STATE OF NEW JERSEY

In the Matter of Duncan Williams, Lawrence Township, Department of Public Safety

CSC DKT. NO. 2020-1056
OAL DKT. NO. CSV 17964-19

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: APRIL 28, 2021 (NFA)

The appeal of Duncan Williams, Emergency Medical Technician, Lawrence Township, Department of Public Safety, removal effective September 23, 2019, on charges, was before Administrative Law Judge Jeffrey N. Rabin (ALJ), who rendered his initial decision dismissing the appeal on March 23, 2021. Exceptions were filed on behalf of the appellant and a reply was filed on behalf of the appointing authority.

Having considered the record and the exceptions, as well as the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on April 28, 2021, did not adopt the recommendation to dismiss the appeal. Rather, the Commission remanded the matter to the Office of Administrative Law (OAL) for a hearing on the merits.

DISCUSSION

The appellant in this matter was charged with incompetency, inefficiency or failure to perform duties and neglect of duties. Specifically, it was alleged that the appellant failed to record his actions regarding a patient, falsified patient records and failed to complete numerous patient reports.

In his initial decision, the ALJ granted the appointing authority's motion to dismiss the appellant's appeal as untimely. For the purposes of this matter, the following are the pertinent facts:

1. On September 22, 2019 the appellant was personally served a fully signed and executed Final Notice of Disciplinary Action (FNDA) upholding the charges and imposing a 120 working day suspension. The FNDA included a Last Chance Agreement (LCA).
2. The appellant filed an appeal of the FNDA, postmarked October 11, 2019.
3. The appellant never signed the LCA.
4. Based on the appellant's rejection of the LCA, the appointing authority issued a fully signed and executed second FNDA, again upholding the same charges for the same alleged misconduct, indicating the penalty of removal, effective September 23, 2019.
5. The appellant did not file an appeal of the second FNDA

In his initial decision, the ALJ dismissed the appellant's appeal as untimely, finding that:

> In an attempt to mediate this matter, on September 22, 2019, respondent offered a lesser penalty—a 120-day unpaid suspension—on the condition that appellant agree to the terms of the LCA and execute said LCA. Respondent attached the proposed FNDA as a Schedule B to the LCA.
>
> If the proposed FNDA attached to the LCA from September 22, 2021, were the operative document, an appeal of that FNDA would have had to been filed by October 12, 2021. However, no appeal form was filed by appellant. It was three days after that deadline, on October 15, 2021, when the Commission received from appellant an unexecuted copy of the LCA and proposed FNDA, which documents were accepted by the Commission as a petition for due process.

The ALJ further indicated that the appellant did not serve a copy of his appeal on the appointing authority as indicated in *N.J.A.C.* 4A:2-2.8(c). The ALJ continued:

> [R]eceipt of the unsigned LCA and proposed FNDA did not take place until after the 20-day appeal period would have ended; it did not contain the above-referenced information required by *N.J.A.C.* 4A:2-2.8(c), and at best an appeal of the September 22, 2019, proposed FNDA would have only served as an appeal of the 120-day suspension set forth in the proposed FNDA. Appellant never filed an appeal of his termination. Additionally, even if appellant's letter to the Commission received on October 15 had been a proper form of appeal, no copy of such appeal was ever served on respondent; respondent only became aware of the October 15 filing because the Commission contacted them that day to obtain a copy of the PNDA, a document required to be part of an appeal but which appellant failed to provide to the Commission.

