SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

Audrey Kernan, Plaintiff/Appellant, Vs. State Of New Jersey, New Jersey Department of Labor and Workforce Development; Commissioner Robert Asaro-Angelo, and Governor Phillip D. Murphy, Defendants/Respondents	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-001199-22-T04 ON APPEAL FROM THE GOVERNOR'S LETTER OF TERMINATION PURSUANT TO N.J.A.C. §12:235-10.9, DATED JULY 25, 2022 and THE GOVERNOR'S DENIAL OF RECONSIDERATION DATED AUGUST 12, 2022

BRIEF ON BEHALF OF PLAINTIFF/APPELLANT AUDREY KERNAN

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PROCEDURAL HISTORY

Supervising Judge Audrey Kernan was the subject of four complaints filed with the New Jersey Department of Labor and Workforce Development ("DLWD") between June and September of 2018. (Pa20-56). On November 23, 2018, the Office of Labor Relations ("OLR") found insufficient credible evidence to substantiate any of them. (Pa57-60). Assistant Commissioner Tennille McCoy then conducted a separate investigation on October 4, 2018 through the Office of Diversity Compliance ("ODC"). She found two (2) allegations to be substantiated and informed Kernan of her right to appeal the findings with the New Jersey Civil Service Commission ("NJCSC"). (Pa62-65).

After Judge Kernan tried to appeal to the NJCSC, Ms. McCoy filed a Verified Judicial Complaint with the Commission on Judicial Performance ("CJP") on April 14, 2019, which would then serve as the appellate forum. (Pa68; Pa104). The CJP filed its recommendation on May 11, 2021. (Pa187). Judge Kernan then requested a final hearing by an independent hearing officer, withdrew that request on June 21, 2022, and filed a Verified Complaint and Order to Show Cause in the Law Division on September 1, 2022. (Pa209). On November 30, 2022, the Honorable Robert Loughy, A.J.S.C. determined that the Law Division did not have jurisdiction and transferred the matter to this Appellate Division. (Pa6). This Order served as the Notice of Appeal.

STATEMENT OF FACTS

Between June and September of 2018, Ingrid L. French, Daisy Palumbo, Carmine Taglialatella, and Stephanie Mingin filed complaints against Supervising Judge Audrey Kernan with the New Jersey Department of Labor and Workforce Development ("DLWD"). (Pa20-56). On November 23, 2018, Deborah Palombi, the Employee Relations Coordinator for the Office of Labor Relations, responded to each of the complaints in the identical manner:

> Upon receipt of the complaint, the Office of Labor Relations (OLR) conducted a thorough investigation of the allegations by interviewing the complainant, you, other witnesses, and reviewing emails and other documentation submitted into the record.
>
> The Office of Labor Relations concluded the investigation on October 19, 2018, and determined that there was insufficient credible evidence to substantiate a finding of Workplace Violence, however there were noted concerns.

(Pa57-60). These findings, after a thorough investigation, should have conclusively ended the matter. Unfortunately, and through some mechanism that is unclear from the agency record, Assistant Commissioner Tennille McCoy ("McCoy") was able to have these identical complaints heard by some other office within the DLWD while the above investigation was pending. (Pa62).

Whereas the OLR did not complete its investigation until October 19, 2018, McCoy (as the Assistant Commissioner for Human Capital Strategies), conducted and directed her own investigation commencing on October 4, 2018.

(Pa62). McCoy stated that the Office of Diversity Compliance ("ODC") received complaints (notably from the exact same complainants, alleging the same exact conduct at issue in the OLR investigation). McCoy investigated five (5) allegations of misconduct, all of which Kernan denied, and found two (2) of them to be substantiated as of February 21, 2019. Ms. Kernan allegedly referred to Judge Bradley Henson as suffering from "Small Penis Syndrome" and stated that Judge Ingrid French "only has her job because she is a black woman." (Pa63-65). McCoy concluded her letter with: "If you wish to appeal this determination, you must submit a written appeal to the New Jersey Civil Service Commission (NJCSC) … postmarked or delivered within 20 days …." (Pa64).

That is precisely what Judge Kernan did, as instructed. Unfortunately, she never even received the opportunity to contest the findings in an appeal to the NJCSC, as McCoy again steered the process. While Ms. Kernan was in the midst of the appeal, McCoy used her investigation as the basis to file a Verified Judicial Complaint with the Commission on Judicial Performance ("CJP") on April 14, 2019. (Pa68-70). Ms. McCoy improperly "verified" the complaint, as she could not verify any of the facts contained therein. Instead, she used the French and Palumbo complaints, which had already been deemed insufficient to warrant further action. (Pa71). Judge Kernan's counsel, Stephen T. Mashel, Esq., argued that "[i]nterests of justice and fundamental fairness" compelled a

dismissal or stay of the CJP process in light of the pending appeal. (Pa75). The CJP nonetheless forged forward, and the NJCSC ultimately declined jurisdiction over the appeal, finding that "the appropriate venue for this appeal is the Commission on Judicial Performance." (Pa104). As will be established below, the CJP is not an appellate forum, nor did it act as one in the present case.

The undisputed facts presented above thereby reveal the following procedural history and the outsized role of Assistant Commissioner McCoy. While Ms. Kernan was already subject to investigation by the OLR, Ms. McCoy independently conducted her own parallel investigation. She then used her own findings made during that parallel investigation as the basis for her own Verified Complaint, even though her lack of first-hand knowledge of the events in question rendered her incompetent to verify any of the facts. The individuals that suffered the supposed indignity of having to hear Judge Kernan's two comments are not the complainants. The individual that conducted the investigation and came to her own conclusions, separate from the findings of Ms. Palombi, initiated the entire matter all the while divesting the NJCSC from rendering a decision on Ms. Kernan's appeal. One individual – Tennile McCoy – engendered her own investigation while another investigation was pending, made her own findings, and then circumvented Ms. Kernan's right to appeal those findings.

Mr. Mashel again made these issues explicit at the very commencement of the CJP Process, to no avail. He argued:

> It appears Assistant Commissioner McCoy's Complaint is an improper attempt to use this commission as a cudgel with which to punish Judge Kernan simply because assistant Commissioner McCoy is frustrated by the ODC's decision not to issue any major discipline … or minor discipline … against Judge Kernan. …
>
> No office or person having oversight authority over Judge Kernan within the scope of the DLWD or its Division of Worker's Compensation, ever undertook to give Judge Kernan a warning, reprimand or other form of administrative action, or for that matter, to even require her to submit to some form of remedial training or counseling. It is simply inconceivable how an Assistant Commissioner has any standing to assert ethics charges against Judge of Compensation for conduct which a state agency the Assistant Commissioner oversees has concluded does not warrant any degree of discipline or any form of remedial action. In fact, the effort undertaken by Assistant Commissioner McCoy to use this Commission to exact punishment against Judge Kernan is likely unprecedented and will set a dangerous precedent going forward ….

(Pa76-77). Although McCoy's subjective motivations are beyond the purview of this appeal, the system allowed one person to conduct her own investigation and engender a judge's removal for **allegedly** making two isolated comments in private conversation, while an appeal related to that very conduct was pending.

Of course, these problems would be ameliorated if the CJP process itself were fair and balanced, and led to an impartial decision that could then be aptly tested on appeal. It is not, as the entire process vests near exclusive decision making power in one individual, the Commissioner, who displayed his bias from the very start. On August 22, 2019, E. Richard Boylan, Esq. on behalf of the CJP

requested witness statements and other evidence supporting the allegations made in the Complaint, which consisted of only two (2) violations of State Policy, as cited in the Verified Complaint. Instead, Commissioner Robert Asaro-Angelo tainted the process by filing a letter excoriating Judge Kernan with unfounded allegations from her entire tenure both before and after the subject of the Complaint, unconnected to the two violations that were found. (Pa106).

On October 10, 2019, the Commissioner drafted correspondence to E. Richard Boylan wherein he literally spelled out precisely what findings he wanted to CJP to make. (Pa106-108). Mr. Boylan is not an independent hearing examiner, but rather works subordinate to the Commissioner himself. Based on this hierarchy, the Commissioner was the effective head of the CJP Process. Mr. Boylan reports directly to Commissioner Asaro-Angelo, yet solicited his input on a contested matter. And the content of the Commissioner's involvement reflects the level of demonstrable bias inherent in the system.

Mr. Asaro-Angelo devoted three single-spaced pages to "alert the Commission" to other allegations that had nothing to do with the Complaint. He began by making unfounded allegations about Judge Kernan's supposed retaliatory conduct subsequent to the Complaint, with additional certifications that infused new information into the evidentiary hearing. He, "by way of background," emphasized voluntary settlements that resulted in a short period

of suspension in the past; provided the CJP with a Confidential Settlement Agreement and General Release that Judge Kernan executed 10 years prior in August 2012, which described other complaints made against Judge Kernan that had nothing to do with the investigation; and then launched into an indictment of her conduct commencing in May of 2019, when the Complaint should have been solely focused on the two violations that occurred in 2018. (Pa106-108).

After three pages, he concluded:

> As you can tell from the above, Judge Kernan is retaliating against employees that make complaints about her. This retaliation is demonstrated by her hiring a private investigator to interrogate those that complained against her, permitting the investigator access a private area where the clerks are located, yelling at employees, slamming doors and file drawers, requesting that a security guard accompany Judge Kernan when speaking to Stephanie Mingin, and wearing a bodycam while at work believing that people were out to get her. In light of the above, Department of Labor requests that you investigate this matter expeditiously **and please consider this information contained herein and attached**, along with the findings that were made in February 2019.

(Pa108)(emphasis added). Every single one of these allegations was prejudicial as they had nothing whatsoever to do with the substance of the Complaint that was filed. His open and unreserved advocacy for the CJP to render an adverse recommendation, made directly to a subordinate, created an intractable conflict.

To make the matter infinitely worse, the CJP determined on January 19, 2021 that it would not require the State to place the complaining witnesses under oath, even though the witness statements were never made under oath subject to

penalty of perjury. On the contrary, to conduct the required "evidentiary review, the Commission" would consider the "letter of Commissioner of Labor Robert Asaro-Angelo of October 10, 2019 along with the witness statements attached to that letter." (Pa109). The CJP thereby relied upon unproven conduct that occurred *after* the Complaint was filed and additional factual certifications that went beyond the limited scope of CJP's evidentiary review. Whereas the CJP was designated as the appellate forum to determine whether Judge Kernan committed only two violations of State Policy, the Commissioner unilaterally transformed the process into an indictment of her entire tenure with the State.

In response, Mr. Mashel detailed the substantial problems with both the actual conduct of the evidentiary hearing as it was being applied as well as the inherent problems with the administrative scheme. The CJP had received 200+ pages of confidential EEO investigation statements from the Commissioner (which itself was a breach of confidentiality) over 15 months prior, yet provided them to Judge Kernan only days before the scheduled hearing. (Pa111). He noted the inherent conflict in having the Commissioner advocate for removal given the hierarchy of the Department: Director Russell Wojtenko, Jr. appoints the CJP members yet answers directly to the Commissioner, the complaining party. He aptly concluded, "the blatant advocacy and overt pressure Commissioner Asaro-Angelo has exerted on this Judicial Commission, and implicitly on Director

Wojtenko, to convict Judge Kernan of the ethical violations raised by Assistant Commissioner McCoy, is so unseemly and disturbing as to effectively destroy any hope Judge Kernan has of receiving an impartial adjudication of the ethic charges being prosecuted against her." (Pa113-114; Pa116).

Judge Kernan thereby opted to forego a formal defense, and instead made a statement through counsel setting forth both the substantive and procedural problems. He explained the inherent conflict of interests given the Assistant Commissioner's role in commencing the matter and the Commissioner's control over both the process and result (Pa126); the fact the complaint "unlawfully relies on a breach of New Jersey's EEO confidentiality policies" at the hands of the Commissioner himself (Pa127); that Tennille McCoy "lacks requisite standing" to make a verified complaint as she "has no personal knowledge;" that the individuals who made the actual complaint never did so under oath (Pa128); that the CJP Process was being misused to avoid proper appellate review of the two alleged violations of State Policy; that removal should be assessed by the clear and convincing standard; that the paltry allegations (even if accurate) were merely "scattered remarks in private, amounting to nothing more than harmless banter" (Pa129); and, finally, "that [Kernan] cannot possibly get a fair hearing today because of the undue prejudice" caused by CJP's stated reliance upon "accusations unrelated to the McCoy complaint." (Pa131-32).

The CJP was undeterred, and their ultimate decision rendered on May 11, 2011 revealed the acuity of Mr. Mashel's objections. Although Mr. Boylan recognized the overlapping jurisdiction of the ODC, he entirely ignored the fact that the CJP was deemed the appellate avenue to assess the ODC's finding. The CJP even explicitly noted that the "personnel department chose to channel this matter" to the CJP and "[i]n whatever manner it occurred, Palumbo's and Mingin's complaints came before the CJP...." (Pa191). Rather than focus on the two findings stated within the CJP Complaint, however, the CJP did precisely as the Commissioner ordered, and evaluated a host of allegations unconnected to the Verified Complaint. (Pa190-197). Notably, Judge Kernan was not informed until June 11, 2021, a full month after the CJP gave its recommendation, and the Commissioner waited another month before suspending Judge Kernan on July 6, 2021. (Pa185; Pa203).

The problems inherent within the CJP process became amplified after the matter proceeded to the adjudicatory phase. Once the Commission recommends major discipline, the aggrieved judge must specifically request a final hearing by an independent hearing officer (in this case retired judge Glenn Berman), who then decides precisely what procedures to employ. N.J.A.C. §12:235-10.9. Judge Kernan's counsel for this adjudicatory process disclosed that Kernan intended to subpoena several high-level officials and employees within the

DLWD including Workers' Compensation Judges. Counsel thereby requested confirmation that the procedures employed by the hearing officer would include the power to issue subpoenas. Finally, because of "significant consequences attendant to the disciplinary recommendations," counsel sought "formal discovery prior to the hearing, including the taking of depositions, exchange of interrogatory questions and propounding of documents." (Pa204-05).

