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parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1659-16T4

IN THE MATTER OF ROBERT ARMSTRONG,  
DEPARTMENT OF HUMANS SERVICES,  
DEVELOPMENTAL DISABILITIES.

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Argued April 16, 2018 – Decided May 10, 2018

Before Judges O'Connor and Vernoia.

On appeal from the New Jersey Civil Service  
Commission, Docket No. 2016-2310.

William G. Blaney argued the cause for  
appellant Robert Armstrong (Blaney & Karavan,  
PC, attorneys; Kyle D. Weinberg, on the  
briefs).

Christopher J. Hamner, Deputy Attorney  
General, argued the cause for respondent New  
Jersey Department of Human Services (Gurbir  
S. Grewal, Attorney General, attorney; Jason  
W. Rockwell, Assistant Attorney General, of  
counsel; Peter H. Jenkins, on the brief).

Gurbir S. Grewal, Attorney General, attorney  
for respondent Civil Service Commission  
(Pamela N. Ullman, Deputy Attorney General,  
on the statement in lieu of brief).

PER CURIAM

Petitioner Robert Armstrong appeals from the Civil Service Commission's final agency decision dismissing his appeal of a twenty-day suspension from his Department of Human Services (DHS) position as Chief Executive Officer of the Vineland Development Center. We affirm.

I.

On December 10, 2014, DHS served petitioner with a preliminary notice of disciplinary action stating he may be suspended for twenty days for violating an administrative order by alleged falsification, violation of rule, regulation and policy, and intentional abuse or misuse of authority, and by engaging in conduct unbecoming an employee in violation of N.J.A.C. 4A:2-2.3(a)(12).<sup>1</sup> The notice alleged petitioner provided false information to an Equal Employment Opportunity officer during an investigation of another employee's discrimination complaint. The notice also stated petitioner could request a hearing before DHS on the proposed suspension.

Petitioner requested a hearing, following which DHS issued a December 15, 2015 final notice of disciplinary action sustaining

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<sup>1</sup> Petitioner correctly notes N.J.A.C. 4A:2-2.3(a)(6) is the regulation prohibiting conduct unbecoming an employee. He does not claim the notice's inaccurate citation to the regulation resulted in any prejudice or provides a basis to reverse the Commission's decision.

the charges and imposing the twenty-day suspension. The final notice advised petitioner he had a right to appeal DHS's decision to the Commission. Petitioner appealed, and the matter was transferred to the Office of Administrative Law as a contested case and assigned to an administrative law judge (ALJ) for a hearing.

DHS subsequently filed a motion for summary disposition, arguing the Commission lacked jurisdiction to decide the appeal because petitioner was in the unclassified service. Petitioner argued DHS utilized Commission disciplinary notices to impose the suspension, and he detrimentally relied on the notices to challenge the suspension in accordance with Commission procedures. Petitioner argued that because he relied on DHS's disciplinary notices, he missed the deadline to grieve the suspension in accordance with N.J.A.C. 4A:2-3.4(a), which requires the filing of a grievance within thirty days of the date of the challenged action or from the date the grievant should have reasonably known of the action.

The ALJ issued a written decision finding petitioner was employed in an unclassified position as the Chief Executive Officer, and therefore not entitled to the protections of the

Civil Service Act (the Act), N.J.S.A. 11A:1-1 to 12-6.<sup>2</sup> The ALJ reasoned that N.J.S.A. 11A:2-6 only vested the Commission with jurisdiction to hear appeals of suspensions by employees in the classified service. The ALJ also found DHS's use of Commission disciplinary forms and its holding of a departmental hearing did not vest the Commission with jurisdiction to hear petitioner's appeal. The ALJ recommended dismissal of the appeal.

Petitioner filed exceptions to the ALJ's decision. The Commission issued a final decision adopting the ALJ's findings and recommendation, and dismissed the appeal. Petitioner appealed and presents the following arguments for our consideration:

POINT I

STANDARD OF REVIEW[.]

POINT II

THE CIVIL SERVICE COMMISSION IN ADOPTING [THE ALJ'S] INITIAL DECISION, ABUSED ITS DISCRETION IN DISMISSING PETITIONER'S APPEAL BASED UPON LACK OF JURISDICTION EVEN THOUGH RESPONDENT HAD ESTABLISHED A MAJOR DISCIPLINARY PROCEDURE PURSUANT TO N.J.A.C. 4A:2-2.1(b).

POINT III

THE CIVIL SERVICE COMMISSION IN ADOPTING [THE ALJ'S] INITIAL DECISION, ABUSED ITS DISCRETION

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<sup>2</sup> "'Unclassified service' means those positions and job titles outside of the senior executive service, not subject to the tenure provisions of [the Act]" and the regulations promulgated pursuant to the Act. N.J.A.C. 4A:1-1.3.

