STATE OF NEW JERSEY

In the Matter of Thomas Valente
West Milford, Police Department

CSC Docket No. 2022-913
OAL Docket No. CSR 09305-21

DECISION OF THE
CIVIL SERVICE COMMISSION

Remand

ISSUED: APRIL 6, 2022 (NFA)

Thomas Valente, Police Lieutenant, West Milford, Police Department, removal, effective October 4, 2021, on charges, was before Administrative Law Matthew G. Miller (ALJ), who rendered his initial decision on February 28, 2022. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the attached ALJ's initial decision, including a thorough review of the exceptions and reply filed in this matter, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on April 6, 2022, did not adopt the ALJ's determination that the appeal should be dismissed pursuant to a settlement entered into between the parties.

DISCUSSION

The Commission thoroughly reviewed the ALJ's initial decision, as well as the exceptions and reply filed in this matter. The Commission regularly acknowledges settlements where such settlements are in compliance with Civil Service law and rules. In this regard, the policy of the judicial system strongly favors settlement. *See Nolan v. Lee Ho*, 120 *N.J.* 465 (1990); *Honeywell v. Bubb*, 130 *N.J. Super.* 130 (App. Div. 1974); *Jannarone v. W.T. Co.*, 65 *N.J. Super.* 472 (App. Div. 1961), *cert. denied*, 35 *N.J.* 61 (1961). This policy is equally applicable in the administrative area. A settlement will be set aside only where there is fraud or other compelling circumstances. *See Nolan, supra.* In this matter, the Commission finds compelling circumstances. Specifically, the purported settlement was

apparently entered into by the appellant's previous attorney via e-mail and telephone communications prior to a departmental-level hearing being held. Nevertheless, the appointing authority subsequently held the departmental hearing, sustained the charges and issued a Final Notice of Disciplinary Action. These actions by the appointing authority cut against its argument that a valid settlement had been reached as there would be no need for such a hearing if there was truly a settlement. Additionally, while the appellant's prior attorney may have had the authority to settle the matter, there is no indication that the appellant ever signed any document memorializing the terms of the settlement. While the lack of a signature is not dispositive, given the appointing authority's contrary actions described above, to dismiss the appellant's appeal on this basis would be inequitable. Accordingly, the Commission remands the matter to the Office of Administrative Law for a hearing on the merits of the charges. The Commission notes, however, that this determination does not foreclose the parties from further agreeing to settle the matter.

ORDER

The Civil Service Commission remands the appeal of Thomas Valente to the Office of Administrative Law for a hearing.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6TH DAY OF APRIL, 2022

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

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and
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. CSR 09305-2021
AGENCY DKT. NO. 2022-913

THOMAS VALENTE,
Petitioner,
v.
BOROUGH OF WEST MILFORD,
Respondent.

Frank C. Cioffi, Esq. for petitioner (Sciarra & Catrambone, attorneys)

Deena B. Rosendahl, Esq. for respondent (DeCotiis, Fitzpatrick, Cole & Giblin, attorneys)

Record Closed: February 11, 2022 Decided: February 28, 2022

BEFORE: **MATTHEW G. MILLER, ALJ**

STATEMENT OF THE CASE

Petitioner, Thomas Valente, was employed as a lieutenant with the Township of West Milford[1] Police Department (Respondent or Township). During an August 11, 2021 departmental hearing, charges of neglect of duty, neglect of supervision, violation of the departmental dating

[1] Improperly pled as the Borough of West Milford

policy and of lying during an internal affairs investigation were sustained. As a result of those findings, he was removed from his position on October 4, 2021.

PROCEDURAL HISTORY

On October 4, 2021, Respondent forwarded a Final Notice of Disciplinary Action to Lt. Valente, terminating his employment with the Borough's police department effective immediately.

The following day (October 5, 2021), Petitioner mailed a Petition for Appeal to the Civil Service Commission and the Office of Administrative Law (OAL). That appeal was perfected on October 20, 2021 and was transmitted to the OAL that day for a hearing as a contested case. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

An initial conference was held on December 8, 2021, which was following by additional conferences on December 13, 2021 and January 5, 2022. Following the filing of a Motion to Enforce Settlement by Respondent, an opposition brief by Petitioner and a reply brief by Respondent, oral argument was held on February 11, 2022, after which the record closed.

Factual Background

The basic facts and nature of the case are not in dispute. On April 21, 2021[2], Respondent received an anonymous complaint concerning an allegedly improper personal relationship between Petitioner and a subordinate police officer.

