

The petitioner was issued a second PNDA, dated June 6, 2014, charging him with neglect of duty, incompetency, inefficiency or failure to perform duties, other sufficient cause, violation of rules and regulations regarding insubordination (three counts), performance of duty (two counts), conduct toward superior and subordinate officers and associates (two counts), criticism of official acts or orders, neglect of duty (two counts), cooperation, and radio discipline, and violation of a general order with respect to prevention of domestic violence procedures. This PNDA included the specifications from the October 9, 2013 Notice of Minor Disciplinary Action and April 15, 2014 PNDA, namely, the events which allegedly occurred on June 11, 2013 and January 11, 2014, respectively, as well as incidents alleged to have occurred on January 26, 2014 and March 11, 2014. Specifically, on January 26, 2014, the appointing authority asserted that the petitioner willfully disobeyed a direct order by a Police Sergeant to use proper etiquette when responding to radio communication and inappropriately responded on the police radio to the Police Sergeant's directive in an insolent manner. Additionally, it was claimed that on March 11, 2014, the petitioner was given a lawful order by his supervisor during an inspection and he refused to follow the order. Further, during roll call, the petitioner allegedly made an inflammatory and unwarranted comment to a Police Lieutenant, which was intended to criticize the agency and incite conflict, distrust, and dissention. The June 6, 2014 PNDA proposed a penalty of a 180 working day suspension² or removal.

The petitioner requests that the charges contained in the June 6, 2014 PNDA be separated and he be granted a departmental hearing for each alleged incident, as the incidents are "factually and temporally unrelated to each another." He claims that the charges have been joined together to "unjustly prejudice" him and "to seek unreasonably severe disciplinary penalties." Further, the petitioner notes that he requested discovery relating to the October 9, 2013 Notice of Minor Disciplinary Action, but his requests were ignored and a departmental hearing was never scheduled. Regarding the April 15, 2014 PNDA, the petitioner states that the appointing authority provided him with initial discovery and it adjourned the departmental hearing set for May 21, 2014. He then received the June 6, 2014 PNDA, containing the combined set of charges and specifications. The petitioner indicates that the appointing authority denied his request to segregate the charges and conduct separate departmental hearings. Moreover, the petitioner urges the Commission to review criminal case law and statutes for this "case of first impression" as guidance on evaluating whether to bifurcate the charges. He reiterates that his alleged violations are not linked in temporal scope and are separate and distinct incidents. Evidence presented to prove one charge cannot establish proof for another charge. Therefore, based on the foregoing, the petitioner

² It is noted that, except for suspensions pending a criminal complaint or indictment, the maximum suspension under Civil Service law is six months. See *N.J.S.A.* 11A:2-20. Thus, a 180 working day suspension exceeds the statutory limit. See also *N.J.A.C.* 4A:2-2.4(a).

maintains that there is a clear likelihood that he will succeed in having the charges against him separated.³

Furthermore, the petitioner asserts that consolidating the charges irreparably harms him, as it taints the impartiality of the hearing officer. The hearing officer will hear testimony on unrelated charges, which may suggest that the petitioner is of "low moral character." Moreover, the petitioner argues that the consolidated charges violate the principle of progressive discipline, as it would be unlikely that he would be removed from employment if he were found guilty of the charges separately. He also states that the Attorney General instituted a system of progressive discipline to correct minor problems. In choosing to bring multiple charges in one PNDA, the petitioner contends that the appointing authority has violated the Attorney General's Guidelines and has failed to "turn square corners" with the public. Therefore, the appointing authority's conduct also irreparably harms the public's confidence in government.

Additionally, the petitioner submits that there is no harm in granting him separate departmental hearings for each charge. Although the appointing authority may argue that consolidation is more efficient and economical, the petitioner maintains that these concerns do not override his right to a fair hearing. Lastly, he contends that the public is best served if the appointing authority follows Civil Service law and rules, as well as the Attorney General's Guidelines. The petitioner emphasizes that the charges against him are merely allegations and may not be considered valid for purposes of challenging his interim relief request. He submits that a "dangerous precedent" would surely be set if the Commission allows a law enforcement agency to charge a Police Officer "with unrelated offenses in a single charging instrument solely for the purposes of obtaining a more severe disciplinary penalty."

