STATE OF NEW JERSEY

In the Matter of George Showell
Ancora Psychiatric Hospital,
Department of Health

CSC DKT. NO. 2019-3178
OAL DKT. NO. CSV 07984-19

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: September 30, 2020 BW

The appeal of George Showell, Humans Services Technician, Ancora Psychiatric Hospital, Department of Health, removal effective December 10, 2018, on charges, was heard by Administrative Law Judge Catherine A. Tuohy, who rendered her initial decision on August 26, 2020. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on September 30, 2020, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission dismisses the appeal of George Showell as moot.

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 30TH DAY OF SEPTEMBER, 2020

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
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attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. CSV 07984-19
AGENCY DKT. NO. 2019-3178

IN THE MATTER OF GEORGE SHOWELL,
DEPARTMENT OF HEALTH, ANCORA PSYCHIATRIC HOSPITAL.

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

Ryan J. Silver, Esq., Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: August 7, 2020 Decided: August 26, 2020

BEFORE **CATHERINE A. TUOHY,** ALJ:

STATEMENT OF THE CASE

Appellant, George Showell, a Human Services Technician with the Department of Health, Ancora Psychiatric Hospital, appeals his removal, effective December 10, 2018, pursuant to a Final Notice of Disciplinary Action (31B) (FNDA) dated April 18, 2019 arising from a May 25, 2018 altercation with a patient. Charges presented include N.J.A.C. 4A:2-2.3(a)6 Conduct Unbecoming an Employee; N.J.A.C. 4A:2-2.3(a)7 Neglect of Duty; N.J.A.C. 4A:2-2.3(a)12 Other Sufficient Cause; Administrative Order 4:08 B-2.3 Neglect of Duty; Administrative Order 4:08 C-8.1 Falsification; Administrative Order 4:08 D-9.1

Failure to report injury, abuse or accident involving patient, resident or client; and Administrative Order4:08 E-1.3 Violation of a rule, regulation, policy, procedure, order or administrative decision.

PROCEDURAL HISTORY

On December 10, 2018 respondent issued an amended Preliminary Notice of Disciplinary Action (31-A) (PNDA 1) setting forth the charges and specifications made against the appellant (Silver certification, Exhibit B). Appellant requested a departmental hearing which was held on March 26, 2019. The respondent issued a Final Notice of Disciplinary Action (31-B) on April 18, 2019 (FNDA 1) sustaining the charges listed in the PNDA and removing appellant, effective December 10, 2018 (Silver certification Exhibit C). Appellant filed an appeal on April 30, 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 June 11, 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.

A Consent Confidentiality and Protective Order was entered on July 30, 2019 and the parties exchanged discovery. Follow-up telephone status conferences were conducted on July 29, 2019, October 2, 2019, December 5, 2019, February 5, 2020, March 5, 2020 and June 2, 2020.

Respondent filed a motion for summary decision based on mootness dated February 3, 2020. Respondent argues that a subsequent FNDA, dated November 26, 2019 (FNDA 2) seeking the same removal date was never appealed by appellant, rendering the current matter moot. Respondent submits that the notice was sent regular mail and certified mail, return receipt requested to the same address of record for appellant that all other notices were sent and received. Respondent argues that the certified mail remained unclaimed and then was returned. The regular mail was never returned. Appellant filed opposition dated February 13, 2020 arguing that he never received the November 26, 2019 Final Notice of Discipline (FNDA 2). He did not receive it via regular mail, and he was too busy with work obligations to go to the post office and claim the certified mailing, notice of which he admits he did receive at his home address.

Respondent filed a reply dated February 21, 2020. During a conference call with the parties on March 5, 2020, the parties were permitted to file sur-replies. Appellant filed a sur-reply dated April 4, 2020 and respondent filed a sur-reply dated April 24, 2020. A further conference call was conducted on June 2, 2020 and the parties were advised to further supplement the record. Respondent filed a supplemental sur-reply dated July 7, 2020 and appellant filed a supplemental sur-reply dated August 7, 2020. Oral argument was conducted telephonically on August 18, 2020.

FACTUAL DISCUSSION AND FINDINGS

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

Appellant, George Showell, a Human Services Technician with the Department of Health, Ancora Psychiatric Hospital, appealed his removal, effective December 10, 2018, pursuant to a Final Notice of Disciplinary Action (31B) dated April 18, 2019 (FNDA 1) arising from a May 25, 2018 altercation with a patient. Charges presented include N.J.A.C. 4A:2-2.3(a)6 Conduct Unbecoming an Employee; N.J.A.C. 4A:2-2.3(a)7 Neglect of Duty; N.J.A.C. 4A:2-2.3(a)12 Other Sufficient Cause; Administrative Order 4:08 B-2.3 Neglect of Duty; Administrative Order 4:08 C-8.1 Falsification; Administrative Order 4:08 D-9.1 Failure to report injury, abuse or accident involving patient, resident or client; and Administrative Order4:08 E-1.3 Violation of a rule, regulation, policy, procedure, order or administrative decision.

