

B-44



STATE OF NEW JERSEY  
CIVIL SERVICE COMMISSION

In the Matter of Yolande Dubisson,  
Department of Human Services

Court Remand

CSC Docket No. 2015-2706

ISSUED: JUN - 8 2015 (SLD)

The Superior Court of New Jersey, Appellate Division, reversed the Civil Service Commission's (Commission) decision to dismiss Yolande Dubuisson's request to reinstate her appeals of her two removals, effective September 14, 2012, which were dismissed due to her failure to appear at her scheduled settlement conference. The Court granted the appellant's request to supplement the record and remanded the matter to allow the Commission to reconsider her appeal in light of the supplemented record. *See In the Matter of Yolande Dubuisson, Department of Human Services*, Docket No. A-1898-13T2 (App. Div. April 2, 2015). The court did not retain jurisdiction. Copies of the Appellate Division's decision and the Commission's decision, *In the Matter of Yolande Dubuisson* (CSC, decided November 8, 2013), are attached hereto and incorporated herein.

The facts of this matter are thoroughly discussed in the attached decisions. In the Commission's previous decision, it denied the appellant's request to reinstate her appeals of her two removals. The record revealed that the appellant and her attorney, Edward A. Berger, Esq., failed to appear at a settlement conference at the Office of Administrative Law (OAL) that was scheduled for December 11, 2012. In a notice dated December 13, 2012, the appellant and her attorney were notified that they had failed to appear, and as a result, the matter was returned to the "transmitting agency." The notice also indicated that if she still wanted a hearing she:

. . . must explain, in writing, why you did not appear and send the explanation to the [Commission]. The agency must receive the

explanation within 13 days of this notice. Copies of the explanation must be sent to all other parties.

Subsequently, on August 14, 2013, the appellant appealed to the Commission and claimed that although she sent letters on December 17, 2012 and July 16, 2013 to the OAL requesting that the matter be rescheduled, she had not received a reply. Specifically, Mr. Berger claimed that he had mistakenly sent his December 17, 2012 request to reschedule the matter to the OAL. In support, he submitted an unsigned letter to the OAL and a blank certified mail receipt on which the tracking number could not be read. The appellant claimed that they did not appear because neither she nor her attorney received the notice of the settlement conference. The Commission denied the appellant's appeal and noted that the Failure to Appear notice specifically advised that the matter had been returned to this agency, and they were to submit their request for a new hearing to this agency. Moreover, the Commission noted that the record failed to reveal that this agency was notified of the appellant's request prior to the August 14, 2013 letter, which was more than five months after the matter had been dismissed.

The appellant appealed that decision to the Appellate Division. During oral argument, Berger presented a signed return receipt for the December 17, 2012 letter, which had not originally been provided to the Commission, and the Appellate Division granted his request to supplement the record. Consequently, the Appellate Division reversed the Commission's decision and remanded the matter so that the Commission could reconsider the appellant's request in light of the new evidence.

On remand, in relevant part, the appellant reiterates her arguments that neither she nor her attorney had received notice of the hearing, and that although the request for a new hearing was directed to the wrong agency, that it was timely filed. Moreover, the appellant claims that she was not listed on the service page of the Notice of the Settlement Conference, in violation of *N.J.A.C. 1:1-9.5*, which requires that all parties receive notice. Additionally, the appellant maintains that she should not be penalized for the errors of her attorney.

In response, the appointing authority, represented by Adam Verone, Deputy Attorney General, maintains, in relevant part, that although Mr. Berger received the Failure to Appear Notice, he failed to comply with the instructions to send the request to this agency. Additionally, it notes that Mr. Berger did not even send the request to the correct office of the OAL, where the conference was scheduled. Instead, he sent the request to the OAL in Newark. Moreover, the appointing authority notes that Mr. Berger admittedly did not follow up on his request until nearly eight months later, when he sent a general letter to the OAL. Furthermore, the appointing authority notes that the appellant did not present the signed certified mail receipt until oral argument at the Appellate Division, more than two years after the letter was purportedly sent. Finally, the appointing authority

argues that it has been substantially prejudiced by the inordinate delay in this matter. In this regard, it notes that Woodbridge Developmental Center has since closed and all files and documents are in storage, and one of the witnesses has retired and moved out of State. Therefore, it asserts that the appellant's request to reinstate her appeal should be denied.