In response, the appointing authority, represented by Marlin G. Townes III, Esq., contends that there is no legal basis for the Commission to grant the instant request. It maintains that it complied with statutory and regulatory requirements by providing the petitioner with notice of discipline and the specifications supporting the charges being pursued. See *N.J.S.A. 11A:2-13* and *N.J.A.C. 4A:2-2.5(a)*. The appointing authority argues that granting the instant request for relief "would constitute a clear infringement" on its "managerial prerogative" to discipline its employees and to select which charges to be levied. Moreover, the appointing authority responds that criminal law is inapplicable to the instant matter, as there is a clear distinction on the burdens of proof in criminal and administrative matters. Further, it states that the petitioner will suffer no irreparable harm since

³ The petitioner notes that because of the appointing authority's undue delay in providing him with discovery and the prejudicial nature of the June 6, 2014 PNDA, it is difficult for him to establish whether he will ultimately be successful on the merits of his case.

he will have the opportunity to receive discovery and defend himself. The appointing authority also notes that should the petitioner be removed, he will be afforded the right to appeal to the Commission and be granted a hearing on his removal. The Commission will evaluate the charges and penalty imposed. Should the Commission grant the petitioner's appeal, he will be entitled to reinstatement and back pay. Thus, the appointing authority maintains that the petitioner may be made whole with monetary remedies. In addition, the appointing authority disputes that it has violated the Attorney General's Guidelines with respect to the principle of progressive discipline, as it is within its discretion to seek harsher penalties based on the petitioner's "continued pattern of behavior which entails various instances of refusing to comply with orders and departmental rules." Further, it submits that the "turn square corners" doctrine is not relevant to the instant matter, since it has not taken an unfair advantage by exercising its disciplinary discretion to charge the petitioner. It emphasizes that the petitioner is "not a regular member of the public." Rather, he is an employee and a sworn Police Officer. The appointing authority reiterates that none of the petitioner's protections which ensure due process and fairness have been infringed. Lastly, the appointing authority emphasizes that efficient operations and saving tax payer monies clearly benefit the public. Therefore, consolidation of the petitioner's charges is in the public's interest.

The petitioner replies that the appointing authority's prerogative to discipline its Police Officers must be in accordance with due process and fundamental fairness. Further, he indicates that it is not true that certain criminal law concepts are not relevant in administrative proceedings. In this regard, the petitioner notes that except to prove a charge of habitual misconduct, an employee's past disciplinary record cannot be utilized to prove a present charge. Therefore, he requests that his petition for interim relief be granted.

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.

In the instant matter, it is not necessary to address the merits of the charges against the petitioner since he raises procedural issues. Specifically, the main issue to be determined is whether it was appropriate for the appointing authority to have charged the petitioner for arguably unrelated incidents occurring on four different dates in a single PNDA.

Initially, the charges relating to the incident occurring on June 11, 2013 must be removed from the June 6, 2014 PNDA. The appointing authority already issued the petitioner an amended Notice of Minor Disciplinary Action, dated October 9, 2013. Regardless of whether or not the suspension has been served, the appointing authority imposed a five-day suspension for the petitioner's actions.⁴ It is noted that minor discipline is a formal written reprimand or a suspension or fine of five working days or less. See *N.J.A.C.* 4A:2-3.1(a). The minor disciplinary process as well as any appeals of minor disciplinary actions taken against county or municipal government employees are not reviewable by the Commission since the Legislature has limited such reviews to employees of State service. See *N.J.S.A.* 11A:2-16. Further, the record does not indicate that the petitioner would have been entitled to a hearing at the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 4A:2-2.9(b).⁵ Accordingly, the appointing authority and the petitioner must resolve this notice under standards and procedures established by the jurisdiction or by a negotiated labor agreement.

Regarding the other set of charges, *N.J.A.C.* 4A:2-2.5(a) provides that an employee must be served with a PNDA, setting forth the charges and statement of facts supporting the charges (specifications), and afforded the opportunity for a hearing prior to imposition of major discipline. This rule reiterates the requirements of *N.J.S.A.* 11A:2-13, which states that the employee shall be notified in writing before certain disciplinary action is taken. Moreover, *N.J.A.C.* 4A:2-2.6(a) indicates that a hearing shall be held before the appointing authority or its designated representative. See also *N.J.S.A.* 11A:2-13. It is noted that the Commission's review of departmental hearings is limited. *N.J.A.C.* 4A:2-2.5 and *N.J.A.C.* 4A:2-2.6 outline the procedures regarding hearings before the appointing authority. In evaluating the applicable statutory and regulatory provisions, no Civil Service law or rule has been found which prohibits an appointing authority from combining charges for multiple incidents in a single PNDA and conducting a consolidated hearing. In this case, the petitioner has been notified in writing of the charges against him, the facts supporting such charges, and the proposed penalty.

