STATE OF NEW JERSEY

In the Matter of Jamie Van Syckle, Department of Children and Families	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC Docket No. 2022-949	Request for Interim Relief

ISSUED: FEBRUARY 7, 2022 (SLK)

Jamie Van Syckle, an Assistant Family Service Worker 2, with the Department of Children and Families, represented by Todd J. Gelfand, Esq., petitions the Civil Service Commission (Commission) for interim relief of her removal, effective June 16, 2021.[1]

By way of background, on June 14, 2021, the petitioner was served with a Preliminary Notice of Disciplinary Action (PNDA) alleging violations of various administrative rules and State laws regarding ethical standards. Specifically, the petitioner was alleged to have misused her State employment to secure unwarranted advantages when she was pulled over by the police. Additionally, she was accused of divulging to the Police Officer confidential information concerning another Police Officer who had a prior matter with the Division of Child Protection and Permanency, which initially led to an immediate suspension with pay, effective June 14, 2021. On June 16, 2021, a pre-termination, or *Loudermill* hearing was held to determine whether the petitioner should be immediately suspended without pay and she was represented by her union at the hearing. *See Cleveland Board of Education v. Loudermill*, 470 *U.S.* 532 (1985). However, the petitioner's private counsel, Gelfand, also appeared at the hearing, but was advised by the appointing authority and the hearing officer that under the collective negotiations agreement (CNA), that the union was the sole representative for a departmental hearing. The hearing officer issued a determination finding that the petitioner should be immediately suspended without pay. Thereafter, Gelfand continued to contact the appointing authority's

[1] The petitioner originally filed this as a request for interim relief regarding her indefinite suspension without pay. However, the record indicates that on November 15, 2021, the appointing authority issued a Final Notice of Disciplinary Action removing her, effective June 16, 2021.

Office of Employee Relations, which reiterated that pursuant to the CNA, the union was the sole permitted representative for departmental hearings. On June 22, 2021, the appointing authority issued an amended PNDA seeking the petitioner's removal and advising that she was suspended without pay, effective June 16, 2021. Subsequently, the departmental hearing was held on August 4, 2021, and the petitioner was represented by her union. However, Gelfand also appeared at the hearing, which was conducted remotely. Consequently, the hearing was adjourned at the appointing authority's request because it indicated that the union was supposed to be the petitioner's sole representative. On August 13, 2021, the petitioner filed an Order to Show Cause with Temporary Restraints in Superior Court requesting to immediately restore her to pay status pending the outcome of the disciplinary hearing process, requiring discovery, requiring that Gelfand be able to represent her during the disciplinary hearing process, restraining the appointing authority from holding a departmental hearing without allowing for the petitioner to be represented by Gelfand, and temporarily restraining the appointing authority from scheduling and conducting the departmental hearing. On September 9, 2021, the court denied the petitioner's requests. On October 7, 2021, the departmental hearing was held, and the union declined to provide representation for the petitioner at the hearing. On November 15, 2021, the appointing authority issued a Final Notice of Disciplinary Action (FNDA), sustaining all charges against the petitioner and removing her, effective June 16, 2021, and an amended FNDA was issued on November 19, 2021 removing her, effective June 16, 2021.

In her request, the petitioner presents that she is a 15-year employee with a previously unblemished disciplinary record and was terminated after a hearing where she was provided no advanced discovery. The petitioner asserts that her discovery rights under *N.J.A.C.* 4A:2-2.6(c) were violated. She states that the hearing was 115 days after her suspension without pay, in disregard for the 30-day hearing rule under *N.J.S.A.* 11A:2-13 and *N.J.A.C.* 4A:2-2.5. The petitioner presents cases to argue that the remedy for these alleged violations is the dismissal of the administrative charges. Further, she indicates that under *N.J.A.C.* 1:1-14.1, she had the right to an open public hearing, which the appointing authority violated by not allowing her counsel to remain present, even as a non-participating member of the public. The petitioner asserts that not allowing her to have counsel was a violation of past practice under the negotiated departmental hearing procedure and the appointing authority violated the plain language of the CNA by its unwillingness to allow her counsel to represent her as the union's "designee." She states that *N.J.A.C.* 1:1-15.1 and *N.J.A.C.* 4A:2-2.6(b) provide her the right to counsel during a termination hearing. Additionally, she indicates that the appointing authority violated her *Loudermill* rights by not giving her any explanation as to its evidence in support of the charges at the pre-termination hearing. The petitioner presents that her departmental hearing was required to be held within 30 days and cites cases to support her argument that not holding the hearing until 115 days after she was suspended without pay violated her constitutional rights. She also states that the