On May 27, Michael J. Mitzner, Esq. of Mitzner & Mitzner, P.C. entered an appearance on behalf of Lt. Valente. At some point, but no later than June 14, communications began between Mr. Mitzner and Deena B. Rosendahl, Esq. (then of Kaufman, Semeraro & Leibman, L.L.P.), who represents Respondent, which ultimately led to the drafting of a "settlement agreement" in mid-June.

However, on July 1, Petitioner's current counsel substituted in for Mr. Mitzner and took the position that the matter had not settled. Despite expressing Respondent's belief that the matter

[2] All dates are 2021 unless specified

had indeed settled, ultimately a departmental hearing was conducted on August 11. Subsequent to that hearing, four charges were sustained against Petitioner, and he was removed from his position as a lieutenant in the Borough's police department effective October 4.

Motion

Respondent has filed a Motion to Enforce Settlement, arguing that prior to the August 11 departmental hearing, after an extensive negotiation with his Mr. Mitzner, it had reached a full and final settlement of the disciplinary charges with Lt. Valente.

Petitioner opposes the motion, claiming that Mr. Mitzner had neither actual nor apparent authority to settle the matter on his behalf and, further, that no settlement was ever reached.

If Respondent prevails on this motion, the merits of the case are never reached and that the appeal must be dismissed.

Legal Arguments

Petitioner

Petitioner is propounding a multi-pronged argument.

First, he argues that Mr. Mitzner did not have either actual or apparent authority to settle the case on behalf of Lt. Valente and that there is a clear factual dispute that would necessitate either a denial of the motion of, alternatively, a plenary hearing to resolve the dispute.

It is also argued that the proposed agreement was never finalized by either party, with no evidence that it had been approved by the Borough's Mayor, let alone Lt. Valente.

It was also argued that, even in the absence of a certification from Lt. Valente or Mr. Mitzner, that Petitioner's conduct was indicative of the fact that Mr. Mitzner did not have authority to enter into a settlement agreement.

In support of his position, Petitioner cites to City of Jersey City v. Roosevelt Stadium Marina, Inc., 210 N.J. Super. 315 (App. Div. 1986), United States Plywood Corp. v. Neidlinger, 41 N.J. 66 and Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995).

Respondent

Respondent argues that parties clearly reached a settlement over the course of telephone calls and e-mails that took place from June 14 – June 21, which were then documented in a detailed written settlement agreement.

Citing to the long-standing public policy in favor of settlements as well as what it argues to be the clear (both actual or, as a fallback position, apparent) authority of Mr. Mitzner to settle the matter, Respondent argues that per Amatuzzo v. Kozmiuk, 305 N.J. Super. 469 (App. Div. 1997) and its progeny, the granting of the motion is appropriate.

It was emphasized that at no time did either Lt. Valente or Mr. Mitzner (as opposed to current counsel) ever provide any evidence or argument that Mr. Mitzner did not have authority to settle the case or that Lt. Valente did not agree to its terms. Given that, there was no need for a plenary hearing.

In essence, Respondent argued that after agreeing to settle the case, Lt. Valente had second thoughts or buyer's remorse as evidence by new counsel's insistence that any "new" settlement would include him maintaining his employment. That, it is argued, is insufficient to renege on a previously agreed to resolution of the matter.

Timeline

Perhaps the best way to understand the issues raised by this motion is to create a detailed timeline from the onset of the dispute on April 21, 2021 through the time of the filing of appeal with the CSC.

> 04/21/21 – Respondent receives an anonymous complaint alleging that Petitioner was engaged in an improper relationship with a subordinate. **(Exhibit R-A)**

05/12/21 – Respondent issues an Internal Affairs Notice advising Petitioner of the complaint. **(Exhibit R-A).**

05/13/21 – Respondent issues an Administrative Advisement Form to Petitioner, advising him that he is the subject of an internal affairs investigation, which he acknowledges via his signature. **(Exhibit R-B)**

05/26/21 – Respondent issues a series of Internal Affairs Charging Forms and setting a hearing date of June 1, 2021. **(Exhibit R-C)**

05/27/21 – Letter from Petitioner's former counsel (MM) to Respondent, entering his appearance, requesting discovery and requesting an adjournment of the June 1 hearing. **(Exhibit P-2)**

06/02/21 – Preliminary Notice of Disciplinary Action issued to Petitioner and setting a new hearing date of June 21, 2021. **(Exhibit P-3)**

06/03/21 – Internal Affairs Investigation Disposition Form executed by Respondent. **(Exhibit P-3)**

06/11/21 – Internal Affairs Charging Form issued by Respondent. **(Exhibit R-C)**

06/15/21 (12:53 p.m.) – e-mail from MM to Respondent's counsel (DR), confirming their discussion of the previous day and "setting forth...a proposed settlement agreement to resolve all aspects of this matter". He also asked that she discuss same with Respondent and "put a proposed agreement together, containing all of the terms set forth below, for signature by both parties after they have had a chance to review it". The proposed terms are then set forth in twelve numbered paragraphs. **(Exhibit R-E)**