Finally, the ALJ stated:

> Appellant had relied on correspondence from Commission personnel stating that a timely appeal had been received. These statements carry no legal weight in the matter before this court. The Commission employees did not correctly calculate the 20-day time frame. Those employees confirmed that the correspondence sent by appellant on October 11, 2019, did not consist of a proper form of appeal letter, and arguably at best petitioner's letter only appealed the 120-day suspension. Personnel handling the intake of petitions at the Commission are not expected to make determinations on questions of fact and law; their statements did not reflect the fact that the 120-day suspension was only offered as part of the LCA, and that appellant's rejection of the LCA was a rejection of the proposed FNDA attached thereto. If appellant had signed the LCA and then properly appealed the 120-day suspension, and then respondent sent another FNDA calling for termination, there might be a stronger argument that those Commission employees correctly concluded that a second "appeal" need not be filed. But the personnel at the Commission failed to see that there was no FNDA calling for a 120-day suspension because appellant had rejected it by never executing the LCA, or that appellant was attempting to create the appearance that he had been issued a FNDA with a 120-day suspension. Further, Commission personnel were unaware that appellant failed to serve a copy of his "appeal" on the appointing authority.
>
> As appellant did not execute the LCA, I **CONCLUDE** that respondent acted properly in issuing a FNDA on October 21, 2019, and that the FNDA of October 21, 2019, was the only final, operative FNDA and the only FNDA that could have been appealed. As appellant never filed an appeal of the October 21, 2019, FNDA, I **CONCLUDE** that appellant never filed a proper, timely appeal of an FNDA, and therefore this matter is not properly before the Office of Administrative Law.

In his exceptions, the appellant indicates that the ALJ was in error in dismissing the appeal. In this regard, he contends he filed a timely appeal of the first FNDA. Moreover, he argues that under *N.J.A.C.* 4A:2-2.9(a) it is a designee of the Commission who makes the determination as to whether an appeal is timely filed and whether a hearing should be granted. Further, he argues that the procedural requirements found in *N.J.A.C.* 4A:2-2.8 do not provide a basis to ignore an otherwise timely filed appeal. Finally, he argues that it was, in fact, improper for the ALJ to have entertained the issue of timeliness as only the Commission may do so.

In response, the appointing authority states that the original LCA included "a copy of the proposed Final Notice of Disciplinary Action . . . offering the suspension as an attachment to the settlement agreement (emphasis in original)." It further indicates that the appellant "sent a copy of the unsigned settlement agreement with the proposed but unserved and unsigned FNDA" to the Commission along with payment of the appeal fee. It further argues that, contrary to the appellant's assertion that the ALJ did not have the jurisdiction to decide the timeliness of the appeal, there are numerous cases where an ALJ has decided the matter of the timeliness of an appeal. Additionally, it contends that the appellant has no substantive or valid excuse for failing to file an appeal of the second FNDA.

The Commission rejects the ALJ's dismissal of the appeal. Initially, the Commission notes that, while the appellant is generally correct that only the Commission can determine the timeliness of an appeal, if there is an error that is violative of the statutory provisions of *N.J.S.A.* 11A:2-15 and *N.J.S.A.* 11A:2-6 in any determination granting a hearing, it is proper for an ALJ to entertain the issue of timeliness, with the Commission thereafter making a final determination. However, for the reasons below, no such violation exists in this matter.

The ALJ, as well as the appointing authority, indicate more than once that the first FNDA issued to the appellant was a "proposed" FNDA as it was included as part of the LCA. The Commission wholly disagrees. The first FNDA indicates the charges that were upheld as well as the underlying specifications outlining the appellant's alleged misconduct. Most importantly, and contrary to the appointing authority's assertion, it is **signed** by the appointing authority. In this regard, a copy of the FNDA sent to the Commission by the appellant is attached showing it was signed by the Municipal Manager and personally served on the appellant on September 22, 2019. As such, this document, regardless of the intent of the appointing authority, cannot be considered to be anything but a valid and legally served FNDA. The ALJ's conclusion that the LCA was part and parcel of the FNDA is misplaced. Based on the way the FNDA was issued, it was the LCA that was, in fact, the "proposed" document, as to be valid it would have had to be signed by the appellant, which did not occur. However, the signed FNDA did not just cease to exist once the appellant failed to sign the LCA. If the appointing authority truly wished to have the FNDA not be considered as valid, it should have either not included it when it sent the LCA to the appellant, or it **should not** have signed it. Moreover, the appellant was clearly on notice that he was facing removal from employment if he did not sign the LCA and his appeal showed his intent to challenge that action. Thus, his appeal of the first FNDA was proper.[1] Further,

