

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 16th DAY OF SEPTEMBER, 2020

Deirdre L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
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Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. CSV 16508-19

AGENCY DKT. NO. 2020-1186

**IN THE MATTER OF MICKEY YOUNG,
DEPARTMENT OF HUMAN SERVICES,
WOODBINE DEVELOPMENTAL CENTER.**

Arnold Shep Cohen, Esq., for appellant (Oxfeld Cohen, P.C., attorneys)

**Anita Pinkas, Director of Employee Relations, Human Services, for respondent
pursuant to N.J.A.C. 1:1-5.4(a)2**

Record Closed: July 17, 2020

Decided: August 17, 2020

BEFORE CATHERINE A. TUOHY, ALJ:

STATEMENT OF THE CASE

Appellant, Mickey Young, Painter, Woodbine Developmental Center, Department of Human Services, appeals his fifteen working day suspension effective January 6, 2020 pursuant to a Final Notice of Disciplinary Action (31-B) dated October 16, 2019 arising from a November 30, 2018 incident wherein appellant sent an email to S. Katz, Legal Specialist (Central Office) that was inappropriate as were the comments which were insulting and

disrespectful. The charges presented include N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)12 Other sufficient cause; and C-4.1 Verbal abuse of a patient, client, resident or employee.

PROCEDURAL HISTORY

On December 10, 2018 respondent issued a Preliminary Notice of Disciplinary Action (31-A) setting forth the charges and specifications made against the appellant (Respondent's Brief, Exhibit R-5). Appellant requested a departmental hearing which was held on September 26, 2019. The respondent issued a Final Notice of Disciplinary Action (31-B) on October 16, 2019, sustaining the charges listed in the Preliminary Notice and suspending appellant fifteen working days beginning January 6, 2020 (Respondent's Brief, Exhibit R-6).

Appellant filed an appeal on October 17, 2019 and the matter was transmitted by the Civil Service Commission, Division of Appeals and Regulatory Affairs to the Office of Administrative Law (OAL) where it was filed on November 21, 2019 as a contested case pursuant to N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52: 14F-1 to 13. An initial telephone prehearing conference was conducted on March 10, 2020 and a pre-hearing order entered March 11, 2020, scheduling the hearing for September 9, 2020. The pre-hearing order also directed that respondent file its motion for summary decision by May 13, 2020 if attempts at settlement were unsuccessful.

By letter dated May 13, 2020, Anita Pinkas, Director of Employee Relations for respondent, advised that respondent had decided to reduce the fifteen working day suspension to a five-day working suspension, thereby rendering the matter a minor disciplinary action and not within the jurisdiction of the OAL. Petitioner, by letter brief dated May 18, 2020, objected to respondent's May 13, 2020 letter advising of the amendment of the discipline, as a ploy to deprive petitioner of his right to a full hearing on the merits of the disciplinary charges, before the OAL. A further telephone conference was conducted on May 21, 2020 to discuss the matter and a formal briefing schedule was

discussed in order to make a record in the event the parties could not reach a settlement. A follow-up telephone conference was conducted on June 18, 2020 after the parties were unsuccessful in reaching a settlement.

Under cover letter dated June 25, 2020, respondent served appellant personally with the Notice of Suspension from Duty Without Pay, reflecting the reduction of the penalty to minor discipline with a suspension for five days. Appellant was further advised that pursuant to the contract between the State and Local 195, International Federation of Professional and Technical Engineers, appellant may appeal the suspension of five days to the Joint Union/Management Panel in accordance with Article 8, Section 1, by filing a written notice of appeal with the Employee Relations Office at Woodbine Developmental Center within ten days of receipt of the Notice of Suspension From Duty Without Pay (Respondent's Brief, Exhibits R-3 and R-4).

Respondent filed a motion for summary decision on June 26, 2020 and seeks to dismiss this case for lack of jurisdiction. Petitioner filed opposition to same on July 10, 2020. Respondent submitted a Reply on July 17, 2020.

FACTUAL DISCUSSIONS AND FINDINGS

The following facts are not in dispute and I **FIND** as follows:

Appellant, Mickey Young, is a painter at respondent Woodbine Developmental Center, Department of Human Services. He received a fifteen working day suspension effective January 6, 2020 pursuant to a Final Notice of Disciplinary Action (31-B) dated October 16, 2019 arising from a November 30, 2018 incident wherein appellant sent an email to S. Katz, Legal Specialist (Central Office) that was inappropriate as were the comments which were insulting and disrespectful. The charges presented include N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)12 Other sufficient cause; and C-4.1 Verbal abuse of a patient, client, resident or employee. (Respondent's Brief, Exhibit R-6).

Appellant filed an appeal on October 17, 2019 and the matter was transmitted by the Civil Service Commission, Division of Appeals and Regulatory Affairs to the Office of Administrative Law (OAL) where it was filed on November 21, 2019 as a contested case pursuant to N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52: 14F-1 to 13.

Thereafter, by letter dated May 13, 2020, respondent advised appellant that after considering the penalty and based on managerial discretion, the respondent had determined to reduce the penalty from a fifteen-day suspension, to a five-day suspension, while maintaining all the disciplinary offenses and specifications previously set forth.

