

MAY 20 2014

PREPARED BY THE COURT

FILED

FRANCINE HOVERMANN,
Plaintiff,

SUPERIOR COURT OF NEW JERSEY
CUMBERLAND COUNTY
LAW DIVISION – CIVIL PART

VS.

DOCKET NO.: CUM-L-905-13

CUMBERLAND COUNTY
PROSECUTOR'S OFFICE,
Defendant.

ORDER DENYING MOTION TO
DISMISS AND REMANDING MATTER
FOR ADMINISTRATIVE HEARING

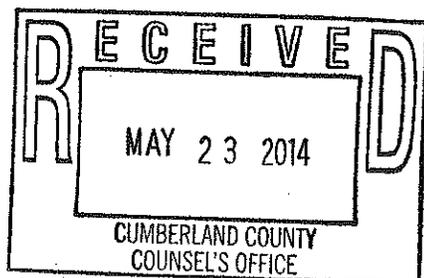
THIS MATTER being opened to the Court by way of a Complaint in Lieu of Prerogative Writs, and the Court having reviewed the Complaint, Answer and Motion to Dismiss filed herein, and having heard the arguments of counsel on March 21, 2014, and the Court having placed findings of fact and conclusions of law in a letter opinion of the same date as this Order, and for good cause shown;

It is on this 20th day of May, 2014 **ORDERED** as follows:

1. Defendant's Motion to Dismiss is denied.
2. Plaintiff's appeal from the written reprimand herein is governed by N.J.S.A. 11A:2-16 and N.J.A.C. 4A:2-3.2.
3. Defendant failed to comply with the hearing provisions of N.J.A.C. 4A:2-3.2.
4. This matter is remanded for further proceedings in accordance with N.J.S.A. 4A:2-3.2(b).
5. This court does not retain jurisdiction.
6. Either party may propose a supplement to this Order for clarification purposes.



Timothy G. Farrell, J.S.C.



✓
✓

SUPERIOR COURT OF NEW JERSEY
CUMBERLAND/GLOUCESTER/SALEM VICINAGE

HONORABLE TIMOTHY G. FARRELL
Judge, Superior Court of New Jersey



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May 20, 2014

SUPERIOR COURT OF N.J.
CUMBERLAND COUNTY

MAY 20 2014

REC'D & FILED
CIVIL CASE
MANAGEMENT OFFICE

John P. Rowland, Esquire
830 Radio Road, Suite B
Little Egg Harbor, NJ 08087

Theodore E. Baker, Jr., County Counsel
790 E. Commerce Street, Room 214C
Bridgeton, NJ 08302

Re: Francine Hovermann v. County of Cumberland Prosecutor's Office
Docket No.: CUM-L-905-13

Dear Counsel:

I am writing to memorialize my decision in the above referenced matter.

Procedural History

This matter comes before the court by way of a Complaint in Lieu of Prerogative Writs filed by Plaintiff pursuant to R. 4:69-1 on October 21, 2013. It stems from a written reprimand issued to Plaintiff by Defendant on September 4, 2013. Plaintiff served an "appeal of written reprimand" requesting a hearing on Defendant on September 9, 2013. No hearing took place and the complaint herein followed.

Factual Background

Plaintiff is an administrative employee of Defendant. She was issued a written reprimand by the First Assistant Prosecutor based on complaints filed by another employee of Defendant. The First Assistant Prosecutor found that Plaintiff violated office policy 10.2 regarding interactions with co-employees and the public and that she demonstrated a lack of candor and had been untruthful during the investigation of those complaints.

Legal Analysis

Defendant seeks dismissal of the complaint on four grounds. First, it asserts that Plaintiff's reliance on N.J.S.A. 40A:14-150 is misplaced. It argues that the discipline of Plaintiff is actually governed by N.J.S.A. 11A:2-16. Secondly, it argues Plaintiff fails to state a claim

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cognizable in this court. Thirdly, it argues that Plaintiff failed to exhaust her administrative remedies as required by R. 4:69-5. Finally, it argues that Plaintiff's refusal to accept a hearing before the appointing authority deprives her of a *de novo* hearing in this court and that its actions should be judged by the arbitrary and capricious standard. Plaintiff counters that her discipline was covered by N.J.S.A. 40A:14-150. She also argues that her discipline should be voided because Defendant failed to follow the proper notice and due process requirements.

