



**STATE OF NEW JERSEY**

**FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION**

In the Matter of Michael Johnson,  
Elmwood Park

CSC Docket No. 2021-1803

Request for Interim Relief

**ISSUED: JULY 2, 2021 (JET)**

Michael Johnson, a Police Officer with Elmwood Park, represented by Stuart J. Alterman, Esq., petitions the Civil Service Commission (Commission) for interim relief of the Commission’s May 10, 2021 letter decision, declining to address his request for Interlocutory Review.

As background, the petitioner was removed on charges of conduct unbecoming an employee, failure to perform duties, neglect of duty, insubordination and other sufficient cause. The appointing authority issued three Preliminary Notices of Disciplinary Actions (PNDAs) on July 10, 2019, asserting that Johnson conducted an inappropriate motor vehicle stop while on duty; inappropriately wrote a letter on the Police Chief’s stationery that was not authorized; and he made derogatory comments about his superior officers.<sup>1</sup> The departmental hearing was held in October 2019. The appointing authority issued three Final Notices of Disciplinary Action (FNDAs) on December 24, 2019, removing him effective December 24, 2019. Johnson appealed his removal and the matter was transmitted to Office of Administrative Law (OAL)

<sup>1</sup> The appointing authority alleged that petitioner pushed a device on an internal monitoring unit in his police vehicle five times in order to avoid detection that he had stopped; had followed the individual whom he had stopped after she filed an Internal Affairs complaint against him and pointed to his face indicating that he was watching her; and called his superiors “flaming fag.”

for a hearing. The matter was assigned to Administrative Law Judge Thomas R. Betancourt (ALJ).<sup>2</sup>

On February 17, 2021, the petitioner requested discovery from the appointing authority, including all training manuals, empirical articles and/or instructions provided by Captain Kassai of the Internal Affairs (IA) unit, which were utilized for conducting IA Investigations.<sup>3</sup> Petitioner planned to provide such information to his proposed expert witness for review. By letter dated March 1, 2021, the appointing authority stated that no discovery would be provided as the opportunity to request discovery had expired. In addition, on March 17, 2021, the appointing authority filed a motion requesting to bar the petitioner's proposed expert witness, Joseph Blaettler, from testifying at the OAL hearing. On April 9, 2021, the petitioner filed a response. Specifically, petitioner argued that the ALJ would be unable to obtain a clear, full picture of the facts without relying on such expert testimony, and he again requested discovery.

In his April 29, 2021 Order, the ALJ found the proposed expert testimony purported to explain the facts of the case; demonstrate who is credible; and lead to the legal conclusions the ALJ should draw. The ALJ determined that it was the appellant's burden to show that an expert witness is required. *See State v. Reeds*, 197 N.J. Super 280 (2009); *New Jersey Div. of Youth and Family Servs. V.P.R.*, 351 N.J. Super 427 (App. Div. 2002). The ALJ explained that the appellant must show that the subject matter is beyond the ken of the trier of fact; the opinions and conclusions of the expert are reliable; and the expert has sufficient expertise in the subject matter. The ALJ explained that, after two full days of hearing, nothing was beyond his ken in the instant case. The ALJ noted that it was within his province at the hearing to make factual determinations, credibility findings, and to demystify the concept of progressive discipline. The ALJ explained that he could accomplish the aforementioned tasks without the assistance from the proposed expert. Ultimately, the ALJ concluded that Johnson's proposed expert report was replete with legal conclusions and net opinions. Accordingly, the ALJ barred the proposed expert from testifying and denied the request for discovery. Specifically, the ALJ stated in the decision that:

[A] review of Mr. Blaettler's report reveals that it is replete with legal conclusions and net opinion. What appellant proposes is that Mr. Blaettler be permitted to testify and tell me what the facts of the cases are; who is credible; and what legal conclusions I should draw. It is the province of

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<sup>2</sup> Although the matter was adjourned on several occasions, hearings occurred on February 11, 2021 and on March 23, 2021. The hearing was scheduled to proceed on May 27, 2021 and on July 16, 2021. The appointing authority indicated that the matter was adjourned several times at the petitioner's request.