Judge Berman refused to permit depositions, signaling the proverbial nail in the coffin in terms of fundamental fairness. Counsel made a motion seeking to depose key witnesses, especially in light of the substantial problems inherent in the CJP process. Specifically, he argued that the depositions of "several witnesses whose affidavits were apparently considered by the [CJP] in making its recommendation of major discipline" were necessary. He noted that Judge Kernan had no effective ability to cross examine these witnesses, as the State was never required to call them and provide testimony. He noted the gravity of the consequences, as well as the Constitutional roots of Judge Kernan's rights. He concluded that both "the interests of justice" and "the due process envisioned in the *Russo v. Governor of State of New Jersey* matter" required the requested discovery so that Judge Kernan could "prepare for meaningful cross-examination at the final hearing," to no avail. (Pa206-07). Judge Berman denied the request without even entering an order or stating the reasons for his decision.

As the Administrative Code makes clear, the system is designed so that at the very end of this adjudicatory process, the hearing officer *does not* render a final decision in the same manner as an Administrative Law Judge. On the contrary, Commissioner Asaro-Angelo makes the final determination on almost all discipline. Remarkably, the same individual who drafted the October 10, 2019 letter and indicated exactly what findings the CJP should make has the power to order any punishment short of complete removal. Although the Code reserves that power to the Governor, the Governor's decision is based on the Commissioner's recommendation. N.J.A.C. §12:235-10.9. It borders on absurdity to conclude that Judge Kernan could in any way achieve a fair result by continuing on with the adjudicatory process given the tortured history of the investigatory process, the Commissioner's obvious bias against Judge Kernan, his decision-making authority, and the fact that the Governor ultimately acts upon his recommendation.

Based on the futility of continuing with the administrative process, Judge Kernan withdrew her request for a hearing on June 21 2022, precisely because the hearing to which she was subjected did not provide her with the Constitutional hearing to which she was entitled. Approximately one month after Judge Kernan withdrew from the administrative process, she received a letter from the Governor's office (which was not even signed by the Governor, but

merely effectuated through a literal rubber stamp) informing her that she would be removed as a judge "in accordance with N.J.S.A. 12:235-10.9." (Pa1).

Judge Kernan immediately informed the Governor that she had not waived her right to a removal hearing, guaranteed by the State Constitution, and that the "withdrawal from the N.J.A.C. hearing does not simultaneously withdraw …from a right to a constitutional hearing." Specifically, counsel argued:

> Withdrawing from the N.J.A.C. 12:235-10.9 does not, because it cannot, act to automatically waive Supervising Judge Kernan's constitutional right to be heard at a public hearing before being removed. Further, it does not replace the Governor's requirement to provide Supervising Judge Kernan with a public hearing. Moreover, it must be noted that Supervising Judge Kernan has never been afforded her basic right of cross examination of witnesses related to this removal.

(Pa2-3). The quality and integrity of the process was simply so poor and failed to provide Judge Kernan with the full panoply of rights to which she was entitled pursuant to Article V, Section IV, paragraph 5 as a tenured judge.

Because Judge Kernan had a legitimate, good faith belief that the administrative hearing was not a removal hearing (as removal could only be accomplished through the mechanism spelled out in the Constitution), the State should have reopened the administrative hearing and permitted her the option to complete the process. Instead, Chief Counsel for the Governor stated that the "Governor was satisfied that his decision to remove Judge Kernan was made in adherence to all applicable regulatory, statutory and constitutional principles."

Because Judge Kernan had ostensibly "waived her right to an administrative public hearing as provided by the New Jersey State Constitution," a statement fraught with inaccuracies both factual and legal, the request that "the Governor … provide Judge Kernan with another public hearing is denied." (Pa4).

Judge Kernan never sought "another" public hearing. Judge Kernan sought precisely what the Constitution guaranteed her, and it was apparent that the administrative mechanism did not even come close to satisfying the constitutional mandate. Judge Kernan thereby filed a Verified Complaint in the Law Division, setting forth the fact she had only "waived" her right to an administrative hearing and that she had not at any point waived her right to the Constitutional Hearing to which she was entitled. (Pa214-17). The Honorable Robert Loughy, J.S.C. did not issue a substantive decision, yet determined the Law Division lacked jurisdiction and transferred this matter to the Appellate Division as an appeal of the adverse disciplinary decision. (Pa6-19).

LEGAL ARGUMENT

I. THE ADMINISTRATIVE PROCESS SET FORTH AT N.J.A.C. 12:235-10.1, ET. SEQ., FACIALLY AND AS APPLIED, FAILED TO SATISFY THE CONSTITUTIONAL MANDATE CONTAINED IN ARTICLE V, SECTION IV, PARAGRAPH 5 OF THE NEW JERSEY CONSTITUTION (Pa2-3; Pa111-120).

Constitutional challenges to either a statute or an administrative regulation passed pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 to-15,

are not to be asserted nor taken lightly. A reviewing court must "accord" administrative regulations a "presumption of reasonableness," vesting "the burden on the attacking party to demonstrate that they are arbitrary, capricious, unduly onerous or otherwise unreasonable." N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 561 (1978); New Jersey State League of Municipalities v. Department of Community Affairs 158 N.J. 211, 222 (1999)("NSLM")). The required "deference, however, is not without limit." Although "rare," an Appellate Court may not uphold a regulation that is *ultra vires* or otherwise frustrates legislative policy and violates the Constitution. NJSLM, 158 N.J. at 222; Long, 75 N.J. at 561-62.

The deference normally accorded administrative action does not apply here. First, because "cases involving the disciplining of a public officer or employee ordinarily involve no expertise," the "substantial evidence rule" normally applicable upon judicial review is inapt. Disciplinary matters, especially ones involving high level officials, follow "the fundamental premise of substantial justice as the standard of judicial review." Connelly v. Hous. Auth. of Jersey City, 63 N.J. Super. 424, 428 (App. Div. 1960); see also Wester v. City of Asbury Park, 299 N.J. Super. 358, 367 n.5 (Law Div. 1996)("substantial justice" standard of review of public employee discipline is "unburdened by deference to ... quasi-judicial expertise"). Second, the standard of review "in

construing the meaning of a constitutional provision or a statute is de novo." Gormley v. Wood-El, 218 N.J. 72, 87 (2014). With regard to questions of law such as whether a public employee "was deprived of due process," the reviewing court "will review the agency's determination de novo." George v. City of Newark, 384 N.J. Super. 232, 238-39 (App. Div. 2006).

A. To Remove a Workers' Compensation Judge, the Constitution Compels an Investigation Caused by the Governor, Adequate Notice, an Opportunity to Respond at a Public Hearing, the Governor's Involvement Sufficient to Render an Informed Decision, and an Effective Right to Judicial Review.

The New Jersey Judiciary "has the obligation and the ultimate responsibility to interpret the meaning of the Constitution." N.J. Republican State Comm. v. Murphy, 243 N.J. 574, 591 (2020). To do so, New Jersey courts are guided by certain interpretive principles. First, "the constitutional provision in question must be interpreted and applied in a manner 'that serves to effectuate fully and fairly its overriding purpose,'" as the "'polestar of constitutional construction is always the intent and purpose of the particular provision.'" State v. Trump Hotels & Casino Resorts, 160 N.J. 505, 527 (1999)(internal citations omitted). To ascertain intent, "a court must first look to the precise language used by the drafters," such that if the Constitutional language is "clear and unambiguous, the words used must be given their plain meaning." Id; Vreeland v. Byrne, 72 N.J. 292, 302 (1977).

If the language is subject to more than one valid interpretation, the courts may then consider outside sources, such as pertinent historical materials. Id. at 527-28. Judges are called to evaluate "'the text and structure of the Constitution, the relevant historical materials, and, most importantly, the 'basic principles of our democratic system.'" N.J. Republican State Comm, 243 N.J. at 592 (internal citations omitted). Our courts must "avoid interpretations that render language in the Constitution superfluous or meaningless," because "when interpreting a constitution, 'real effect should be given to all the words it uses.'" Id.; State Conference-NAACP v. Harvey, 381 N.J. Super. 155, 159 (App. Div. 2005).

The New Jersey Courts have further recognized that the "authority of the Governor of New Jersey derives from Article V of the State Constitution." Bullet Hole, Inc. v. Dunbar, 335 N.J. Super. 562, 572 (App. Div. 2000). In the present case, the governing Constitutional provision states:

> The Governor may cause an investigation to be made of the conduct in office of any officer or employee who receives his compensation from the State of New Jersey, except a member, officer or employee of the Legislature or an officer elected by the Senate and General Assembly in joint meeting, or a judicial officer. He may require such officers or employees to submit to him a written statement or statements, under oath, of such information as he may call for relating to the conduct of their respective offices or employments. After notice, the service of charges and an opportunity to be heard at public hearing the Governor may remove any such officer or employee for cause. Such officer or employee shall have the right of judicial review, on both the law and the facts, in such manner as shall be provided by law.

N.J. Const., Art. V, Sec. IV, Para. 5.

Our courts have interpreted and applied N.J. Const., Art. V, Sec. IV, Para. 5 in only a handful of decisions. Commenting upon the power conferred upon the Governor, the Supreme Court stated:

> The delegates to the 1947 Convention, adhering closely to our traditional concept of the separation of powers among the three departments of government, legislative, executive and judicial, stressed the thought that the primary responsibility for the conduct of the executive and administrative branches of the government resided in the Governor, and accordingly, for the first time, conferred upon the chief executive the power to meet and discharge the recognized responsibility by investigating the conduct of state employees and granting him the right to remove for cause shown.

Russo v. Walsh, 18 N.J. 205, 209 (1955). The Governor thereby has the "dual power of investigation and removal" so as "to provide for a centralization of authority and power in the office of the Governor under reasonable checks and balances… ." Id. The Supreme Court further found that "the 1947 Constitution as drafted … was intended to confer upon him the additional power of temporary suspension incidental to removal." Id. at 211-12. Although the 1947 Constitution as a whole greatly expanded the Governor's power, the draftsmen were nonetheless concerned with the arbitrary use of that power. The Supreme Court expressly acknowledged "the possible abuses to which the power of suspension may be subject in the hands of an arbitrary chief executive." Id. at 212-13.

In a seminal case with regard to the removal process, the Supreme Court reviewed "an order of the Governor removing Louis J. Russo from his position

as Assistant Chief Examiner in the Department of Civil Service for misconduct in office ... ." Russo v. Governor of State, 22 N.J. 156, 159 (1956). In that matter, the Governor personally appointed the first superintendent of the New Jersey State Police to conduct the investigation, which revealed misconduct in connection with overtime vouchers. The investigation led to specific formal charges, at which point the "Governor appointed Mr. Augustus C. Studer, Jr., of the New Jersey bar, to conduct a hearing on the charges and report his findings to the Governor together with his recommendations." Id. at 160.

After "the Governor's case [-in-chief]," Russo "moved for a dismissal of the charges," and the hearing officer recommended that the motion be granted. Counsel for the Governor filed exceptions, and the Governor then personally heard oral argument, ultimately denying the motion. The Governor made explicit findings that the case should not be dismissed as the State had satisfied its initial burden, and personally heard the remainder of the proceedings. Id. at 161-62. Pertinent history of the constitutional power shows that "the Constitution gave the Governor a quasi-judicial status." Walsh, 18 N.J. at 216 (BURLING, J. dissenting)(quoting 1 Convention Proceedings, Constitutional Convention of 1947, State of New Jersey (1949), p. 240)). The drafters thereby contemplated that the "state official [would be] be tried before the Governor." Id. at 217. In fact, the Supreme Court expressly noted "the particular and specific language of

Article V, Section IV, paragraph 5 of the Constitution authorizing the Governor to conduct a trial (ordinarily a judicial function) and the courts to review the Governor's order on both the law and the facts." Russo, 22 N.J. at 176.

The drafters thereby contemplated the Governor's substantial involvement in the removal proceeedings, tempered by effective and robust judicial review:

> Since the Governor is given the power to be the accuser, the prosecutor, the judge and the jury, it seems but natural that the review in the judicial branch of government contemplated by the framers of the Constitution was intended to be an effective check on the exercise of the power for the protection of the public officer or employee. While this power was given to the Governor as part of the over-all attempt to strengthen his executive authority over those within his charge, it is obvious that the people likewise sought to provide for the broadest type of review "on both the law and the facts," not only to remove any possibility of misuse of the power to the detriment of the public officer or employee but, equally important, to also protect the Chief Executive from all suspicion that he was in any way using his power for any personal or political purpose. Nothing less than the standard of substantial justice will satisfy the necessities of the situation.
>
> No matter what may be the particular phraseology that is continued to be employed by reason of historical developments in specific classes of cases of judicial review, the ideal of substantial justice is the underlying concept toward which all of our appellate proceedings tend.

Russo, 22 N.J. at 167-68 (citations omitted). The courts must interpret any rule or statute that relates to this process "as requiring the same quest for substantial justice that is called for by the constitutional provision," so that "the Constitution and the statute fit together to form the harmonious provision." Id. at 170.

The Administrative Code procedures (facially and as applied) stand in stark contrast to the procedures employed in Bonafield v. Cahill, 125 N.J. Super. 78 (Super. Ct. 1973). In that matter, the New Jersey State Commission of Investigation, an investigatory body *outside the Department of Labor*, conducted the investigation now vested within the CJP. The Commissioner was relatively uninvolved in the entire process, except for the fact that Governor Cahill "directed [him]to review the sworn testimony and documentation which was presented before the New Jersey State Commission of Investigation." The Governor himself then "determined it to be contrary to the public interest for a Judge of Compensation to continue acting in his official capacity pending investigation and" issued a suspension pending resolution of the matter. The Commissioner then, again at the Governor's direction, "reviewed the sworn testimony and documentation presented before the New Jersey Commission of Investigation" and "formally charged" Judge Bonafield. Id. at 80-81.

The Governor further memorialized all of the above information in an Executive Order that concluded as follows:

> NOW, THEREFORE, I, WILLIAM T. CAHILL, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and Statutes of this State, do hereby ORDER and DIRECT:
> 1. Ronald M. Heymann, Commissioner of the Department of Labor and Industry, shall serve upon James J. Bonafield, Judge of Compensation, a copy of the charges concerning the unauthorized practice of law by said James J. Bonafield.

> 2. John J. Francis, Esq. is appointed hearing examiner to conduct a public hearing based on the above charges prepared and served by the Commissioner of Labor and Industry and to report to me his findings of fact and law concerning those charges.
> 3. James J. Bonafield shall continue to be suspended from all his official duties pending the hearing and determination of the charges.
> 4. This Order shall take effect immediately.
> GIVEN, under my hand and seal this third day of July, in the year of Our Lord, one thousand nine hundred and seventy-three, of the Independence of the United States, the one hundred and ninety-seventh.
> /s/ William T. Cahill, GOVERNOR
> ATTEST:
> /s/ Jean E. Mulford, ACTING SECRETARY TO THE GOVERNOR.