Under cover letter dated June 25, 2020, respondent served appellant personally with the Notice of Suspension from Duty Without Pay, reflecting the reduction of the penalty to minor discipline with a suspension for five days. Appellant was further advised that pursuant to the contract between the State and Local 195, International Federation of Professional and Technical Engineers, appellant may appeal the suspension of five days to the Joint Union/Management Panel in accordance with Article 8, Section 1, by filing a written notice of appeal with the Employee Relations Office at Woodbine Developmental Center within ten days of receipt of the Notice of Suspension From Duty Without Pay (Respondent's Brief, Exhibits R-3 and R-4).

There has been no proof submitted that appellant has received an aggregate number of days suspended or fined in any one calendar year of fifteen days or received more than three suspensions or fines of five or less days in a calendar year.

LEGAL ANALYSIS

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, 142 N.J. 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 251-2, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214.

I CONCLUDE that this matter is ripe for summary decision since there are no issues of material fact in dispute and that respondent is entitled to summary decision as a matter of law as set forth below.

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 or her 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. However, only major discipline of six days or more is appealable to the Civil Service Commission. N.J.S.A. 11A:2-14 provides:

"Except as otherwise provided herein, within 20 days of the hearing provided in N.J.S.11A:2-13, the appointing authority shall make a final disposition of the charges against the employee and shall furnish the employee with written notice. If the appointing authority determines that the employee is to be removed, demoted or receive a suspension or a fine greater than five days, the employee shall have the right to appeal to the Civil Service Commission. The suspension or fine of an employee for five days or less shall be appealable if an employee's aggregate number of days suspended or fined in any one calendar year is 15 days or more. Where an employee receives more than three suspensions or fines of five or less days in a calendar year, the last suspension or fine is appealable."
(Emphasis added)

Minor discipline is defined at N.J.A.C. 4A:2-3.1(a) as a formal written reprimand or a suspension or fine of five working days or less. N.J.A.C. 4A:2-3.2(a) states that where departmental minor discipline appeal procedures are established by a negotiated agreement, such agreement shall be the applicable appeal process.

Appellant cites Hammond v. Monmouth County Sheriff's Department, 317 N.J. Super 199 (App. Div. 1999) for the proposition that the appointing authority cannot change the FNDA, which is not accurate. The Hammond case basically stated that new charges cannot be added at the OAL's de novo hearing. "No provision of law empowers the public employer to prosecute charges before the Board which the appointing authority has, itself, dismissed after the required local disciplinary proceedings have been held." *Id.* at 204. The de novo hearing on the administrative appeal is limited to the charges made below. West New York v. Bock, 38 N.J. 500, 522 (1962).

It is well settled that the appointing authority has the inherent right to reduce a disciplinary penalty (In the Matter of Thomas Burd, DOP Docket No. 2002-1212, August 20, 2001). If the appointing authority modifies the penalty to a minor discipline, the appeal must be processed under the minor disciplinary rules. See In the Matter of Michael Driber and William LaGraff, Docket No. A-0904-05T1 (App. Div. February 26, 2007). In that

case, the Appellate Division upheld the Commissioner of Personnel's decision that the appointing authority did not abuse its discretion in modifying major disciplinary penalties to minor disciplines prior to the commencement of the OAL hearing and declining further review of the minor disciplines as they did not meet the standard for review. In this regard, N.J.A.C. 4A:2-3.2(a) indicates that "(w)here departmental minor discipline appeal procedures are established by a negotiated agreement, such agreement shall be the applicable appeal process." In this matter, the appellant's contract establishes that minor disciplinary matters are appealable to the JUMP panel and not to the Commission. Likewise, In re Ruffin, 2014 N.J. Super. Unpub. Lexis 955, the Appellate Division affirmed the decision of the New Jersey Civil Service Commission finding that it lacked jurisdiction over Ruffin's appeal from a suspension that had been reduced by his employer, respondent DHS, to five days, prior to his appeal hearing. The Appellate Division concluded that the reduction of his suspension from a fifteen-day working suspension to a five-day suspension prior to his appeal hearing divested the Commission of jurisdiction.

In the present matter, I **CONCLUDE** that the final result of the disciplinary action against appellant is a five-day suspension which constitutes minor discipline with no right to appeal to the Civil Service Commission. I further **CONCLUDE** that therefore respondent is entitled to summary decision dismissing appellant's appeal based on lack of jurisdiction, pursuant to N.J.S.A. 11A:2-14.

ORDER

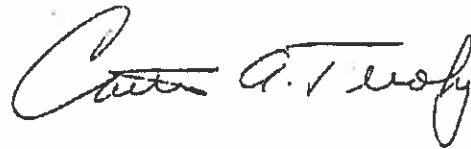
Accordingly, I **ORDER** that respondent's motion for summary decision is **GRANTED**. Appellants appeal is **DISMISSED**.

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.



August 17, 2020
DATE

CATHERINE A. TUOHY, ALJ

Date Received at Agency:

August 17, 2020 (emailed)

Date Mailed to Parties:

/mel

APPENDIX

LIST OF EXHIBITS

For Petitioner:

- July 10, 2020 Brief in Opposition to Motion for Summary Decision

For Respondent:

- June 26, 2020 Letter Brief in support of Motion for Summary Decision with Exhibits R-1 through R-6
- July 17, 2020 Reply Letter Brief