STATE OF NEW JERSEY

In the Matter of Carolyn Whitehead
City of East Orange, Department of
Policy, Planning and Development

CSC DKT. NO. 2021-534
OAL DKT. NO. CSV 11252-20

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 6, 2021 BW

The appeal of Carolyn Whitehead, Assistant Zoning Officer, City of East Orange, Department of Policy, Planning and Development, removal and resignation not in good standing, effective July 23, 2020, on charges, was heard by Administrative Law Judge Julio C. Morejon, who rendered his initial decision on September 1, 2021. Exceptions were filed by the appellant.

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 (Commission), at its meeting of October 6, 2021, 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 finds that the action of the appointing authority in removing and resigning the appellant not in good standing was justified. The Commission therefore affirms that action and dismisses the appeal of Carolyn Whitehead.

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 6TH DAY OF OCTOBER, 2021

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Allison Chris Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING MOTION FOR
SUMMARY DECISION
OAL DKT. NO. CSV 11252-20
AGENCY DKT. NO. 2021-534

IN THE MATTER OF CAROLYN WHITEHEAD, CITY OF EAST ORANGE, DEPARTMENT OF POLICY, PLANNING AND DEVELOPMENT.

Carolyn Whitehead, appellant, appearing pro se

Malee Wing, Esq., Assistant Coporation Counsel, attorney for respondent

Record Closed: July 16, 2021 Decided: September 1, 2021

BEFORE: **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE

Appellant, Carolyn Whitehead (Whitehead) was employed by respondent, City of East Orange, (East Orange), as a Keyboarding Clerk I & Assistant Zoning Officer. On July 23, 2020, Whitehead was terminated from her employment for failure to take a COVID-19 test as a condition to return to work. Whitehead appeals East Orange's decision.

PROCEDURAL HISTORY

On July 23, 2020, pursuant to a Preliminary Notice of Disciplinary Action (PNDA), dated August 10, 2020, East Orange suspended Whitehead without pay and charged her with violating N.J.A.C. 4A:2-6.2(b), resignation not in good standing, and N.J.A.C. 4A:2-2.3(a)(2), insubordination, due to her refusal to undertake a COVID-19 test as a condition to return to work.

Following a hearing held on October 6, 2020, the charges contained in the PNDA were upheld, and a Final Notice of Disciplinary Action (FNDA) was issued on October 28, 2020, which sustained the PNDA charges. Whitehead was removed from her employment effective July 23, 2020, and she now appeals the said decision.

On November 18, 2020, the Civil Service Commission transmitted the underlying matter to the Office of Administrative Law (OAL), pursuant N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, where it was filed on November 25, 2020.

Telephonic prehearing conferences were held on January 6, 2021, March 1, 2021, and March 22, 2021. On March 22, 2021, East Orange requested leave to file a motion for summary decision [1], which was granted. On or about March 31, 2021, East Orange filed its motion, and on or about April 29, 2021, Whitehead filed her opposition to the motion. On or about May 6, 2021, East Orange filed a *sur reply*.

On July 9, 2021, oral argument was held. On July 16, 2021, East Orange submitted additional documents that the undersigned requested at oral argument. The record was closed on July 16, 2021.

FACTUAL DISCUSSION AND FINDINGS

The following facts are undisputed, and I **FIND** the same as **FACTS** herein.

[1] Counsel for East Orange filed a motion for "summary judgment", the term used in the Superior Court. Summary decision is the administrative counterpart to summary judgment in the judicial arena. N.J.A.C. 1:1-12.5. Therefore, respondent's motion will be received as a motion for summary decision.

On March 17, 2020, East Orange, implemented a partial work suspension in response to the COVID-19 pandemic. Following this order, Whitehead, an employee of the Department of Policy, Planning, and Development, worked at home four days a week and came into the office once a week. On June 30, 2020, East Orange issued return to work guidelines containing safety and operational protocols to maximize employee safety when they returned to their offices.

On July 2, 2020, East Orange notified its employees as to the measures taken to protect the health and safety of employees and visitors. Among the listed items was a communicated a requirement that all employees must present a negative COVID-19 test to East Orange by July 15, 2020, as a condition to be allowed to return to their work location. On July 16, 2020, Whitehead emailed the Director of Human Resources to notify her that she would not be taking a COVID test and requested exemption from the order because it violated the Americans with Disabilities Act ("ADA") as well as her rights protected by the U.S. Constitution and Title VII of the Civil Rights Act.