departmental hearing did not meet the definition of a hearing as indicated in case law.

The petitioner argues that she is in danger of immediate and irreparable harm trying to support herself and her two daughters while being suspended without pay while alleging that statutes, regulations and the Constitution have been violated. The petitioner states that the Court indicated in *Loudermill* that if the employer "perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." The petitioner argues that there is a clear public interest in the Civil Service procedures and regulations being followed to protect employees from arbitrary action. She asserts that a 15-year employee with no prior discipline being immediately suspended without pay and terminated without receiving any discovery and the ability to be represented by counsel, is a clear violation of Civil Service law and rules, is outrageous and not "in the public interest."

In response, the appointing authority, represented by Ryan J. Silver, Deputy Attorney General, argues that the Civil Service Commission (Commission) lacks jurisdiction in this matter. It presents that *N.J.S.A.* 11A:2-13 and *N.J.A.C.* 4A:2-2.1(c) provide that when the State and the union enter into an agreement to a procedure for appointing authority review before disciplinary action is taken against a permanent employee in the career service, such process shall be the exclusive procedure for review before the appointing authority. In this matter, the appointing authority indicates that the CNA provides that exclusive procedures for departmental level appeals and hearing of all disciplinary matters and the petitioner must pursue any alleged violations of the disciplinary hearing process through the contract. Therefore, it argues that the petitioner's requests for interim relief must be dismissed

Further, the appointing authority argues that even if the Commission reviews the matter, the petitioner cannot satisfy the factors for interim relief. It asserts that she is not likely to succeed on the merits. Regarding the petitioner's claim that she has the right to private counsel, it states that her reliance on *N.J.A.C.* 1:1-15.1 is mistaken as that regulation only applies to contested cases before the Office of Administrative Law (OAL) or an agency head and not to disciplinary hearings at the departmental level. Further, it reiterates that the CNA provides the union is the exclusive representative for the disciplinary procedures at the departmental level and the petitioner was afforded union representation throughout the departmental disciplinary process. Concerning *N.J.A.C.* 1:1-14.1 and her claim that her rights were violated because she was not provided an open hearing where her counsel could be present, it asserts that this claim is meritless as this requirement also only applies to contested cases at the OAL. Further, the CNA does not provide for pre-hearing discovery, and even if it did, it would only respond to discovery requests from the union and not her private counsel.

Additionally, it contends that it is not obligated to hold the departmental hearing within 30 days under *N.J.S.A.* 11A:2-13 or *N.J.A.C.* 4A:2-2.5, as under the CNA, the appointing authority is not required to follow the requirements of these statutes or rules. Moreover, the appointing authority asserts that any delay in holding the departmental hearing was caused, at least in part, by the petitioner. It presents that the departmental hearing was initially scheduled for July 29, 2021, but was adjourned due to witness unavailability. The appointing authority indicates that the union was offered new dates for the hearing, but did not respond. Thereafter, it rescheduled the hearing for August 4, 2021, but despite being advised that the petitioner's counsel was not permitted to participate, Gelfand appeared and refused to leave. Therefore, with the consent of the union, the hearing was adjourned. On August 13, 2021, the petitioner filed an Order to Show Cause with Temporary Restraints in Superior Court, which prevented the appointing authority from rescheduling the hearing until that was resolved. Once that matter was heard, it states that it rescheduled the hearing as soon as possible. Additionally, it cites case law that indicates that failure to comply with the 30-day requirement is not grounds for dismissal of serious disciplinary charges. Also, the appointing authority asserts that it complied with *Loudermill* as the petitioner was served with the written charges, including the specification forming the basis of those charges. Moreover, she was provided with supporting documents and information in support of the charges at the departmental hearing and the opportunity to have union representation and respond at both the *Loudermill* and departmental hearings. It notes that the petitioner has the right to appeal the appointing authority's determination to the Commission and have a *de novo* hearing at the OAL where she will have the right to private counsel and pre-hearing discovery. Finally, the appointing authority presents that any procedural irregularities are cured by the *de novo* hearing at the OAL.