Appellant filed an appeal on April 30, 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 June 11, 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, and assigned to the undersigned.

Subsequent to that discipline, respondent served appellant with a second PNDA dated March 4, 2019 arising from a July 8, 2018 altercation with a patient (PNDA 2). The March 4, 2019 PNDA 2 was sent via regular and certified mail to appellant's primary address. The charges presented included N.J.A.C. 4A:2-2.3(a)6 Conduct Unbecoming

an Employee; N.J.A.C. 4A:2-2.3(a)7 Neglect of Duty; N.J.A.C. 4A:2-2.3(a)12 Other Sufficient Cause; Administrative Order 4:08 B-2.3 Neglect of Duty; Administrative Order 4:08 C-3.1 Physical or mental abuse of a patient, client resident or employee; Administrative Order 4:08 C-4.1 Verbal abuse or a patient, client, resident or employee; and Administrative Order 4:08 E-1.3 Violation of a rule, regulation, policy, procedure, order or administrative decision. (Silver certification, Exhibit D).

Appellant appealed the March 4, 2019 PNDA 2 and a departmental hearing was held on October 28, 2019, which appellant attended. The FNDA dated November 26, 2019, FNDA 2, sustained the charges set forth in the Preliminary Notice and sought appellant's removal effective December 10, 2018 (Silver certification, Exhibit E).

The December 10, 2018 removal date set forth in FNDA 2 dated November 26, 2019 was the same removal date previously set forth in the prior FNDA 1, dated April 18, 2019.

The Certification of Nereida Weisback, Acting Employee Relations Coordinator at Ancora Psychiatric Hospital stated that it is their customary practice that when an employee cannot be served personally, respondent will send notices via regular mail and certified mail with return receipt requested to the address listed as the employee's primary residence.

Certifications of both Ms. Weisback and Ms. Harlin, Personnel Aide 2, indicate that the November 26, 2019 FNDA (FNDA 2) was correctly addressed, that proper postage was affixed, that the return address was correct, that the mailing was deposited in a proper receptacle or at the post office, that it is customary to serve FNDA's via both regular and certified mail, and that the November 26, 2019 FNDA was mailed via regular mail and certified mail.

Respondent sent appellant the November 26, 2019 FNDA 2, via regular mail and certified mail, return receipt requested, to his home address on November 26, 2019. (Weisback certification, paragraph 7; Silver certification, Exhibit E).

On December 24, 2019 the certified mail was returned as unclaimed and unable to forward. The regular mail was not returned as undeliverable (Weisback certification paragraphs 7-8)

The USPS tracking history for the certified mailing indicates that it was sent out for delivery on November 30, 2019 but no authorized recipient was available, and a Notice was left. It was unclaimed and was returned to sender on December 22, 2019 and arrived back to respondent on December 24, 2019 marked "return to sender unclaimed and unable to forward". (Silver certification, Exhibit F).

Appellant admits to receiving Notice of the certified mailing at his address but states he did not have time to go to the post office to pick it up because of his work schedule. (February 3, 2020 Affidavit of George E. Showell submitted in opposition to summary decision motion).

The FNDA 2 was sent to appellants primary residence address and was the same address that the FNDA 1 and PNDA 2 were sent (Silver Certification, Exhibits C, D and E).

Appellant did not file an appeal of the November 26, 2019 FNDA (FNDA 2).

LEGAL ANALYSIS AND CONCLUSIONS

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.

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 Envtl. 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 FNDA 1. However, he failed to appeal FNDA 2. FNDA 2 was sent to Showell's home address via certified mail as mandated by N.J.A.C. 4A:2-2.6 (d) and was also sent via regular mail. The certified mail was returned to respondent as unclaimed while the regular mail was not. "New Jersey cases have recognized a presumption that mail properly addressed, stamped, and posted was received by the party to whom it was addressed." Ssi Medical Servs. v. HHS, Div. of Medical Assistance & Health Servs., 146 N.J. 614, 618 (1996). This presumption is rebuttable and "may be overcome by evidence that the notice was never in fact received." Szczesny v. Vasquez, 71 N.J. Super. 347, 354 (App. Div. 1962). See In re Murphy, 2018 N.J. Super. Unpub. LEXIS 1399 (App. Div. 2018) (affirming the Commission's conclusion that the employee cannot benefit from refusing to pick up the certified mail at the post office when he clearly received notice of the attempted delivery. The employee did not dispute that the certified mail was sent to his home. Furthermore, the appointing authority sent three FNDAs by ordinary mail and certified mail; only the third FNDA certified mail was returned unclaimed. The Commission also found that given the appointing authority's undisputed method of service by certified and regular mail, the employee had not persuasively rebutted the presumption.)

