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STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of Telina Hairston,
City of East Orange

CSC Docket No. 2015-1098

Request for Interim Relief

ISSUED: DEC 19 2014 (DASV)

Telina Hairston, a Police Officer with the City of East Orange, represented by Steven J. Kaflowitz, Esq., petitions the Civil Service Commission (Commission) for interim relief of her disciplinary proceedings.

By way of background, on June 27, 2014, the appointing authority served the petitioner with a Preliminary Notice of Disciplinary Action (PNDA), dated June 26, 2014, charging her with insubordination; failure or deliberate refusal to obey a lawful order given by a superior officer; neglect of duty; malingering; violation of sick leave procedures; and other sufficient cause. The proposed penalty against the petitioner was either a six-month suspension or removal from employment. Specifically, the appointing authority asserted that, on December 28, 2013, the petitioner willfully disobeyed a direct order from her supervisor to relieve another officer on duty and subsequently reported out-of-work due to illness, although she was not ill. Moreover, the appointing authority claimed that the petitioner had violated a "Last Chance Agreement" she and the appointing authority entered into on March 24, 2014. This agreement resolved disciplinary charges[1] concerning

[1] The petitioner had been issued Final Notices of Disciplinary Action on January 22, 2013 and May 12, 2013, on charges of chronic and excessive absenteeism, for which she received a suspension for 30 days and 45 days, respectively. Upon her appeal to the Commission, the matter was transmitted to the Office of Administrative Law for a hearing. Subsequently, the parties entered into a settlement agreement, which included the "Last Chance Agreement" and the appellant's acceptance of a 60-day suspension and 15 days of back pay for withdrawal of her appeal and request for a hearing. The settlement agreement was acknowledged by the Commission at its June 18, 2014 meeting. *See In the Matter of Telina Hairston* (CSC, decided June 18, 2014).

attendance infractions and placed the petitioner on probation for one year, from March 24, 2014 to March 23, 2015. The agreement stipulated that if the petitioner exceeded her allotted 20 days of sick leave during the period, the agreement was "self-executing" and failure to comply with its terms would be cause to terminate the petitioner's employment. It is noted that a departmental hearing was scheduled for October 23, 2014, but the hearing has been held in abeyance pending the resolution of the within matter.

In the instant matter, the petitioner requests that the reference to the "Last Chance Agreement" in the PNDA be deleted. She states that the incident occurred in December 2013 and she did not sign the "Last Chance Agreement" until March 2014. The petitioner indicates that she has not violated the terms of the agreement to date. Moreover, the petitioner maintains that referring to the "Last Chance Agreement" in the PNDA is highly prejudicial and provides irrelevant information. She contends that the PNDA also violates the Attorney General's (AG) Internal Affairs Guidelines, noting that nowhere in the model PNDA form "is there a space for listing past or unrelated infractions.[2]" Furthermore, the petitioner submits that there is a clear likelihood that she will succeed on the merits of her petition for interim relief. The petitioner alleges that the only purpose for referring to the "Last Chance Agreement" in the PNDA is to taint the hearing officer's perception that the petitioner has supposedly committed additional wrongdoing. She contends that the appointing authority is subjecting her to an unfair and biased disciplinary process, which constitutes irreparable harm. Additionally, the petitioner asserts that the appointing authority will not suffer any hardship if it amends the PNDA. Alternatively, she suggests that any harm which may come to the appointing authority was brought upon by its own actions. The petitioner also contends that the public interest is best served if the AG Guidelines are enforced and bias is removed from her disciplinary proceedings.

In response, the appointing authority, represented by Marlin G. Townes III, Esq., contends that the petitioner will not succeed on the merits of her claim because it has the legal discretion to include a violation of the "Last Chance Agreement" in the PNDA. It states that the petitioner was charged with a new infraction while the agreement was in effect. The appointing authority notes that courts have recognized an appointing authority's discretion in determining a violation of such an agreement. Moreover, the appointing authority responds that there is no legal authority requiring that the "Last Chance Agreement" be presented only after a hearing officer has made a decision. Further, while the appointing authority acknowledges that an employee's past record cannot prove a present charge, it indicates that the prior record may be used for the purpose of progressive discipline. It maintains that the reference to the "Last Chance Agreement" in the PNDA was provided in part to determine the petitioner's

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[2] It is noted that the PNDA form is issued by the Commission for use by appointing authorities. The Commission is not bound by any instructions on how to complete the PNDA.

discipline for the current charges. Additionally, it submits that the agreement provides a "valid independent basis to impose discipline." As for the petitioner's claim that the hearing officer will be biased, the appointing authority replies that that is "unfounded conjecture." It indicates that it will be utilizing a "third party neutral" hearing officer. Moreover, the appointing authority states that the petitioner may further appeal and be granted a hearing before an Administrative Law Judge (ALJ) at the Office of Administrative Law (OAL). Thus, any bias on the part of the hearing officer at the local level may be remedied by that hearing.[3] Furthermore, the appointing authority claims that any harm that the petitioner may suffer is monetary in nature and may be remedied by an award of back pay. Thus, it maintains that the petitioner cannot demonstrate that she would suffer irreparable harm if the instant request is not granted. On the contrary, it would be detrimental to the appointing authority and the public interest if the appointing authority is not permitted to enforce a breach of the "Last Chance Agreement." The appointing authority asserts that the effect would be to "chill the use of such agreements." Therefore, it contends that the petitioner's request for interim relief should "clearly" be denied.