The appointing authority states that the petitioner is not at risk of irreparable harm as her claims are financial in nature and she will be entitled to full back pay if she ultimately prevails. It asserts that the balance of hardships weighs in its favor as the appointing authority and the State have a strong interest in the administration of their own appeal process, where the statute mandates that the appointing authority has the exclusive right to the departmental hearing process where agreed upon in the CNA and any contrary determination by the Commission would have a potential chilling effect on collective negotiations. The appointing authority emphasizes the serious nature of the charges against the petitioner and argues that the public interest is best served by not having the employee on the job pending the outcome of the appeal.

In reply, the petitioner argues that the Commission has jurisdiction over this interim relief application since the appointing authority indicates that FNDAs were issued on November 15 and 19, 2021, and she has the right to appeal to the Commission and have the matter transmitted to the OAL as a contested case. She presents that the Superior Court did not rule on the substance of this request and

has no bearing on this request as it is not binding on the Commission. The petitioner notes that there is a parallel/related civil suit in Superior Court connected to this matter, by which she asserts New Jersey Law Against Discrimination and civil rights violations against the appointing authority. She claims that the appointing authority misinterprets *N.J.S.A.* 11A:2-13 suggesting that because of the exclusivity of the CNA disciplinary appeal procedures, the Commission has no jurisdiction. The petitioner argues that the appointing authority's negotiated review of the disciplinary action is something different from the "hearing" referred to in the opening, 30-day hearing paragraph of *N.J.S.A.* 11A:2-13. She asserts that if the legislature meant to suggest that where the State negotiates a "hearing process" which is not subject to other statutory or regulatory requirement, it would have used the word "hearing" somewhere within the second paragraph. However, the petitioner claims that it does not appear that there is any prior authority for the proposition that where there is negotiated "appeal review procedure" internally within the State, the 30-day hearing rule does not apply. Moreover, *N.J.S.A.* 11A:2-13 explicitly refers to CNA for review procedures as an agreement "pursuant to the New Jersey Employer Relations Act," explicitly citing *N.J.S.A.* 34:13A-5.3. She presents that this statute suggests public employers may negotiate disciplinary appeal procedures to be subject to grievance procedures of the CNA, which include arbitration through PERC instead of through Civil Service. The petitioner highlights that the appointing authority concedes that she has the right to appeal to the Commission and have the matter transmitted to the OAL for a hearing. She indicates that *N.J.S.A.* 34:13A-5.3 also says that procedures negotiated for discipline "may not replace or be inconsistent with any alternative statutory appeal procedure, nor may they provide for binding arbitration of disputes involving the protection under tenure or civil service laws…" with the exception that minor discipline of civil service employees may be made arbitrable under the CNA with a public employer. The petitioner argues that there is no legal basis to support the appointing authority's conclusion that these two statutory provisions read together make the 30-day hearing rule of *N.J.S.A.* 11A:2-23, or any other of the petitioner's regulatory or statutory rights inapplicable. Further, she reiterates her argument that as a career service employee involved in a termination case, she has a right to due process and statutes and regulations cannot be interpreted in a way to violate those rights.

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
4. The public interest.

N.J.S.A. 11A:2-13 and *N.J.A.C.* 4A:2-2.1(c) provide that when the State of New Jersey and the majority representative have agreed pursuant to the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-5.3, to a procedure for appointing authority review before a disciplinary action is taken against a permanent employee in the career service or an employee serving a working test period, such procedure shall be the exclusive procedure for review before the appointing authority.