---

[1] The Commission notes that even if the first FNDA was not signed, in this case, it still would find that the appellant's appeal was timely filed. The purpose of the timeliness provisions is to allow an employee sufficient time to challenge a major disciplinary action as well as to ensure the finality of an appointing authority's actions should no appeal, or an untimely appeal, be filed. If the first FNDA was truly just a "proposed" document, the appellant's appeal would merely be considered a

under the facts presented, while it was appropriate for the appointing authority to thereafter issue an ***amended*** FNDA to clarify the penalty, the appellant was not required to appeal that amended notice. In this regard, the second FNDA contains the exact same charges, specifications and other information as the first FNDA. The only change is the amendment to the penalty.[2]

The ALJ also indicated that even if the first FNDA was the "operative" document, the appellant's appeal of that FNDA was untimely. This determination is incorrect. *N.J.S.A.* 11A:2-15 provides that an appeal from an adverse action specified in *N.J.S.A.* 11A:2-6a(4) must be filed within 20 days of receipt of the notice by the employee. This 20-day time limitation is jurisdictional and cannot be relaxed or waived. *See Borough of Park Ridge v. Salimone*, 21 *N.J.* 28, 46 (1956); *See also Mesghali v. Bayside State Prison*, 334 *N.J. Super.* 617 (App. Div. 2000), *cert. denied*, 167 *N.J.* 630 (2001); *Murphy v. Department of Civil Service*, 155 *N.J. Super.* 491, 493 (App. Div. 1978). When calculating the 20-day period, the date the appeal is **postmarked** is considered the filing date. In this matter, the facts indicate that the appellant was personally served the first FNDA on Sunday, September 22, 2019. New Jersey Court Rules 1:3-1 states, in pertinent part: "In computing any period of time fixed by rule or court order, the date of the act or event from which the designated period begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor legal holiday." Thus, in this matter, the time period the appellant had to file spanned from Monday, September 23, 2019 through Tuesday, October 15, 2019.[3] The appellant's appeal, postmarked October 11, 2019, was therefore, clearly timely filed.[4] It is noted that the ALJ's apparent reliance on the fact that the appellant did not utilize a major disciplinary form in filing his appeal or did not include all required documents is similarly misplaced. The **only**

---

premature appeal. The Commission treats such premature major disciplinary appeals as timely filed, as they are filed usually before any valid FNDA is issued, which clearly meets the 20-day time period. The Commission usually only requires thereafter a copy of the valid FNDA. The Commission most commonly sees such premature appeals after an employee is issued a Preliminary Notice of Disciplinary Action (PNDA). Clearly, an employee who prematurely files an appeal of a PNDA or any FNDA is showing his or her clear intent to challenge the appointing authority's action.

[2] To find otherwise could lead to a "gotcha game" scenario where an appointing authority issues subsequent amended FNDAs in an attempt to "catch" an employee who does not appeal each one. While this is an extreme example and did not appear to have occurred in this case, such a circumstance is one of the reasons such subsequent appeals are not required. Moreover, the Commission cannot fathom any scenario where it dismisses an originally filed timely appeal of a valid FNDA where a subsequently filed FNDA amending the first one is not appealed. In this regard, only one FNDA can be issued based on charges and specifications contained in an initial PNDA. While that FNDA can be amended to, for example, clarify or correct errors on the first FNDA, no further appeal is required so long as the initially issued FNDA is timely appealed.

[3] October 14, 2019 was Columbus Day, a national holiday.