Id. at 81. Notably, the extent of this formality was deemed necessary solely to issue formal charges and a temporary suspension.

In fact, the issuance of an Executive Order by the Governor has always been deemed a prerequisite to the removal of a Worker's Compensation Judge. Our legislature has stated that an aggrieved judge who has been "removed by the Governor, pursuant to Article V, Section IV, paragraph five, of the Constitution, may appeal **from the order of removal** to the Appellate Division of the Superior Court ...." N.J.S.A. §52:14-17.2 (emphasis added). This Appellate Division has noted, moreover, "Executive orders, *when issued within their appropriate constitutional scope*, are an accepted tool of gubernatorial action." Commc'ns Workers of Am., AFL-CIO v. Christie, 413 N.J. Super. 229, 254 (App. Div. 2010)(emphasis added).

With regard to the proper person empowered to bring disciplinary charges, our courts have ruled, "The proceedings by N.J. Const. (1947), Art. V, § IV, par. 5, N.J.S.A. 34:1A-3(b), and N.J.A.C. 12:235-3.13 et seq., for the removal of the Director or any Judge of Compensation vest authority in and may be instituted only by the Governor, the Commissioner of Labor or the Director of the Division of Workers' Compensation." Middlesex Cty. Bar Ass'n v. Parkin, 226 N.J. Super. 387, 392-93 (App. Div. 1988). Notably, the constitutional history establishes that the "1942 proposed constitution provided for investigation on complaint," while "the 1944 draft authorized investigation by the Governor on his own initiative," resulting in the language whereby the Governor may "cause investigations to be made." Walsh, 18 N.J. at 216 (BURLING, J. dissenting).

Based on the plain language of Art. V, Sec. IV, Para. 5., as well as Supreme Court cases interpreting that provision, a Judge of the Worker's Compensation Court must receive 1) the Governor's involvement in commencing the investigation; 2) notice of official charges; 3) service of those charges; 4) an opportunity to be heard at public hearing; 5) the Governor making the final decision as to removal, for cause only; 6) an "order of removal;" and 7) the right of judicial review, on both the law and the facts. The ultimate question is whether the administrative scheme faithfully executes these constitutional requirements. As this Court will readily conclude, it does not even approximate them.

B. In Light of the Clear Mandate of the Constitution and the Interpretation Provided by Russo and Bonafield, the Administrative Code Procedure is Facially Unconstitutional.

In contrast to the above procedures, the process for the removal of a Worker's Compensation Judge now commences with the CJP, a body empowered "to investigate complaints or reports referred by the Director concerning judicial conduct and to give advisory opinions, recommendations, and reports to the Director." N.J.A.C. §12:235-10.5. At the evidentiary review stage, the CJP must "[r]equire the filing of a verified complaint or report;" provide proper notice to the judge; and "review and determine requests for discovery." N.J.A.C. §12:235-10.7. If the CJP "concludes ... that formal charges should be instituted, the Commission shall promptly file a copy of the recommendation and the record of the Commission ... with the Director" and "issue also without delay and serve upon the judge a notice advising him or her" of the recommendation. N.J.A.C. § 12:235-10.8. The procedure with regard to a final hearing states, in full:

> When requested by the judge, a final hearing in major discipline shall be conducted by an independent hearing officer under procedures set by the hearing officer. The hearing officer will make a recommendation to the Commissioner. As feasible and as permitted by law, the hearing officer shall be a retired judge of the Superior Court. At the hearing, the Department may be represented by the Attorney General or a designated representative. After recommendation of the hearing officer or on the record if no hearing had been requested, the Commissioner shall make the final decision in all cases other than removal. The Governor, pursuant to Art. V, Sec. IV, Par. 5 of the New Jersey Constitution and upon recommendation of the Commissioner, may remove a judge from office.

N.J.A.C. § 12:235-10.9.

1. The Administrative Process is Not Public By Design, and Thereby Fails to Safeguard a Tenured Judge's Constitutional Right to a Public Hearing.

The right to "due process mandates the hearing requirement of Rule 1:2-1," which provides that hearings must "be conducted in open court, unless otherwise provided by rule or statute." In re Cayuse Corp. LLC, 445 N.J. Super. 80, 91 (App. Div. 2016). As encapsulated within the following summary:

> The courts of New Jersey have a long and venerable tradition of being open to the public.
>
> Courts are public institutions. As Justice Douglas once wrote, "[a] trial is a public event. What transpires in a public courtroom is public property." The opportunity of citizens to observe the workings of the judicial process is a vital part of our democracy. Such public access advances important constitutional values.
>
> As a general matter, open proceedings "perform numerous beneficial functions." Among other things, public access to the courts "increase[s] the respect for the law" through fostering "an 'intelligent acquaintance' with the administration of justice." Open proceedings also help assure consistency and integrity in the outcomes attained through the judicial process. "The principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-American distrust for secret trials.

Smith v. Smith, 379 N.J. Super. 447, 450-51 (Law Div. 2004)(citations omitted).

In the administrative context, "administrative tribunals may mold their own procedures so long as they operate fairly and conform with due process principles," unless a Constitutional or legislative provision mandates a certain

procedure. See Kelly v. Sterr, 62 N.J. 105, 107 (1973)(quoting Laba v. Bd. of Educ., 23 N.J. 364, 382 (1957)). Although the "Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., ... is silent on the matter of whether or not an administrative hearing should be public," other sources of law may require that a hearing be open to the public. Yet even without an explicit requirement,

> ... it must be recognized that in administrative agency proceedings a public hearing has certain advantages. Obviously it promotes public confidence in the integrity and fairness of the process. It can be viewed as a restraint against the filing of frivolous or insubstantial disciplinary charges against a person. Therefore, absent a showing of good cause or sufficient reason for keeping a hearing private, the general policy favors an open administrative hearing, particularly if the person involved requests it.

Id. at 108; see also Pub. Interest Research Grp., Inc. v. State, Dep't of Envtl. Prot., 152 N.J. Super. 191, 205 (App. Div. 1977)("... the guarantee of a full adversary trial is reserved for those cases in which the legal rights and duties of "specific parties" are at issue and required to be determined by a decision disposing of their interests because of "constitutional right" or "statute.")

Facially, the Administrative Code is directly at odds with the Constitution with regard to the conduct of the hearing – whereas the former requires complete confidentiality and closed proceedings (both before the CJP and the Hearing Officer) the latter compels a public hearing and a full adversary trial. Every attempt Judge Kernan made to invoke the protections attendant to a full adversary trial, at both the CJP and adjudicatory stages, were denied in this case.

2. The Governor Is Completely Uninvolved in the Entire Procedure, Other than the Absolute Final Act, Thereby Vesting the Commissioner with Outsized Powers that Were Reserved to the Governor Under the Constitution.

Our courts have had limited occasion to discuss the relative powers of the Commissioner of the Department of Labor vis-a-vis the Worker's Compensation judges. However, it is clear that a "judge of compensation is ... subject to some measure of direction and control by the Commissioner, not the least of which are when and where he sits, the nature and extent of his caseload, and the rules of practice and procedure to be followed by his court." Bonafield, 125 N.J. Super. at 84. The Commissioner thereby enjoys certain regulatory parameters in terms of the day to day conditions, yet whereas he is an actual Department of Labor employee, judges are deemed tenured executive branch employees. They are only "subject to existing procedures for suspension and removal" as set forth in the Constitution, "Art. V, § IV, par. 5." Id. at 85.

Appellant Kernan is not seeking direct Governor involvement in every termination hearing mandated by the Constitution. She seeks direct Governor involvement solely with regard to termination hearings for Worker's Compensation judges, pursuant to Russo and its progeny. This Court has already stated that regulations for the conduct and discipline of Judges of Compensation may be treated differently from other regulations. Prior to the adoption of the N.J.A.C. provisions at issue in this case, the "regulations were proposed and

published on October 3, 1988, in the New Jersey Register. 20 N.J.R. 2442(c). Notice was given there that written comment would be accepted for a period of thirty days. No additional notice was given the Judges of Compensation." Matter of Adoption of Rules Concerning Conduct of Judges of Comp., N.J.A.C. 12:235-3.11 Through 3.23, 244 N.J. Super. 683, 685 (App. Div. 1990).

Although there appeared to be *technical* compliance with N.J.S.A. 52:14B-4(a)(1), there was not "substantial compliance:"

> We need not describe the outer boundaries of the requirement in order to decide this case. It is enough to hold that a proposed regulation directly, uniquely and significantly affecting about 50 state employees whose identities and addresses are well known, must be additionally publicized to inform them of the proposed regulation and the time and manner of comment. ... When dealing with 50 state employees who as a group receive regular mailings from their Division, individual mailing is obviously practical, suitable and effective.

Id.; see also Gillespie v. Dep't of Educ., 397 N.J. Super. 545, 557 (App. Div. 2008)(fact that "the rules included in that case directly affected only fifty individuals" supported the special procedures employed).

Presumably, the number of the times that the removal procedure will be properly invoked is rather limited (and in any event would apply solely to the Judges of Compensation) and thus the direct involvement of the Governor will not impede the efficient and effective administration of the Executive Branch. The Administrative Code, however, completely divorces the Governor from the

entire process, expect the final pro forma act of issuing a decision in accordance with the Commissioner's recommendation. Although the Governor is the only person who is empowered to cause an investigation and issue a Complaint under the Constitution, the Administrative Code and Parkin now permit the Director or the Commissioner to do so, yet even that was violated here. The entire process was instituted by the Assistant Commissioner, who has no authority at all.

3. Although Both the Investigatory and the Adjudicatory Processes Appear Facially Neutral, the Fact that the Commissioner Advocates on Behalf of Removal at the Start, While Making the Final Recommendation to the Governor at the End, Renders the Process Constitutionally Infirm.

Our State and Federal Supreme Courts agree that "[a]dministrative due process requires a fair hearing before a neutral and unbiased decisionmaker." In re Carberry, 114 N.J. 574, 584 (1989)(citing Withrow v. Larkin, 421 U.S. 35, 46-47 (1975)). Although an agency head is not per se barred from hearing a contested disciplinary matter simply because of his position, it is axiomatic that "if the agency head is tainted by actual bias, then he or she should not hear the matter." Id. at 585. A court should find actual bias "when the decisionmaker" (the Commissioner here) "... has been the target of personal criticism from one seeking relief." Id. at 586. A hearing in which the decision maker is a witness is also by definition not a fair hearing, and thus "the entire situation should be reviewed very carefully on appeal." Connelly, 63 N.J. Super. at 429. Our

Supreme Court has similarly stated, "Suffice it to state that a hearing cannot be fair if the hearing body prejudges the matter before the hearing begins." Nanavati v. Burdette Tomlin Mem'l Hosp., 107 N.J. 240, 246-47 (1987).

As Mr. Mashel sought to establish early in this process, the Commissioner's role as the Supervisor of the DLWD renders him in control of the CJP Process. He noted the inherent conflict in having the Commissioner advocate for removal given the hierarchy of the Department: the members of the CJP were appointed by and answer to Director Russell Wojtenko, Jr. who in turn answers directly to the Commissioner, the complaining party. Yet even if these obstacles were surmountable, the Commissioner advocates on behalf of removal at the start of the CJP, and then makes the final decision at the end of the adjudicatory process. When all is said and done, the administrative code vests "the Commissioner" with the power to "make the final decision in all cases other than removal," and to make a "recommendation" to the Governor to "remove a judge from office." N.J.A.C. § 12:235-10.9. In other words, the same person that advocates for removal at the very start gets to make the final recommendation to the Governor, who has not been involved in the process at all prior to this point. This is a far cry from Russo, Bonafield and every other related case.

Notably, as the present case makes all too clear, the administrative scheme even provides the Commissioner with the power of appellate review of decisions

made by specific Offices within the Department. Although Judge Kernan sought to appeal the adverse findings of the ODC to the NJCSC, in accordance with McCoy's letter dated February 21, 2019, the Administrative Code process permitted circumvention of those appellate rights. Deirdre L. Webster Cobb, Chairperson of the Civil Service Commission, determined that there was a "*comparable* appeal process through the Commission on Judicial Performance" and that "the appropriate venue for this appeal is the Commission on Judicial Performance." (Pa104)(emphasis added). As argued above (and as will be argued below in connection with the "as applied" challenge as well) the CJP does not provide a comparable appeal process because it vests outsized power in the Commissioner. The appellate rights enjoyed by other employees within the DOL can be been supplanted by the will of one singular individual – the Commissioner – insofar as Judges are concerned.

C. Even if the Code is Facially Constitutional, the Manner Within Which the Process Was Applied to Judge Kernan Violates the Constitutional Mandate.

Our Supreme Court has specifically acknowledged "the form of 'as-applied' challenges to particular regulations." NJSLM, 158 N.J. at 227. In contrast to the facial challenge set forth supra, "as-applied attack[s] . . . do[ ] not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprive[s] that person of a

constitutional right." Kratovil v. Angelson, 473 N.J. Super. 484, 522 (Super. Ct. 2020)(quoting Lewis v. Guadagno, 837 F. Supp. 2d 404, 413 (D.N.J. 2011)).

Although Russo v. Walsh and its progeny made clear that the 1947 Constitution provided the Governor with the power of temporary suspension incidental to removal, our courts have ruled that the Commissioner's power is not co-extensive. Whereas the Governor may issue a temporary suspension after sufficient cause is found to institute formal charges, the Commissioner may not.

> We would affirm but for the fact that the Commissioner suspended appellant without the issuance of formal charges or a public hearing. It is now conceded that these procedural safeguards should not have been dispensed with. Hence, while we uphold the power of the Commissioner to discipline judges of compensation by suspension in appropriate cases, the action taken in this instance is reversed and the matter remanded for further proceedings which shall include formal notice and a hearing on the charges.

Grzankowski v. Heymann, 128 N.J. Super. 563, 569 (App. Div. 1974). The Commissioner only possesses "[c]omplementary disciplinary powers" to the Governor and thus may only issue a "short-term suspension," after formal notice and a full, public hearing. Id. at 567 and 569.

Based on the foregoing, even the Commissioner's July 6, 2021 suspension letter was ultra vires. First, Grzankowski holds that the Commissioner may only impose a short-term suspension, and even that requires formal notice and a full, public hearing. Second, the CJP rendered its decision in May 2021; Judge Kernan was not informed about the recommendation until June 11, 2021, a full

month after the CJP gave its recommendation; and Commissioner Asaro-Angelo waited another month before suspending Judge Kernan on July 6, 2021. (Pa203). That suspension then lasted for over a year, as the Governor's termination letter is dated July 25, 2022. (Pa1). This is far afield from the "short-term suspension" envisioned by Grzankowski.