N.J.A.C. 4A:2-2.5(a)1 provides that an employee may be suspended immediately and prior to a hearing where it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services. *N.J.A.C.* 4A:2-2.5(b) states that where suspension is immediate and is without pay, the employee must first be apprised either orally or in writing, of why an immediate suspension is sought, the charges and general evidence in support of the charges and provided with sufficient opportunity to review the charges and the evidence in order to respond to the charges before a representative of the appointing authority.

N.J.S.A. 11A:2-13 and *N.J.A.C.* 4A:2-2.5(d) provides, in pertinent part, that a departmental hearing, if requested, shall be held within 30 days of the PNDA unless waived by the employee or a later date as agreed to by the parties.

N.J.A.C. 4A:2-2.6(b) provides that the employee may be represented by an attorney or authorized union representative in the hearing before the appointing authority.

N.J.A.C. 4A:2-2.6(c) provides that the parties shall have the opportunity to review the evidence supporting the charges and present and examine witnesses in the hearing before the appointing authority.

Initially, it is noted that the Commission has jurisdiction over this matter as a FNDA has been issued removing the petitioner, she has timely appealed her removal to the Commission, and that appeal has been transmitted to the OAL as a contested matter.

In this matter, the appointing authority alleged that when the petitioner was pulled over by the police for a possible traffic violation, she misused her position as a State employee when she knowingly tried to secure an unwarranted advantage by showing the police officer her State-issued identification. Additionally, it was alleged that she divulged confidential client information to the Police Officer concerning another Police Officer who had a prior case with the Division of Child Protection and Permanency. Clearly, these are serious allegations that warrant an immediate suspension as such allegations call in to question her fitness for duty and, thus, that

suspension without pay was necessary to maintain safety, health, order or effective direction of public services. *See N.J.A.C.* 4A:2-2.5(a)(1).

Initially, the information provided in support of the instant petition does not demonstrate a clear likelihood of success on the merits. A critical issue in any disciplinary appeal is whether or not the petitioner's actions constituted wrongful conduct warranting discipline. The Commission will not attempt to determine such a disciplinary appeal on the written record without a full plenary hearing before an Administrative Law Judge who will hear live testimony, assess the credibility of witnesses, and weigh all the evidence in the record before making an initial decision. Likewise, the Commission cannot make a determination on whether the petitioner's penalty of removal was inappropriate without the benefit of a full hearing record before it. Since the petitioner has not conclusively demonstrated that she will succeed in having the underlying charges dismissed as there are material issues of fact present in the case, she has not shown a clear likelihood of success on the merits. Further, while the Commission is cognizant of the petitioner's financial situation, the harm that she is suffering while awaiting her OAL hearing is financial in nature, and as such, can be remedied by the granting of back pay should she prevail in her appeal. Moreover, given the serious nature of the disciplinary charges at issue, the public interest is best served by not having the petitioner on the job pending the outcome of his appeal to the Commission.

Regarding the *Loudermill* hearing, the record reflects that the appointing authority complied with the requirements of *N.J.A.C.* 4A:2-2.5(b). The petitioner received written charges against her and general evidence in support of the charges at the time of her suspension. Specifically, the petitioner was served with a PNDA at the time she was immediately suspended, setting forth the charges and specifications for the charges. It is noted that the specification portion of the PNDA constitutes the general evidence in support of the charges. Additionally, she was afforded the opportunity to be represented by her union. Moreover, the petitioner was provided with sufficient opportunity to respond to the charges before the appointing authority. *See In the Matter of Robert Totten* (MSB, decided August 12, 2003); *In the Matter of Joseph Auer* (MSB, decided October 23, 2002).

