

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2845-12T2

THOMAS HUNT,

Petitioner-Respondent,

v.

BOROUGH OF WILDWOOD CREST,

Respondent-Appellant.

Argued September 22, 2014 - Decided December 15, 2014

Before Judges Lihotz, Espinosa and St. John.

On appeal from the Civil Service Commission,
Docket Nos. 5413-12, 7144-12, 10688-12.

William G. Blaney argued the cause for
appellant (Blaney & Donohue, P.A.,
attorneys; Mr. Blaney, Ryan T. Karrer and
John R. Dominy, on the briefs).

Michelle J. Douglass argued the cause for
respondent (Douglass Kinniry Law, L.L.C.,
attorneys; Ms. Douglass, on the brief).

John J. Hoffman, Acting Attorney General,
attorney for respondent Civil Service
Commission (Todd A. Wigder, Deputy Attorney
General, on the statement in lieu of brief).

PER CURIAM

We consider whether withdrawal following commencement, but
not completion, of an agency evidentiary hearing precludes
further review of the issues raised in that action by the

courts. Appellant the Borough of Wildwood Crest (the Borough) appeals from a January 9, 2013 final decision issued by the New Jersey Civil Service Commission (the Commission), allowing respondent Thomas Hunt to withdraw his agency appeal challenging the Borough's disciplinary actions and his termination as a police sergeant with the Wildwood Crest Police Department (WCPD). In Hunt's agency appeal, filed in May 2012, he alleged he was terminated in retaliation for engaging in union activities. Hunt had also filed a civil rights complaint in the United States District Court for the District of New Jersey, asserting retaliatory discharge.

One day after the administrative hearing commenced, the Supreme Court issued its opinion in Winters v. North Hudson Regional Fire and Rescue, 212 N.J. 67 (2012), which held the Commission's final decision on a question of retaliatory discharge, advanced in a disciplinary appeal, estops a plaintiff from filing a complaint seeking damages on the same basis in court. Id. at 92. Additional testimony in Hunt's agency action was presented for three days. Hunt then moved to dismiss his administrative appeal. The Commission granted his request.

The Borough appeals, arguing the Commission must issue a final determination on Hunt's claims. Alternatively, the

Borough argues Hunt's withdrawal mid-hearing could only be with prejudice. We reject the Borough's arguments and affirm.

The facts are not in dispute. Hunt was employed as a police sergeant with the WCPD. In 2011 and 2012, the Borough issued Preliminary Notices of Disciplinary Action charging Hunt with thirty violations, which arose from ten incidents occurring on various dates, including: the inability to perform the duties of a police sergeant, N.J.A.C. 4A:2-2.3(a)(3); insubordination, N.J.A.C. 4A:2-2.3(a)(2); conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); neglect of duty, N.J.A.C. 4A:2-2.3(a)(7); and violation of the WCPD rules and regulations, N.J.A.C. 4A:2-2.3(a)(11). Three Final Notices of Disciplinary Action were issued, sustaining the charges and informing Hunt he was removed from employment effective April 6, 2012 and April 23, 2012 respectively.

Hunt appealed from the disciplinary actions. The Commission consolidated the matters and certified them as contested. The cases were transferred to the Office of Administrative Law (OAL) for hearing.

In the proceeding before an Administrative Law Judge (ALJ), discovery was conducted, motions were filed and determined, and pretrial disclosure of witnesses were exchanged. At least thirty witnesses were proposed and the estimated time for the

hearing was a dozen days. The record was closed and the hearing began on September 12, 2012.

The Borough's first witness was the WCPD captain, who supervised Hunt throughout his career. The captain testified regarding the bases of the disciplinary charges and discussed approximately eight internal affairs investigations he had conducted regarding Hunt's conduct.

Prior to resumption of the hearing on October 17, 2012, the ALJ addressed in limine motions. Once decided, the Borough next called its expert, a psychiatrist, whose testimony was provided on October 17 and 18, 2012. The expert examined Hunt on three occasions to determine whether he was fit for duty. Also at issue was Hunt's truthfulness when responding to the doctor's inquiries during the evaluations. On October 22, 2012, Hunt presented his treating psychologist, the first of his two medical experts, who related his findings regarding Hunt's fitness for duty.