To remain faithful to the Constitution, proper application of the Administrative Code also requires the individual subject to discipline be able to acquire sufficient evidence to mount a defense. In Russo, the defendant sought "to inspect the records of other departments to ascertain the exact facts as to similar overtime payments in these other departments to prepare himself for the Governor's cross-examination." The Governor refused the request prompting the Supreme Court to find that "[Russo] was clearly entitled by the same kind of discovery processes as would be available in an ordinary civil trial to prepare himself for cross-examination." The Court ultimately concluded that "he was indeed prejudiced by the refusal of the Governor...." Russo, 22 N.J. at 174-75.

In the present case, first of all, Judge Kernan was never served with formal charges. The CJP report is not itself a formal charge, but rather is merely a recommendation that "formal charges should be instituted." In fact, the very start of the report makes clear that the CJP gives "advisory opinions, recommendations and reports to the Director," without having the power to

actually institute formal charges. (Pa188). Neither the Director nor the Governor ever served Judge Kernan with formal charges in the present case, even though both the Code and due process compel such service, and Kernan's counsel made a specific request for the charges on June 14, 2021. (Pa200-01).

Judge Berman further denied Judge Kernan the right to engage in meaningful discovery. Administrative hearings are designed to be "thorough" whereby "the parties shall present all their evidence relevant to the constitutional claims and defenses." The proceedings must "promote development of a complete and informed record, which will reflect determinations of appropriate administrative issues as well as the resolution of factual matters material to the ultimate constitutional issues." Abbott v. Burke, 100 N.J. 269, 303 (1985). If they do not, they should be deemed futile. The State should be precluded from advocating that Kernan was required to complete the administrative process, when the State itself precluded her from making a complete record in the proceedings below. Although Judge Berman permitted some discovery, it was essential to Judge Kernan's defense to be able to conduct depositions so that she could then engage in effective cross-examination, a right that was denied with neither an order nor a statement of reasons. (Pa204-208)

The State was also never required to present live witnesses to establish a prima facie case-in-chief, at either the CJP or the adjudicatory stage, again

contrary to Russo. Judge Kernan chose not to present any witnesses at the CJP, precisely because the State was never compelled to establish its case through testimony. From the beginning, the CJP made clear it would rely solely upon the letter from the Commissioner and the confidential attachments thereto, which is the opposite of how these matters were handled prior to the administrative era. (Pa109). And the same holds true for the adjudicatory portion, which is a direct byproduct of the fact that the Code does not require any specific procedures, nor compliance with the procedures normally employed by the OAL. Rather, the Code contemplates "a final hearing in major discipline … by an independent hearing officer under procedures set by the hearing officer" who then makes "a recommendation to the Commissioner." N.J.A.C. 12:235-10.9.

Finally, and most importantly, that Commissioner (the ultimate decisionmaker) expressed clear and obvious bias against Kernan at the start. The very first correspondence to E. Richard Boylan, Esq. was a scathing indictment of Judge Kernan by Commissioner Robert Asaro-Angelo. (Pa106). After the CJP completed its evidentiary review, it recommended that formal charges be instituted (which never occurred as Judge Kernan was never served with any formal charges), despite the fact that the agency had already determined, **after a thorough investigation**, that no discipline was necessary. Commissioner Asaro-Angelo, the same person that directed the CJP at the start of the process,

chose to suspend Judge Kernan "until final resolution of these major discipline charges in accordance with N.J.A.C. 12:235-10.2." (Pa203). Lo and behold, he is the one empowered to "make the final decision in all cases other than removal" at the culmination of the administrative hearing. N.J.A.C. 12:235-10.9.

To review the process as it occurred here – an investigation occurred within the agency which found no violations; the Assistant Commissioner then revived those exact same complaints, conducted her own investigation, and found that Kernan committed two violations; while that decision was under appeal, that same Assistant Commissioner rerouted that appeal into the CJP, making it the appellate body; instead of acting as an appellate body, the CJP conducted a broad, expansive inquiry beyond the two alleged violations; the Commissioner himself then essentially laid out precisely what he wanted the investigatory body to find; he then issued the suspension after the investigatory body did precisely as it was requested; at the conclusion of the entire process, the Commissioner then had the power "to make the final decision in all cases other than removal" or recommend removal to the Governor pursuant to N.J.A.C. §12:235-10.9. Based on the tenor and content of his October 10, 2019 correspondence to Mr. Boylan, Judge Kernan's termination was a fait accompli.

This administrative scheme stands in stark contrast to why administrative law judges are used in the first place. As our Supreme Court has stated when

commenting upon the creation of the Office of Administrative Law pursuant to N.J.S.A. 52:14F-1 to -11, the entire purpose was to "to eliminate conflict of interests for hearing officers, promote due process, expedite the just conclusion of contested cases and generally improve the quality of administrative justice," which would be accomplished by making sure that the "administrative law judges will be independent of the administrative agency whose jurisdiction is involved." Abbott, 100 N.J. at 302 (quoting City of Hackensack v. Winner, 82 N.J. 1, 36-37 (1980)). The present case upends this entire process by effectively making the administrative hearing officer subject to the Commissioner.

Finally, the act of removal here is *ultra vires* because the Governor never executed an Executive Order of Removal as required by N.J.S.A. §52:14-17.2. A simple letter of termination, where the Governor's signature is affixed by rubber stamp, is insufficient. The framers of our Constitution sought to vest broad powers in the Governor, an elected official, to oversee the executive branch; they did not vest that power in the Commissioner, a State employee that is not subject to the will of the people. The administrative scheme effectively transfers the Governor's broad power, envisioned by the drafters of the Constitution, to an individual the drafters never even contemplated.

II. BECAUSE WORKER'S COMPENSATION JUDGES PERFORM THE IDENTICAL TASKS AS SUPERIOR AND MUNICIPAL COURT JUDGES, THE PROCESS FOR REMOVAL SHOULD PROVIDE SIMILAR, THOUGH NOT IDENTICAL, PROTECTIONS (Pa126-157).

The process for removal of Superior Court or Municipal Court Judge commences "with the filing of a complaint ... with the Advisory Committee on Judicial Conduct (ACJC ...)." In re Samay, 166 N.J. 25, 29 (2001). The ACJC acts in an investigatory capacity, much like the CJP here, as it then makes recommendations that formal proceedings be instituted if the allegations in the complaint have been substantiated. Notably, our statutes provide that "[a] proceeding for removal may be instituted by either house of the Legislature acting by a majority of all its members, or the Governor, by the filing of a complaint with the clerk of the Supreme Court...." N.J.S.A. §2B:2A-3. With regard to the hearing, "[e]vidence may be taken either before the Supreme Court sitting en banc, or before three justices or judges, or a combination thereof, specially designated therefor by the Chief Justice." N.J.S.A. §2B:2A-7.

The Supreme Court applies "de novo review of the record" for all "[m]atters of judicial discipline brought before this Court on the presentment of the ACJC." Id. If removal is sought, "the reason for removal must be established beyond a reasonable doubt." Id. at 31 (citing N.J.S.A. §2B:2A-9 and In re Coruzzi, 95 N.J. 557, 569 (1984)). As oft stated, the reasonable doubt standard involves "an honest and reasonable uncertainty in [one's mind] about the guilt of the [accused] after [one has] given full and impartial consideration to all of the evidence." Id. (quoting State v. Medina, 147 N.J. 43, 61 (1996)).

Appellant has not argued that these exact protections should apply, as it is beyond dispute that they do not. Nonetheless, through statutory enactments, the New Jersey Legislature has expressed the intent "to elevate the quality of the judges of compensation by requiring their appointment in the same manner as judges serving in the judicial branch of government." Grzankowski, 128 N.J. Super. at 568. (quoting N.J.S.A. §34:15-49). Moreover, it is beyond dispute that "our appellate courts have conceded to the Workmen's Compensation Bureau powers customarily exercised by courts, ..." Mulhearn v. Fed. Shipbuilding & Dry Dock Co., 2 N.J. 356, 361 (1949). By 1973, it had become undeniable that "the Division of Workmen's Compensation functions for all practical purposes as a court, not only in physical appearance but in judicial procedure and decorum. Its determinations are likewise made by final judgment on the basis of the law and the facts." Bonafield, 125 N.J. Super. at 82. When reviewing a substantive decision, the Appellate Division ruled:

> In reaching this conclusion, we take judicial note of the fact that hearings before the Division are adversary in nature; are presided over and tried by a judge who must now be an attorney-at law of New Jersey (N.J.S.A. 34:1A-12.1 and N.J.S.A. 34:15-49), and that the judge is required to file a copy of his determination and award (N.J.S.A. 34:15-58). Under such circumstances, the judge of compensation's determination, when reviewed on appeal, is equivalent to a trial by a judge without a jury.

De Angelo v. Alsan Masons, Inc., 122 N.J. Super. 88, 90 (App. Div. 1973).

Whereas both the law in terms of the appointment of judges has evolved to elevate their status to be on par with other judges, and the overall conduct of the Division is now viewed as akin to a court, the removal process has gone in the opposite direction. Prior to the administrative era, Russo v. Governor set forth a formal process that required due process protections, a public hearing and direct Governor involvement, while the current process was literally manufactured by the whims of two people – Asst. Commissioner McCoy, who steered a Civil Service Appeal into a disciplinary matter, and Commissioner Asaro-Angelo, whose subjective opinion was betrayed on October 10, 2019, ensuring Judge Kernan would never receive a fair and impartial decision.

Finally, the Code fails to even include an objective standard or burden of proof, unlike the beyond a reasonable doubt standard applicable to Superior Court judges. Whereas they enjoy a burden of proof necessary to achieve a criminal verdict, a Workers' Compensation Judge can be removed simply because of the Commissioner's whims, as this case makes all too clear.

III. JUDGE KERNAN WAS DENIED FUNDAMENTAL DUE PROCESS IN THE CONDUCT OF BOTH THE CJP INVESTIGATION AND THE ADMINISTRATIVE HEARING (Pa75; Pa111-120, Pa126-157; Pa2-3).

As a tenured Judge of the Worker's Compensation Court, Audrey Kernan possesses a protected interest in her continued employment. Whether denoted as a property interest or a liberty interest, these "interests require the Division to

proceed with due process before terminating [her] employment." Carberry, 114 N.J. at 584. It is axiomatic, moreover, that the right to due process encompasses "'more than fair process'; it 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'" Gormley, 218 N.J. at 98 (quoting Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997)). In addition, courts analyze constitutional deprivations by considering "the totality of the circumstances—a standard commonly used in our constitutional jurisprudence." Id. at 110. The Court "cannot look at individual factors in isolation," because "[n]o singular brushstroke reveals the whole picture." Id.

Our courts have further established that the concept of due process is neither fixed nor universal, but malleable dependent upon circumstances:

> Due process is not a rigid concept. Its flexibility is in its scope once it has been determined that some process is due. It calls for such procedural protections as the particular situation demands recognizing that not all situations calling for procedural safeguards require the same kind of procedure. Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). Relevant considerations are the public interest, the rights involved and the nature of the proceeding. The manner of holding and conducting the hearing may vary. As long as principles of basic fairness are observed and adequate procedural protections afforded, the requirements of administrative due process have been met.

Kelly, 62 N.J. at 107; see also Matter of Allegations of Sexual Abuse at E. Park High Sch., 314 N.J. Super. 149, 160 (App. Div. 1998)("The exact contours of due process cannot be defined. What it commands depends upon the specific

facts presented.") Ultimately, "due process requires an opportunity to be heard at a *meaningful time and in a meaningful manner*." Doe v. Poritz, 142 N.J. 1, 106 (1995)(emphasis added).

A. Judge Kernan was Denied Procedural Due Process, as She was Never Served with Formal Charges, and was Denied a Meaningful Opportunity to Respond to the Charges.

Courts within the Third Circuit have made clear that public employees who can only be discharged for cause "have a constitutionally protected property interest in their tenure entitling them to procedural due process protection." Keim v. County of Bucks, 275 F. Supp. 2d 628, 633 (E.D. Pa. 2003). With regard to the adequacy of the process, the courts have similarly held:

> Moreover, in order to state a claim for failure to provide due process, a plaintiff must have taken advantage of the processes that are available to him, unless those procedures are unavailable or patently inadequate. Indeed, a due process violation is not complete when the deprivation occurs; it is not complete unless and until the state fails to provide due process. When, however, access to procedure is absolutely blocked or there is evidence that the procedures are a sham, the plaintiff need not pursue them to state a due process claim.

Keim, 275 F.Supp.2d at 634 (citations omitted); Alvin v. Suzuki, 227 F.3d 107, 116 (3d Cir. 2001).

Under the New Jersey Constitution, in order to determine "whether particular administrative procedures are constitutionally sufficient, the primary question is always whether there is a protectible liberty interest at stake." E. Park High Sch., 314 N.J. Super. at 160. The overall inquiry requires that our courts

"consider (1) the private interest at stake; (2) the risk of erroneous deprivation of that interest through the agency procedures used, and the probable value of additional or substitute procedural safeguards; and (3) the State's interest, including the fiscal and administrative burdens that the additional procedural safeguards would entail." J.E. ex rel. G.E. v. State, 131 N.J. 552, 566-67 (1993).

Clearly, "tenure employment" is sufficient to satisfy the first prong. Nicoletta v. N. Jersey Dist. Water Supply Com., 77 N.J. 145, 154 (1978)(citing Slochower v. Board of Higher Educ., 350 U.S. 551 (1956)). With regard to the second prong, the inquiry centers upon whether the actual process employed was sufficient to protect the individual's interest, and if not what "additional procedural safeguards … would suffice." E. Park High Sch., 314 N.J. Super. at 164. When the outcome of the hearing is dependent upon credibility determinations, the witnesses should be compelled to testify before the actual decisionmaker, subject to cross-examination. Id. Due process demands a "trial type hearing" committed to the "truth-testing process," so as to, "[a]t the very least … eliminate the appearance of partiality which inexorably flows when [an agency] employee reviews a decision of that agency." Id. at 164-65.

The primary component of a fair and effective hearing is "an unbiased tribunal" with "the goal being to minimize the possibility of error or injustice, rectifiable in any case by subsequent judicial review." Nicoletta, 77 N.J. at 164.