N.J.S.A. 40A:14-150 specifically applies to any "member or officer of a police department or force in any municipality." Unfortunately, "member" is not defined. However my review of N.J.S.A. 40A:14-1 et. seq. suggests that Plaintiff would not fall within its provisions. The statutory scheme focuses on individuals acting in a law enforcement capacity rather than support staff. Thus, the written reprimand for Plaintiff fell within N.J.S.A. 11A:2-16. That statute differentiates between State and local government employees. Although Plaintiff was not entitled to review pursuant to civil service standards, she was permitted to "request review under standards and procedures established by the political subdivision or appeal pursuant to an alternate procedure where provided by a negotiated contract provision." Id. Plaintiff is not a member of a collective bargaining unit so her appeal is governed by the Cumberland County Policy.

Cumberland County Policy Number 3.02.III.C.1 defines minor discipline as "a formal written reprimand or a suspension or fine of five working days or less." Cumberland County Policy Number 3.02.III.B.2 sets forth the requirements for issuing a written reprimand:

"Supervisors shall detail (sic) nature of the violation in a clear and concise fashion and indicate further discipline to be taken should another violation occur. The reprimand shall be given to the employee with a copy forwarded to the County Personnel Office."

There does not appear to be a policy relating to hearings or appeals from written reprimands, however, Defendant acknowledges that Plaintiff is afforded certain rights by N.J.A.C. 4A:2-3.2. That provision affords employees such as Plaintiff the right to seek a hearing within 5 days of receipt of the notice of discipline (here the written reprimand). The hearing must be conducted within 30 days of the request and a written final decision must be rendered within 20 days of the hearing. The failure to issue a written final decision "shall be considered a denial of the appeal." Id.

Defendant suggests that "N.J.A.C. 4A:2-3.2(b) clearly specifies that the appointing authority may offer a hearing within five days of a demand or such additional time as it may agree." (Defendant's Reply Brief, page 2). In actuality, that section provides that the employee "shall request a departmental hearing within five days of receipt of a notice of discipline or such additional time as may be agreed to by the appointing authority." I interpret this provision as allowing an appointing authority to extend the time in which an employee may file a request for a departmental hearing. N.J.A.C. 4A:2-3.2(b)1 dictates that "[t]he departmental hearing

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shall be conducted within 30 days of such request *unless adjourned by the consent of the parties.* (emphasis supplied). Contrary to Defendant's argument, there is a specific timeframe within which it was required to give Plaintiff a hearing. It is undisputed that Plaintiff demanded a hearing but was never afforded one by Defendant. While I agree that there is no specified hearing format for this type of discipline, Plaintiff had some due process rights which include, at a minimum, the right to know the "charges" facing her and an opportunity to "answer" them. Cermele v. The Township of Lawrence, 260 N.J. Super. 45, 47 (App. Div. 1992). While the written reprimand provided Plaintiff with a summary of the charges, she was never given the opportunity to answer them.

Defendant next suggests that Plaintiff's claims herein involve "trifling matters" and, therefore, I should dismiss her complaint. I cannot agree. Plaintiff's "right of review is constitutional, established by the N.J. Const. of 1947, art. VI, sec. 5, para. 4 which gives such jurisdiction to the Superior Court, and by R. 4:69-1 establishing venue in the Law Division." Id. at 48. I can find nothing in either statutory or case law to support Defendant's position on this issue. Defendant referred me to Burns v. Borough of Glasboro, 2014 N.J. Super. Unpub. LEXIS 484, where the court was asked to interpret the due process rights afforded to a recipient of a written reprimand under N.J.S.A. 40A:14-147.¹ In that case, the Appellate Division ruled that a police officer's written reprimand did not trigger the hearing requirements of the statute. Id. at page 9. Footnote 7 of the unpublished opinion goes on to emphasize :

"As this appeal solely concerns the right to advanced notice and hearing for a written reprimand, we have not been presented with and do not reach the issue of what due process recourse a police officer may have after the imposition of that discipline and the exhaustion of any municipal appeal process. Cf. Cermele, supra, 260 N.J. Super. at 48." (citation in original).

Cumberland County cannot take away Plaintiff's right to seek review of its actions by way of a Complaint in Lieu of Prerogative Writs.

Defendant suggests that Plaintiff has failed to exhaust her administrative remedies. Although Plaintiff has the right to proceed by way of a Complaint in Lieu of Prerogative Writs she must exhaust her administrative remedies. Cermele, supra, 260 N.J. Super. at 48; R. 4:69-5. Here, Plaintiff chose to precede with her argument that this discipline was governed by N.J.S.A. 40A:14-150 after Defendant failed to afford her a hearing. This may have resulted in a different outcome. It would be unfair to force her to pursue her administrative remedy after her complaint was filed.

Plaintiff suggests that her written reprimand must be vacated because Defendant failed to provide her a hearing as required by N.J.A.C. 4A:2-3.2(b)1. I find no support for this argument. Default judgments are not favored under our law. See: Marder v. Realty

¹ Defendant submitted this opinion pursuant to R. 1:36-3.

Construction Co., 84 N.J. Super. 313, 319 (App. Div.), aff'd 43 N.J. 508 (1964); Morristown
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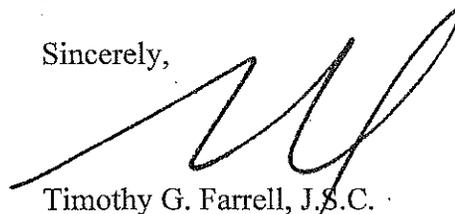
Housing Authority v. Little, 135 N.J. 274, 283-284 (1994); Mancini v. EDS, 132 N.J. 330
(1993); Davis v. DND/Fidoreo, Inc., 317 N.J. Super. 92, 99 (App. Div. 1998), certify. Den. 158
N.J. 686 (1999); Jameson v. Great Atlantic, 363 N.J. Super. 419, 430 (App. Div. 2003), certify.
Den. 179 N.J. 309 (2004); Regional Constr. Corp. v. Ray, 364 N.J. Super. 534, 540-541 (App.
Div. 2003); Nowosleska v. Steele, 400 N.J. Super. 297, 300 (App. Div. 2008); Prof'l Stone
Applicators v. Carter, 409 N.J. Super. 64, 68 (App. Div. 2009); L.E.'s LLC v. Simmons, 392
N.J. Super. 520, 529 (Law Div. 2006).

Of course, our Legislature has created instances when lack of government action results in a default in favor of a citizen. For example, our Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. provides for default approvals of variances, site plans and subdivisions if local boards fail to act within the required timeframe. N.J.S.A. 40:55D-61 and 76. There is no similar provision here. In fact, N.J.A.C. 4A:2-3.2(b)3 provides that a failure to render a decision within the required 20 day timeframe "shall be considered a denial of the appeal." Thus, at most, Defendant's inaction is considered a denial of Plaintiff's appeal. Unfortunately, that creates a situation where there is no record for a *de novo* review by this court. It is appropriate to remand the matter to the appointing authority for it to comply with N.J.A.C. 4A:2-3.2(b) and create the appropriate record for possible review by a court. Defendant shall schedule a hearing within 30 days of the date of this letter.

Finally, Defendant argues that its conduct should be evaluated under the arbitrary and capricious standard because Plaintiff failed to exhaust her administrative remedies. That issue is moot due to my decision. If it is not moot, I find that Defendant's failure to provide Plaintiff her hearing was arbitrary and capricious.

I have prepared an Order. I do not retain jurisdiction.

Sincerely,



Timothy G. Farrell, J.S.C.

TGF/maf
Enc.