IN FAILING TO DISMISS PETITIONER'S UNDERLYING CHARGES IF THEY WERE CORRECT IN DETERMINING THE CIVIL SERVICE COMMISSION LACKED JURISDICTION OF THE SAME.

POINT IV

THE CIVIL SERVICE COMMISSION, IN ADOPTING [THE ALJ'S] INITIAL DECISION, ABUSED ITS DISCRETION IN DENYING PETITIONER'S DISCIPLINARY APPEAL LEAVING HIM WITHOUT THE ABILITY TO FILE A PROPER TIMELY GRIEVANCE.

II.

Our review of an agency's decision is limited. In re Stallworth, 208 N.J. 182, 194 (2011) (citing Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980)). We "afford[] 'a strong presumption of reasonableness' to an administrative agency's exercise of its statutorily delegated responsibilities." Lavezzi v. State, 219 N.J. 163, 171 (2014) (quoting City of Newark v. Nat. Res. Council, Dep't of Env'tl. Prot., 82 N.J. 530, 539 (1980)). A reviewing court "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) (citing In re Herrmann, 192 N.J. 19, 28 (2007)). The party challenging the agency's action has the burden of proving the

action was arbitrary, capricious, or unreasonable. Lavezzi, 219 N.J. at 171.

Employees in the classified service are subject to the imposition of major discipline for reasons related to their employment. See N.J.A.C. 4A:2-2.3. Major discipline includes "[s]uspension[s] . . . for more than five working days at any one time." N.J.A.C. 4A:2-2.2. Petitioner contends the Commission erred by dismissing his appeal, but neither the Act nor the Commission's regulations authorize the Commission to hear appeals by employees in the unclassified service from the imposition of major discipline.

The right to appeal the imposition of major discipline is expressly limited "to permanent employees in the career service or a person during a working test period," N.J.S.A. 4A:2-2.1, and the Act vests the Commission, inter alia, only with authority to "render the final administrative decision on appeals concerning permanent career service employees or those in their working test period" who are suspended "as prescribed in N.J.S.A. 11A:2-14," N.J.S.A. 11A:2-6(a)(2). Other provisions of the Act defining the procedure for challenging the imposition of major discipline are uniformly limited to discipline imposed on permanent career service employees or those in their working test period. See, e.g., N.J.S.A. 11A:2-13 (providing for notice of discipline and a

hearing for "permanent employee[s] in the career service or a person serving a working test period"); N.J.S.A. 11A:2-14 (requiring notice of the right to appeal to employees entitled to a hearing under N.J.S.A. 11A:2-13); N.J.S.A. 11A:2-15 (providing appeal procedure for challenges to discipline imposed under N.J.S.A. 11A:2-13 and N.J.S.A. 11A:2-6(a)(4)).<sup>3</sup>

Petitioner is neither a permanent employee in the classified service nor an employee serving a working test period. Moreover, petitioner was not suspended "as prescribed in N.J.S.A. 11A:2-14," because that provision applies to employees who have been provided a hearing in accordance with N.J.S.A. 11A:2-13, and N.J.S.A. 11A:2-13 is expressly limited to disciplinary actions imposed on "permanent employee[s] in the career service or a person serving a working test period."

Petitioner was employed in the unclassified service, see N.J.S.A. 11A:3-4(d), and therefore is "not subject to the provisions of [the Act]," Keuerleber v. Twp. of Pemberton, 260 N.J. Super. 541, 548 (App. Div. 1992). See also N.J.S.A. 11A:3-4 (providing employees in State unclassified service "shall not be subject to the provisions of [the Act] unless otherwise

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<sup>3</sup> N.J.S.A. 11A:2-6(a)(4) permits appeals by career service employees who are terminated "at the end of the working test period for unsatisfactory performance."

specified").<sup>4</sup> We therefore find no basis in the Act or the Commission's regulations supporting petitioner's claim he had a right to appeal DHS's final decision imposing the twenty-day suspension.

We are not persuaded by petitioner's argument DHS's use of the Commission's preliminary and final notices of disciplinary action, and its decision to hold a departmental hearing, vested the Commission with jurisdiction to hear his appeal. We recognize DHS used the disciplinary forms and conducted a hearing in a manner consistent with the requirements for permanent employees in the career service and those in their working test periods, but petitioner cites no legal authority permitting an appointing authority to expand the Commission's jurisdiction to hear appeals beyond that authorized by the Act and the Commission's regulations. DHS's actions as an appointing authority did not, and could not, confer upon petitioner any appeal rights beyond those otherwise provided by law. See, e.g., Cipriano v. Dep't of Civil Serv., 151 N.J. Super. 86, 91 (App. Div. 1977) ("Where [an] act in question is utterly beyond the jurisdiction of a public entity and is ultra

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<sup>4</sup> Petitioner does not contend he was employed in an unclassified service position the Act "otherwise specified" is subject to its provisions.



vires, the doctrine of estoppel in the interest of equity and essential justice has no direct application.").