On July 20, 2020, Whitehead received a reply notifying her that the testing mandate did not violate the ADA, and if she did not comply, she would be subject to disciplinary action. Whitehead still refused to take the test and was suspended without pay effective July 23, 2020, and eventually terminated from her employment effective the same date.[2]

LEGAL ANALYSIS AND CONCLUSION

A Motion for Summary Decision shall be granted "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." N.J.A.C. 1:1-12.5(a). If "a Motion for Summary Decision is made and supported, an adverse party in order to prevail, must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. A Motion for Summary Decision before the OAL must be analyzed, "in accordance with the principles set forth by the New Jersey Supreme Court in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 540 (1995)." Nat'l

[2] There has been no record presented of previous disciplinary action against Whitehead.

Transfer v. New Jersey Dep't of Envtl. Prot., 347 N.J. Super. 401, 408 (App. Div. 2002). A determination that there is a genuine issue of material fact requires the motion 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 factfinder to resolve the alleged disputed issue in favor of the non-moving party. Brill, 142 N.J. at 540-41.

In order to defeat the motion, the opposing party must establish the existence of genuine disputes of material fact relevant to the case. The facts upon which the party opposing the motion relies to defeat the motion must be something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful, frivolous, gauzy or merely suspicious.'" Brill. At 529 (citations omitted).

This matter is ripe for Summary Decision because the facts and applicable law 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." N.J.A.C. 1:1-12.5(a).

East Orange's motion for summary decision argues the following legal points, which Whitehead disputes:

A. In light of the COVID-19 global pandemic, and according to the ADA, EEOC, and CDC, employers may require employees to provide a negative COVID-19 test as a condition to return to work.

B. Under Title VII of the Civil Rights Act, Whitehead's request for accommodations creates undue hardship:

C. The Fourth Amendment of the U.S. Constitution was not violated by East Orange, and

D. The First Amendment's Free Exercise Clause was not violated by East Orange.

I will address each point separately below.

ADA Analysis:

Whitehead claims that East Orange's testing requirement violates ADA protections against required medical examinations as outlined by the Equal Employment Opportunity

Commission ("EEOC"). The ADA states that a medical test shall not be required unless it is job-related and is consistent with business necessity. 42 U.S.C. § 12101. As of April 23, 2020, the EEOC's website stated that employer required COVID-19 testing falls within the ADA's "business necessity" standard because an infected employee could jeopardize the health and safety of their coworkers and the function of the operation overall. Equal Employment Opportunity Commission, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws, https://www.eeoc.gov/wysk/what-you-should-know-about-COVID-19-and-ada-rehabilitation-act-and-other-eeo-laws (last visited Jun. 9, 2021).

An employer may not require antibody tests because they are a medical examination that does not currently meet the ADA's "job related and consistent with business inquiry" standard, but viral tests are permissible because they are less invasive. Id. Furthermore, the employer must require tests that are accurate and reliable in accordance with the Food and Drug Administration (FDA) and The Centers for Disease Control (CDC) recommendations. Id.

In the present case, East Orange required that Whitehead take a viral test, (COVID-19), as a condition to return to work in accordance with CDC and EEOC standards. Whitehead argues that this is not in line with EEOC standards. However, as East Orange has clearly submitted, the COVID-19 test has been undoubtedly enumerated as permissible under the ADA on the EEOC website since April 2020. Furthermore, those tests were recommended by the CDC as the most effective means of detecting COVID-19 infections at the time. (Respondent Sur-Reply 2). Therefore, I **CONCLUDE** East Orange has not violated the ADA nor EEOC guidelines in requesting that Whitehead undertake a COVID-19 test.

Title VII Analysis:

Whitehead claims that her rights under Title VII of the Civil Rights Act were violated by East Orange when it refused to provide her "reasonable accommodations" for her sincerely held religious belief that her faith in God "will protect her from COVID-19 so there is no reason to take a test", as she stated in oral argument. East Orange argues that Whitehead's requested accommodations would cause them undue hardship. (Appellant's Opposition Brief at 5).