[4] Even if no extra days were added from the appellant's receipt of the FNDA, his appeal postmarked October 11, 2019 would be timely, as the date to timely file would have otherwise been from September 23, 2019 through October 12, 2019.

requirement that bears on the timeliness of an appeal filed from a major discipline is whether the statutory 20-day time period is met. As per above, the Commission finds that it was. The Commission will not allow an appellant to procedurally lose his or her property interest in government employment where a timely appeal is submitted but further information or clarification is necessary. While the provisions of *N.J.A.C.* 4A:2-2.8(c), (d) and (e) require that the employee provide certain information upon appeal to both the Commission and the appointing authority, the Commission cannot find that, in this case, absent some showing of **actual** prejudice to the appointing authority, that the appellant's otherwise timely filed major disciplinary appeal should be dismissed or that any potential future back pay award should be lessened. *See N.J.A.C.* 4A:2-2.8(e). To find otherwise in this matter would be the ultimate example of placing form over substance.

Finally, the ALJ indicated that "[a]ppellant had relied on correspondence from Commission personnel stating that a timely appeal had been received. These statements carry no legal weight in the matter before this court. The Commission employees did not correctly calculate the 20-day time frame . . . Personnel handling the intake of petitions at the Commission are not expected to make determinations on questions of fact and law." All of the above statements are inaccurate. In this regard, *N.J.A.C.* 4A:2-2.9(a) states that for major disciplinary appeals "[r]equests for a Commission hearing will be reviewed and determined by the Chairperson or the Chairperson's designee." For many decades, per above, the authority to determine whether a hearing at the OAL should be granted upon receipt of a major disciplinary appeal has been delegated by the Chairperson of the Commission to the Director of the Division of Appeals and Regulatory Affairs. In that regard, the Director will grant a hearing on such an appeal where it is timely filed under *N.J.S.A.* 11A:2-15 and all other statutory requirements are satisfied. The facts in this matter indicate that the determination to grant a hearing in this matter was made by the Deputy Director of the Division of Appeals and Regulatory Affairs, who had been given this authority by the Director, who was on vacation at the time. Regardless, upon subsequent inquiries from the appointing authority's representative, the Director concurred with the Deputy Director's determination. Further, and contrary to the ALJ's statement, both the Director and Deputy Director correctly calculated the 20-day period, and correctly determined that the appellant's appeal was timely filed. As such, the ALJ's statements regarding the Commission's personnel's inability and lack of authority to make determinations of fact and law regarding the granting of hearings in major disciplinary appeals, for the reasons set forth above, is inaccurate.

Accordingly, this matter is remanded to the OAL for a hearing on the merits of the charges against the appellant.

ORDER

The Civil Service Commission remands the appeal of Duncan Williams to the Office of Administrative Law for a hearing on the merits.

This is the final administrative determination regarding the issue of the timeliness of the appellant's appeal. Any further review shall be made in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 28TH DAY OF APRIL, 2021

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION DISMISSAL
OAL DKT. NO. CSV 17964-19
AGENCY REF. NO. 2020-1056

IN THE MATTER OF DUNCAN WILLIAMS,
TOWNSHIP OF LAWRENCE,
DEPARTMENT OF PUBLIC SAFETY.

Christopher Gray, Esq., for appellant Duncan Williams (Sciarra & Catrambone, LLC, attorneys)

Armando V. Riccio, Esq., for respondent Township of Lawrence (Armando V. Riccio, LLC, attorneys)

Record closed: March 1, 2021 Decided: March 23, 2021

BEFORE **JEFFREY N. RABIN**, ALJ:

STATEMENT OF THE CASE

Respondent, Township of Lawrence, Department of Public Safety, filed a motion to dismiss, claiming appellant, Duncan Williams, failed to file a proper appeal in a timely fashion.

PROCEDURAL HISTORY

On October 11, 2019, appellant filed a petition for due process with the Civil Service Commission (Commission). The due process petition was transmitted to the Office of Administrative Law (OAL), where it was filed on December 26, 2019, to be heard as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14 F-1 to -13. (OAL Dkt. No. 06986-19.)