Likewise, in this case, appellant has not persuasively rebutted the presumption. The detailed certifications of Ms. Weisback and Ms. Harlin stated that the standard practice of respondent is to mail FNDAs both by regular and certified mail return receipt requested, despite the fact that the FDNA form only indicates it was sent certified mail. It is noted that N.J.A.C. 4A:2-2.6(d) only requires service of the FNDA by personal service or certified mail and respondent argues that service was complete on the mailing of the certified mail. However, respondent further submits that service was similarly completed by regular mail pursuant to R. 1:5-4(a-(b). The regular mail was sent to the same address as the certified mail. Appellant admits to receiving notice of the attempted delivery of the certified mail, so it is clear it went to the correct address; he just did not go to the post office to claim it. The regular mailing sent to the same address was not returned to respondent. Also, the fact that the PNDA 2 was sent regular and certified mail and received and appealed by appellant who appeared in person for the hearing, further evidences the fact that respondent properly served appellant with the November 26, 2019 FNDA 2. The appellant cannot benefit from refusing to pick up the certified mail at the

post office when he clearly received notice of the attempted delivery. He received the PNDA 2, appealed it and appeared at the hearing and admittedly received notice of the certified mailing of the FNDA 2. It is clear that due process was afforded appellant. Respondent followed the same procedures in serving FNDA 2 as they did in serving FNDA 1 which appellant successfully appealed.

Appellant in his supplemental sur-reply dated August 7, 2020 relies on the case In the Matter of Janice Sanford, Department of Human Services, DOP Docket No. 2003-1715, August 15, 2003. In that case the Board found that Sanford did not have notice of the charges against her. She did not receive the PNDA and did not receive the second FNDA by regular mail because she had moved and lived at a different address and the certified mail containing the FNDA was returned unclaimed and therefore she did not receive notice of the FNDA in order to appeal it. That case is distinguishable from Mr. Showell's case in that Mr. Showell has lived at the same address for many years, the respondent sent both the regular mail and certified mail to that address and Mr. Showell admitted he received notice of the certified mailing sent to his address. He just did not go to the post office to pick it up. Mr. Showell was also served with the PNDA 2 dated March 4, 2019 which he appealed, and a departmental hearing was held on October 28, 2019, which appellant attended. He admitted receiving notice of the certified mailing of the FNDA 2 sent to his home address. It is clear that due process was afforded Mr. Showell.

Under circumstances where certified mail is unclaimed, the Commission will count the twenty-day appeal period from the date the certified mail is returned. This is necessary to prevent employees from artificially extending the twenty-day period by never accepting receipt of the FNDA and then claiming that he or she never received it. See In the Matter of Joshua Giles (CSC, decided November 5, 2009). In the instant matter, the certified mail was returned to respondent on December 24, 2019. Appellant had twenty days from December 24, 2019 to file his appeal and he did not. Since appellant did not appeal FNDA 2, the sustained charges became final and the disciplinary action of removal, effective December 10, 2018, became final. Since by operation of law appellant is already removed from his position effective December 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 appeal.

Mootness Discussion

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." Ibid. (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 Envtl., 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 December 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 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.

August 26, 2020
DATE

CATHERINE A. TUOHY, ALJ

Date Received at Agency: August 26, 2020 (emailed)

Date Mailed to Parties: August 26, 2020 (emailed)

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APPENDIX

EXHIBITS

For Appellant:

- February 13, 2020 letter brief in opposition to motion for summary decision and Affidavit of Appellant George E. Showell, dated February 13, 2020
- April 4, 2020 letter brief in sur-Reply and attached certification of George E. Showell, unsigned and undated
- August 7, 2020 letter brief in Sur Sur-Reply with attached exhibits A and B

For Respondent:

- February 3, 2020 Summary Decision letter brief; Certification of Nereida Weisback, Acting Employee Relations Coordinator, Ancora Psychiatric Hospital; and Certification of Ryan J. Silver, DAG in support of motion for summary decision with attached exhibits A through F;
- February 21, 2020 Reply letter brief in further support of motion for summary decision
- April 24, 2020 letter brief in Sur-Reply; Supplemental Certification of Nereida Weisback dated April 20, 2020; and Certification of Heather Harlin, Personnel Aide 2 at Ancora, dated April 20, 2020
- July 7, 2020 letter brief in Sur-Reply