It is imperative that the ultimate decision be based only on the evidence presented, as "[i]t offends elemental concepts of procedural due process to grant enforcement to a finding neither charged in the complaint nor litigated at the hearing." Id. at 162.

In the present case, the OLR conducted an investigation and found insufficient credible evidence to substantiate any of the allegations. (Pa57). McCoy then took it upon herself to conduct a separate investigation. (Pa64). While Judge Kernan sought to appeal that determination, McCoy filed the Verified Complaint, listing solely two violations. (Pa69). As both the CJP record and Recommendation make clear, the CJP considered, evaluated, and cited a host of information that was never charged in the complaint when it recommended removal, going far beyond the two alleged violations. (Pa188-199). This amounts to the quintessential procedural due process violation - presenting a party with a limited complaint containing only two violations and then compelling that party to respond to factual allegations that have never been disclosed nor even made under oath, prejudicing Judge Kernan.

Although Judge Kernan ostensibly had the right to "cross-examine" witnesses during the CJP process, this was an empty right, amounting to a sham. Without compelling the witnesses to testify under oath in the first place, there was nothing to "cross-examine." Moreover, the right to cross examine a witness

before the *investigatory* body is meaningless when there is no corresponding right of cross-examination during the adjudicatory phase. In order to be heard at a *meaningful time and in a meaningful manner* as stated in Doe v. Poritz, a party should have the right to compel their accusers to testify, and then cross examine them, *in front of the actual, unbiased decision maker.* Here, Judge Kernan was denied the right to conduct depositions and thereby engage in effective cross-examination during the hearing, yet even that would have been empty. The *Commissioner* is the de facto decision maker, while the Governor acts on his recommendation, neither of which would actually see any cross examination.

The adjudicatory process, in turn, commenced without the service of formal charges, again the quintessential procedural due process violation. The formal charges, at a minimum, would have at least defined the charges and the evidence upon which they were based. Instead, the hearing encompassed the full panoply of allegations considered during the CJP process, without the need to actually litigate them – the State was never going to be compelled to put forth a prima facie case. The hearing officer even denied Judge Kernan the mere right to conduct depositions, so that she could at least compel her accusers to state their allegations under oath. These minimal protections are grossly insufficient when evaluating a tenured judge's right to continued employment.

B. Because Judge Kernan Was a Tenured Judge With a Property Interest in Her Employment, the Administrative Removal Process Denied Her Substantive Due Process.

To assert "a substantive due process claim, a plaintiff must have been deprived of a particular quality of property interest." Fralin v. Cty. of Bucks, 296 F. Supp. 2d 609, 614 (E.D. Pa. 2003)(quoting Nicholas v. Penn. State Univ., 227 F.3d 133, 140 (3d Cir. 2000)). A non-legislative government deprivation "that comports with procedural due process may still violate substantive due process 'upon allegations that the government deliberately and arbitrarily abused its power.'" Nicholas, 227 F.3d at 139 (quoting Independent Enters. Inc. v. Pittsburgh Water & Sewer Auth., 103 F.3d 1165, 1179 (3d Cir. 1997)). A non-legislative substantive due process claim requires a plaintiff to "establish as a threshold matter that he has a protected property interest to which the Fourteenth Amendment's due process protection applies." Id. at 139-40. If so, "then substantive due process protects the plaintiff from arbitrary or irrational deprivation, regardless of the adequacy of procedures used." Id. at 142.

Obviously certain categories of official misconduct "are so patently inimical to the public interest and to the public trust upon which the office is predicated that they will, per se, not only justify but virtually compel removal, such as, for example, criminal misconduct in office or misconduct which proceeds from a corrupt or other improper motive." Golaine v. Cardinale, 142

N.J. Super. 385, 397 (Super. Ct. 1976). Short of this level of conduct, "whether a specific act or omission constitutes cause for removal requires an evaluation of the conduct in terms of its relationship to the nature of the office itself, and, in that context, an appraisal of the actual or potential impairment of the public interest which may be expected to result from the conduct in question." Id.

In the present case, even if the procedures passed constitutional muster, the objective facts reveal an arbitrary or irrational deprivation. This entire process commenced with two allegations - Ms. Kernan allegedly referred to Judge Bradley Henson as suffering from "Small Penis Syndrome" and stated that Judge Ingrid French "only has her job because she is a black woman." (Pa63). Even if accepted as true, these minimal violations do not equate to conduct worthy of removal. The Administrative Code, in turn, provides no meaningful standard or burden of proof to substantiate removal, again establishing that the arbitrary and irrational actions of one individual will suffice to strip someone of their tenured property rights. This neither comports with substantial justice nor serves the public interest, compelling reversal and immediate reinstatement.

IV. JUDGE KERNAN WITHDREW FROM THE ADMINISTRATIVE HEARING BECAUSE CONTINUED PARTICIPATION WAS FUTILE IN LIGHT OF THE PROBLEMS WITH BOTH THE CJP AND THE ADJUDICATORY PROCESS (Pa2-3; Pa75-77; Pa111-120; Pa126-157).

Although a litigant is normally required to exhaust administrative remedies in order to be heard on appeal, "[t]he requirement for the exhaustion

of the administrative remedy is neither jurisdictional nor absolute in its terms." Durgin v. Brown, 37 N.J. 189, 202 (1962). On the contrary, the reviewing court has discretion "to determine whether the interests of justice require that the administrative process be by-passed." Id. The factors that militate in favor of dispensing with the exhaustion requirement include "when only a question of law need be resolved," "when the administrative remedies would be futile," "when an overriding public interest calls for a prompt judicial decision," or when a party asserts a "constitutional right." Abbott v. Burke, 100 N.J. at 296 (quoting Garrow v. Elizabeth General Hospital and Dispensary, 79 N.J. 549, 558 (1979)); see also Atl. City v. Laezza, 80 N.J. 255 (1979).

With specific application to the present case, our Supreme Court has ruled that "facial constitutional challenges to statutes should be judicially resolved, even where an as-applied challenge to a statute may strongly suggest initial agency adjudication." Abbott, 100 N.J. at 299 (citing Brunetti v. Borough of New Milford, 68 N.J. 576, 588 and 591(1975)). This arises because "facial constitutionality involves no real issues of fact." Brunetti, 68 N.J. at 591. Judicial courts, rather than administrative agencies, are also "uniquely suited" to adjudicate constitutional challenges to an administrative action. Where the challenge seeks "the administrative body…to declare illegal its own actions," continued "use of administrative expertise will be an idle gesture." Matawan v.

Monmouth Cty. Bd. of Taxation, 51 N.J. 291, 297 (1968). Finally, even as-applied challenges should not be subject to the exhaustion requirement when "the matter contains no factual questions which require administrative determination." Brunetti, 68 N.J. at 590.

Although appellate courts prefer that litigants create a proper record for appellate review, the initial conduct of the hearing establishes that *even if* Judge Kernan continued that there would not be a sufficient record. For example, the Hearing officer was presented with a motion to take depositions, which the State opposed in writing. The Hearing Officer did not even enter a written order, much less a written decision, explaining why Judge Kernan was denied this fundamental right. Judge Kernan sought to ameliorate the prejudice caused by both the refusal itself and the lack of reasons from the trier of facts by making a motion to supplement the record to this appellate tribunal, to no avail.

Finally, the Abbott v. Burke factors all militate in favor of dispensing with the exhaustion requirement, as only a question of law need be resolved (i.e. the constitutionality of the Code and the extent of due process). The administrative process and remedies would also be futile. Regardless of the conduct of the hearing, the Commissioner was still going to be the one to make the final recommendation to the Governor, and his opinion on the matter was clearly expressed at the start of the CJP process. An overriding public interest calls for

a prompt judicial decision, as a tenured Workers' Compensation Judge was removed in violation of the Constitution and Judge Kernan's "constitutional right." Nothing within the agency's "expertise" is relevant to the lack of constitutional protections provided by that same agency's removal process.

CONCLUSION

N.J.S.A. § 52:14-17.10 makes clear that the Appellate Division "may affirm the order of removal, or it may reverse or nullify the same and order the reinstatement of the appellant to the office or position of employment from which he was removed, as of the date of removal, or as of such date as the court may determine, upon the determination of a matter of law or when it clearly appears that there was no evidence before the Governor reasonably to support the order of removal." This Court should exercise its statutory power to find that, as a matter of law, the regulations as worded and as applied in this case do not satisfy the constitutional mandate, and order reinstatement as of the date of her initial suspension, July 6, 2021.

Respectfully Submitted,

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Attorneys for Appellant, Audrey Kernan

/s/ Pasquale Guglietta
BY: PASQUALE GUGLIETTA, ESQ

Dated: September 22, 2023

AUDREY KERNAN, Appellant, v. STATE OF NEW JERSEY, NEW JERSEY DEPARTMENT OF LABOR AND WORK-FORCE DEVELOPMENT, ROBERT ASARO-ANGELO, AND PHILIP D. MURPHY, Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001199-22T4 Civil Action ON APPEAL FROM A FINAL ADMINISTRATIVE ORDER OF THE GOVERNOR SUBMISSION DATE: February 26, 2024

BRIEF ON BEHALF OF RESPONDENTS STATE OF NEW JERSEY, NEW JERSEY DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, ROBERT ASARO-ANGELO, AND PHILIP D. MURPHY

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PRELIMINARY STATEMENT

On July 25, 2022, Governor Philip Murphy ("Governor") issued an order removing Audrey Kernan from her employment as a supervising judge of workers' compensation ("JWC") effective August 12, 2022. That action culminated four years of proceedings, which began when numerous co-workers complained that she engaged in a pattern of making disparaging, demeaning and even racist remarks about other JWCs, co-workers, and attorneys who appeared before her. The allegations were thoroughly investigated by the Department of Labor and Workforce Development ("Department") as potential violations of the State's workplace violence and anti-discrimination policies, and then referred to the Commission on Judicial Performance ("CJP") for further investigation.

During the CJP proceedings, Kernan had the opportunity to present witnesses and testify on her own behalf; she did neither, relying solely on the arguments of her attorney. Based on its careful examination of the evidence, the CJP recommended termination of Kernan's employment. The matter was then scheduled for a *de novo* hearing before a retired Superior Court judge at Kernan's request. But before that hearing commenced, Kernan voluntarily withdrew from the process. Based on the investigatory record and the recommendation of the Commissioner of Labor and Workforce Development

("Commissioner"), the Governor ordered the termination of Kernan's employment.

Kernan's challenge to the Governor's order of removal should be rejected for procedural and substantive reasons. Procedurally, her appeal is untimely. Under applicable law, she had 20 days to file an appeal with the Appellate Division; she filed late, in the Law Division, and never sought an extension or leave to file a late notice of appeal. And even if she could clear that hurdle, her arguments on appeal should be deemed waived because she failed to raise them below and/or because Kernan denied herself the process that she now claims she was due. Kernan would have had the opportunity, during the *de novo* hearing, to testify, present witnesses, cross-examine the State's witnesses, and raise any legal challenges she desired. Instead, she voluntarily withdrew her hearing request, and now asks this court to rule on a myriad of issues that she did not raise for consideration during the administrative proceedings. Such a request flies in the face of well-settled appellate law and procedure.

Even if this court were to consider Kernan's substantive arguments, it should reject them. Contrary to Kernan's claims, the Department's extensive, multi-layered process for disciplining and removing JWCs comports with the requirements of the New Jersey Constitution, both facially and as applied here. She received adequate notice of the charges against her, had the opportunity for

a full, independent public hearing on those charges, and the Governor made the final decision regarding removal based appropriately on the recommendation of the Commissioner of Labor and the administrative record. For the same reasons, her claim that she was deprived of procedural due process must fail. And finally, the penalty imposed here was reasonable and substantially just, considering the uncontradicted evidence of her misbehavior that violated judicial norms and the code of conduct governing JWCs.

The Governor has a substantial interest, indeed a responsibility, to ensure that JWCs conduct themselves according to standards that engender confidence and trust in the integrity of the workers' compensation system. Kernan was charged with conduct that violated those standards. And despite being offered the opportunity for a full hearing on the charges, Kernan attempted an end-run around the process in an effort to evade responsibility for her behavior. This court should not permit her to manipulate the proceedings with her belated arguments challenging the process that she refused to participate in. The Governor's decision complied with federal and State constitutional requirements, is substantially just, and should be affirmed.

COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

A. Background

Kernan was employed as a supervising JWC within the Department at the time the Governor ordered her removal for misconduct on July 25, 2022, with an effective date of August 12, 2022. (Pa1).[2]

Kernan's removal from state employment followed a history of complaints and disciplinary actions against her. In 2012, Kernan agreed to a six-month suspension as a JWC in a settlement of charges against her. (Pa106). As part of that settlement agreement, Kernan relinquished her supervisory JWC position for up to five years and agreed to be assigned to Camden upon her return from suspension. Ibid.

The proceedings eventually giving rise to Kernan's removal began in 2018, when Kernan was assigned to the Atlantic City Workers' Compensation Court and several coworkers filed complaints about her conduct in the workplace. (Pa20-56). The complaints against Kernan potentially implicated several different policies governing workplace conduct, including the Workplace Violence Policy, the New Jersey State Policy Prohibiting

[1] Because they are closely related, these sections are combined for efficiency and the court's convenience.

[2] "Ab" refers to Appellant's brief; "Pa" refers to Appellant's appendix; and "Ra" refers to Respondent's appendix.

Discrimination in the Workplace and the rules specific to misconduct by JWCs. Because each of these policies is administered by a different office within the Department, the conduct alleged in the complaints against Kernan was investigated sequentially by the Office of Labor Relations ("OLR"), which administers the Workplace Violence Policy; the Office of Diversity Compliance ("ODC"), which administers the New Jersey State Policy Prohibiting Discrimination in the Workplace; and the Commission on Judicial Performance ("CJP"), which administers the rules of conduct for JWCs.

B. The Four Co-Worker Complaints Filed Against Kernan in 2018

First on June 14, 2018, JWC Ingrid French filed a workplace violence incident report against Kernan, noting that Kernan began harassing her via e-mail in May 2018 "with slanderous implications and unauthorized review of personal/confidential records, unauthorized investigation and the mis-use of her supervisory title." (Pa20). French believed Kernan was retaliating against her because French was appointed to replace Kernan as the administrative supervising judge ("ASJ") in Atlantic City. (Pa21). Kernan met with then-Director and Chief JWC Russell Wojtenko who "verbally warned" her to cease the unauthorized investigation and harassing e-mails to French. Ibid.

