STATE OF NEW JERSEY

In the Matter of Mian Shi, Department of Human Services	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC Docket No. 2021-863	Minor Discipline Appeal

ISSUED: JULY 2, 2021 (SLD)

Mian Shi, a Manager 1, Fiscal Resources, with the Department of Human Services, represented by Casey P. Acker, Esq., appeals a five working-day suspension.

The record indicates that the appellant was served with notification of a five working-day suspension on charges of insubordination, intentional abuse or misuse of authority or position, neglect of duty, conduct unbecoming a public employee and other sufficient cause. Specifically, it was alleged that in a December 20, 2019 email to H.B., the Budget Director, and copied to other individuals in the appellant's division, the appellant, in part, criticized H.B.'s office for not completing the spending plan. Additionally, in a January 7, 2020 email to an outside State vendor, the appellant stated, in part, that the delay in paying invoices was due to understaffing and that the individual assigned had left. Finally, it was alleged that the appellant had, without justification, failed to process the invoices in a timely manner.

Following a departmental hearing, the Hearing Officer found that on September 6, 2019, the appellant attended a meeting regarding "a continued pattern of inappropriate behaviors" on the tone and content of her communications. During this meeting, the appellant was presented with charges of insubordination, intentional abuse or misuse of authority or position, conduct unbecoming a public employee and other sufficient cause. The Hearing Officer further found that on December 20, 2019, the appellant sent an email to the Budget Director, which the Budget Director described as inappropriate, unprofessional and did not display collaborative communication or demonstrate the divisional goal of service to employees and/or clients. The Hearing Officer also noted that on January 7, 2020, the appellant, in an email, informed a vendor that their payment was late due to lack

of staff. The Hearing Officer indicated that although it was unclear whether the appellant received her interim PAR rating, she had signed off on the Major Goals of the Ratee on June 29, 2018, which included the duty of "ensuring that all accounting and procurement transactions are performed clearly, accurately, timely and in compliance with State departmental and divisional policies." The Hearing Officer noted that based on the evidence and testimony, that the appellant's emails displayed an unpleasant and demeaning tone and content that were inappropriate for a work setting. Moreover, that the appellant's behavior negatively impacted her effectiveness and tarnished the collaborative relationship with her fellow employees and that the appellant had been previously warned that her behavior was inappropriate and needed to be corrected. Accordingly, the Hearing Officer found that the appointing authority had met its burden of proof and upheld the five working-day suspension. It was also noted that the appellant did not testify at the hearing.

On appeal to the Civil Service Commission (Commission), the appellant contends that the Hearing Officer's decision contained several errors. First, the appellant disputes that she never attended a meeting on September 6, 2019, nor was she presented with a copy of an exhibit contain a record of counseling/corrective action issued to the appellant. Moreover, the appellant argues that the Budget Directors' subjective feelings regarding the December 20, 2019, email cannot be used to uphold a five working-day suspension. The appellant also asserts that tone in an email is difficult to determine and that the email was only one email from a larger conversation. With regard to the June 7, 2020 email, the appellant maintains that there was nothing wrong with that email as it was truthful and instead, the appointing authority would have had her "mislead" the vendor. Further, with regard to the PAR, the appellant disputes that she was ever provided with the PAR or that she signed it on June 29, 2018. She argues that as the PAR was not presented until after the hearing, it cannot be used to support the charges. Furthermore, the appellant argues that with regard to her not testifying, as indicated by the union representative, she had "desired to be represented by legal counsel" but was prohibited from doing so by the appointing authority. Finally, the appellant argues that the Hearing Officer's selection by the appointing authority, speaks to a lack of impartiality and due process at the departmental hearing. She further argues that the Hearing Officer's decision completely failed to articulate how the charges were met. Therefore, she maintains that in the interest of fairness and procedural due process, she be afforded an opportunity to be represented by legal counsel in a hearing at the Office of Administrative Law (OAL).

Finally, the appellant maintains that although not required by the union contract, this appeal also presents issues of general applicability. Specifically, she argues that the appointing authority's policy of administering suspensions based upon third party subjective interpretations of emails without any progressive discipline is inappropriate. Additionally, she argues that the appointing authority's

policy that employees are prohibited from being represented by an attorney at the departmental hearing violates *N.J.S.A.* 11A:2-18 and *N.J.A.C.* 4A2-3.6, which provide that an employee "may be represented" by an attorney before a hearing before an appointing authority. Furthermore, she maintains that as attorney representation is specifically granted by statute, it is non-negotiable. In this regard, the appellant contends that attorney representation at departmental hearings does not meet the test for negotiability, set forth in *Local 195, IFPTE, AFL-CIO v. State,* 88 *N.J.* 393 (1982), as it does not "intimately and directly affect the work and welfare of public employees."

In response, the appointing authority initially notes that, with regard to the appellant's claim that she was prohibited from being represented by an attorney, this issue has been raised for the first time on appeal. Specifically, the appointing authority notes that the appellant failed to assert that she had the right to be represented by an attorney at the departmental hearing either to the Management Representative or the Hearing Officer. Therefore, her claim that it had illegally prohibited her from being represented by an attorney is factually incorrect as no denial of such a request ever occurred as no request was ever made. However, the appointing authority does acknowledge that if the request had been made, it would have been denied as *N.J.S.A.* 11A:2-18 and *N.J.A.C.* 4A2-3.6 do not mandate that an employee must be represented by an attorney. In this regard, the appointing authority contends that *N.J.S.A.* 11A:2-18 and *N.J.A.C.* 4A2-3.6 only state that an employee may be represented by an attorney. Moreover, it notes that Article VI.F.3 of the International Brotherhood of Electrical Workers (IBEW) Local 30 contract relevant to this matter specifically provides that the employee "may be represented at the hearing/meeting by a steward or an authorized union representative" and that an outside attorney "shall not be permitted to be present at the departmental hearing" except where criminal charges are pending.