<sup>3</sup> Kassai testified at OAL on March 23, 2021.

the undersigned to make credibility findings. It is also the province of the undersigned to demystify the concept of progressive discipline. All of the above can be accomplished by the undersigned without assistance from an expert. In point of fact the undersigned has performed these tasks numerous times without the need of, or assistance from, an expert. In short, appellant's proposed expert report is an attempt to tell the undersigned what the facts are what legal conclusions I should draw from them. Nothing in this matter, after two full days of hearings, has been beyond my ken.

The ALJ also determined that:

[T]his matter was filed at the OAL on January 6, 2020. The first day of the hearing was February 11, 2021. Discovery should have been propounded and answered well before the first hearing date. Appellant was fully aware of who would testify, and as to what that testimony would cover. Specifically, the appellant knew Captain Kassai would testify. Indeed, Captain Kassai testified at Appellant's departmental hearing. Any material regarding Captain Kassai could have been, and should have been, requested well before the hearing commenced. Appellant's discovery request is untimely. There was more than a year between the date of filing with the OAL and the first hearing date. As such, Johnson had ample time to make an appropriate discovery request.

On April 30, 2021, the petitioner filed a request for Interlocutory Review with this agency, which was declined for review by letter decision dated May 10, 2021. The arguments presented in the Request for Interlocutory Review have been reiterated in this matter.

In his request for interim relief, the petitioner argues that the ALJ improperly barred the proposed expert from testifying and denied the request for discovery, which is prejudicial to his case. The petitioner maintains that the proposed expert testimony is relevant and probative to this matter, as it will assist the ALJ to obtain a clear understanding of the facts and to "demystify" the concepts of progressive discipline. Specifically, the petitioner asserts that the expert is knowledgeable and experienced with respect to the principles of progressive discipline, and such testimony will establish that the disciplinary charges against him are unjustified.<sup>4</sup>

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<sup>4</sup> The petitioner explains that the proposed expert possesses a Master's degree in Police Administration, is a certified public manager, is a graduate of the FBI National Academy, possesses

In this regard, the petitioner explains that the proposed expert will provide opinions pertaining to various errors that allegedly occurred during the IA investigation. The petitioner argues that the appointing authority's investigators inappropriately determined prior to the completion of the IA investigation that the petitioner would be removed, and such methods must be examined by the expert witness to determine if the resultant disciplinary sanction was appropriate. In this regard, the petitioner explains that the expert will provide an analysis pertaining to how the IA investigation was conducted, policies and procedures used to remove the petitioner, and information with respect to Civil Service rules and the Attorney General Guidelines. The petitioner argues that such testimony will address the inadequacy of the IA investigation and does not constitute a legal opinion and conclusion. Further, the petitioner asserts that such testimony is well within the expert's level of competence, knowledge, skill, experience and training, and is based on the facts and data made known to him at or before the hearing.<sup>5</sup> The petitioner contends that, although the ALJ is not required by law to be completely unknowledgeable about a subject prior to admitting expert testimony, the ALJ inappropriately determined in this matter that the proposed testimony is not beyond his "ken" or understanding in barring the expert. The petitioner maintains that his expert is highly qualified and experienced, and therefore, should not be reasonably viewed as taking away from the ALJ's level of ability or impartiality, and it is not within the ALJ's "ken" or discretion to determine that an expert would not aid the fact finder with deciding the case. Moreover, the petitioner maintains that he is entitled to present his witness in accordance with his due process rights.