Second, JWC Carmine Taglialatella filed a workplace violence complaint against Kernan on September 17, 2018, asserting that Kernan had contacted ASJ

Lionel Simon and falsely claimed that Taglialatella "had inappropriate and unethical dealings in [Taglialatella's] position as Trustee for Shore Medical Center." (Pa34). Taglialatella expressed "grave concerns regarding [the] allegations and the disparagement of [his] reputation." (Pa34). Kernan subsequently contacted Simon to indicate that she was no longer concerned that Taglialatella's activities presented "any actionable ethical issue," and Simon inferred there would be no further investigation. Ibid.

Taglialatella also complained that Kernan had e-mailed ASJ Ashley Hutchinson urging that Taglialatella be removed from hearing the Second Injury Fund lists in Atlantic City based on her mistaken belief that he had a "non-waivable" conflict with a particular law firm. (Pa39). Taglialatella denied the allegations made against him by Kernan and accused Kernan of defaming him. (Pa46-47).

Third, on September 17, 2018, Daisy Palumbo, a clerk typist, also filed a workplace violence complaint against Kernan, accusing her of being "extremely obsessive" and making disparaging and insulting remarks about other JWCs, staff members, and attorneys. (Pa24). According to Palumbo, Kernan told her that JWC French "was a thief," who "stole from the State, she [wa]s a mean and nasty woman" and that "[JWC] French only got the job because she was a black woman." Ibid. Palumbo said Kernan warned her that French "was corrupt and

a bully." (Pa24). Kernan also demeaned JWC Taglialatella, telling the clerk typist that he was on "French and Henson's team" or "the Darkside," so Taglialatella could not be trusted. (Pa26). Kernan said Taglialatella should not be a JWC because "he is the most unethical man [Kernan's] ever met … he was a liar and no friend to anyone." (Pa26). Palumbo stated that Kernan berated her for accepting a small container of lotion that Palumbo received from Taglialatella as a Christmas gift. (Pa27). Kernan told Palumbo that the gift was inappropriate and that Taglialatella must have given it to Palumbo with sexual intentions. Ibid.

Palumbo also recounted instances in which Kernan fixated on particular attorneys or other JWCs. Kernan told Palumbo that a particular attorney who often appeared in the Atlantic City Workers' Compensation Court was "a crook … liar and a snake." (Pa24). And she ranted for months that a fellow JWC and an attorney were "sleeping together, how it was unethical for the [JWC] to hear [that attorney's] cases, and how it enraged [Kernan] that the [JWC] and the attorney were having sex in the Atlantic City office." (Pa25). She accused the JWC of stealing from the State, and told Palumbo that the reason the JWC "was so mean and so corrupt was because he had "Small Dick Syndrome" or "SDS." (Pa26). Kernan also asserted that the attorney to whom the JWC was allegedly

romantically connected was "a sloppy drunk, a whore, [and] … unfit to be an attorney because she's so stupid and she gets by on her looks." (Pa26).

Palumbo said that when JWC Eric Spevak was transferred to the Atlantic City office, Kernan warned Palumbo that Spevak "was a spy for [JWC] French and to not trust him at all," because he "was corrupt and a snake" and he would take anything he saw or heard back to French. (Pa26). While Spevak was in the office, Kernan brought up several times that he was Jewish, and there were times when Kernan said "well, he's Jewish, that's just how they are he can't help it [sic]." (Pa26).

According to Palumbo, Kernan also bullied Palumbo's immediate supervisor, Stephanie Mingin, on several occasions, name-calling Mingin "Scary and Barbeque Becky," and made several comments about Mingin's physical appearance. (Pa25). Kernan even insinuated that Mingin was in a relationship with one of the JWCs. Ibid.

Finally, Mingin herself filed a workplace violence complaint against Kernan on September 19, 2018, alleging that Kernan had been hostile toward her and critical of everything Mingin did. (Pa54). According to Mingin, Kernan often tried to diminish her and caused some of Mingin's normal work duties as head clerk to be taken from Mingin without any communication from Mingin's

supervisor. Ibid. Kernan also called out, humiliated, and harassed Mingin in front of coworkers. (Pa56).

C. The OLR and ODC Investigations

The workplace violence incident reports were submitted to the OLR, which determined on November 23, 2018 that there was insufficient evidence to substantiate any finding of workplace violence, but noted that there were concerns with Kernan's behavior in all the complaints. (Pa57-60). Because certain of the conduct alleged in the complaints raised concerns under the New Jersey State Policy Prohibiting Discrimination in the Workplace, the reports were then submitted to the ODC for further investigation into whether Kernan's alleged conduct violated the State Policy. (Pa62).

The ODC conducted a thorough and impartial investigation, which included interviewing Kernan and other witnesses and reviewing the documentation submitted into the record, and concluded in a report dated February 21, 2019 that two of the five allegations made against Kernan were substantiated for violation of the State Policy. (Pa62). Kernan's derogatory comments about the genitals of the JWC and Kernan's comments claiming another JWC only got her job because of her race were substantiated by the ODC as workplace discrimination. (Pa73).

In addition to determining that Kernan had violated the State Policy, the ODC also expressed concerns about Kernan's unprofessional conduct and referred the matter to the Department for appropriate action. (Pa73). Based on the ODC's findings and referral, on April 14, 2019, Tennille McCoy, the Department's Assistant Commissioner, filed a Judicial Complaint with the CJP against Kernan for judicial misconduct. (Pa68).

D. The Commission on Judicial Performance Proceedings

1. Regulatory Framework

The procedures for disciplining JWCs are governed by N.J.A.C. 12:235-10.1 to -10.11. A JWC may be disciplined for, among other things: (1) violating the Code of Judicial Conduct for JWCs; (2) willful misconduct including misconduct which, even though unrelated to judicial duties, brings the office into disrepute or is prejudicial to the administration of justice; and (3) failure, neglect, or inability to perform judicial duties. N.J.A.C. 12:235-10.1. The disciplinary measures that may be taken against a JWC include, but are not limited to, an oral or written private reprimand, an oral or written public reprimand, suspension and removal. N.J.A.C. 12:235-10.2. A public reprimand, suspension or removal is considered major discipline. N.J.A.C. 12:235-10.4.

A JWC facing major discipline is entitled to receive notice of the disciplinary charges and an opportunity to be heard. N.J.A.C. 12:235-10.4.

Upon receipt of the complaint, the CJP conducts an initial review to determine if the allegations, on their face, would constitute a basis for discipline under the regulations. N.J.A.C. 12:235-10.6.

Once the CJP determines that the complaint merits further action, it initiates an evidentiary review. N.J.A.C. 12:235-10.7. During that process, the CJP is required to: (1) ensure that a verified complaint has been filed against the JWC; (2) notify the JWC of the nature of the complaint and the name of the person making the complaint against the JWC, and provide the JWC with a copy of the complaint; (3) provide the JWC with notice of the proceeding, advise the JWC that she can offer evidence, present and cross-examine witnesses, and make a statement under oath; and (4) review and determine requests for discovery. N.J.A.C. 12:235-10.7. Upon the completion of the evidentiary review by the CJP, if the CJP concludes that major discipline should be taken against the JWC, the CJP provides its findings and recommendation to the Director and Chief JWC, and also serves the JWC under investigation with a notice advising her that the CJP has filed such a recommendation with the Director and Chief JWC. N.J.A.C. 12:235-10.8.

If major discipline is recommended against the JWC, the JWC may request a final *de novo* hearing to be conducted by an independent hearing officer under procedures set by the hearing officer, who shall be a retired judge

of the Superior Court to the extent feasible. N.J.A.C. 12:235-10.9. At the conclusion of the hearing, the hearing officer shall make a recommendation to the Commissioner. Ibid.

Upon recommendation of the hearing officer, or on the record if the JWC did not request a final hearing, the Commissioner may render a final decision imposing any form of discipline short of removal (or determining that no discipline is warranted). Ibid. Only the Governor can remove a JWC. Therefore, if the Commissioner determines that removal is appropriate, the Commissioner makes a recommendation to the Governor, who may then act upon the recommendation. Ibid.

2. The CJP Investigation of Kernan

On August 22, 2019, the CJP responded to the Department's April 14, 2019 referral by requesting that the Department provide it with witness statements and other evidence supporting the allegations against Kernan so the CJP could determine if there was a basis to further investigate Kernan for judicial misconduct. (Pa106). On October 10, 2019, the Commissioner responded to the CJP attaching the witness statements that were taken as part of the ODC investigation into allegations of harassment/discrimination in the February 21, 2019 findings against Kernan. (Pa106). The Commissioner also provided certifications from several employees alleging that, subsequent to the

filing of the Judicial Complaint, Kernan had lashed out against the employees who complained against her by, among other things, yelling at them and slamming doors and file drawers, hiring a private investigator to question the complainants, and wearing a bodycam while at work because Kernan believed people were out to get her. Ibid. Kernan admitted that she hired a private investigator to question workers and attorneys on her behalf, and admitted to wearing a bodycam at work. (Pa107-108). The Commissioner pointed out that Kernan's actions appeared to be retaliatory, and jeopardized the confidentiality of the work of the office. Ibid.

By letter dated November 6, 2019, the CJP advised Kernan, pursuant to N.J.A.C. 12:235-10.6, that it had received and conducted an initial review of the Judicial Complaint and found that it merited further investigation. (Pa66). The CJP enclosed a copy of the complaint and, under N.J.A.C. 12:235-10.7, asked Kernan to provide a written response to the allegations within twenty-one days. (Pa66). On November 26, 2019, Kernan responded to the allegations, denying that she violated the State discrimination policies or laws and asked the CJP to dismiss the complaint with prejudice for lack of merit. (Pa75-84).

The matter was originally scheduled to be heard before the CJP on March 5, 2020, but it was adjourned several times due to the COVID-19 shutdown and Kernan's scheduling conflicts. (Pa189). On June 17, 2020, the CJP provided

Kernan with information on her right to appear before the CJP to confront or cross-examine witnesses under N.J.A.C. 12:235-10.7. (Ra1). On January 19, 2021, the CJP notified Kernan that the matter was tentatively set for February 16, 2021, and reminded Kernan of her right to appear before the CJP to confront and cross-examine witnesses, and advised that, upon receipt of her response, the CJP would schedule her appearance and the testimony of witnesses she intended to call. (Pa109-10). After another delay, on March 1, 2021, Kernan advised the CJP that she would not call any witnesses but would instead rely on the arguments of counsel. (Ra2).

An evidentiary hearing finally took place before the CJP on March 16, 2021, during which Kernan's counsel argued on her behalf and, on March 25, 2021, provided a supplemental written statement. (Pa121; Ra4). As noted, Kernan did not call any witnesses or present any evidence during that hearing. (Ra2).

On May 11, 2021, the CJP issued its unanimous findings and recommendation that Kernan be removed from her position. (Pa188). It concluded that the complainants were credible, in that their statements "were corroborated, consistent and meet the test of common sense." Ibid. It then considered whether Kernan's actions violated the rules of conduct, and concluded that they had.

It found that her "constant maligning of other judges to other judges and to members of the staff and in front of litigants serves only to destroy confidence and trust in the integrity of the judiciary." Ibid. And because that conduct made other judges and members of her staff fearful of interacting with her, her actions interfered with the functioning of the workers' compensation system. Ibid. The CJP also took into account the fact that she was a supervising judge, and that instead of setting an example of good demeanor and management, she wielded power "in such a way as to cause fear and trepidation," causing others to restrict their interactions with her. Ibid. Finally, the CJP noted that Kernan crossed boundaries by sharing with clerical staff her worst opinions of other judges, the former Director, and attorneys who appear in court. As the CJP explained: "that Judge Kernan could refer to judges as 'corrupt'; a 'snake"; a 'thief' and about to be 'arrested' can only hamper the ability of the clerical staff to do their job and can only destroy confidence in the judiciary." Ibid. And her references to members of the bar as "'corrupt'; a 'snake'; a 'whore'; a 'drunk' and to question and demean the sexuality of members of the bar," were hardly those of "someone who is temperate, attentive and impartial." Ibid. The CJP concluded that Kernan's actions were "contrary to basic principles of proper judicial conduct," and taking into consideration her previous six-month suspension and demotion, as well as the fact that Kernan's veracity and credibility were found questionable

in two previous CJP proceedings, the CJP unanimously recommended that Kernan be removed. (Pa199).

3. Proceedings Before the Independent Hearing Officer

On June 11, 2021, the Director and Chief JWC provided a copy of the CJP's report to Kernan, notified her of formal charges of major discipline, and advised her of her right to a final hearing under N.J.A.C. 12:235-10.9 to be conducted by an independent hearing officer. (Pa185). In a letter dated July 6, 2021, the Commissioner advised Kernan that, in light of the CJP's May 11, 2021 recommendation that major discipline be taken against Kernan, she would be suspended as a JWC with pay effective July 9, 2021. (Pa203). On July 16, 2021, Kernan requested a "formal hearing" under N.J.A.C. 12:235-10.9 and indicated that she would be calling "several high-level officials and employees within the New Jersey Department of Labor including several Workers' Compensation judges to testify at the hearing". (Pa204). In accordance with N.J.A.C. 12:235-10.9, retired Superior Court Judge Glenn Berman was selected to be the independent hearing officer. (Ra6).

Under N.J.A.C. 12:235-10.9, the independent hearing officer shall set the procedures for the final hearing, and the parties agreed to follow the administrative procedure rules (N.J.A.C. 1:1-1.1 to -21.6) for the hearing process, which commenced in September 2021. (Ra6). Under those rules, the

hearing officer conducts a *de novo* hearing, at the conclusion of which an initial decision is rendered, served upon the parties, and submitted to the transmitting agency for a final decision. N.J.A.C. 1:1-18.1. The agency head may then reject or modify conclusions of law, interpretations of agency policy, or findings of fact not relating to issues of credibility of lay witness testimony. N.J.A.C. 1:1-18.6. Under N.J.A.C. 1:1-10.2, either party may seek written interrogatories, production of documents, and request for admissions; or may seek an informal, non-transcribed meeting with witnesses to facilitate discovery. However, the parties may take depositions only on a motion for good cause. N.J.A.C. 1:1-10.2(c).

On November 3, 2021 Kernan submitted a motion to compel the depositions of witnesses from the Department. (Pa206). Judge Berman orally denied Kernan's motion under N.J.A.C. 1:1-10.2(c), finding that Kernan did not establish good cause for the taking of depositions. Both parties then requested written discovery. Kernan never responded to the Department's discovery requests, but the Department provided its answers to Kernan's request for admissions, its responses to Kernan's request for production of documents, and its responses to Kernan's first set of interrogatories. (Ra8; Ra26; Ra45).