On or about May 12, 2020, respondent filed the within motion to dismiss. Oral argument was held on June 22, 2020, via telephone due to the ongoing Covid-19 pandemic. Post-oral argument briefs were received, and the record closed on March 1, 2021.

FINDINGS OF FACT

I **FIND** the following to be the undisputed facts:

1. Appellant was an Emergency Medical Technician (EMT) for respondent. On June 6, 2019, a Preliminary Notice of Disciplinary Action (PNDA) was served on appellant, alleging failure to record his actions regarding patient actions, falsification of patient records and failure to complete reports. The PNDA called for appellant to be terminated from his position. A hearing on the PNDA took place on July 31, 2019.
2. Appellant subsequently asked respondent to consider imposing a lesser penalty. On September 22, 2019, appellant was served a Last Chance Agreement (LCA), which contained a waiver of a right to appeal to the Civil Service Commission, with a proposed form of Final Notice of Disciplinary Action (FNDA) attached, which reduced the penalty from termination to a 120-day suspension without pay, if appellant would execute the LCA.
3. On October 15, 2019, respondent was advised by the Commission that it had just received an unexecuted copy of the LCA that appellant had mailed them on October 11, 2019. This was the first notice respondent had that

appellant had rejected the LCA; appellant never served a copy of any appeal on respondent.

4. As appellant had rejected the LCA and proposed form of FNDA, and had not served respondent with a copy of an appeal, respondent on October 21, 2019, issued a FNDA calling for appellant's termination, effective September 23, 2019. Appellant never filed an appeal of the FNDA from October 21, 2019.

LEGAL ANALYSIS

The issue is whether petitioner appellant filed a proper, timely appeal of the FNDA issued by respondent.

While caselaw has been presented by respondent and controverted by appellant, as a Civil Service matter, it is N.J.S.A. 11A:2-15 which controls the filing of appeals. It requires that any applicable Civil Service appeals be made in writing to the Civil Service Commission no later than twenty days from receipt of the final written determination of the appointing authority. Otherwise, if the appointing authority failed to provide a written determination, the appeal could be made directly to the Commission.

Further, N.J.A.C. 4A:2-2.8 addresses civil service appeals. Subsection (a) also states that an appeal from a FNDA must be filed by the employee within twenty days of receipt of the FNDA. If an employer/appointing authority fails to provide the employee with a FNDA, an appeal may be made directly to the Civil Service Commission within a reasonable time. Additionally, subsection (c) requires that the employee shall provide a copy of the appeal to the appointing authority, and shall attach to the appeal a copy of the PNDA, FNDA, and information including a statement of the reason(s) for the appeal and the requested relief; failure could result in dismissal of the appeal.

The PNDA regarding appellant called for a penalty of termination. In an attempt to mediate this matter, on September 22, 2019, respondent offered a lesser penalty—a 120-day unpaid suspension—on the condition that appellant agree to the terms of the

LCA and execute said LCA. Respondent attached the proposed FNDA as a Schedule B to the LCA.

If the proposed FNDA attached to the LCA from September 22, 2021, were the operative document, an appeal of that FNDA would have had to been filed by October 12, 2021. However, no appeal form was filed by appellant. It was three days after that deadline, on October 15, 2021, when the Commission received from appellant an unexecuted copy of the LCA and proposed FNDA, which documents were accepted by the Commission as a petition for due process.

Per appellant's own admissions, he never served or provided a copy of any appeal, nor his documentation filed with the Commission on October 15, 2019, to the respondent/appointing authority, in violation of N.J.A.C. 4A:2-2.8(c).

Because appellant had rejected the terms of the LCA including the reduced penalty set forth in the proposed FNDA, respondent revoked its offer of a lesser penalty by issuing a FNDA dated October 21, 2019, which called for a penalty of termination, the same as the penalty set forth in the PNDA. The October 21, 2019, cover letter from respondent to petitioner made it clear that petitioner had rejected the LCA and proposed FNDA of September 22, 2019, and that the October 21, 2019, FNDA was the only FNDA.