With respect to the discovery request, the petitioner states that, following the hearing on February 11, 2021, it became necessary to request additional discovery, including training manuals, empirical articles and/or instructions which were used by Captain Kassai to conduct IA investigations. The petitioner opines that, since the disciplinary charges stem from the allegedly flawed IA investigation, it is necessary to obtain such information for the expert's review, so that he can provide testimony pertaining to such evidence at the hearing. Moreover, the petitioner argues that the appointing authority's denial of producing discovery is an attempt to deprive him of

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23 years of law enforcement experience and is a retired Deputy Police Chief, and is knowledgeable and experienced with respect to how IA investigations are conducted.

<sup>5</sup> The petitioner contends that the expert will also testify regarding such matters including, but not limited to, the appointing authority's offer of a settlement agreement and the petitioner's level of truthfulness with respect to the charges against him. The petitioner contends that the expert will establish that the appointing authority is disingenuous with respect to the disciplinary penalty, since it did not seek to remove him at the time it was discussing the proposed settlement agreement. Additionally, the petitioner states that, at the time the PNDAs were served, he was suspended without pay as a result of criminal charges that were issued against him, which have since been dismissed. Petitioner explains that the PNDAs were served approximately 30 days after he filed the motion to dismiss the criminal charges. The petitioner does not list what the criminal charges are or discuss what occurred that led to the charges in this matter. As such, the criminal charges do not appear relevant in this matter.

his due process and a fair defense in this matter, and any evidentiary deficiency should be cured in the interests of justice rather than be barred outright.

Additionally, the petitioner asserts that, since his Motion for Interlocutory Review was denied by this agency, it is now necessary to file the instant request for leave to file an appeal with the Appellate Division. The petitioner maintains that he has a clear likelihood of success on the merits, as he should be allowed to present his expert at the hearing in accordance with his due process rights. The petitioner states that the ALJ's decision to bar his expert is hindering his ability to present an adequate legal defense. The petitioner maintains that the lack of discovery and expert witness testimony will result in an incomplete record and, ultimately, he will experience irreparable harm due to the situation. The petitioner states that the only way he will avoid irreparable harm is by way of granting interim relief in this matter. Moreover, the petitioner argues that there is an absence of danger to others, the appointing authority would not be prejudiced if his request in this matter is granted, and the public interest is served by allowing the petitioner to present his expert.

In response, the appointing authority, represented by Arthur R. Thibault, Jr., asserts that petitioner's expert testimony does not meet the standards of admissibility, as it constitutes a net opinion.<sup>6</sup> The appointing authority asserts that, since the subject of such testimony is not based on reliable information and the generally accepted criteria in the industry, such testimony is inadmissible. In this regard, the appointing authority explains that the proposed expert testimony merely relies on personal views and is not supported by valid reasoning and methodology.<sup>7</sup> Further, the appointing authority asserts that the proposed testimony intends to explain what legal conclusions that the ALJ should render, which is not permitted by expert testimony. The appointing authority asserts that admitting such expert testimony would impede the ALJ's ability to apply the law. In this regard, the appointing authority explains that, by opining the removal was improper, the witness is impeding the province of the ALJ and the Commission who are tasked with

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<sup>6</sup> The appointing authority explains that the expert report would indicate that 1) the stop was not illegal from a constitutional standpoint 2) the petitioner had nothing to lie about during the IA investigation 3) the letter incident was minor in nature 4) there was no indication of any malice or deceit relating to the letter 5) there are several mitigating factors which must be considered to determine the punishment 6) the petitioner properly invoked his 5th amendments rights with respect to the derogatory incident, and 7) the parties engaged in settlement discussions which shows that there were other acceptable means of discipline.