06/15/21 (5:18 p.m.) – e-mail from DR to MM covering Respondent's response in Red highlights. **(Exhibit R-E)**

06/16/21 – e-mail from MM to DR, accepting the "general parameters of the settlement agreement as set forth in our email and your comments in your June 15, 2021 email" as being "acceptable to Lt. Valente, subject to working out the actual language and preparing a formal Agreement." The e-mail also confirmed the adjournment of the June 21 hearing. **(Exhibit P-4)**

06/18/21 – e-mail from DR to MM, attaching the settlement agreement "in draft form" and noting that it is "subject to review by the Mayor" and requesting a list of department equipment in Lt. Valente's possession. The settlement agreement consists of twenty-two paragraphs over nine pages. **(Exhibit R-F)**

06/21/21 – e-mail from DR to MM attaching "an updated proposed settlement agreement", with the only change being the addition of "a detailed list of property to be returned". **(Exhibit R-G)**

07/01/21 – Substitution of Attorney executed by Messrs. Mitzner and Cioffi (FC). **(Exhibit P-5)**

07/09/21 – Letter from FC to DR enclosing Substitution of Attorney, advising that Petitioner is open to resolving the case and requesting discovery. **(Exhibit P-6)**.

07/15/21 – Letter from DR to FC advising, in essence, that the matter had already been settled. **(Exhibit P-7)**.

07/21/21 – Letter from DR to FC maintaining Respondent's position that the matter had settled, but scheduling, without prejudice, a new hearing from August 11, 2021. **(Exhibit P-8)**.

08/11/21 – Departmental hearing held. **(Exhibit P-9)**

10/04/21 – Notice of Final Disciplinary Action issued by Respondent, with Petitioner to be removed from his position effective immediately. **(Exhibit P-2)**

10/05/21 – Letter from FC to the Civil Service Commission (CSC) and the OAL covering the disciplinary appeal. **(Exhibit P-12).**

10/06/21 – Appeal received by the CSC.

10/13/21 – Appeal received by OAL.

10/20/21 – Appeal perfected.

Law and Analysis

The New Jersey Supreme Court has modified and clarified the analysis required when considering a motion for summary decision/judgment. In Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), the Court adopted the summary judgment standard utilized by federal courts:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to

> weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." [Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986).] . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. Liberty Lobby, supra, 477 U.S. at 250, 106 S. Ct. at 2511, 91 L. Ed. 2d at 213. The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214, the trial court should not hesitate to grant summary judgment.
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> [Id. at 540.]

The burden is on the moving party to exclude all reasonable doubt as to the existence of any genuine issue of material fact, and all inferences of doubt are drawn against the moving party and in favor of the non-moving party. Saldana v. DiMedio, 275 N.J. Super. 488, 494 (App. Div. 1994). The critical question therefore is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one-sided that one party must prevail as a matter of law." Brill, supra, 142 N.J. at 533 (citation omitted). If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See, Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998).

This standard has been held to apply to contested motions to enforce a settlement with the party seeking to establish that a settlement had been entered into having the burden of establishing same. Amatuzzo v. Kozmiuk, 305 N.J. Super. 469, 475 (App. Div. 1997).

It should also be noted that;

> New Jersey has a long-standing public policy in favor of the negotiated settlement of disputes. Zuccarelli v. Department of Envtl. Protection, 326 N.J. Super. 372, 380, 741 A.2d 599 (App.Div.1999); Pascarella v. Bruck, 190 N.J. Super. 118, 124, 462 (App. Div.) A.2d 186 , certif. denied 94 N.J. 600, 468 A.2d 233 (1983). It would be contrary to that policy to permit a litigant, years later, to assert that he or she, at the time of executing the release, had an intent that had not been communicated to anyone else. Other parties to the litigation would have no realistic way to defeat that newly-stated assertion.
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> Domanske v. Rapid-American Corp., 330 N.J. Super. 241, 246 (App. Div. 2000). See also, Nolan v. Lee Ho, 120 N.J. 465, 472

> (1990) [quoting Jannarone v. W.T. Co., 65 N.J. Super 472, 476 (App. Div.), certif. denied, 35 N.J. 61 (1961)].

In the instant case, there are potentially two legal issues in play. First, it must be determined whether Petitioner's former attorney had either actual or apparent authority to effectuate a settlement of the case. Then, if it is determined that he had either actual or apparent authority, it must be determined whether an enforceable settlement was reached.