Per appellant's own admissions, he never filed or served upon respondent/appointing authority an appeal of the FNDA dated October 21, 2019.

Legal requirements for appeals were attached to the proposed FNDA of September 22, 2019, and the FNDA of October 21, 2019, and appellant was being advised by his union representative and had already retained legal counsel, and therefore appellant is deemed to have had full knowledge of the appeal requirements. Appellant claimed his return of the unsigned LCA and attached FNDA, received by the Commission on October 15, 2019, served as an appeal of the LCA/proposed FNDA. However, receipt of the unsigned LCA and proposed FNDA did not take place until after the 20-day appeal period would have ended; it did not contain the above-referenced information required by N.J.A.C. 4A:2-2.8(c), and at best an appeal of the September 22, 2019, proposed FNDA

would have only served as an appeal of the 120-day suspension set forth in the proposed FNDA. Appellant never filed an appeal of his termination. Additionally, even if appellant's letter to the Commission received on October 15 had been a proper form of appeal, no copy of such appeal was ever served on respondent; respondent only became aware of the October 15 filing because the Commission contacted them that day to obtain a copy of the PNDA, a document required to be part of an appeal but which appellant failed to provide to the Commission.

The proposed FNDA attached to the LCA would only have been the operative FNDA if appellant had accepted and executed the LCA. Because appellant did not accept and execute the LCA, I **FIND** that the proposed FNDA attached thereto was not the final, operative FNDA in this matter, and even if the September 22, 2019, proposed FNDA was the operative document, appellant failed to comply with the 20-day appeal deadline set out in N.J.S.A. 11A:2-15 and N.J.A.C. 4A:2-2.8(a), the appeal requirements set out in N.J.A.C. 4A:2-2.8(c), and failed to serve a copy upon respondent.

Appellant had relied on correspondence from Commission personnel stating that a timely appeal had been received. These statements carry no legal weight in the matter before this court. The Commission employees did not correctly calculate the 20-day time frame. Those employees confirmed that the correspondence sent by appellant on October 11, 2019, did not consist of a proper form of appeal letter, and arguably at best petitioner's letter only appealed the 120-day suspension. Personnel handling the intake of petitions at the Commission are not expected to make determinations on questions of fact and law; their statements did not reflect the fact that the 120-day suspension was only offered as part of the LCA, and that appellant's rejection of the LCA was a rejection of the proposed FNDA attached thereto. If appellant had signed the LCA and then properly appealed the 120-day suspension, and then respondent sent another FNDA calling for termination, there might be a stronger argument that those Commission employees correctly concluded that a second "appeal" need not be filed. But the personnel at the Commission failed to see that there was no FNDA calling for a 120-day suspension because appellant had rejected it by never executing the LCA, or that appellant was attempting to create the appearance that he had been issued a FNDA with

a 120-day suspension. Further, Commission personnel were unaware that appellant failed to serve a copy of his "appeal" on the appointing authority.

As appellant did not execute the LCA, I **CONCLUDE** that respondent acted properly in issuing a FNDA on October 21, 2019, and that the FNDA of October 21, 2019, was the only final, operative FNDA and the only FNDA that could have been appealed. As appellant never filed an appeal of the October 21, 2019, FNDA, I **CONCLUDE** that appellant never filed a proper, timely appeal of an FNDA, and therefore this matter is not properly before the Office of Administrative Law.

ORDER

The respondent's motion to dismiss is **GRANTED** and OAL Dkt. No. CSV 17964-19 is hereby **DISMISSED** without prejudice.

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.

March 23, 2021
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency

Date Mailed to Parties:

JNR/dw

APPENDIX
EXHIBITS

For appellant:

Brief, dated May 22, 2020

For respondent:

Brief, dated May 12, 2020
Brief, dated June 1, 2020