Concerning the appointing authority's alleged procedural violations during the departmental hearings where the petitioner was not allowed to have her private counsel represent her, discovery was not presented in advance of the hearings, and the departmental hearing was not held within 30 days of the issuance of the PNDA, the appointing authority presents that pursuant to its CNA with the petitioner's union, the appointing authority's review is the exclusive procedure for departmental-level matters. *See N.J.A.C.* 4A:2-2.1(c). As such, it presents that pursuant to the CNA, the union was the sole representative permitted at these hearings and the petitioner had no right to private counsel at these hearings, there was no obligation for pre-hearing discovery, and to the extent there was such a right, it was the union

and not her attorney who had a right to such discovery, it was not subject to 30-day time frame to schedule the departmental hearing, and any delay in holding the department hearing was, at least in part, caused by the petitioner's counsel's actions. Further, any complaints about the departmental hearing were based on contractual violations and not Civil Service violations, which needed to be addressed through the grievance process.

To the extent that Civil Service rules are applicable, concerning the petitioner's request that the matter be dismissed because the departmental hearing was not held within 30 days of the issuance of the PNDA, the record indicates that most of the delay was due to the dispute as to whether the petitioner was entitled to private counsel at the departmental hearing. Regardless, the appointing authority's alleged failure to conduct a departmental hearing within 30 days pursuant to *N.J.S.A.* 11A:2-13 and *N.J.A.C.* 4A:2-2.5(d) does **not** mandate a dismissal of the charges. *See Goodman v. Department of Corrections*, 367 *N.J. Super.* 591 (App. Div. 2004); *In the Matter of Patrick Dunican*, Docket No. A-5937-99T1 (App. Div. November 2, 2001); *In the Matter of Francis Salensky* (MSB, decided April 6, 2005); *In the Matter of Dennis Tassie, et al.* (MSB, decided November 9, 1999); *In the Matter of Edward Wise* (MSB, decided July 19, 1999); *In the Matter of Kenneth Hixenbaugh* (MSB, decided February 24, 1998). Moreover, given the apparent attempts by the appointing authority to reschedule the hearing several times based on the apparent dispute between it, the petitioner, her attorney and her union, any such delays do not warrant any other form of remedy. In this regard, procedural deficiencies at the departmental level which are not significantly prejudicial to an appellant are deemed cured through the *de novo* hearing received at the OAL. *See Ensslin v. Township of North Bergen*, 275 *N.J. Super.* 352, 361 (App. Div. 1994), *cert. denied*, 142 *N.J.* 446 (1995); *In re Darcy*, 114 *N.J. Super*. 454 (App. Div. 1971).

Concerning the petitioner's argument that she had a right to an attorney at the departmental hearing, neither the New Jersey Constitution nor the provisions of Title 11A of the New Jersey Statutes or Title 4A of the New Jersey Administrative Code guarantee a right to counsel to parties in administrative proceedings.[2] *See Mira Shah v. Union County Human Services,* Docket No. A-2772-99T2 (App. Div. October 8, 2004). *See also, David v. Strelecki,* 51 *N.J.* 563 (1968), *cert. denied,* 393 *U.S.* 933 (1968), "[I]t is equally clear that the special rules attaching to criminal proceedings do not extend to administrative hearings." Nevertheless, at the *de novo* OAL hearing, the petitioner shall have the right to be represented by private counsel and may request discovery. *See N.J.A.C.* 1:1-5.1 and *N.J.A.C.* 1:1-10.1, *et seq*. Accordingly, the Commission finds no basis for interim relief.

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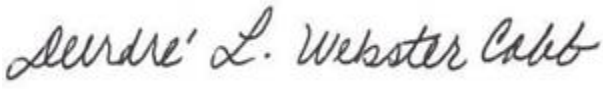
[2] In this regard, as *N.J.A.C.* 4A:2-2.6(b) provides that the employee **may be** represented by an attorney or authorized union representative in the hearing before the appointing authority, there is nothing prohibiting a negotiated agreement between an authorized representative and an appointing authority permitting only **one** type of representative in such proceedings.

ORDER

Therefore, it is ordered that this petition 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 2ND DAY OF FEBRUARY 2022



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