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 concerning the December 13, 2013 incident since she does not present any argument in that regard. Rather, the issues to be determined are whether it was appropriate for the appointing authority to have charged the petitioner for a violation of the "Last Chance Agreement" or to have included the

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[3] It is noted that the hearing at the OAL and the Commission review of the record is *de novo*. *See In the Matter of Morrison*, 216 *N.J. Super.* 143 (App. Div. 1987) (While the appellant argued that the entire disciplinary proceedings were void *ab initio* because the hearing officer at the original hearing was prejudiced toward him and should have recused himself, the Superior Court of New Jersey, Appellate Division, found that the hearing before the OAL was *de novo* and there was no reason to believe that any prejudice which might have existed at the local level affected the proceedings before the ALJ); *In the Matter of Neal Hansen* (MSB, decided September 25, 2001). Moreover, 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).

reference in the PNDA for progressive discipline purposes. The simple answer to these questions is "no."

In *In the Matter of Vanessa Warren* (CSC, decided November 21, 2012), *modified on remand,* Docket No. A-5092-09T3 (App. Div. August 3, 2012), the Commission modified the appellant's removal to a six-month suspension. The Commission originally upheld the removal, declining to adopt the ALJ's decision to modify the penalty to a six-month suspension. In recommending the modification, the ALJ did not consider the appellant's 45-day suspension for an incident occurring in October 2008, just prior to the current offense which occurred on November 2008. Upon the appellant's appeal to the Superior Court of New Jersey, Appellate Division, the Court remanded the matter to the Commission to reconsider the penalty imposed. The Court found that there was ample evidence that the appellant's actions did not result in a "serious" breach of security. Additionally, the Court was not persuaded that the October 2008 incident and resulting 45-day suspension should have been considered as part of the appellant's progressive disciplinary history. It found that there was no testimony or evidence submitted to indicate that, prior to the November 2008 incident, the appellant had any knowledge of the nature of the charges and the severity of the penalty for the October 2008 incident. The PNDA for the October 2008 incident had not been served prior to the second incident in November 2008 and the discipline had not yet been imposed for the prior October 2008 misconduct. The Court opined that the appellant did not have a "realistic" opportunity to be educated by her mistakes and the ramifications of the October 2008 incident in order to correct her behavior. Accordingly, the Court reversed the appellant's removal and remanded the matter back to the Commission to reconsider the penalty.

In the present case, the appellant is being charged for an incident that occurred in December 2013 and she did not sign the "Last Chance Agreement" until March 2014. The settlement agreement was also not approved by the Commission until June 18, 2014. In other words, the agreement was not in effect at the time of her alleged infraction in December 2013. It is simply not possible for her to have violated the "Last Chance Agreement" if it did not exist in December 2013. Thus, similar to the appellant in *Warren, supra*, the petitioner did not have a "realistic" opportunity to have corrected her behavior in December 2013 based on a future agreement, which did not take place until March 2014, notwithstanding the fact that she was not charged until June 2014 for the December 2013 incident and the agreement dealt with charges from January and March 2013. Furthermore, for the same reasons, the "Last Chance Agreement" should not be considered for progressive disciplinary purposes, since it did not exist in her disciplinary record prior to December 2013. However, the petitioner's 60-day suspension may be considered for progressive discipline purposes because it was imposed for infractions that occurred prior to December 2013.

Therefore, given that the case law is clear, should this matter have come before the Commission after the conclusion of the departmental and OAL proceedings, the Commission would not find a violation of the "Last Chance Agreement" or consider it for progressive discipline purposes. Accordingly, the appellant has succeeded on the merits of her claim. Moreover, although the petitioner would not be subject to irreparable harm since these issues could technically have been later cured by the Commission's reversal, it certainly subjects the petitioner to immediate harm, namely an erroneous charge. Furthermore, the appointing authority is not harmed by this decision, as it should have been cognizant of its flawed reasoning in charging the petitioner with a violation of a future instrument. Finally, the public interest is best served if appointing authorities comply with Civil Service law and rules. Therefore, under these circumstances, the petitioner's request for interim relief is granted and the appointing authority is ordered to amend the PNDA and delete any reference to the "Last Chance Agreement." The appointing authority must also refrain from utilizing the agreement for progressive discipline purposes for the current charges. As a final comment, the Commission emphasizes that it makes no determination with regard to the proposed charges against the petitioner with respect to the December 13, 2013 incident. It notes that the departmental proceedings are at the preliminary stage. A Final Notice of Disciplinary Action has yet to be issued.

ORDER

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 17TH DAY OF DECEMBER, 2014

Robert M. Czech

Robert M. Czech
Chairperson
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