<sup>7</sup> The appointing authority states that, while the expert's personal experience may be included as supporting information, such experience must include the generally accepted standards, practices, and customs of the relevant industry. The appointing authority explains that the Police Chief is responsible to issue disciplinary penalties for misconduct, and there is no recognized schedule of penalties for Police Officers that an expert may rely on to form an opinion as to the reasonableness of the penalty under a particular set of facts. Thus, the appointing authority maintains the witness opinion in this matter is without foundation.

rendering a conclusion regarding the removal.<sup>8</sup> The appointing authority asserts that an expert cannot testify as to the governing law and/or apply the law to the facts to form a legal conclusion. The appointing authority explains that matters of law and the legal conclusions, as well as the principles of progressive discipline and the disciplinary penalty, are clearly within the ALJ's purview to decide, subject to the Commission's ultimate decision.<sup>9</sup> Moreover, the appointing authority maintains that the expert opinion was properly excluded as it does not relate to a subject matter that is beyond the "ken" or understanding of the ALJ in this case, as expert testimony is not needed to explain information that an ALJ can understand himself.<sup>10</sup> Moreover, the appointing authority maintains that the proposed testimony with respect to the IA investigations are a red herring and are outside the scope of the expert report and are not supported by the record. The appointing authority explains that the two issues to be decided by the ALJ are whether the petitioner is guilty of the charges and if the removal was proper.

With respect to the discovery request, the appointing authority asserts that the request for discovery is untimely and was correctly denied. Specifically, the appointing authority maintains that petitioner waited 419 days to request discovery, as the matter was filed at OAL in December 2019 and the motion to produce the discovery was not filed until April 2021.<sup>11</sup> The appointing authority explains that OAL discovery rules are designed to eliminate surprise at trial and avoid ambush, as such, OAL imposes limitations on discovery requests. In this regard, the pertinent rules provide that the parties shall complete discovery no later than 10 days before the first scheduled evidentiary hearing or by such date ordered by the judge. Therefore, the appointing authority contends that the February 2021 discovery request was prohibited as it was beyond the proscribed 10-day timeframe. The appointing authority adds that the petitioner requested discovery after Kassai had testified at OAL, and since the petitioner was aware that Kassai testified at the

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<sup>8</sup> The appointing authority adds that the proposed expert testimony pertaining to the petitioner's credibility and truthfulness is inadmissible, as issues of credibility are not the proper subject of expert testimony. The truthfulness charge that would be discussed by the witness testimony is not a distinction and is not probative or necessary, and improperly impinges on the ALJ's role as fact finder.

<sup>9</sup> The appointing authority states that the ALJ and the Commission do not need the witness to demystify the concept of progressive discipline and are capable of making the final determination with respect to the disciplinary matter. The credibility issue is within the ALJ's purview to decide and a witness is not necessary for that issue. With respect to the settlement agreements, the appointing authority asserts that the expert witness cannot testify about the proposed settlement agreements, as OAL precludes such testimony. The appointing authority asserts that the expert witness testimony attempts to interpret AG guidelines which is a matter to be decided by the ALJ.

<sup>10</sup> The appointing authority asserts that the ALJ and the Commission are well versed in deciding such disciplinary matters and reviewing evidence, including the testimony of fact witnesses, and will ultimately decide if the removal was appropriate.

<sup>11</sup> As noted above, the petitioner initially requested discovery by letter in February 2021. The appointing authority explains that, not only did petitioner fail to request discovery on a timely basis, but he has requested to adjourn the hearing on numerous occasions, which has delayed the case.

departmental hearing, he should have expected that Kassai would testify at OAL.<sup>12</sup> In addition, the appointing authority maintains that the production of such discovery at this late date would necessitate undue consumption of time and create a substantial danger of undue prejudice. The appointing authority states that the information that is the subject of the discovery request is not related to the ultimate investigation that was conducted. The appointing authority maintains that although petitioner was afforded due process and fairness to make timely discovery requests, he did not avail himself of that opportunity, and even if he made such a request, it maintains the information is not probative in nature.<sup>13</sup>