According to Title VII, reasonable accommodations are adjustments/modifications provided by the employer to enable those with sincerely held religious beliefs that conflict with work requirements to enjoy equal employment opportunities, provided said accommodations do not impose undue hardship on the employer. 42 U.S.C. § 2000e-2. According to the EEOC, an undue hardship is an accommodation that is too costly, compromises workplace safety, infringes on the rights of other employees, decreases workplace efficiency, infringes on the rights of other employees, or requires employees to do more than their fair share of burdensome or hazardous work. Equal Employment Opportunity Commission, Religious Discrimination, https://www.eeoc.gov/religious-discrimination (last visited Jun. 9, 2021). The Supreme Court has held that if an employer must bear more than a "de minimis" (minor) burden when making religious accommodations, the accommodations are considered undue hardships. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977). In Hardison, the Court ruled that it was an undue hardship for the employer to accommodate the employee's religious beliefs that prevented him from working on Saturdays. Id.

In the present case, Whitehead argues that she should be allowed to work from home as East Oranges allows at risk employees to remain working from home until they can return to work. (Appellant's Opposition Brief at 7). Whitehead argues that according to East Orange's "Return To Work Policy", East Orange has already implemented "staggered schedules" and office reconfigurations. Whitehead argues further that East Orange also allows high risk employees to work from home. Whitehead states that her four-month period of working from home during the partial work suspension was successful as she was able to successfully perform her duties from home four-days each week.

East Orange argues that Whitehead's refusal to be tested creates an undue hardship because it risks exposing their low- risk employees to COVID-19 in the office which could create an outbreak and shut down the office again. (Respondent's Sur-Reply at 4). East Orange argues further that said employees could then also expose high-risk individuals outside of work. When applying the standard set in Hardison to the present case, it is unreasonable to expect East Orange to mandate those high-risk employees to stay at home

so Whitehead can come into to work, which is no guarantee that Whitehead could transmit COVID-19 to low-risk employees simply by being at the office.

Even if Whitehead could guarantee that she would remain in a full quarantine before returning to the office, there is no way of knowing definitively that she poses no risk to her fellow employees without a test. Therefore, I **CONCLUDE** that Whitehead's requested accommodations for her religious beliefs pose an undue hardship and East Orange is not required by Title VII to accommodate her. On the contrary, I **CONCLUDE** that permitting Whitehead to return to work without a COVID-19 test may pose a direct threat to the health of other employees and their families. Furthermore, I **CONCLUDE** that Whitehead's refusal to take the COVID-19 test is inconsistent with other employees right to work in a safe environment, where their employer takes reasonable measures to ensure their safety.

Right to Privacy Analysis:

East Orange argues that the viral test did not violate Whitehead's privacy rights because it is a reasonable search, does not invade an expectation of privacy, and is justified at its inception due to it being for non-investigatory, work-related purposes. (Respondent's Sur-Reply at 5). However, Whitehead argues that the test is an unreasonable search and is not justified at its inception because there is not sufficient individualized suspicion to justify a search. (Appellant's Opposition Brief at 8).

The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated..." U.S. Const. amend. IV. The Supreme Court has held that what ultimately determines the constitutionality of a search is the reasonableness. Verona School Dist. 47J v. Acton, 115 S. Ct. 2386 (1995). Determining the reasonableness of a search involves determining if it was justified at its inception and was conducted in a reasonable scope. N.J. v. T.L.O., 469 U.S. 325 (1985). A search is justified a its inception if there is individualized suspicion of misconduct, or the search is necessary for non-investigatory work-related purposes. O'Connor v. Ortega, 480 U.S. 709 (1987). The scope of the search is reasonable if the measures adopted are reasonably related to the search and is not excessively intrusive under the circumstances. Id. The permissibility of a particular intrusion is judged by

balancing the individual's fourth amendment interests against the legitimate governmental interest. United States v. Martinez-Fuerte, 428 U.S. 543 (1976). Furthermore, a search without reasonable individualized suspicion is permissible if such a requirement would jeopardize a legitimate government interest. Id., at 561. Also, if a government entity seeks to obtain physical evidence from a person, the fourth amendment applies if doing so infringes on an expectation of privacy that society recognizes as reasonable. California v. Greenwood, 486 U.S. 35, 43 (1988).