Petitioner seeks refuge in N.J.A.C. 4A:2-2.1(b), which provides that "[a]ppointing authorities may establish major discipline procedures for other employees." He argues DHS's decision to conduct a departmental hearing and its use of disciplinary notice forms stating he had a right to appeal to the Commission established a disciplinary procedure for him, as an unclassified employee, in accordance with N.J.A.C. 4A:2-2.1(b). He further claims that under the procedure DHS established, the Commission was vested with the authority to decide his appeal. We disagree.

As noted, the Act and the applicable regulations limit the Commission's jurisdiction to hear appeals of major discipline to permanent employees in the career service and persons during their working test periods. N.J.A.C. 4A:2-2.1(b) is permissive in that it allows appointing authorities to establish disciplinary procedures for employees who are not permanent in the career service or in their working test periods. But the regulation does not authorize an appointing authority to establish a disciplinary procedure that expands the jurisdiction of the Commission to hear appeals beyond those otherwise permitted by the Act or applicable regulations.

Petitioner further contends DHS's use of the disciplinary notices, and the final notice's statement that petitioner could appeal to the Commission, were misleading and resulted in his decision to forego the timely filing of a grievance challenging his twenty-day suspension under N.J.A.C. 4A:2-3.4(a). The regulation is part of a sub-chapter that "only appl[ies]" to "[m]inor discipline appeals of [State service] employees in the career service or persons serving during the working test period," N.J.A.C. 4A:2-3.1(e)(1), and "[g]rievance appeals of any employees in the career or unclassified service," N.J.A.C. 4A:2-3.1(e)(2). Petitioner relies upon the latter provision of the regulation.

Petitioner claims that as an employee in the unclassified service, he was entitled to file a grievance with DHS challenging his twenty-day suspension under N.J.A.C. 4A:2-3.1(e)(2) within thirty days of the date he received the final notice imposing the suspension, see N.J.A.C. 4A:2-3.4(a), but failed to file the grievance because DHS misinformed him about the applicable disciplinary process.<sup>5</sup> Even accepting that contention as true,

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<sup>5</sup> As an unclassified employee, petitioner is entitled to grieve only those matters enumerated in N.J.A.C. 4A:2-3.1. Petitioner does not challenge "a formal written reprimand or a suspension . . . of five working days or less," and he therefore did not have a cognizable grievance under N.J.A.C. 4A:2-3.1(a). We do not consider or decide whether petitioner's challenge to his suspension would have otherwise constituted "an employee complaint

DHS's actions could not vest the Commission with jurisdiction to consider an appeal that is not authorized by the Act or the regulations.

Moreover, even if petitioner had filed a grievance in accordance with N.J.A.C. 4A:2-3.4(a), and it was not resolved in his favor, the Commission would not have jurisdiction to hear an appeal from DHS's final decision. N.J.A.C. 4:2-3.7 only provides for appeals of minor discipline, N.J.A.C. 4:2-3.7(a), and final appointing authority decisions in "[g]rievances," N.J.A.C. 4:2-3.7(b). Petitioner did not challenge the imposition of minor discipline, and appeals of "grievances" are limited to "issues of general applicability in the interpretation of law, rule, or policy." N.J.A.C. 4:2-3.7(b). Petitioner did not present such issues in his challenge to his suspension. Rather, his challenge related solely to whether DHS had sufficient evidence to sustain the disciplinary charges and support the suspension. Thus, DHS's use of the disciplinary forms, and the procedure it employed to make its final decision imposing the suspension, did not prejudice petitioner by depriving him of a right to pursue a grievance that could be appealed to the Commission. N.J.A.C. 4:2-3.7(b).


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regarding any term or condition that is beyond the employee's control and is remedial by management," such that it would constitute a cognizable grievance under N.J.A.C. 4A:2-3.1(b).

We are therefore convinced the Commission correctly determined it lacked jurisdiction to consider petitioner's appeal of DHS's final decision imposing the twenty-day suspension. We do not decide if DHS's use of the disciplinary forms and any erroneous instructions to petitioner provide a basis premitting the filing of a grievance beyond the time permitted by N.J.A.C. 4A:2-3.4, if petitioner's challenges to the preliminary and final notices of disciplinary action should be deemed the filing of a grievance under the regulation, or if petitioner's challenge to the suspension constitutes a cognizable grievance under N.J.A.C. 4A:2-3.1(e)(2).<sup>6</sup> Those issues are not before us. We decide only that the Commission correctly determined it lacked jurisdiction to decide petitioner's appeal of DHS's imposition of the twenty-day suspension.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION

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<sup>6</sup> A grievance is defined as "an employee complaint regarding any term or condition that is beyond the employee's control and is remedial by management." N.J.A.C. 4A:2-3.1(b).