On October 29, 2012, in light of the holding in Winters released on September 13, 2012, Hunt sought withdrawal of his agency appeal in favor of continuing his federal civil rights action.¹ In a five-page letter, Hunt's counsel outlined the

¹ On May 11, 2012, Hunt had filed a complaint with the Law Division in Cape May County, which was ultimately withdrawn on
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Winters holding, explaining a preclusive effect would bar Hunt's statutory claims if a final agency decision was issued. Further, counsel argued since Hunt must raise the issue in a single proceeding, and the right to fully develop discovery regarding the retaliation claim was limited in the OAL, withdrawal was appropriate to effectively advance a claim of retaliation in federal court. She reasoned: "In light of the Winters case . . . no meaningful choice [exists,] but to require full discovery in order to pursue the claim for retaliation against the [Borough]"

In response to Hunt's request for withdrawal, the Borough asserted the OAL must issue an initial decision on Hunt's claims on appeal. Without comment on the Borough's position, the OAL returned the case to the Commission. The Borough thereafter requested the Commission incorporate the procedural history into any order issued and dismiss the appeal with prejudice. Nonetheless, as recorded in the minutes of the regular Commission meeting on January 9, 2013, Hunt's case was listed as "withdrawn and removed from the hearing calendar."

After filing this appeal, the Borough moved to settle the record. The Commission issued a written final agency decision

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November 5, 2012. Hunt filed the retaliatory discharge action in federal court on November 8, 2012.

stating, "although the Winters question is one for the Appellate Division to decide, it cannot be argued that Hunt's claims were thoroughly adjudicated before the Commission, as they had been in Winters." Because the issue of "how far along the OAL proceedings had progressed prior to Hunt's withdrawal request" bears on whether withdrawal should have been permitted and, if so, whether it should have been with prejudice, the Commission granted the Borough's motion to expand the record to include the transcripts from the OAL proceeding.

Finally, Hunt's federal action was dismissed without prejudice pending this court's review. The District Court's order conditionally reserved Hunt's right to refile his complaint.

On appeal, the Borough argues the Commission erred in failing to render a determination on the merits or, alternatively, in dismissing Hunt's action without prejudice.² Hunt argues, as he did before the OAL, that he timely requested withdrawal and asserted his forum choice once Winters was

² Responding to our request for a statement of jurisdiction, the Borough maintained the Commission's acceptance of Hunt's withdrawal of his appeal was a final action and the need for a determination of whether the withdrawal was with prejudice is necessary. Hunt maintained the Borough could not challenge his request to withdraw his action and suggested this court dismiss the appeal. Further, Hunt asserted no bar to seeking judicial relief was imposed because a final determination was not made. Hunt's subsequently filed motion to dismiss was denied.

released. The Commission filed a statement in lieu of brief, R. 2:6-4(c), asserting Hunt's request to withdraw was timely as "only three of 33 witnesses had testified before the [ALJ]. Plainly, . . . withdrawal at this early stage of the proceedings did not prejudice the Borough."

Our review of administrative action is limited. Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995). Here, the Commission's decision to allow Hunt's request for withdrawal required consideration of the status of the OAL proceeding, as well as analysis of the basis presented for withdrawal. In our review, we "ordinarily should not disturb an administrative agency's determinations or findings unless there is a clear showing that (1) the agency did not follow the law; (2) the decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial evidence." In re Virtua-West Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422 (2008). However, we are not bound by an agency's determination of a legal issue. Utley v. Bd. of Review, 194 N.J. 534, 551 (2008).

Interestingly, both the Borough and Hunt argue their respective position is supported by the Court's decision in Winters. Before considering specific issues advanced on appeal, we relate the Winters analysis.

In Winters, the Court considered "whether a plaintiff, who was removed from public employment after positing a claim of employer retaliation in a civil service disciplinary proceeding, should be barred from seeking to circumvent that discipline through a subsequent Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14, action also alleging retaliation." Winters, supra, 212 N.J. at 71. The employee firefighter had challenged his termination from employment through an appeal to the Commission. Id. at 71, 74. Following discovery, which included depositions granted by special order to address the employee's claims of retaliation, the OAL hearing commenced. Id. at 81. After several days of testimony, the ALJ granted the employer's motion for partial summary decision on the disciplinary charge the employee engaged in outside employment while on sick leave. Id. at 71, 81. In his review, the ALJ found the evidential record supported the employer's disciplinary charges and the employee's evidence failed to support his claims of retaliation. Ibid. The Commission upheld the sanction of removal, which it determined was necessary for the employee's "misconduct in breach of the public trust." Id. at 71-72. The employee's appeal of the order resulted in a decision affirming his removal. Id. at 72, 82.

While his appeal was pending, the employee filed a Law Division complaint, alleging his termination was retaliatory in violation of CEPA. Id. at 82. The employer moved for summary judgment, maintaining the employee was collaterally estopped from raising the retaliation claims, which had been addressed in the administrative proceedings. Ibid. The Law Division denied the motion and this court granted leave to appeal and affirmed. Id. at 83. Certification was granted. Winters v. N. Hudson Reg'l Fire & Rescue, 205 N.J. 12 (2010).

Reversing the denial of summary judgment, the Supreme Court stated:

A litigant should not be permitted to participate in the administrative system designed to promote a fair and uniform statewide system of public employee discipline, raise a retaliation defense (as plaintiff did here), and then hold back on the defense in an attempt to save it for later duplicative litigation. No efficient and respected system of justice can permit the spectacle, and resulting disrepute, of inconsistent litigated matters involving the same transactional set of facts, notwithstanding that the forums embrace judicial and quasi-judicial proceedings. The public will neither understand nor appreciate the confounding wastefulness of such a result; and such disrespect of the legislatively created forum for supervision over, and resolution of, public employee discipline in this state should not be permitted. Rather, if an employee and employer engage the system of public employee discipline established by law and the employee raises a claim that employer

retaliation at least partially motivated the decision to bring the charge or the level of discipline sought, then both the employee and employer must live with the outcome, including its potential preclusive effect on related employment-discrimination litigation as a matter of the equitable application of estoppel principles.

[Winters, supra, 212 N.J. at 72-73 (citation omitted).]

Key to this conclusion was the Court's finding that "the ALJ assessed [the] claim of retaliation," id. at 91, which it found was a prominent theme of the litigation, and

the disciplinary proceedings fairly conducted in this matter concluded with the determination that plaintiff had forfeited his right to continued employment as an officer in his firefighting unit. He raised his retaliation-themed defense in an opening session with the ALJ and was told to present it as part of his case in chief. That he did not fully present his defense before the Commission and is now barred from a more expansive presentation of his claim of disparate treatment in a CEPA action is a consequence with which he must live. Nothing prevented plaintiff from presenting his defense more fully than he did. Discovery was available to him as an OAL litigant. See N.J.A.C. 1:1-10.1. Accordingly, it is not unfair to require him to present the defense that he raised in the administrative forum and to accept the consequences of his strategy.

[Id. at 73.]

Because the retaliation claim was "litigated as part of the final judgment in the administrative action," id. at 88, the

Court held "[f]indings made as part of the discipline process will have preclusive impact in later employment-discrimination litigation raising allegations of employer retaliation based on the same transactional set of facts." Id. at 74.

Here, the Borough argues the testimony presented by the three witnesses who testified during the four hearing-days before the ALJ triggered Winters' holding and requires imposition of estoppel to preclude any further review of the retaliation issue. Following our examination of all circumstances, we are not persuaded.

The administrative code allows a party to "withdraw a request for a hearing or a defense raised by notifying the judge and all parties." N.J.A.C. 1:1-19.2(a). As happened here, upon receipt of the notice, the ALJ must stop the proceedings and transmit the case to the clerk for return to the Commission. N.J.A.C. 1:1-19.2(a)-(b). The ALJ "may enter an initial decision memorializing the withdrawal" prior to return of the file, but is not required to do so. N.J.A.C. 1:1-19.2(a).

In Winters, the administrative action concluded and a final order was entered. Winters, supra, 212 N.J. at 81. The Court's holding recognized "'[a]dministrative tribunals can and do provide a full and fair opportunity for litigation of an issue'" Id. at 87 (quoting Hennessey v. Winslow Twp.,

183 N.J. 593, 600 (2005)). Therefore, final administrative decisions regarding issues later raised in proceedings before a court trigger collateral estoppel if the administrative proceedings are shown to have afforded litigants sufficient substantive and procedural safeguards regarding the issues litigated. Ibid.

Collateral estoppel is an equitable principle directing that "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, [then] the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Id. at 85 (quoting Restatement (Second) of Judgments § 27 (1982)). The doctrine facilitates the promotion of society's values, including "finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and uncertainty; and basic fairness." Ibid. (quoting Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 522 (2006)).

Collateral estoppel applies if:

- (1) the issue to be precluded is identical to the issue decided in the prior proceeding;
- (2) the issue was actually litigated in the prior proceeding;
- (3) the court in the prior proceeding issued a final judgment on the merits;
- (4) the

determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.

[Ibid. (quoting Olivieri, supra, 186 N.J. at 521).]

The Borough argues the Commission erred in allowing Hunt's withdrawal in this matter, which is argued not only violates the holding of Winters, but also leads to "fragmented litigation, forum shopping, judicial inefficiency, undue expense, and a waste of judicial resources." The Borough asserts the principles articulated in Winters bar relitigation of claims arising in an administrative action once the hearing begins.

We agree parties who strike upon a course to litigate their claims in the administrative forum may not test the waters by starting a hearing only to later reconsider that decision and seek withdrawal. See Aldrich v. Manpower Temp. Servs., 277 N.J. Super. 500, 505-06 (App. Div. 1994) (noting "estoppel principles should have applicability where, for example, the administrative action is withdrawn in the middle of an OAL hearing which is proceeding unfavorably for a complainant" (internal quotation marks omitted)), certif. denied, 139 N.J. 442 (1995). We would not sanction such gamesmanship and have no difficulty instructing Winters mandates a need for close scrutiny of withdrawal requests made once agency hearings commence, as

parties are on notice that the same issues may not be litigated in administrative and then judicial forums. Nevertheless, we decline the Borough's request to set a bright-line rule stating completion of discovery or the commencement of the agency hearing triggers estoppel. Rather, we conclude any analysis of whether estoppel is prompted involves a fact-sensitive consideration of the status of the administrative action and the basis for withdrawal.