While Amatuzzo was eventually remanded for an evidentiary hearing (an issue that will be discussed below), the decision provides an excellent primer on the basic law of what constitutes a valid settlement and when it should be enforced. There, an eleven paragraph "Stipulation of Settlement" was drafted following negotiations between counsel for the parties. Prior to a scheduled pretrial conference, plaintiff's counsel advised the court, with a copy to defense counsel, that the matter had been resolved and the stipulation would be filed within ten days. The settlement was contingent upon plaintiff examining the premises involved on a specific date and time "to verify its condition". Id. at 471.

The stipulation that was sent to defense counsel was undated but contained the signature of both plaintiff and plaintiff's counsel. The defendant failed to appear for the inspection and refused to sign the stipulation. The plaintiff then filed the motion to enforce and in reply, a substitution of attorney was filed by replacement defense counsel and the defendant filed a certification in opposition to the motion claiming that he "did not enter into any settlement agreement with the plaintiff in this case". He further certified that he had advised his attorney that he strenuously objected to the terms of the agreement "and never authorized her to settle the case on the terms demanded by plaintiff". He also noted that no paperwork had been signed by either him or his attorney. Id. at 472-73.

In discussing the issue of enforcement, the Court held;

> The general rule is that unless an attorney is specifically authorized by the client to settle a case, the consent of the client is necessary. City of Jersey City v. Roosevelt Stadium Marina, Inc., 210 N.J. Super. 315, 327, 509 A.2d 808 (App.Div.1986) (citing Stout v. Stout, 155 N.J. Super. 196, 203-04, 382 A.2d 659 (App.Div.1977)). Negotiations of an attorney are not binding on the client unless the client has expressly authorized the settlement or the client's voluntary act has placed the attorney in a situation wherein a person of ordinary prudence would be justified in presuming that the

> attorney had authority to enter into a settlement, not just negotiations, on behalf of the client. United States Plywood Corp. v. Neidlinger, 41 N.J. 66, 74, 194 A.2d 730 (1963) (citing and quoting J. Wiss & Sons Co. v. H.G. Vogel Co., 86 N.J.L. 618, 621, 92 A. 360 (E. & A.1914)). HN4[ ]
>
> Thus, in private litigation, where the client by words or conduct communicated to the adverse attorney, engenders a reasonable belief that the attorney possesses authority to conclude a settlement, the settlement may be enforced. However, the attorney's words or acts alone are insufficient to cloak the attorney with apparent authority. Seacoast Realty v. West Long Branch, 14 N.J. Tax 197, 203 (1994) (citing Hallock v. State, 64 N.Y.2d 224, 230, 474 N.E.2d 1178, 1181, 485 N.Y.
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> Id. at 475.

The pre-eminent case on apparent or actual authority in New Jersey is United States Plywood Corp. v. Neidlinger, 41 N.J. 66 (1963). There, in a case involving the payment of a creditor by a debtor company, the plaintiff asserted during the hearing "nothing had been introduced to establish that (its attorney) was authorized to make a binding settlement on its behalf". Id. at 70.

The Court disagreed, noting that;

> The plaintiff knew that the meeting of May 18th had been specifically called to consider the settlement of creditors' claims. It sent its attorney Mr. Green, who is also its attorney in the present litigation. Throughout the meeting Mr. Green acted on its behalf. He was appointed to the creditors' committee which took over the defendant's assets and he thereafter acted as a member of that committee. His connection with the committee was never questioned by the plaintiff. If Mr. Green approved a settlement agreement, he presumptively had his client's authority to take that action.
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> Id. at 73-74, cit. omitted.

United States Plywood has been cited with approval on multiple occasions, including in Amatuzzo, as well as in Trufolo v. Trufolo, 2015 N.J. Super. Unpub. LEXIS 2374. That case concerned an ejectment action and counsel for both parties appeared before the court and advised that while other actions in other courts remained pending between the parties, this specific action had settled and the terms of same were put on the record. Defense counsel

expressed to the court that despite his client not appearing at the trial, "(h)e totally understands the terms. I have the ability to consent to those terms, which were arrived at a meeting on Thursday afternoon." He further expressed that it was plaintiff's counsel who wanted the settlement placed on the record. The matter was then marked settled by the court. Id. at 3-4.

After continued attempts to resolve the other matters, defense counsel withdrew from the case and the defendant, now *pro se*, filed a motion to vacate the settlement and the plaintiff cross-moved to enforce. The trial court granted plaintiff's cross-motion and an appeal ensued. Contrary to the scenario in Amatuzzo, the defendant's certification did not allege that he had not agreed to or authorized his former attorney to settle the case but argued that he was under "extreme pressure" and that "due to his medical condition", he was "unable to comprehend the circumstances of the verbal agreement". He conceded, however, that he knew about the settlement and that he was represented by counsel. Id. at 7-8.