Moreover, the appointing authority maintains that the petitioner has not met the standards for interim relief in this matter. The appointing authority asserts that the petitioner has not demonstrated a likelihood of success in this matter and there is no danger of irreparable harm to petitioner. The appointing authority maintains that it will experience irreparable harm if this matter is delayed further,<sup>14</sup> and the public interest will be harmed if interim relief in this matter is granted. The appointing authority asserts that the ALJ issued a legally correct determination and the petitioner's request for Interlocutory Review was declined. The appointing authority argues that, generally, an order is considered final if it disposes of all issues as to all parties. *See Silvierra-Francisco v. Bd. Of Educ. Of City of Elizabeth*, 224, N.J. 126 (2016). The appointing authority further asserts that the parties do not have a right to appeal an interlocutory order. *See Brundage v. Estate of Carambio*, 195 N.J. 575 (2008). It explains that an application to appeal from an interlocutory order shall be made by serving and filing with the agency from which the appeal is taken, and with the Appellate Court on motion for leave to appeal, within 20-days of such order. *See R. 2:8-1*. The appointing authority states that the courts generally uphold the stringent standards imposed on the finality of interlocutory orders. Moreover, the appointing authority maintains that the petitioner has not demonstrated any evidence of injustice that would warrant granting his request.

## CONCLUSION

*N.J.A.C.* 4A:2-1.2(c) provides the following factors for consideration in evaluating petitions for interim relief:

1. Clear likelihood of success on the merits by the petitioner;
2. Danger of immediate or irreparable harm;
3. Absence of substantial injury to other parties; and

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<sup>12</sup> The appointing authority adds that, prior to the departmental hearing, the petitioner was in possession of the IA reports, corresponding IA interview recordings, and transcripts prepared by Kassai, and counsel for petitioner was present when petitioner was questioned by Kassai.

<sup>13</sup> The appointing authority states that petitioner can present arguments regarding Kassai and the IA investigation at OAL.

<sup>14</sup> The appointing authority contends that the further in time that this matter is delayed, the more likely it will be that its witnesses will not recall the pertinent events that occurred.

4. The public interest.

Initially, the petitioner has not met the standards for interim relief as provided by *N.J.A.C.* 4A:2-1.2(c). The arguments presented in the instant request were previously presented in the petitioner's request for Interlocutory Review, and the Commission declined to review the request. The petitioner's attempt to request reconsideration of the prior May 10, 2021 letter decision declining to address his request for Interlocutory Review is without merit. The petitioner cannot now submit such issues for reconsideration in this format, and the Commission will not now address the arguments previously presented in the request for Interlocutory Review.<sup>15</sup> Moreover, the Commission finds that the May 10, 2021 letter decision declining to review the request for Interlocutory Review is now final.

*N.J.A.C.* 4A:2-1.2(g) in conjunction with *N.J.A.C.* 1:1-12.6 provides the factors for consideration in evaluating petitions for interim relief when hearings are pending at OAL. Based on the above rules, and the prior May 10, 2021 decision declining to review the request for Interlocutory Review, the Commission is satisfied that it is not necessary to grant the request. In this matter, the petitioner has presented no substantive evidence to show that there is any probable prejudice, special requirements, or other good cause that warrants granting his request. Additionally, the petitioner did not provide any substantive information to show that an emergent situation exists, nor any substantive evidence to show that some injustice occurred. As such, the petitioner did not meet his burden of proof in this matter. Moreover, the petitioner's due process rights have not been adversely affected, as he will have the opportunity to cross examine the appointing authority's witness testimony which will minimize any possible prejudice. Additionally, the petitioner may address any additional objections in that regard in his exceptions to the Civil Service Commission after the ALJ has issued an initial decision on the merits of the charges. Accordingly, the petitioner's request for interim relief is denied.

### ORDER

The Civil Service Commission orders that the petitioner's request for interim relief be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

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<sup>15</sup> By declining review, the Civil Service Commission, in essence, indicated its agreement with the ALJ's initial order. It finds nothing in the petitioner's current request to persuade it that its original determination to decline review was in error.



DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 30<sup>TH</sup> DAY OF JUNE, 2021

*Deirdre' L. Webster Cobb*

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