Viewing the facts here, we determine this matter poses a unique circumstance. Frankly, the timing of Hunt's withdrawal was prompted by the Winters decision; it was not motivated by forum shopping or avoiding a potentially bad result. Winters was announced one day after the hearing started. In Winters, the Court, for the first time, dictated an employee who asserts employer disciplinary charges resulted from retaliation remains bound by an agency decision on that challenge and may not separately seek relief in a judicial proceeding if the agency action is completed. See Winters, supra, 212 N.J. at 71. Prior reviews of the issue by the trial court and this court had not reached such a conclusion, distinguishing administrative review of a disciplinary action from requests for statutory relief raised in the courts. See Winters v. N. Hudson Req'l Fire & Rescue, No. A-1117-09 (App. Div. Aug. 30, 2010) (slip op. at 23)

("CEPA's purpose in protecting employees from being retaliated against by their employers . . . would be undermined if employers . . . could discipline an employee and rely on the Commission's decision that finds legitimate reasons exist for the discipline but which does not examine the motivating reason in bringing the disciplinary action."). Based on Winters, once the issue was determined and a final judgment on the merits made by the agency, further presentation of the same cause of action was estopped. Consequently, the change in view of parallel proceedings required Hunt to limit his retaliation cause to a single forum, which he did with reasonable promptness.

Perhaps Hunt could have decided to end the agency action immediately after Winters was published. Nevertheless, following our review, and after considering the scope and nature of the OAL hearing, we concur with the Commission's observation that "the hearing had just gotten underway and withdrawal at this early stage of the proceedings did not prejudice the Borough."

When Hunt sought withdrawal, only three of the parties' more than thirty witnesses had testified and the matter was scheduled for another nine hearing-days. Hunt reserved his cross-examination of his WCPD captain, the Borough's only fact witness who testified, such that the captain's testimony was not

completed. The Borough's expert testified to Hunt's fitness for duty, but only one of Hunt's two experts completed his testimony on that issue. The request to withdraw from agency review in favor of federal court consideration was made well before the proofs on any substantive issue was closed.³

The ALJ did not make, nor could he have made, factual findings supporting an initial decision on the issues in dispute because presentation of proofs was not completed. This case is unlike Winters, where the agency issued a final decision and Winters lost his challenge, because here there was no finality. See Winters, supra, 212 N.J. at 92; see also Hernandez v. Region Nine Hous. Corp., 146 N.J. 645, 656-57 (1996) (holding adverse EEOC determination did not bar subsequent complaint in Superior Court alleging violation of the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42, because EEOC determinations, unlike determinations of other administrative agencies, are non-final and non-binding); Aldrich, supra, 277 N.J. Super. at 502,

³ The facts here are easily distinguishable from those presented in In the Matter of Rolan Carter, City of Camden Police Dept., 2011 WL 1448131 (N.J. Adm), cited by the Borough as authority to deny Hunt's withdrawal request because the parties expended substantial time and resources litigating an appeal. In Carter, twenty-three days of testimony over a two-year period had elapsed when withdrawal was sought to pursue the matter in the Superior Court. Carter, supra, at 4-5. At that point, the matter had neared conclusion with merely one day remaining. Id.

506 (holding plaintiff was permitted to withdraw action before the New Jersey Division on Civil Rights to file LAD complaint in the Superior Court because parties had only engaged in discovery and the hearing had not commenced). "A plaintiff is permitted to switch forums [] before a final determination has been rendered." Hernandez, supra, 146 N.J. at 656 (citing Aldrich, supra, 277 N.J. Super. at 505).

We decline the Borough's urging to expand Winters' application of collateral estoppel to bar claims that could have been presented when withdrawal is made at the commencement of an administrative proceeding because discovery was undertaken and motion practice conducted. Prior discovery efforts were not wasted and may easily be utilized in the judicial proceeding.

The Commission also did not err in declining to dismiss Hunt's appeal with prejudice. A dismissal with prejudice operates as an adjudication on the merits. Velasquez v. Franz, 123 N.J. 498, 507 (1991). The withdrawal pursuant to N.J.A.C. 1:1-19.2, made early in the hearing prior to presentation of all evidence on any issue, does not foreclose Hunt's later presentation of the claims arising from alleged retaliation in the United States District Court. The Borough has failed to demonstrate how the Commission's actions in accepting the

withdrawal were contrary to law, unreasonable, arbitrary, capricious or unsupported by the evidence.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION