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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4921-14T3

DEBORAH UPCHURCH,

Plaintiff-Appellant,

v.

CITY OF ORANGE TOWNSHIP, HAKEEM SIMS, and STATE OF NEW JERSEY,

Defendants-Respondents.

Submitted January 19, 2017 – Decided June 12, 2017

Before Judges Alvarez and Accurso.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-1145-15.

Eldridge Hawkins, attorney for appellant.

David C. Stanziale, attorney for respondents City of Orange Township and Hakeem Sims.

Christopher S. Porrino, Attorney General, attorney for respondent State of New Jersey (Melissa H. Raksa, Assistant Attorney General, of counsel; Todd A. Wigder, Assistant Attorney General, on the brief).

PER CURIAM

Plaintiff Deborah Upchurch appeals from the April 29, 2015 Law Division order dismissing her action in lieu of prerogative writs against defendants City of Orange Township (City), Hakeem Sims, and the State of New Jersey. She also appeals the May 29 denial of her application for reconsideration.

We affirm the Law Division judge's decision that the forty-five-day time limit found in N.J.S.A. 40A:14-147 does not apply to a written reprimand. The statute requires that "[a] complaint charging a violation of the internal rules and regulations established for the conduct of a law enforcement unit shall be filed no later than the [forty-fifth] day after the date on which the person filing the complaint obtained sufficient information to file[.]" We do not agree with the judge, however, that the Superior Officers Association Local 89 (SOA) contract, which included Upchurch's terms of employment, offered her a means by which to challenge the written reprimand. Nor do we agree that Upchurch is entitled to challenge the reprimand under the due process clause of either the federal or state constitutions. Thus her complaint remains dismissed, as we affirm the judge's order albeit for different reasons.

After an internal affairs investigation into Upchurch's conduct, on January 8, 2015, the City issued a written reprimand for insubordination. Upchurch had been earlier served a complaint

notification on June 6, 2014, which the City ultimately dismissed because it believed belated service violated the forty-five-day rule. When she was served with the January 8, 2015 reprimand, Upchurch, contending the statutory time limit applied to a written reprimand as well, filed the complaint in lieu of prerogative writs against defendants.

In the complaint, Upchurch alleged that the City and Sims, the Orange Police Department Director, violated N.J.S.A. 40A:14-147's forty-five-day rule, that the City and State's procedures for minor disciplinary action taken against municipal employees were unconstitutional, challenged the factual basis for the issuance of the reprimand, and further alleged that the Legislature's differential treatment of State and municipal employees, a byproduct of the statutory scheme, was unconstitutional. Defendants responded to the service of the complaint and order to show cause by filing a Rule 4:6-2 motion to dismiss.

During oral argument on the return date of the order to show cause hearing granted on her petition, see Rule 4:69-1, the City argued that the January 1, 2008 contract with SOA controlled. In the contract, Article XXII includes a grievance process for minor discipline, to be followed by arbitration, if one of the parties is dissatisfied with the outcome.

The judge concluded that N.J.S.A. 40A:14-147 did not apply to written reprimands because it was not a complaint. He also concluded that "[t]he common sense reading of N.J.S.A. 11A:2-16[1] provides a basis for [Upchurch] to file an appeal . . . when you look at that along with Article 21 [of the SOA Contract] and you read them together she would have had an opportunity to appeal [the reprimand]." He observed that Upchurch had focused her argument on the notion that the applicability of N.J.S.A. 11A:2-16 was limited to the terms "suspension or fine of five days or less," rather than reading the statute in conjunction with the contract.

At the oral argument in support of reconsideration, Upchurch reiterated her position that the SOA contract did not create a mechanism for appeal of a reprimand, and that N.J.S.A. 11A:2-16 only applied to appeals of suspensions or fines. The judge in turn reiterated his decision that the statutory scheme, when read in conjunction with the SOA contract, provided a means for Upchurch to challenge the written reprimand.

[1] "If an employee of a political subdivision receives a suspension or fine of 5 days or less, the employee may request review under standards and procedures established by the political subdivision or appeal pursuant to an alternate appeal procedure where provided by a negotiated contract provision." N.J.S.A. 11A:2-16.

I.

Because in rendering his decision the judge considered materials outside the four corners of the complaint, such as the contract, the Rule 4:6-2 motion for dismissal for failure to state a claim is treated as if a summary judgment motion. See R. 4:6-2 ("If, on a motion to dismiss based on [failure to state a claim], matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46[.]").

"We review the grant of summary judgment using the same standard as the motion judge." Manqual v. Berezinsky, 428 N.J. Super. 299, 306 (App. Div. 2012) (citing Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998)). Under this standard, the court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1996).

There are no facts in dispute. The issues relate solely to questions of law. On questions of law, our review is plenary.

D'Agostino v. Maldonado, 216 N.J. 168, 182 (2013) (citation omitted).

II.

Upchurch claims that a written reprimand can only issue within forty-five days of the event, pursuant to N.J.S.A. 40A:14-147. We begin our discussion with the language found in the statute:

> Except as otherwise provided by law, no permanent member or officer of the police department or force shall be removed from his office, employment or position for political reasons or for any cause other than incapacity, misconduct, or disobedience of rules and regulations established for the government of the police department and force, nor shall such member or officer be suspended, removed, fined or reduced in rank from or in office, employment, or position therein, except for just cause as hereinbefore provided and then only upon a written complaint setting forth the charge or charges against such member or officer . . . .
>
> A complaint charging a violation of the internal rules and regulations established for the conduct of a law enforcement unit shall be filed no later than the [forty-fifth] day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based.
>
> [(Emphasis added).]

Furthermore, "failure to comply with said provisions as to the service of the [written] complaint and the time within which a

complaint is to be filed shall require a dismissal of the complaint." N.J.S.A. 40A:14-147.

"The starting point of all statutory interpretation must be the language used in the enactment." Vitale v. Schering-Plough Corp., 447 N.J. Super. 98, 115 (App. Div. 2016) (quoting N.J. Div. of Child Prot. & Permanency v. Y.N., 220 N.J. 165, 178 (2014)). "If the statutory language is clear and unambiguous, and reveals the Legislature's intent, [the court] need look no further." Ibid. (quoting Farmers Mut. Fire Ins. Co. of Salem v. N.J. Prop.-Liab. Ins. Guar. Ass'n, 215 N.J. 522, 536 (2013)).

The key statutory language in this case requires the contested discipline to fall within the category of a "suspen[sion], remov[al], fine[] or reduc[tion] in rank from or in office, employment, or position therein . . . ." N.J.S.A. 40A:14-147. The language is straightforward and clear, lacking any ambiguity requiring us to do other than read it literally.

Upchurch only received a written reprimand, therefore she does not fall within the purview of the statute. She was not removed from her position, nor was she suspended, fined, or reduced in rank. The statutory forty-five-day time frame simply does not apply.

III.

Upchurch also contends that her due process and equal protection rights have been abrogated because the Legislature has addressed the rights and safeguards necessary for State employees faced with minor discipline, but those rules and regulations do not apply to municipal employees. "[T]he Due Process Clause provides that certain substantive rights — life, liberty, and property — cannot be deprived except pursuant to constitutionally adequate procedures." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541, 105 S. Ct. 1487, 1493, 84 L. Ed. 2d 494, 503 (1985). Our Supreme Court has stated:

> the equal protection of the laws means that no person or class of persons shall be denied the protection of the laws enjoyed by other persons or classes of persons in their lives, liberty and property, and in the pursuit of happiness, both as respects privileges conferred and burdens imposed.
>
> [Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 79 (1978) (quoting Wash. Nat'l Ins. Co. v. Bd. of Review of N.J. Unemployment Comp. Comm'm, 1 N.J. 545, 553 (1949)).]

We agree with Upchurch that State employees have procedural safeguards found in the Civil Service Act, N.J.S.A. 11A:1-1 to -12-6, and its implementing regulations, N.J.A.C. 4A:1-1.1 to -10-3.2, not extended to municipal employees. In the Law Division

judge's opinion, plaintiff has equivalent recourse in N.J.S.A. 11A:2-16. That statute states:

> If a State employee receives a suspension or fine of five days or less, the employee may request review by the Civil Service Commission under standards and procedures established by the Civil Service Commission or appeal pursuant to an alternate appeal procedure where provided by a negotiated contract provision. If an employee of a political subdivision receives a suspension or fine of five days or less, the employee may request review under standards and procedures established by the political subdivision or appeal pursuant to an alternate appeal procedure where provided by a negotiated contract provision.
>
> [(Emphasis added).]

The corresponding regulation, N.J.A.C. 4A:2-3.1(d), enacted by the Civil Service Commission, provides that "[the] subchapter shall not apply to local service, where an appointing authority may establish procedures for processing minor discipline and grievances." The regulations define minor discipline as "a formal written reprimand or a suspension or fine of five working days or less." N.J.A.C. 4A:2-3.1(a). Thus, the Commission authorized municipalities to establish their own procedures for processing minor discipline and grievances. This category includes the written reprimand served on Upchurch.

Article XXII of the SOA, titled "discharge or suspension," provides:

> No employee shall be suspended, disciplined or discharged without just cause. . . .
>
> The arbitration provisions contained in Article XXII of this Agreement shall be available for appeal for suspensions of five (5) days or less, and Civil Service procedures shall be available for appeal of suspensions of more than five (5) days.
>
> [(Emphasis added).]

The section prohibits any suspension, discipline or discharge "without just cause." The arbitration clause, however, does not encompass "discipline[.]" It only applies to "suspensions of five [] days or less," which does not include written reprimands.

Upchurch's due process rights would be violated if she had no procedural protection from disciplinary action. But "due process is flexible and calls for such procedural protections as the particular situation demands." N.J. Div. of Youth & Family Servs. v. R.D., 207 N.J. 88, 119 (2011) (quoting Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484, 494 (1972)). Different safeguards are required for different disciplinary actions. A written reprimand is different from a suspension of five days or less. The demands of due process "will be a function of what reason and justice require under the circumstances." In re Freshwater Wetlands Statewide Gen. Permits, 185 N.J. 452, 466-67 (2006).

For example, in Cermele v. Township of Lawrence, 260 N.J. Super. 45 (App. Div. 1992), the plaintiff filed a complaint in lieu of prerogative writs after he was suspended for three days without pay, arguing that there was no internal review procedure available to him. Id. at 46. The trial court dismissed the complaint for, among other reasons, the suspension being "such a minor matter." Ibid. We reversed. "There was no contractual review procedure or alternative appeal established by ordinance for plaintiff's conduct . . . . whether the penalty was as minor as one day's suspension, or as major as dismissal, plaintiff had certain due process rights." Ibid. A formal hearing is not required, as long as the plaintiff has the opportunity to present his position. Ibid. Since the municipality provided no grievance procedure for this form of minor discipline, the appropriate course of action was to bring a complaint in lieu of prerogative writs in the Law Division. Id. at 48.

But this matter differs from Cermele. Upchurch was not entitled to formal due process before or after the issuance of the reprimand, even though the SOA contract required "just cause" whenever any disciplinary action is imposed. A reprimand is not a suspension, with the attendant loss of pay and advancement potential because of the loss of a day of service. A reprimand is nothing more than a warning advising an employee of conduct

with which the employer is dissatisfied. That is not the equivalent of a compensable loss. It has no certain consequence to the employee, at the time of the issuance, or in the future.

Other jurisdictions are in accord with this conclusion.[2] See Stanton v. City of W. Sacramento, 226 Cal. App. 3d 1438 (Ct. App. 1991) (declining to extend certain procedural due process to written reprimands since "[d]emotion, suspension and dismissal all involve depriving the public employee of pay or benefits; a written reprimand results in no such loss to the employee."); Bogdanovic v. Swatara Twp., 23 Pa. D & C.3d 115, 121-22 (Ct. Com. Pl. 1982) (holding that the reprimand letter was not an adjudication requiring due process protections because no direct action resulted and future effects were too speculative and did not implicate protected rights); In re Hoffman, 652 N.Y.S.2d 346, 348 (App. Div. 1997) (explaining that if a letter of reprimand is "nothing more than a critical admonition," then it does not have the requisite formalities to trigger a hearing requirement).

The argument that a written reprimand may prevent an officer from getting promoted is too speculative to be equivalent to a

[2] As previously noted, we have expanded judicial review of the suspension of a police officer, not including written reprimands. See Cermele v. Twp. of Lawrence, 260 N.J. Super. 45, 47 (App. Div. 1992); Romanowski v. Twp. of Brick, 185 N.J. Super. 197, 203-04 (Law Div. 1982), aff'd o.b., 192 N.J. Super. 79, 480 (App. Div. 1983).

suspension, reduction in rank, reduction in pay, or the termination of employment. It is simply notice to an employee of an issue which the employer perceives to be a problem. It gives the employee the opportunity to alter his or her behavior before it is too late.

Moreover, the Orange Police Department Policies and Procedures Internal Affairs does provide, under the "Investigation and Adjudication of Minor Complaints," that the "supervisor investigating the complaint shall interview the complainant, all witnesses and the subject officer." (emphasis added). Presumably, such steps are undertaken to establish just cause. An officer can also request a hearing upon charges being brought. At the officer's request, "the Director will set the date for the hearing within a reasonable time and arrange for the hearing on the charges." Thus, it appears the City does provide an opportunity to be heard and a parallel procedure for minor discipline to that available to State employees. The statutory scheme, assuming the argument is tenable, does provide State and municipal employees the same recourse. But this procedure does not include a written reprimand because it does not fall into the category of "minor complaints." A written reprimand has no immediate or ascertainable future impact on an employee. Therefore, Upchurch's due process claim fails.

Upchurch also alleges that her privacy or property rights were affected by the issuance of the reprimand. That point is so lacking in merit as to not warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

IV.

Upchurch also maintains the trial court abused its discretion in denying her motion for reconsideration. "Reconsideration is a matter within the sound discretion of the [c]ourt, to be exercised in the interest of justice." Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)). We review the trial court's denial of such a motion for abuse of discretion. Id. at 389.

As stated in Rule 4:49-2, motions for reconsideration should be granted when the prior decision overlooked evidence, law, or was otherwise plainly incorrect. Id. at 384. Upchurch's motion was nothing more than a reargument of her original application, thus no abuse of discretion occurred in the judge's denial.

V.

While we do not agree with the judge's reading of the relevant SOA language as including written reprimands, we nonetheless affirm the dismissal of Upchurch's action in lieu of prerogative writs. Written reprimands simply do not require the procedural safeguards afforded to discharges, suspensions, and fines. Thus,

while the municipality does not appear to have a formal process for dealing with written reprimands, it was not required to develop one more than what was available under the internal affairs policies and procedures.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION