Human Service, Woodbine Developmental Center, CSV 12438-11, Initial Decision (August 8, 2012), <<http://njlaw.rutgers.edu/collections/oal>> (finding the appeal of a disciplinary matter moot where appellant timely appealed one FNDA but failed to appeal the other issued FNDAs.)

Appellant appealed the FNDA, dated April 13, 2018. However, he failed to appeal the subsequent FNDA, dated November 14, 2018. That FNDA was sent to appellant’s mother’s residence via certified mail, as mandated by N.J.A.C. 4A:2-2.6 (d). Appellant and his fiancé, A.W., admitted that they received the FDNA on November 16, 2018. Therefore, notice and due process was afforded to appellant. Appellant had twenty days from his receipt to appeal the FDNA.

While facts and evidence are to be reviewed in a light most favorable to the non-moving party in determining if summary decision in favor of the moving party is

appropriate, the affidavits submitted by respondent in this matter were insufficient to establish a genuine issue of material fact. Brill at 524. No documentary evidence was submitted to corroborate or support the self-serving allegations made by appellant and A.W. These unsubstantiated statements were barely a mere scintilla of evidence indicating that appellant might have attempted to file an appeal. The statements were suspicious, because appellant did not take any additional actions after allegedly mailing his appeal to confirm that the Civil Service Commission had received it and that his appeal was perfected. More than a mere scintilla of evidence is required to demonstrate that a genuine issue of material fact exists. Brill at 529. Appellant did not satisfy this requirement. Appellant failed to appeal the November 14, 2018 FNDA. Here, I **CONCLUDE** that the competent evidence is so one-sided that summary decision in favor of respondent is appropriate.

Mootness

The Constitution limits the judiciary to the adjudication of actual cases and controversies. U.S. Const. art III, § 2. Accordingly, “[a] case is moot when the issues presented are no longer “live” or the parties lack a legally cognizable interest in the outcome.” Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211, 216 (3rd Cir. 2003) (citing Powell v. McCormack, 395 U.S. 486, 496 (1969)). Specifically, it is “[t]he court’s ability to grant effective relief [that] lies at the heart of the mootness doctrine.” U (citation omitted). For instance, when developments evolve during the “course of adjudication” that negate the plaintiff’s interest in the outcome of a case or thwart a court from being able to give the requested relief, the suit must be dismissed as moot. Ibid. (citation omitted). “This requirement that a case or controversy be ‘actual [and] ongoing’ extends throughout all stages of . . . judicial proceedings” Ibid. (citing Khodara Eenvtl., Inc. v. Beckman, 237 F.3d 186, 193 (3rd Cir. 2001) (emphasis supplied). In the absence of an actual case or controversy, a ruling by a court would constitute an advisory opinion, disregarding the Constitution’s limitation of jurisdiction. See, Id. at 217, n.3; see also, Armstrong World Indus., Inc. v. Adams, 961 F.2d 405, 410 (3d Cir. 1992) (stating, “[Article III, section 2 of the Constitution] ‘stands as a direct prohibition on the issuance of advisory opinions.’”).

Similarly, the doctrine of mootness has utility in the administrative setting if no effective relief can be granted in a case. Benjamin v. Masciocchi, Comm'r of Educ., EDU 14102-11, Initial Decision (March 12, 2013), adopted, Comm'r (April 11, 2013), <http://njlaw.rutgers.edu/collections/oal/> (citing In re Tenure Hearing of Mujica, EDU 5184-01, Initial Decision (March 15, 2006), adopted, Comm'r (April 25, 2006), <http://njlaw.rutgers.edu/collections/oal/>). An action is considered moot when it no longer presents a justiciable controversy, and the conflict between the parties has become merely hypothetical. Ibid. (citing In re Conroy, 190 N.J. Super. 453, 458 (App. Div. 1983)). It is well-settled law in New Jersey that cases that have become moot prior to adjudication are no longer actionable. Ibid. (citing Mujica, EDU 5184-01). Cases in which the issues are hypothetical, a judgment cannot grant effective relief, or there is no concrete adversity of interest between the parties are moot. See, Advance Elec. Co., Inc. v. Montgomery Twp. Bd. of Educ., 351 N.J. Super. 160, 166 (App. Div. 2002) (citing Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976)).

Since by operation of law appellant is already removed from his position effective February 10, 2018, for failure to appeal the subsequent discipline, the current matter before this tribunal is moot. Appellant will remain removed from his employment regardless of the outcome of this instant appeal. Therefore, I **CONCLUDE** that appellant's appeal is moot, and respondent is entitled to summary decision dismissing appellants appeal as moot.

ORDER

It is hereby **ORDERED** that Respondent's motion for summary decision is **GRANTED**. Appellant's appeal is **DISMISSED** as moot.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision

within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



October 6, 2020
DATE

DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency

October 6, 2020

Date Mailed to Parties:

October 6, 2020

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EXHIBITS

For petitioner

- A-1 Affidavit of A.W., dated January 23, 2020
- A-2 Affidavit of Appellant, dated January 22, 2020

For respondent

- R-A Employee Master Inquiry Record for Appellant
- R-B PNDA, dated February 16, 2018
- R-C FNDA, dated April 13, 2018
- R-D PNDA, dated May 16, 2018 with certified mail receipt
- R-E Correspondence of William Nash, Esq., dated November 13, 2018
- R-F FNDA, dated November 14, 2018 with certified mail receipt