In a succinct, but comprehensive opinion, the court noted that;

> It is a well-settled principle that agreements "made by attorneys when acting within the scope of their authority are enforceable against their clients.'" *Jennings v. Reed*, 381 N.J. Super. 217, 230, 885 A.2d 482 (App. Div. 2005) (quoting *Carlsen v. Carlsen*, 49 N.J. Super. 130, 137, 139 A.2d 309 (App. Div. 1958)). '"[I]t is the clear policy of our courts to recognize acts by the attorneys of the court as valid and presumptively authorized[.]'" *Id.* at 231 (quoting *Bernstein & Loubet, Inc. v. Minkin*, 118 N.J.L. 203, 205, 191 A. 733 (E. & A. 1937)). "Consequently, an attorney is presumed to possess authority to act on behalf of the client, and the party asserting the lack of authority must sustain 'a heavy burden to establish that [his] attorney acted without any kind of authority[.]'" *Ibid.* (citations omitted).
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> Moreover, '"New Jersey law recognizes two types of authority to settle a lawsuit which would bind its client: actual, either express or implied, and apparent authority.'" *Burnett v. Cnty. of Gloucester*, 415 N.J. Super. 506, 513, 2 A.3d 1110 (App. Div. 2010) (citation omitted). Even if defendant had certified that his counsel lacked actual authority, "the circumstances here gave rise to an apparent authority" on which plaintiff and the trial court could rely. United States Plywood Corp. v. Neidlinger, 41 N.J. 66, 74, 194 A.2d 730 (1963). On September 23, defendant did not appear. Given defendant's non-appearance on the day of trial, when his counsel "approved a settlement agreement, he presumptively had his client's authority to take that action." See id. at 73-74. Thus, "the client's voluntary act has placed the attorney in a situation wherein

> a person of ordinary prudence would be justified in presuming that the attorney had authority to enter into a settlement, not just negotiations, on behalf of the client." *Amatuzzo, supra*, 305 N.J. Super. at 475 (citing United States Plywood Corp, supra, 41 N.J. at 74). Therefore, even ignoring that the parties and counsel had negotiated on September 19, 2013, and that, on September 23, 2013, defendant's counsel made clear he had defendant's actual authorization (which defendant has not denied) to enter into the settlement reached on September 19, the settlement on the day of trial was supported by apparent authority. *See Jennings, supra*, 381 N.J. Super. at 231-32.
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> Id. at 8-9. See also, State v. Real Prop., 2009 N.J. Super. Unpub. LEXIS 2413 at 8-9.

The court found, very simply, since the "defendant has not certified or even alleged that the settlement was not supported by actual or apparent authority", there was a settlement. Ibid., cit. Amatuzzo, 305 N.J. Super. at 475.

This issue is also discussed in impressive detail in Releasee I v. Golembreski, 2017 WL 11037010 (N.J. Super. L. Apr. 13, 2017).[3] In particular, it's exploration of the concepts of actual (express or implied) and apparent authority is worth repeating.

> Under the concept of "implied authority," the attorney, as agent, is authorized to do what he/she may reasonably infer the principal desires him to do in light of the principal's manifestations and the facts that the agent knows or should know when he acts. Lampley v. Davis Mach. Corp., 219 N.J. 540, 548 (App. Div. 1987). In connection with implied authority, the focus is on the agent's reasonable perception of the principal's manifestations toward him.
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> Id. at 2.

As for apparent authority;

> On the other hand, under the concept of "apparent authority," the principal is bound by the act of his agent within his apparent authority, which he knowingly permits an agent to assume or which he holds the agent out as possessing. Reynolds Offset Co. v. Summer, 58 N.J. Super. 542, 558 (App. Div. 1959), certif. denied, 31 N.J. 554 (1960). Such authority exists "when a third party reasonably believes the actor has authority to act on behalf of the

[3] **Exhibit R-H**

> principal and that belief is traceable to the principal's manifestations. AMB Property, LP v. Penn Am. Ins. Co., 418 N.J. Super. 441 (App. Div. 2011). The attorney's words or actions alone are not sufficient to give rise to such apparent authority, Amatuzzo, supra at 476. However, an attorney is presumed to possess the authority to act on behalf of a client, a presumption which the client has a "heavy burden" of overcoming. Jennings v. Reid, 381 N.J. Super. 217, 231 (App. Div. 2005) (quoting Sun Ins. Co. of Cal. v. Williams, 729 F.2d 581, 583 (8th Cir. 1984).
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> Ibid.

In the case at bar, it is the e-mails authored from June 15 – 21, 2021 that are obviously the key to this decision. More specifically, it is the June 15 and 16 e-mails e-mail that clearly illustrate that, at the very least, Mr. Mitzner had apparent authority to not only negotiate a potential settlement, but also the actual authority to enter into one. First, the June 15 e-mail from Mitzner to Rosendahl;

> As we discussed yesterday, we are setting forth below a proposed settlement agreement to resolve all aspects of this matter. As we also discussed, these provisions are necessary to secure Lt. Valente 15 years in the pension plan, so that he would qualify for a retired officer ID and carry permit, which would be helpful to him if he tries to get some type of security or security related job.
>
> We would appreciate your discussing this with your client and advising us as quickly as possible as to its acceptability to West Milford. Once that is achieved, we would ask that you put a proposed agreement together, containing all of the terms set forth below, for signature by both parties after they have had a chance to review it.
>
> Additionally, if you can get figures as to the benefits that would be due to Lt. Valente in addition to his normal pay, please provide that information to us as well.
>
> In light of the rapidly approaching Hearing date, your cooperation in responding as quickly as possible will be greatly appreciated.
>
> **(Exhibit R-E)**.

This language was followed by a twelve-paragraph settlement proposal from Mr. Mitzner.

In reply to that e-mail, later that day, Ms. Rosendahl supplied Respondent's reply to the proposal, including the provision of accumulated service time figures. **(Exhibit R-E)**.

Most vitally, on June 16, Mr. Mitzner replied as follows;

> As we discussed today, the general parameters of the settlement agreement as set forth in our email and your comments in your June 15, 2021 email are acceptable to Lt. Valente, subject to working out the actual language and preparing a formal Agreement.
>
> We understand that the June 21, 2021 Hearing has been adjourned and that you will get us a draft of a proposed formal Agreement within the next few days
>
> **(Exhibit P-4)**

From this e-mail it is clear that Lt. Valente was not only aware of the settlement negotiations, but also had been apprised of and had approved the revisions to the original proposal by Respondent. And, as was emphasized by Respondent during oral argument, as a direct consequence of this e-mail, the disciplinary hearing scheduled for June 21 was adjourned. This is not a case of a passive, uninvolved party whose attorney ran amok. Rather, per the e-mails, there had been very specific discussions concerning reasoning behind the terms of the agreement, which was to achieve an outcome most favorable to his future employment. When a counterproposal was propounded by Respondent, per Mr. Mitzner, this was specifically discussed and approved by Lt. Valente.

And, as important for the purpose of deciding this motion, literally no evidence has been provided to even infer that (at any time);

a. Mr. Mitzner did not represent Lt. Valente.
b. Mr. Mitzner was not authorized to enter into settlement negotiations with Respondent.
c. Mr. Mitzner was not authorized to accept the settlement terms offered by Respondent.

Given the evidence and argument submitted in the matter, I **FIND** that Respondent has demonstrated that Mr. Mitzner had, at the very least, implied actual authority from Lt. Valente to not only enter settlement negotiations on his behalf, but also to enter into a settlement agreement. I further **FIND** that even if no such actual authority existed, the manner in which the negotiations played out would lead Respondent to believe that that Mr. Mitzner had such (apparent) authority.

The next question to be answered is whether the agreement that was reached was sufficient to constitute a settlement. As noted in Mosley v. Femina Fashions, Inc., 356 N.J. Super. 118 (App. Div. 2002), certif. denied, 176 N.J. 279 (2003), which confirmed that;

> Before a settlement agreement may be enforced, however, there must be an agreement to the essential terms of the agreement.
>
> Id. at 126.

Merely because an actual agreement has not been signed does not mean that an enforceable settlement has not been reached;

> Where the parties agree upon the essential terms of a settlement, so that the mechanics can be "fleshed out" in a writing to be thereafter executed, the settlement will be enforced notwithstanding the fact the writing does not materialize because a party later reneges. Bistricer, 231 N.J. Super. at 145, 555 A.2d 45.
>
> Lahue v. Pio Costa, 263 N.J. Super. 575 at 596 (App. Div. 1993).

While Petitioner argues that this was only a "draft" settlement agreement, he largely omits reference to the June 16 e-mail where Mr. Mitzner, after consultation with Lt. Valente, accepts the revised terms of the document. What was agreed to was clearly more than "the broad parameters" of a settlement but was rather "clearly the essential terms of the settlement". Ibid. The factual scenario is different than that of Mosley, where the settlement offer was contingent on the plaintiff executing an agreement including various terms, including a non-admission of liability clause, none of which were ever "drafted or approved". The court there found those terms to be essential and denied a motion to enforce. Mosley, 356 N.J. Super. at 126.

There is no legitimate question that the document attached to the e-mails in the subject case, upon which both parties commented on and revised, contained all the "essential terms" of any potential settlement. It was very detailed, covering topics such as liability admissions, administrative closure of charges, terms of employment separation, accrued time, waivers, confidentiality, return of property, non-disparagement, attorney's fees, etc. **(Exhibit R-E)**.

The case at bar is actually more akin to Lahue, since the other primary argument from Petitioner concerns the portion of Ms. Rosendahl's June 18 e-mail where she noted that the

agreement is "subject to review by the mayor". In Lahue, as here, there was an issue concerning whether a settlement had been reached because it was contingent on his mother's acceptance of same. However, the mother's attorney testified during a hearing that she was prepared to sign the documents needed to effectuate the settlement and had expressed same the same day that the settlement had been reached. Lahue, 263 N.J. Super. at 596.

Here, while there is a question raised by Petitioner as to whether the "settlement" had been approved by Respondent, in reality, case law is clear that given the facts and circumstances, this is not a stumbling block to a finding that the case had settled. As succinctly detailed in Pote v. Pine Hill Mun. Utils. Ass'n, 2013 N.J. Super. Unpub. LEXIS 1669;

> More specifically, in the context of municipal entities, "[i]t is elementary that municipalities can ordinarily act only by adoption of an ordinance or resolution at a public meeting." *City of Jersey City v. Roosevelt Stadium Marina, Inc.*, 210 N.J. Super. 315, 327, 509 A.2d 808 (App. Div. 1986), *certif. denied*, 110 N.J. 152, 540 A.2d 156 (1988)). We have held that "it would seem to be belaboring the obvious to observe that formal governmental action was required to approve a settlement." *Id.* at 320. "This is without regard to whether experienced counsel knew or should have known that formal approval of a governing body is required." *Id.* at 322 n.4. Additionally, there is no need for defendant to present evidence that the municipality rejected the alleged settlement or that there was a resolution to that effect. *Id.* at 324. *See also* N.J.S.A. 40A:5-17(a).
>
> Id. at 3. See also, Graham v. Monmouth Cty. Bldgs. & Grounds, 2020 U.S. Dist. LEXIS 80417 at 12 (D.N.J. 2020).

Here, while the June 18 e-mail **(Exhibit P-4)** indeed mentioned that the agreement was subject to review by the mayor, the subsequent actions of Ms. Rosendahl clearly indicated that a settlement had been reached. This included her submission of an updated agreement on June 21 (to include a list of property to be returned to Respondent by Petitioner), as well as her letters of July 15 and July 21, which clearly evidenced same. **(Exhibits R-G, P-7 and P-8)**.

Ultimately, I **FIND** that all essential terms of the potential settlement had been agreed to by the parties and that those terms were documented in the agreement that was explicitly agreed to by Lt. Valente after consultation with Mr. Mitzner.

I further **FIND** that there is no legitimate question of fact that Respondent considered this matter settled, subject to what is clearly mandatory approval by the governing body and that this was unequivocally communicated to Petitioner.

Finally, as noted above, with motions such as these, a hearing is often necessary in order to flesh out the positions of the party objecting to the enforcement of the settlement, whether it is to dispute that counsel had the authority to settle same or whether a settlement had been reached at all. This is particularly true when, as in most of the reported case that address motions to enforce settlement, clear factual disputes have been raised by the party objecting to the enforcement. See generally, Amatuzzo, 305 N.J. Super. at 474-75.

Here, Respondent emphasized that at no time has Lt. Valente provided direct evidence in the form of testimony at his departmental hearing, an affidavit or a certification declaring that;

a. Mr. Mitzner was not authored to settle the matter on his behalf.
b. That Mr. Mitzner had not communicated the terms of the proposed settlement to him.
c. That he had not agreed to the terms of the settlement as detailed in the June 15 & 16 e-mails.

As noted in Amatuzzo, there are instances where a hearing is unnecessary if "the available competent evidence, considered in a light most favorable to the non-moving party, is insufficient to permit the judge, as a rational factfinder, to resolve the disputed factual issues in favor of the non-moving party." Id. at 475, cit. omitted.

Amatuzzo is regularly followed. For example, in Medrano v. Rugelis, 2021 N.J. Super. Unpub. LEXIS 2887, the plaintiff certified that she had not authorized her former counsel to settle the case for the number offered or to make a counter-offer in that amount and never signed the release sent by defense counsel in that amount. There, the court found that the certification was sufficient to raise a material fact as to whether her attorney had authorization to settle the case for the offer amount. Id. at 8-9.

In contrast to Medrano, the court in Dep't of Cmty. Affairs v. Thomas, 2016 N.J. Super. Unpub. LEXIS 194, after citing to Amatuzzo, noted that;

> However, not every factual dispute on a motion requires a plenary hearing; a plenary hearing is only necessary to resolve a genuine issue of a material fact. Eaton v. Grau, 368 N.J. Super. 215, 222, 845 A.2d 707 (App. Div. 2004); Harrington v. Harrington, 281 N.J. Super. 39, 47, 656 A.2d 456 (App. Div.), certif. denied, 142 N.J. 455, 663 A.2d 1361 (1995); Adler v. Adler, 229 N.J. Super. 496, 500, 552 A.2d 182 (App. Div. 1988).
>
> Id. at 5.

It must be emphasized that "(b)ald assertions are not capable of...defeating summary judgment. Torre v. Geary, 2017 N.J. Super. Unpub. LEXIS 718 at 11, cit. Ridge at Back Brook, L.L.C. v. Klenert, 437 N.J. Super. 90, 97-98 (App. Div. 2014). See also, Trufalo, 2015 N.J. Super. Unpub. LEXIS 2374 at 10. ("Defendant's certification to the motions judge offered no factual basis why the settlement should be vacated. Therefore, no factual hearing was required.")

I agree with Respondent. As noted above, the only statements concerning the settlement/non-settlement of this matter came from Lt. Valente's new counsel. Nothing was presented by way of certification from Petitioner or prior counsel to raise an issue of fact that was "capable of...defeating summary judgment". In the absence of same, there is no need for a plenary hearing. While I appreciate the argument, I do not accept that Lt. Valente's conduct commencing with the substitution of counsel on July 1 is indicative of the fact that he did not authorize Mr. Mitzner to enter into negotiations and enter into a settlement agreement. In fact, as noted during oral argument, the manner in which this unfolded is indicative of a party having second thoughts about what he had agreed to and not that he had never authorized or agreed to the settlement.

Given the above and given the facts, evidence and both written and oral argument and most particularly a lack of any certification/affidavit from Lt. Valente to raise a factual dispute, I **FIND** that that it is unnecessary to hold a plenary hearing and that it is appropriate to decide this motion in the absence of same.

CONCLUSION

Given the totality of the evidence, I **CONCLUDE** that Mr. Mitzner was authorized by Lt. Valente to enter into the settlement agreement in question.

I further **CONCLUDE** that the agreement reached between the parties consisted of a resolution of the matter, including all essential terms of same and I further **CONCLUDE** that given the lack of competent evidence from Petitioner to create a factual dispute, a plenary hearing was unnecessary.

Finally, I **CONCLUDE** that this matter was settled between the parties as a result of the negotiations and writings that occurred from June 14 through June 21, 2021.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Respondent's Motion to Enforce Settlement be and is hereby **GRANTED** and;

It is further **ORDERED** that summary decision be **ENTERED** on behalf of Respondent and that the Petitioner's appeal be and is hereby **DISMISSED**.

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. 40A:14-204.

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

February 28, 2022
DATE

Matthew G. Miller, ALJ

Date Received at Agency: February 28, 2022

Date Mailed to Parties: February 28, 2022

MGM/mm

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

For petitioner:

P-1	May 26, 2021 Internal Affairs Charging Form
P-2	Letter from attorney Michael Mitzner to the Borough dates May 27, 2021
P-3	Preliminary Notice of Disciplinary Action dated June 2, 2021
P-4	E-mail from Michael Mitzner, Esq. to Deena Rosendahl dated June 16, 2021
P-5	Substitution of Attorney dated July 1, 2021
P-6	Letter from Frank Cioffi to Deena Rosendahl dated July 9, 2021
P-7	Letter from Deena Rosendahl to frank Cioffi dated July 15, 2021
P-8	Letter from Deena Rosendahl to Frank Cioffi dated July 21, 2021
P-9	Transcript of Departmental Hearing conducted on August 11, 2021
P-10	Final Notice of Disciplinary Action dated October 4, 2021
P-11	Borough of West Milford's Annual Major Discipline Reporting Form
P-12	Notice of Appeal submitted to the Civil Service Commission dated October 5, 2021

For respondent:

R-A	May 12, 2021 Internal Affairs Notice
R-B	May 13, 2021 West Milford Police Department Office of Internal Affairs Administrative Advisement Form
R-C	May 26, 2021 and June 11, 2021 Internal Affairs Charging Forms
R-D	May 27, 2021 letter from Mitzner to Respondent

R-E	June 15 & June 16, 2021 e-mails to and from Mitzner and Rosendahl with proposed settlement agreement
R-F	June 18, 2021 e-mail from Rosendahl to Mitzner with "draft" settlement agreement
R-G	June 21, 2021 e-mail from Rosendahl to Mitzner with "updated proposed settlement agreement"
R-H	Unreported case of Releasee I v. Golembreski, 2017 WL 11037010