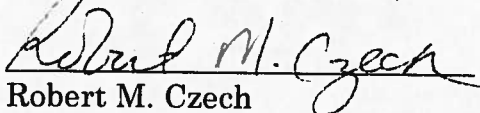
### CONCLUSION

The Appellate Division reversed the Commission's decision, which denied the appellant's request to reinstate her appeals of her two removals and remanded the matter to allow the Commission to consider the signed certified mail receipt for the initial request to reschedule the matter that the appellant produced during oral argument. Initially, the Commission notes that it is still troubled by Mr. Berger's failure to follow the plain instructions on the Failure to Appear Notice which required that the explanation for failure to appear be submitted to this agency. Nevertheless, since Mr. Berger has now presented evidence that his request was timely made, albeit to the wrong agency, the Commission finds it appropriate to remand this matter to the OAL for a hearing. However, it must be noted that although Mr. Berger argues that the appellant must also be placed on the service list, the record reveals that the only address on file for the appellant is incorrect.

### ORDER

Therefore, it is ordered that this matter be referred to the OAL for a hearing as a contested case.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 3RD DAY OF JUNE, 2015



Robert M. Czech  
Chairperson  
Civil Service Commission

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and  
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Attachments

c: Yolande Dubuisson  
Edward Berger, Esq.  
Barbara Maticic  
Adam Verone, DAG  
Pamela Ullman, DAG  
Clerk, Appellate Division  
Joseph Gambino  
Christopher Myers

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1898-13T2

IN THE MATTER OF YOLANDE DUBUISSON,  
WOODBIDGE DEVELOPMENTAL CENTER,  
DEPARTMENT OF HUMAN SERVICES

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Argued February 25, 2015 – Decided April 2, 2015

Before Judges Kennedy and O'Connor.

On appeal from the Civil Service Commission,  
Docket Nos. 2013-820 and 2013-819.

Edward A. Berger argued the cause for  
appellant.

Adam Verone, Deputy Attorney General, argued  
the cause for respondent Civil Service  
Commission (John J. Hoffman, Acting Attorney  
General, attorney; Melissa H. Raksa,  
Assistant Attorney General, of counsel and  
on the brief, Mr. Verone, on the brief).

PER CURIAM

Yolande Dubuisson appeals from a Civil Service Commission (CSC) final agency action denying her application to reinstate her appeal of a decision by her employer, the Department of Human Services, removing her from her job as a cottage services technician at the Woodbridge Developmental Center. Because we have granted a motion by appellant to supplement the record, we reverse the decision of the CSC and we remand with the

instruction to reconsider appellant's application in light of the supplemented record.

Very briefly, Dubuisson appealed her removal to the CSC and the matter was transferred to the Office of Administrative Law (OAL) for a hearing. The OAL scheduled a settlement conference for December 11, 2012, and sent out a notice of the conference on November 14, 2012. Neither Dubuisson nor her attorney, Edward Berger, received the notice of the conference and, consequently, did not attend. The OAL thereafter issued a "failure to attend" notice to Berger, the parties, and counsel.

On December 13, the OAL returned the file to the CSC, and sent a notice to Berger indicating he had thirteen days to present to the CSC any excuse regarding his failure to attend the conference. Berger, apparently misreading the notice, sent a letter to the Deputy Clerk of the OAL, stating that neither he nor his client had received notice of the conference and requesting that the matter be relisted.

That letter was not forwarded by the Deputy Clerk to the CSC, and the CSC administratively dismissed the appeal on March 16, 2013. When he later learned of the dismissal, Berger applied to the CSC to reinstate the appeal.

The CSC denied the application. In its written decision, the CSC was notably skeptical about Berger's claim that he sent

a letter on December 17, 2012, explaining that neither he nor his client had received notice of the conference. The CSC stated, in pertinent part:

In the present matter, there is no basis on which to grant the appellant a hearing. The appellant states that her counsel received a "Failure to Appear" notice from the OAL in December 2012 indicating that she had missed the settlement conference scheduled for December 11, 2012. Although the appellant contends that she contacted the OAL by letter dated December 17, 2012 requesting that the matter be rescheduled, the "Failure to Appear" notice specifically advised that the matter was being returned to the transmitting agency and that if she still wanted a hearing, the appellant was required to explain, in writing, why she did not appear and to send the explanation to the Department of Personnel. A review of her appeal submissions indicates that she did not send her letter to this agency or copy the appointing authority concerning her request. Further, there is no evidence that the letter that was purportedly sent to the OAL was forwarded by the OAL to this agency so that it could consider the matter of the appellant's request excuse. There is also no evidence that the appellant's December 17, 2012 request was sent via certified mail, as the certified mail receipt copied and attached to the letter is blank.

At oral argument, responding to questions from the bench pertaining to his December 17 letter to the OAL, Berger produced in court a signed return receipt showing the letter had indeed been sent and that it was received by the OAL shortly thereafter. Berger was advised that we would not consider any

document not part of the record, and that he would have to move to supplement the record.

Following argument, Berger moved to supplement the record with the certified mail "green card" – a motion not opposed by respondent's counsel – and we granted the motion. Accordingly, the record now contains not only Berger's December 17 correspondence to the OAL explaining that he could not attend a conference for which he did not receive notice, but also the signed receipt indicating it had been sent by certified mail, and was received by the OAL.

Rule 2:5-5(b) states

At any time during the pendency of an appeal from a state administrative agency, if it appears that evidence unadduced in the proceedings below may be material to the issues on appeal, the appellate court, on its own motion or on the motion of any party, may order, on such terms as it deems appropriate, that the record on appeal be supplemented by the taking of additional evidence and the making of findings of fact thereon by the agency below or, in exceptional instances, by a judge of the Superior Court especially designated for that purpose.

A motion to supplement the record is appropriate where, among other things, the supplementation is likely to change the result reached earlier. Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 452-53 (2007). So it is in this case.



We also note that in New Jersey a hearing may be opened for good and sufficient cause "to serve the ends of essential justice and the policy of the law." In re Gastman, 147 N.J. Super. 101, 114 (App. Div. 1997) (citing Handlon v. Belleville, 4 N.J. 99, 107 (1950)). Accordingly, it is appropriate to reopen the matter before the CSC so that it may reconsider its prior determination in light of the supplemented record. Reconsideration has generally been affected by considerations of elapsed time, diligence and reliance, and has been granted generally when there was evidence of, among other things, new evidence or change in circumstances. See Ruvoldt v. Nolan, 63 N.J. 171, 183-184 (1973).

Given our respect for our State administrative agencies and their right and obligation to reconsider decisions that may be affected by a court's later supplementation of the record, we vacate the CSC's decision denying appellant's application to reinstate her appeal and we remand this matter to the CSC to reconsider Dubuisson's application in light of the supplemented record.

Reversed and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION



B-22

**STATE OF NEW JERSEY**

**FINAL ADMINISTRATIVE  
ACTION  
OF THE  
CIVIL SERVICE COMMISSION**

**Administrative Appeal**

In the Matter of Yolande Dubuisson  
Woodbridge Developmental Center  
Department of Human Services

CSC Docket No. 2013-820 &  
2013-819

**ISSUED: November 8, 2013 PM**

Yolande Dubuisson, a former Cottage Training Technician with the Woodbridge Developmental Center, Department of Human Services, represented by Edward A. Berger, Esq., requests that the Civil Service Commission (Commission) reinstate her appeal of her two removals effective September 14, 2012, which was dismissed based on her failure to appear at her scheduled settlement conference.

By way of background, Dubuisson received two removals effective September 14, 2012 following sustained charges of sleeping while on duty (third infraction), violation of a rule, regulation policy and/or procedures, order or administrative decision (third infraction). Dubuisson appealed these sanctions to the Commission, which transmitted these matters to the Office of Administrative Law (OAL). The OAL scheduled the matter for a settlement conference on December 11, 2012. The record indicates that the appellant and her attorney failed to appear at the appointed time, and based on their absence, the OAL issued a "Failure to Appear" notice which indicated that the appellant failed to appear at the scheduled proceeding. On December 13, 2012, this matter was returned to the Commission for a final decision, with a notice giving the parties 13 days to present any excuse for failure to appear to this agency.

In support of her August 14, 2013 request to reinstate her appeal, the appellant's attorney, Berger, states that the appellant's failure to appear at the scheduled conference was due to his office never receiving any documentation advising of a hearing date. He asserts that on or about December 2012, he received a letter from the OAL, signed by the Deputy Clerk, advising that his office and his

client had missed a hearing date scheduled on December 11, 2012. Upon receipt of such notice, Berger states that he spoke with the appellant, who confirmed that she had not received a notice from OAL advising of the hearing date. He adds that he reviewed his telephone log on December 11, 2012 and there was no record of the OAL calling his office to inquire about his whereabouts. Berger indicates that his office is a five minute walk from the OAL and if he had been aware of the scheduled settlement conference, he would have appeared.

Additionally, Berger states that on December 17, 2012, his office contacted the OAL and advised it that he had not received notice of the settlement conference and requested that the matter be rescheduled. After not receiving a reply from the OAL, Berger indicates that he wrote a second letter dated July 16, 2013 requesting that the matter be rescheduled, but he did not receive a reply to his second request. On or about August 14, 2013, Berger states that his office contacted the OAL and was advised that his December 2012 request should have been sent to the Division of Appeals and Regulatory Affairs (DARA). In this regard, due to an inadvertent error, it was his belief that the letter requesting the matter be rescheduled should have been addressed to the tribunal where the matter was originally scheduled. Additionally, he notes that the appellant has been diligent about making all appearances. In fact, on two prior occasions, her departmental level hearings were adjourned upon request of the appointing authority. Under these circumstances, Berger maintains that it would be unfair to deprive the appellant of her due process rights. Therefore, the appellant requests that these matters be transmitted to OAL for a hearing.

The appointing authority, represented by Adam Verone, DAG, argues that on the scheduled conference date, John Carl, Employee Relations Coordinator, and Anita Pinkas, Director, Employee Relations, appeared on behalf of the appointing authority at the OAL and were prepared to proceed. Additionally, on or around December 12, 2012, it asserts that Carl called Berger's office to inquire about the whereabouts of his client and left a voice mail message that was never returned. Further, it states that the "Failure to Appear" notice clearly advised the appellant that if she still wanted a hearing, any explanation regarding her failure to appear must be sent to the Department of Personnel.<sup>1</sup> In this case, the appellant failed to comply with these instructions as her counsel allegedly sent the letter of explanation to the OAL instead of this agency. It also states that the appellant failed to provide a copy of the explanation to the appointing authority. Moreover, the appellant's letter was dated December 17, 2012, was not addressed to the presiding Administrative Law Judge (ALJ) or anyone in particular at the OAL, nor was it signed by appellant's counsel.

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<sup>1</sup> Now, Civil Service Commission.

Regardless, on July 16, 2013, nearly eight months later, the appellant decided to follow up with the OAL and inquire about her hearing. The appointing authority notes that this letter was also unsigned and is not addressed to the presiding ALJ. After nearly a month had passed, the appellant's counsel contacted the OAL and was advised to contact DARA concerning rescheduling her hearing. The appointing authority maintains that the Notice of Settlement Conference was properly addressed to appellant's counsel on the service list. Therefore, it argues the fact that the appellant's counsel inadvertently did not calendar the matter is not a basis to reinstate her appeal. Moreover, the appellant did not follow up with the OAL regarding the status of her hearing until July 16, 2013, almost eight months after she failed to appear for her scheduled conference. In this regard, the appointing authority underscores that the Commission dismissed the appellant's appeal based on her failure to appear at its meeting on March 6, 2013 and she did not appeal that determination in a timely manner. As such, the appointing authority maintains that no valid reason has been provided to transmit this matter back to the OAL.

### CONCLUSION

*N.J.A.C. 1:1-14.4(a)* states that if, after appropriate notice, neither a party nor a representative appears at any proceeding scheduled by the Clerk or judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge shall direct the Clerk to return the matter to the transmitting agency for appropriate disposition pursuant to *N.J.A.C. 1:1-3.3(b)* and (c).

*N.J.A.C. 1:1-3.3(b)* provides that any explanation for failure to appear must be in writing and received by the transmitting agency head within 13 days of the date of the Clerk's notice returning the case.

In the present matter, there is no basis on which to grant the appellant a hearing. The appellant states that her counsel received a "Failure to Appear" notice from the OAL in December 2012 indicating that she had missed the settlement conference scheduled for December 11, 2012. Although the appellant contends that she contacted the OAL by letter dated December 17, 2012 requesting that the matter be rescheduled, the "Failure to Appear" notice specifically advised that the matter was being returned to the transmitting agency and that if she still wanted a hearing, the appellant was required to explain, in writing, why she did not appear and to send the explanation to the Department of Personnel. A review of her appeal submissions indicates that she did not send her letter to this agency or copy the appointing authority concerning her request. Further, there is no evidence that the letter that was purportedly sent to the OAL was forwarded by the OAL to this agency so that it could consider the matter of the appellant's request excuse. There is also no evidence that the appellant's December 17, 2012 request was sent via

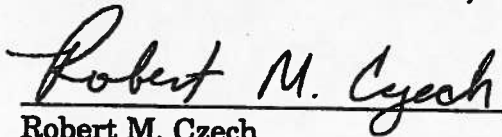
certified mail, as the certified mail receipt copied and attached to the letter is blank. Moreover, on March 6, 2013, the Commission formally acknowledged the appellant's failure to appear at her scheduled settlement conference and dismissed the appeal. However, no appeal of that dismissal was ever made to the Commission until it received her August 14, 2013 request, more than five months after the matter was formally dismissed. Under these circumstances, the record indicates that the appellant did not file an excuse for her non-appearance at the scheduled settlement proceeding in a reasonable time frame and there is no basis on which to grant the appellant a hearing.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

### ORDER

Therefore, it is ordered that this appeal be denied.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 8<sup>th</sup> DAY OF NOVEMBER, 2013



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Chairperson  
Civil Service Commission

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