On June 21, 2022, Kernan's counsel advised by way of a letter that Kernan was withdrawing her request for a hearing under N.J.A.C. 12:235-10.9. (Ra82).

4. Kernan's Removal

After Kernan withdrew from her administrative hearing, and based on the record developed, the Commissioner recommended to the Governor that Kernan be removed as a JWC under N.J.A.C. 12:235-10.9. (Ra83). The Governor adopted the Commissioner's recommendation in accordance with N.J. Const. (1947) art. V, § IV, para. 5, and notified Kernan in a letter dated July 25, 2022 that she would be removed from office effective August 12, 2022. (Pa1).

Kernan responded on August 8, 2022 requesting reconsideration based on the allegation that she was not afforded a right to a public hearing in violation of the State Constitution. (Pa2). On August 12, 2022, the Governor responded through his Chief Counsel that Kernan was afforded her right to a public hearing through the final hearing before Judge Berman, but she voluntarily waived that right. (Pa4).

E. Kernan's Litigation in the Law Division

On September 1, 2022, Kernan filed a Verified Complaint and Order to Show Cause in the Law Division of the Superior Court of New Jersey, Mercer County, against the Department of Labor and its Commissioner, the State of New Jersey, and Governor Philip Murphy (collectively, the "State"), seeking temporary restraints to immediately stay her termination as a JWC. (Pa209).

On September 23, 2022, the court denied Kernan's request for immediate injunctive relief, concluding that Kernan failed to meet her burden of demonstrating that she is entitled to preliminary injunctive relief under Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982). (Ra85). On October 14, 2022, the State moved to dismiss Kernan's Verified Complaint. (Pa10).

On November 30, 2022, the court issued an order and opinion denying Kernan's Order to Show Cause and partially granting the State's motion. (Pa6). The court transferred the matter to the Appellate Division, finding that the Law Division lacked jurisdiction to hear the matter. (Pa7, Pa16-19). In addition to concluding that the Appellate Division has exclusive jurisdiction over Kernan's challenge to the order of removal, the court questioned the timeliness of Kernan's complaint in light of the requirement in N.J.S.A. 52:14-17.3 that any appeal to the Appellate Division from an order of removal occur "within twenty days from the date of the making of the removal order." (Pa18-19). The court's order stated that "[n]othing in this Order eliminates any defenses that Defendants may have regarding timeliness and exhaustion." (Pa7).

LEGAL ARGUMENT

POINT I

KERNAN'S APPEAL SHOULD BE DISMISSED AS UNTIMELY AND PROCEDURALLY DEFECTIVE.

Kernan's appeal should be dismissed because she failed to timely challenge the Governor's determination to remove her and because, to this date, the record does not reflect that Kernan served her notice of appeal upon the Secretary of State as required by law.

Under N.J.S.A. 52:14-17.2, any officer or employee of the State who is removed by the Governor pursuant to Article V, Section IV, paragraph 5 of the New Jersey Constitution may appeal the order of removal to the Appellate Division as in the case of an appeal from a final decision of a State administrative agency. Any such appeal, however, must be made "within twenty days from the date of the making of the removal order" by filing a notice of appeal with the Appellate Division and the Secretary of State, N.J.S.A. 52:14-17.3, instead of within the forty-five days from the date of service generally allowed by Rule 2:4-1(b) for other appeals of administrative actions.

Here, the Governor issued Kernan's removal order on July 25, 2022. (Pa1). Under N.J.S.A. 52:14-17.3, Kernan was thus required to file a notice of appeal with the Appellate Division and the Secretary of State no later than

August 15, 2022. Yet Kernan waited until September 1, 2022 to institute an action in lieu of prerogative writ in the Law Division, seventeen days after the statutory deadline. N.J.S.A. 52:14-17.3. And, to this date, the record does not reflect that Kernan served a notice of appeal upon the Secretary of State as required by N.J.S.A. 52:14-17.3. Thus, Kernan's failure to file a notice of appeal within twenty days of the Governor's July 25, 2022 removal order renders her appeal untimely and it should be dismissed outright.

That conclusion is not affected by Kernan's August 8, 2022 request for reconsideration, which the Governor denied on August 12, 2022. (Pa2-5). First, while Rule 2:4-3(b) provides that the time for appealing to the Appellate Division from a state administrative agency or officer generally may be tolled by an application for reconsideration made "to the agency pursuant to its rules and practice," there is no indication that tolling is available for appeals of the Governor's removal orders that are governed not by Rule 2:4-1(b) but rather by N.J.S.A. 52:14-17.3, which on its face admits of no exceptions. And even if Rule 2:4-3 applied here, Kernan's time to appeal would be tolled only for four days, making her filing of the Verified Complaint thirteen days late instead of seventeen (in addition to being in the wrong forum). See R. 2:4-3(b) (stating that, following the denial of a reconsideration request, "the remaining time shall again begin to run from … the date of service of the decision or denial of such

application by the agency").

Simply put, even affording Kernan all reasonable inferences, she failed to timely appeal the Governor's July 25, 2022 removal order in accordance with the strict deadline established under N.J.S.A. 52:14-17.3. Accordingly, Kernan's appeal should be dismissed.

POINT II

KERNAN'S ARGUMENTS NOT RAISED BELOW SHOULD BE SUMMARILY DISMISSED.

On appeal, Kernan raises new claims concerning the process set forth at N.J.A.C. 12:235-10.1 to -10.11, as applied here. Specifically, for the first time, she claims (1) that the Governor should have been personally involved in the process throughout, but was not (Ab27); (2) that the Commissioner lacked the authority to suspend her pending completion of the disciplinary process (Ab32); (3) that the State was never required to produce live witnesses during the *de novo* hearing (Ab34-35); and (4) that the Governor was required to effectuate her dismissal with an Executive Order, but did not do so here. (Ab37). But this court should summarily dismiss these belated claims.

First, Kernan has forfeited these arguments because she failed to raise them during the administrative process when she had the opportunity to do so. Start with black letter appellate law, which teaches that the Appellate Division "do[es] not consider issues not raised below at an administrative hearing." In re

Stream Encroachment Permit, Permit No. 0200-04-002.1 FHA, 402 N.J. Super. 587, 602 (App. Div. 2008) (citing Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)). Indeed, "if late-blooming issues were allowed to be raised for the first time on appeal, this would be an incentive for game-playing by counsel, for acquiescing through silence when risky rulings are made, and, when they can no longer be corrected at the trial level, unveiling them as new weapons on appeal." State v. Robinson, 200 N.J. 1, 19 (2009)(quoting Frank M. Coffin, *On Appeal: Courts, Lawyering, and Judging*, 84-85 (1994)); see also J.K. v. New Jersey State Parole Bd., 247 N.J. 120, 138 n.6 (2021)(declining to address constitutional arguments that were not raised below). For this reason alone, Kernan's newly raised arguments should not be considered on appeal.

Next, to the extent that Kernan's new claims allege deficiencies in the *de novo* hearing, the rationale for dismissing them is even stronger, because she voluntarily withdrew from that process. New Jersey courts have long recognized waiver as "the voluntary and intentional relinquishment of a known right." Knorr v. Smeal, 178 N.J. 169, 177 (2003) (citing W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152 (1958)). The waiving party need not express her intent to waive explicitly, but waiver is established as long as it is shown clearly that the waiving party knew of the right and then abandoned it, either by design or indifference. Ibid. (citing Merchs. Indem. Corp. of N.Y. v.

Eggleston, 68 N.J. Super. 235, 254 (App. Div. 1961), aff'd, 37 N.J. 114 (1962)).

The constitutional requirements for removal of an executive branch officer, as implemented through the Department's regulations, include the right to a *de novo* hearing before a retired Superior Court judge. N.J.A.C. 12:235-10.9. During such a hearing, an executive branch officer has the opportunity to challenge the procedures employed during the disciplinary process, raise procedural and substantive due process claims, and argue whether removal was the appropriate penalty. Kernan rejected that opportunity; instead, she abruptly withdrew from the process, short-circuiting the development of a complete record on the issues that she now raises on appeal. This court should find that she has waived her right to challenge the sufficiency of that process now.[3]

And while Kernan attempts to excuse her failure to participate in the *de novo* hearing process by claiming that it would have been futile, (Ab49), there is no basis for that assertion. Kernan squandered an opportunity to appear before an independent hearing officer, a retired Superior Court judge, for a complete hearing on the merits of the claims against her and the defenses that she is now raising. During that hearing, she could have presented her case through her own witnesses, testified on her own behalf, and cross-examined the witnesses

[3] State Defendants separately address the merits of Kernan's due process arguments in Point III.A., below.

testifying against her. In short, the process before the independent hearing officer offered Kernan the opportunity to fully litigate the case. Her failure to do so should bar her from pursuing those claims before this court on appeal.

POINT III

KERNAN'S TERMINATION AS A JUDGE OF WORKERS' COMPENSATION SHOULD BE AFFIRMED BECAUSE IT WAS CONSISTENT WITH LAW AND SUBSTANTIAL JUSTICE.

Even if this court reaches the merits of Kernan's appeal, which it should not for the reasons given above, the Governor's order removing Kernan from office still should be affirmed because the State acted consistent with the federal and New Jersey constitutions, applicable law and regulations, and the decision fully accorded with substantial justice.

In matters involving Governmental removal of an Executive Branch officer, courts follow the fundamental premise of substantial justice as the standard of judicial review. Russo v. Governor of State of New Jersey, 22 N.J. 156, 169 (1956). So, courts should not disturb the decision to remove a public officer unless that decision appears to be inconsistent with substantial justice. Ibid. Because that standard is easily met here, this court should affirm Kernan's removal.

The CJP followed an investigatory process in which Kernan could have testified and presented witnesses, but chose not to. The Commission carefully

considered the uncontradicted, credible evidence of Kernan's misconduct, which included her "constant maligning of other judges to other judges and to members of the staff and in front of litigants" and the fact that "judges and members of the staff are fearful of interacting with her," because she wields power "in such a way as to cause fear and trepidation." (Pa198). It also found that she was intemperate when she referred to members of the bar as "'corrupt;' a 'snake;' a 'whore;' a 'drunk;'" and when she "question[ed] and demean[ed] the sexuality of members of the bar." Ibid. Based on all of the evidence in the record, the CJP concluded that Kernan's behavior "serve[d] only to destroy confidence and trust in the integrity of the judiciary," "interfere[d] with the functioning of the system," and was "contrary to basic principles of proper judicial conduct." Ibid. Based on these numerous violations of the Code of Conduct for Judges of Compensation, the CJP unanimously recommended her removal. (Pa199).

Following the CJP process, Kernan requested a *de novo* hearing before a retired Superior Court judge. (Pa204). After months of prehearing proceedings and discovery, Kernan abruptly withdrew from the process before the hearing took place. (Ra82). So, based on the record compiled before the CJP, the Commissioner recommended to the Governor that he terminate Kernan's employment. (Ra83). And following his own review of that record, the

Governor concurred with that recommendation and removed Kernan from her position as a JWC. (Pa1).

As discussed more fully below, the regulatory process followed in Kernan's discipline complied with the New Jersey constitutional requirements, both facially and as applied. It was also consistent with federal due process requirements. And Kernan's outrageous behavior, that consisted of repeated violations of the Code of Judicial Conduct and undermined the very institution she was to serve, warranted nothing short of removal. The Governor's action was substantially just and should be affirmed.

A. The Administrative Process under N.J.A.C. 12:235-10.9 Facially Complies with the New Jersey Constitution.

On appeal, Kernan generally avoids discussion of the merits of the case against her, and instead attacks the constitutionality of the administrative process at N.J.A.C. 12:235-10.1 to -10.11. But her argument falls flat because the regulatory process, which was followed here, fully complies with constitutional requirements.

Our courts have long held that there exists a strong presumption of the validity of a statute, and that "the burden of proving its unconstitutionality is 'an extremely formidable one.'" In re Adoption of N.J.A.C. 7:1e, 255 N.J. Super. 469, 476 (App. Div. 1992)(quoting State v. Owens-Corning Fiberglass Corp., 100 N.J. Super. 366, 382, (App. Div. 1968), aff'd, 53 N.J. 248 (1969)). This

same standard applies to the constitutionality of regulations. Ibid. (citing Schwerman Trucking Co. v. Dep't of Envtl. Prot., 125 N.J. Super. 14, 18 (App. Div. 1974)).

The requirements for Governmental removal of an Executive Branch officer are set forth in Article V, Section IV, Paragraph 5 of the New Jersey Constitution[4]. It provides:

> The Governor may cause an investigation to be made of the conduct in office of any officer or employee who receives his compensation from the State of New Jersey, except a member, officer or employee of the Legislature or an officer elected by the Senate and General Assembly in joint meeting, or a judicial officer. He may require such officers or employees to submit to him a written statement or statements, under oath, of such information as he may call for relating to the conduct of their respective offices or employments. After notice, the service of charges and an opportunity to be heard at public hearing the Governor may remove any such officer or employee for cause. Such officer or employee shall have the right of judicial review, on

[4] The premise of Kernan's argument seems to be that under the New Jersey Constitution, only the Governor can remove Executive Branch officers and employees. Since here the Governor did, in fact, remove Kernan, this court need not reach the issue of whether she could have been removed by the Commissioner. But this court in Grzankowski v. Heymann, 128 N.J. Super. 563, 568 (App. Div. 1974) noted that N.J.S.A. 34:1A-3(b), enacted nearly contemporaneously with the 1947 Constitution, gave the Commissioner the power to appoint and remove officers and other personnel of the Department. And it is beyond dispute that State Executive Branch employees may be removed without the personal involvement of the Governor. See, e.g., N.J.S.A. 11A:2-6 (granting Civil Service Commission the power to remove and discipline employees following a hearing.)

> both the law and the facts, in such manner as shall be provided by law.
>
> [N.J. Const. art. V, § IV, para. 5.]

As this court explained in Middlesex County Bar Ass'n v. Parkin, 226 N.J. Super 387 (App. Div. 1988), "[t]he proceedings by N.J. Const. (1947), Art. V, § IV, para. 5 … for the removal of … any Judge of Compensation vests authority in and may be instituted only by the Governor, the Commissioner of Labor or the Director of the Division of Workers' Compensation." Id. at 392-93.