Additionally, with regard to the appellant's complaints concerning the selection of the Hearing Officer, the appointing authority notes that the appellant did not present any objections to the Hearing Officer prior to the instant appeal. Moreover, the appointing authority notes that Article V.C.3.b, of the contract provide that the hearing officer is to be appointed by management. It also notes that an outside Hearing Officer was selected to ensure that the hearing was carried out objectively and impartially. Furthermore, the appointing authority maintains that the Hearing Officer made relevant and material findings of fact, and supported his recommendation.

Finally, with regard to the appellant's arguments concerning the testimony of the witnesses at the departmental hearing, the appointing authority notes that the appellant had ample opportunity to cross-examine the witnesses, present her own witnesses, and to testify herself.

In response, the appellant reiterates her arguments. Additionally, she maintains that the appointing authority's recitation of the union representative's failure to raise any objections prior to or during the departmental hearing fully demonstrates why the appointing authority's refusal to allow her to be represented by an attorney was inappropriate.

CONCLUSION

Initially, the appellant requests a hearing in this matter. Minor discipline appeals are treated as reviews of the written record. *See N.J.S.A.* 11A:2-6b. Hearings are granted in those limited instances where the Civil Service Commission (Commission) determines that a material and controlling dispute of fact exists which can only be resolved through a hearing. *See N.J.A.C.* 4A:2-1.1(d). No material issue of disputed fact has been presented which would require a hearing. *See Belleville v. Department of Civil Service,* 155 *N.J. Super.* 517 (App. Div. 1978).

N.J.A.C. 4A:2-3.7(a) provides that the minor discipline of State employees may be appealed to the Commission. The rule further provides:

1. The [Commission] shall review the appeal upon a written record or such other proceeding . . . and determine if the appeal presents issues of general applicability in the interpretation of law, rule or policy. If such issues or evidence are not fully presented, the appeal may be dismissed and the [Commission's] decision will be a final administrative decision.

2. Where such issues or evidence under (a)1 above are presented, the [Commission] will render a final administrative decision upon a written record or such other proceeding as the [Commission] directs.

This standard is in keeping with the established grievance and minor disciplinary procedure that such actions should ordinarily terminate at the departmental level.

Moreover, in considering minor discipline actions, the Commission generally defers to the judgment of the appointing authority as the responsibility for the development and implementation of performance standards, policies and procedures is entrusted by statute to the appointing authority. The Commission will also not disturb hearing officer credibility judgments in minor discipline proceedings unless there is substantial credible evidence that such judgments and conclusions were motivated by invidious considerations such as age, race or gender bias or were in violation of Civil Service rules. *See e.g., In the Matter of Oveston Cox* (CSC, decided February 24, 2010). A review of the record evidences no showing that either factor, which would warrant further Commission review, is present in this case.

With regard to the appellant's claims that the appointing authority's refusal to allow her to be represented by an attorney violated her due process rights. *N.J.A.C.* 4A:2-3.6(c) provides, in pertinent part, that for a hearing on a minor discipline matter at the departmental level, an employee **may** be represented "by legal counsel, an authorized union representative or appear on his or her own behalf," may call a reasonable number of relevant witnesses, and has the right to present evidence and examine witnesses. However, as there is no evidence that she was denied the right to call witness or to present any evidence and examine witnesses, her due process rights were not violated. Moreover, the appellant was represented by a union representative. The Commission is also not persuaded by the appellant's arguments that the provisions in the union contract prohibiting legal representation, unless criminal charges are present, violates Civil Service law or regulations. In this regard, *N.J.S.A.* 11A:2-18 and *N.J.A.C.* 4A2-3.6 merely provide that an employee *may* be represented. Moreover, although the appellant argues that this term cannot be negotiated pursuant to the test laid out in *Local 195,* it must be noted that the Commission does not have the jurisdiction to determine which terms and conditions of employment are negotiable. Rather, the authority to make such determination lies with the Public Employment Relations Commission (PERC). Therefore, as the contract at issue specifically prohibits legal representation at the departmental hearing for minor discipline matters, and Civil Service law and regulations does not mandate that an employee must be represented by legal counsel, this claim does not present any issues of general applicability and does not warrant further examination by the Commission.

With regard to the appellant's arguments concerning the hearing and the Hearing Office; it must be noted that none of her objections were raised during the proceeding, nor does the appellant claim that the Hearing Officer's decision was the result of invidious motivation. Other than the appellant's mere allegations, she has presented no evidence to dispute the Hearing Officer's findings. In this regard, in reviewing these matters, this agency must rely on the experience and judgment of hearing officers to adequately summarize testimony and make reasonable and rational conclusions. Based on this record, the appellant has not established an abuse by the appointing authority of its discretion in this minor disciplinary case. Therefore, there is no basis to disturb the Hearing Officer's conclusion and no further review will be conducted by the Commission.

ORDER

Therefore, it is ordered that this appeal be denied.

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 JUNE, 2021

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