The Court held in Skinner v. Ry. Labor Executives' Ass'n, 109 S. Ct. 1402 (1989) that drug and alcohol tests for railroad employees, mandated by Federal Railroad Administration ("FRA"), constituted a search under the fourth amendment. These tests involved breathalyzer tests and gathering samples of employee's blood and urine for chemical analysis which intrudes upon traditional expectations of privacy. Id. This regulation was put in place following a large amount of railroad accidents that were caused by employees being intoxicated while on the job. Id. The Court held that such intrusions, whether they involved reasonable individual suspicion or not, were permissible because of the government's compelling interest in preventing deadly railroad accidents. Id.

Similarly, in the present case, preventing the spread of COVID-19 to East Orange employees while they are in the office could be considered a compelling government interest. Viral testing is a crucial means to that end. Whitehead argues that a nasal swab violates traditional expectations of privacy, so the fourth amendment applies. (Appellant's Opposition Brief at 8). While that may be a convincing argument, I **CONCLUDE** the compelling interest East Orange has in preventing its employees from becoming infected and further spreading the virus outweighs the potential privacy interests of their employees. Furthermore, I **CONCLUDE** that requiring individualized suspicion to conduct these tests would jeopardize the government's interest because many carriers of the virus are asymptomatic, and the only way to know they are infected is to test them. Centers For Disease Control and Prevention, *Testing for SARS-CoV-2 (COVID-19)*, https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html (last visited Jun. 23, 2021). Therefore, I **CONCLUDE** that the testing mandate does not violate Whitehead's fourth amendment rights.

Free Exercise Clause Analysis:

Whitehead alleges that East Orange's testing requirement violates her rights under the Free Exercise Clause of the First Amendment of the U.S. Constitution. (Appellant's Opposition Brief at 9). However, East Orange argues that it did not violate the same because the testing mandate is generally applicable. (Respondent Sur-Reply at 4).

The Free Exercise Clause states that Congress shall make no law prohibiting the free exercise of religion. (U.S. Const. amend. I). However, this clause does not relieve an individual from complying with a generally applicable and facially neutral law because said law violates their religious prescriptions. Employment Div. v. Smith, 494 U.S. 872 (1990). A challenger under the Free Exercise Clause must demonstrate either that the law explicitly targets their religious beliefs or, if the law is facially neutral, it is enforced more harshly against them than other religions that engage in similar conduct. Fulton v. East Orange of Phila., 922 F. 3d 140 (3d. Cir. 2019). For example, in Tenafly Eruv Association v. Borough of Tenafly, 309 F. 3d 144, 151 (3d Cir. 2002), the Borough had an ordinance that prohibited affixing items to telephone poles. This law was almost never enforced until the Orthodox Jewish residents began affixing eruv (ritualistic wiring) on the telephone poles. Id. The Borough began to enforce the ordinance against the Jews, prompting them to sue on the grounds that their free exercise rights were violated. Id. Given the disparate enforcement of the facially neutral law, the court ruled against the Borough. Id.

In the present case, East Orange's testing mandate is facially neutral and generally applicable as it makes no mention of religion and is meant to apply to all employees. Also, there is no evidence to suggest the mandate is being enforced disproportionately against Whitehead nor those who share her religious beliefs. Therefore, for these reasons, I **CONCLUDE** that East Orange's COVID-19 testing mandate does not violate the Free Exercise Clause.

Disciplinary Action Analysis

Whitehead faced disciplinary action and removal for her refusal to take a viral COVID-19 test. The charges levied include insubordination pursuant to N.J.A.C. 4A:2-2.3(a)(2), and

resignation not in good standing. An employee may be subject to major disciplinary action for insubordination. N.J.A.C. 4A: 2-2.3. Major discipline shall include removal, disciplinary demotion, and suspension for more than five working days at any one time. N.J.A.C. 4A: 2-2.2. The New Jersey Administrative Code does not provide a definition of insubordination. Common law generally defines it as a refusal to obey orders of a supervisor. Belleville v. Coppla, 187 N.J. Super. 147 (App. Div. 1982). The governing rule for resignation not in good standing, N.J.A.C. 4A:2-6.2(b), provides:

> Any employee who is absent from duty for five or more consecutive business days without the approval of his or her supervisor shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing. Approval of the absence shall not be unreasonably denied.

The burden of proof rests on the appointing authority to demonstrate by a preponderance of the evidence that the disciplinary action was justified. Atkinson v. Parsekian, 37 N.J. 143 (1962). The prior disciplinary history of the employee may be examined when determining whether a removal of an employee should be upheld. W. New York v. Bock, 38 N.J. 500 (1962). Progressive discipline, the concept of imposition of penalties with increasing severity, is important when considering the reasonableness of a given penalty. Id. at 523-24. Other important factors for consideration include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Id. Unless the penalty is unreasonable, arbitrary, or offensively excessive, it should be permitted to stand. Ducher v. Dep't of Civil Service, 7 N.J. Super. 156 (App. Div. 1950).

However, the theory of progressive discipline is not fixed nor immutable, and some infractions are so serious they warrant removal notwithstanding an unblemished record. Carter v. Bordentown, 191 N.J. 474 (2007). Also, insubordination cannot be tolerated as such conduct adversely affects morale and efficiency in a department. Rivell v. Civil Serv. Comm'n, 59 N.J, 269 (1971).

Charges of insubordination can be sustained for a wide range of infractions. For example, in Nelson v. Woodbine Developmental Center, Docket No. CSV 10407-2009, the

Judge sustained the charge of insubordination and resignation not in good standing against the appellant, a cook, because they refused to follow an order from a supervisor to wash pots. Id. The appellant also refused to show up for a new assignment for more than five business days even after receiving adequate warning of impending disciplinary action should they not show up. Id. However, the Judge changed the penalty of removal to a sixty-day suspension because the conduct in question did not put the appellant's coworkers at risk nor undermined the operations of the employer. Id.

In the present case, Whitehead's conduct in refusing to take a COVID-19 test before returning to work meets the definition of insubordination since she was instructed to return to work by East Orange and take a COVID-19 test prior to her return, which failure to do, results in her not adhering with the safety guidelines that her employer in accordance with CDC guidelines. Consequently, Whitehead was barred from appearing at work from July 15, 2020, to July 23, 2020, because she would not present a negative COVID-19 test to her employer. For these reasons, I **CONCLUDE**, that Whitehead's conduct which resulted in her termination on July 23, 2020, meets the criterion outlined in N.J.A.C. 4A:2-6.2(b), concerning insubordination, as she knowingly refuses to take the COVID -19 test as required of all East Orange employees to return to work. In addition, I **CONCLUDE** that Whitehead's conduct which resulted in her being out of work without an approved absence from July 15, 2020, to July 23, 2020, resulted in her resignation not in good standing, under N.J.A.C. 4A:2-2.3(a)(2).

Having **CONCLUDED** that Whitehead's conduct was in violation of N.J.A.C. 4A:2-6.2(b), insubordination and resulted in her resignation not in good standing, under N.J.A.C. 4A:2-2.3(a)(2), in July 23, 2020, I **CONCLUDE** that East Orange's decision to terminate her on July 23, 2020, did not require adherence to the theory of progressive discipline as Whitehead's conduct in failing to take the COVID-19 is so serious that it warrants her removal notwithstanding any indication that she had a negative employment history. (See, Carter v. Bordentown, 191 N.J. 474). I **CONCLUDE** further that Whitehead's insubordination cannot be tolerated as such conduct adversely affects morale and efficiency in a department (See, Rivell v. Civil Serv. Comm'n, 59 N.J, 269).

I **CONCLUDE** that under the Brill standards this matter is appropriate for summary disposition as requested by East Orange, as the allegations are supported by tangible evidence and the facts presented by Whitehead in her opposition papers are insufficient to raise disputed facts in the record. For these reasons, I **CONCLUDE** that East Orange's motion for summary decision is **GRANTED**.

ORDER

It is hereby **ORDERED** that respondent, East Orange's motion for summary decison is **GRANTED** and East Orange's removal of Whitehead from her employment on July 23, 2020, is hereby **AFFIRMED.**

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.

September 1, 2021
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency: September 1, 2021

Date E-Mailed to Parties: September 1, 2021

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