⁴ It is noted that although the appointing authority served the petitioner with the April 15, 2014 PNDA, proposing to suspend him for 15 working days, this notice is a preliminary notice and may be amended. The June 6, 2014 PNDA is in effect the amended notice.

⁵ *N.J.A.C.* 4A:2-2.9(b) provides that minor discipline matters will be heard by the Commission or referred to the OAL for a hearing before an Administrative Law Judge for an employee's last suspension or fine for five working days or less where the aggregate number of days the employee has been suspended or fined in a calendar year, including the last suspension or fine, is 15 working days or more, or for an employee's last suspension or fine where the employee receives more than three suspensions or fines of five working days or less in a calendar year. Even if the petitioner demonstrates that he was eligible for a hearing at the OAL based on *N.J.A.C.* 4A:2-2.9(b), he did not file a timely appeal. The October 9, 2013 Notice of Minor Disciplinary Action was issued on October 16, 2013 and the petitioner did not file an appeal within 20 days of receipt of that notice. See *N.J.S.A.* 11A:2-14 and *N.J.A.C.* 4A:2-2.8(a).

He will also be afforded a departmental hearing.⁶ Therefore, utilizing a single PNDA or having a consolidated hearing does not deprive the petitioner of his due process or violate fundamental fairness principles.

In addition, the petitioner's argument that consolidation may taint the departmental hearing is speculative at best. In any event, any bias that a hearing officer may have at the local level is remedied by a further appeal and a *de novo* hearing at the OAL. See e.g., *In the Matter of Morrison*, 216 N.J. Super. 143 (App. Div. 1987) (Although the appellant argued that the entire disciplinary proceeding was void *ab initio* because the hearing officer at the departmental hearing was biased against him and should have recused himself, the hearing before the OAL is *de novo*. Thus, there was no reason to believe that any prejudice which might have existed at the local level affected the proceedings before the ALJ.) See also, *In the Matter of Neal Hansen* (MSB, decided September 25, 2001). Furthermore, while the petitioner notes that there has been a delay in receiving discovery materials, the rules do not provide the Commission with the authority to review discovery issues. Nonetheless, procedural deficiencies 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). Moreover, while the petitioner is correct that an appointing authority cannot use prior discipline to prove current charges, there is no indication that a combined hearing will result in such a circumstance. Rather, any such combined hearing would necessarily result in separate and distinct findings regarding the separate charges and separate penalties for each discrete infraction. Furthermore, there is no evidence that a combined hearing will result in any inappropriate level of discipline levied for any upheld infraction. Regardless, the propriety of any disciplinary penalty is not the proper subject of this petition and can only be reviewed by the Commission *de novo* after its imposition. Therefore, the petitioner's request for bifurcated proceedings for the remaining set of charges is denied.

As a final comment, although the Commission finds that no procedural violations have occurred regarding the consolidation of these charges, in future cases it is advisable for an appointing authority to issue separate PNDAs for matters that involve distinct events to help avoid any potential confusion. However,

⁶ N.J.A.C. 4A:2-2.13(b) states that the law enforcement officer or firefighter requests a departmental hearing regarding his or her removal in accordance with N.J.A.C. 4A:2-2.5, the appointing authority shall conduct a hearing within 30 days of the removal's effective date, unless: 1. The officer or firefighter agrees to waive his or her right to the hearing; or 2. The officer or firefighter and the appointing authority agree to an adjournment of the hearing to a later date. The petitioner notes that a departmental hearing for the October 9, 2013 Notice of Disciplinary Action was never scheduled. However, as previously indicated, the Commission does not have jurisdiction to review local minor disciplinary matters. Further, there is nothing in the record that demonstrates a violation of N.J.A.C. 4A:2-2.5 or N.J.A.C. 4A:2-2.13(b) with respect to the other charges.

when one Final Notice of Disciplinary Action is issued based on a PNDA containing one or more distinct events, an appointing authority should specify what charges and specifications have been sustained or dismissed and designate the penalty for each set of sustained charges. Accordingly, an employee would then be given clear notice of what charges and corresponding penalties were upheld that he may wish to appeal.

ORDER

Therefore, it is ordered that the petitioner's request for interim relief is denied.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 22ND DAY OF OCTOBER, 2014

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