In Bonafield v. Cahill, 125 N.J. Super. 78, 80-81 (Ch. Div. 1973), then Governor Cahill directed the Commissioner of the then New Jersey Department of Labor and Industry to serve charges upon JWC James J. Bonafield concerning a complaint against Bonafield for the unauthorized practice of law. The Governor also appointed an independent hearing examiner to conduct a public hearing based on the charges and provide the Governor with his findings. Ibid. Based on the hearing examiner's findings, the Governor suspended Bonafield from all official duties until the investigation surrounding Bonafield's misconduct was completed. Id. at 81.[5] Subsequent to Bonafield, the Department promulgated regulations concerning the conduct and discipline of JWCs that generally follow the Bonafield procedure approved by the court. Thus, while

[5] Bonafield was ultimately removed from office. See, In re Bonafield, 75 N.J. 490, 492 (1978).

the Constitution lays out the broad requirements for the Governor's removal of an officer of an executive department generally, the Department's post-Bonafield regulations set forth the specific procedure for disciplining or removing a JWC. N.J.A.C. 12:235-10.1 to -10.11.

First, a JWC facing discipline is given notice of the disciplinary charges and an opportunity to be heard. N.J.A.C. 12:235-10.4. Upon receipt of the complaint, the CJP conducts an initial review to determine if the allegations constitute a basis for discipline. N.J.A.C. 12:235-10.6. Before the CJP meets to conduct an evidentiary review, the CJP sends a copy of the verified complaint to the JWC; provides the JWC notice of the proceeding; and advises the JWC that she can appear before the CJP to offer evidence, present and cross-examine witnesses, and make a statement under oath. N.J.A.C. 12:235-10.7. Upon the completion of the evidentiary review, if the CJP concludes that major discipline should be taken against the JWC, the CJP provides its findings and recommendation to the Director and Chief JWC, and also serves the JWC with a notice advising her that the CJP has filed a recommendation with the Director and Chief JWC. N.J.A.C. 12:235-10.8.

If the CJP recommends major discipline against the JWC, the JWC may request a final *de novo* hearing to be conducted by an independent hearing officer under procedures set by the hearing officer. N.J.A.C. 12:235-10.9. At

the conclusion of the hearing, the hearing officer shall make a recommendation to the Commissioner. Upon recommendation of the hearing officer, or on the record if the JWC did not request a final hearing, the Commissioner can make any final decision short of removal. Ibid. Only the Governor can remove a JWC upon the recommendation of the Commissioner after the opportunity for a final hearing conducted by an independent hearing officer. Ibid.

Thus, this process provides a unitary approach by which the Commissioner may hold JWCs accountable and impose discipline, including reprimands and suspensions, while recognizing the Governor's authority over their removal. As this court recognized, "[c]omparable powers may be reposed in ranking officials within the executive branch of government without militating against the Governor's ultimate responsibility for the performance of state officers and employees." Grzankowski v. Heymann, 128 N.J. Super. 563, 567 (App. Div. 1974). In fact, that division of responsibilities is reasonably necessary "to relieve the Governor of what would otherwise be the vast burden of being directly responsible for all disciplinary proceedings involving state officers and employees." Ibid. And the Department's process is not unique; the Office of Administrative Law uses similar procedures for the discipline and removal of administrative law judges. N.J.A.C. 1:31-3.1.

Kernan argues that this process is facially invalid because: 1) it is not "public by design" (Ab25); 2) it lacks involvement by the Governor in the proceedings below (Ab27); and 3) it vests the Commissioner with authority to recommend removal (Ab29). But these arguments are easily disposed of.

First, Kernan's baseless assertion that the proceedings before the CJP and independent hearing officer are not "public" is not tethered to any of the plain language in the regulations, nor is it supported by the record here. Kernan cites nothing whatsoever in support of her contention that the Administrative Code "requires complete confidentiality and closed proceedings (both before the CJP and the Hearing Officer)." (Ab26). As to the *de novo* hearing, the regulations simply state that the hearing before an independent hearing officer shall be conducted "under procedures set by the hearing officer." N.J.A.C. 12:235-10.9. Nothing in the rule forecloses a public proceeding. And while the rules do provide as a default that the record before the CJP shall be confidential in certain circumstances, that default rule does not apply if "the judge requests that the charge, proceedings, and action shall be made public." N.J.A.C. 12:235-10.10; see also ibid. (providing that, even in the absence of a request from the judge, any public written reprimand shall be made public, that any complaint and/or charges shall be made public upon issuance, and that the entire record shall be made public, except as ordered by the Director, upon the entry of a decision

imposing a public reprimand, suspension, or removal). And crucially, Kernan never fully availed herself of the hearing nor requested a public hearing, so she cannot now challenge a process she refused to participate in. Beyond her bare assertion that she was denied a public hearing, (Ab26), she cites nothing in the record to support that claim.

Next, there is no legal basis for Kernan's assertion, raised first on appeal, that the Governor must be personally involved in every stage of a removal proceeding involving a JWC, including but not limited to personally presiding over any hearing. Kernan appears to recognize as much. She concedes that the Constitution does not require "direct Governor involvement in every termination hearing mandated by the Constitution," then invites this Court to create such a requirement "solely with regard to termination hearings for Worker's Compensation judges." (Ab27). But there is no basis for drawing that distinction in the Constitution's text, which treats all covered officers and employees equally. See N.J. Const. (1947) art. V., § IV, para. 5.

Moreover, Kernan's argument is foreclosed by this court's reasoning in Middlesex County Bar Ass'n, 226 N.J. Super at 392-93. There, the court specifically found that disciplinary proceedings for JWCs can be instituted by "the Governor, the Commissioner of Labor or the Director of the Division of Workers' Compensation." Ibid. And that makes sense. As an Executive Branch

department, the Department of Labor and Workforce Development falls under the direct supervision and control of the Governor. N.J. Const. (1947) art. V., § IV, para. 2. Acting under the Governor's direction, the Department promulgated regulations establishing a process for discipline of JWCs that incorporated the key elements of the constitutional requirements – initiation of an investigation, notice of charges, a hearing, and a final decision by the Governor.

And that process, whereby the Governor delegated authority for conducting the investigative and hearing stages of JWC removal proceedings, has been followed in one of the only published cases involving removal of Executive Branch officers. In Russo, the Governor appointed someone to conduct an investigation into the management of an Executive Branch agency, and, when charges were brought against an officer of the agency, appointed a different person to act as hearing officer. 22 N.J. at 159-160. Since that time, the Department's regulations have codified the delegation of the investigative and hearing officer functions, but ultimately, the process falls under the supervision of the Governor, who makes the final decision as to removal. And that division of labor permits appropriate delegation of investigative and adjudicatory functions to personnel with relevant expertise in such matters while reserving ultimate decision-making on removal to the Governor, as the State's chief executive. It thus complies with the constitutional mandate.

In a slight twist on her previous argument, Kernan also argues that the Commissioner's involvement in initiating an investigation and making a recommendation to the Governor renders the process constitutionally infirm (Ab29-31), but she is wrong. In fact, the process contemplated by the regulations and followed here is akin to many administrative proceedings where an action is initiated by the head of the relevant agency. N.J.A.C. 1:1-3.1. Once the agency determines that the matter is a contested case, the agency transmits the case to the Office of Administrative Law ("OAL") for a hearing. N.J.A.C. 1:1-3.2. At the end of the hearing in the OAL, the Administrative Law Judge issues an initial decision, which is then transmitted to the agency head for a final decision based on the record. N.J.A.C. 1:1-18.1. That is what happened here, except that it was the Governor and not the Commissioner who was authorized to make the final decision for Kernan's removal. And absent a showing of actual bias, there is nothing constitutionally infirm about this process. See Withrow v. Larkin, 421 U.S. 35, 38 (1975), (holding that "the combination of investigative and adjudicative functions does not, without more, constitute a due process violation.").

And here, the power to remove a JWC still lies solely with the Governor, as is clear from the regulation itself ("[t]he Governor, pursuant to Art. V, Sec. IV, Par. 5 of the New Jersey Constitution and upon recommendation of the

Commissioner, may remove a judge from office."). N.J.A.C. 12:235-10.9. At most, the Department's regulations provided Kernan with an additional layer of process, but they in no way detract from the fact that it was ultimately the Governor's decision whether to terminate her employment, based on his review of the record, as required by the New Jersey Constitution.

In sum, the regulations and the procedure they require facially comply with the New Jersey Constitution. And because the Department followed that procedure in this case, the Governor's decision to remove Kernan should be affirmed.

B. The Removal Procedure as Applied to Kernan Was in Accord with the Requirements of the New Jersey Constitution.

In addition to the regulations being facially compliant with the New Jersey Constitution, the process also fully comported with the Constitution as applied to Kernan here. Kernan presents six arguments challenging the process as it was applied: (1) the Commissioner lacked the authority to suspend her with pay pending final action on the disciplinary charges (Ab32-33); (2) the Commissioner was biased against Kernan (Ab35-37); (3) the Governor was required to effect Kernan's dismissal with an Executive Order, but did not (Ab37); (4) Kernan was not served with formal charges (Ab33-34); (5) Kernan was denied the right to conduct depositions (Ab34); and (6) the State was never required to present live witnesses at the CJP or *de novo* hearing stages (Ab34-

35). The first three of Kernan's claims are addressed here; the remainder, which she also raises in connection with her due process claims, will be addressed below.

Kernan claims, for the first time on appeal, that the Commissioner lacked the power to suspend her pending the final adjudication of her case, but she is incorrect.[6] (Ab32-33). Putting aside that the issue of her suspension is moot since it has been superseded by her removal, Kernan misconstrues the relevance Grzankowski, 128 N.J. Super. at 564. There, the court considered whether the Commissioner could suspend JWCs as a form of discipline. The court found that the Commissioner had the power to suspend JWCs in appropriate cases, but needed to follow the proper procedures for doing so. Id. at 569. Now, under N.J.A.C. 12:235-10.2 -- codified following Grzankowski -- the Commissioner may suspend a JWC, with or without pay, pending the outcome of the disciplinary process. As the record shows, following the completion of the CJP process and receipt of a recommendation that Kernan be removed from her position, the Commissioner suspended her with pay until a final resolution of her removal. (Pa203). Though that process was somewhat lengthy due to

[6] In a separate civil matter against the Department and the Commissioner, Docket No. CPM-L-238-22, Kernan alleges, among other things, that her suspension and removal were wrongful and/or unlawful on numerous grounds, including due process violations. That matter is still pending.

COVID-19-related obstacles and Kernan's numerous requests to adjourn the evidentiary hearing, she continued to be paid until the Governor issued his order removing her. Thus, Kernan's suspension by the Commissioner was fully in accord with the administrative procedures.

Kernan next repackages her argument that the Commissioner was not a neutral party throughout the disciplinary process, but that should be rejected for the same reasons set forth above. To reiterate, the Commissioner's role in the proceedings here was limited to providing requested information to the CJP, and then acting on the recommendations of the CJP and independent hearing officer. N.J.A.C. 12:235-10.9. Based on the CJP's recommendation of removal, the Commissioner suspended Kernan with pay, an action the CJP had also recommended, and referred the matter for a *de novo* hearing before a retired Superior Court judge. (Pa185; Pa203). Had Kernan not short-circuited the process by withdrawing from the hearing, the Commissioner's role would have been to review the recommendations of the hearing officer; instead, based on his review of the record, he recommended removal to the Governor. Kernan cites no evidence of actual bias on the part of the Commissioner. See, e.g., Withrow, 421 U.S. at 47 (noting certain circumstances in which "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."). And here, the ultimate decision involving removal is made by the

Governor, based on his independent review of the record and subject to review by this court.

This court can likewise dispose of Kernan's newly raised argument that the Governor was required to issue something styled as an "Executive Order" to remove her from office. (Ab22; Ab37). There is no such requirement in the Constitution or in N.J.S.A. 52:14-17.2 on which Kernan relies. The Constitution itself does not specify the manner in which the Governor may effectuate a removal, provided that the Governor acts "[a]fter notice, the service of charges and an opportunity to be heard at public hearing." N.J. Const. (1947) art. V., § IV, para. 5. And N.J.S.A. 52:14-17.2, which governs judicial review of removals rather than the manner in which the Governor effectuates removals, merely indicates that the Governor's "order of removal" is appealable to the Appellate Division in the same manner as an appeal from a final agency decision. The statute does not require that the Governor's order take any particular form or prohibit the Governor's order from taking the form of the letter issued in this case, and such a formal restriction on the manner in which the Governor effects an officer or employee's removal would serve no discernible purpose whatsoever.

C. Kernan was Afforded All Due Process Prescribed by Law and the New Jersey Constitution.

Next, contrary to her claims, Kernan was afforded all the process that she was due before she was terminated as a JWC. It is black letter law that "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Fundamentally, due process requires an opportunity to be heard at a meaningful time and in a meaningful manner. Kahn v. U.S., 753 F.2d 1208, 1218 (3d Cir.1985). The basic requirements of procedural due process, therefore, are: (1) adequate notice and (2) an opportunity to be heard. U.S. v. Raffoul, 826 F.2d 218, 222 (3rd Cir. 1987) (citing Goss v. Lopez, 419 U.S. 565 (1975)); Jamgochian v. N.J. State Parole Bd., 196 N.J. 222, 240 (2008) (citing Doe v. Poritz, 142 N.J. 1, 106 (1995)). The manner of holding and conducting the hearing may vary, and "[a]s long as principles of basic fairness are observed and adequate procedural protections afforded, the requirements of administrative due process have been met." Kelly v. Sterr, 62 N.J. 105, 107 (1973).

Before addressing Kernan's claims, it is worthwhile to receive the process she received. Kernan received notice and an opportunity to be heard throughout the CJP and the final *de novo* hearing processes. The CJP investigated the complaint and, on June 17, 2020, provided Kernan with information on her right to appear before the CJP to confront or cross-examine witnesses under N.J.A.C.

12:235-10.7, which it reiterated when she requested adjournments. (Ra1; Pa109). On March 1, 2021, Kernan advised the CJP that she would not call any witnesses but would present argument of counsel instead. (Ra2).

The CJP held an evidentiary hearing on March 16, 2021, during which Kernan's counsel made a statement on her behalf. (Pa121). Kernan's counsel submitted a supplemental written statement on her behalf on March 25, 2021. (Ra4). The CJP unanimously recommended that Kernan be removed from office due to her improper work conduct of, among other things, berating and making disparaging remarks about colleagues and attorneys to office staff, which "serve[d] only to destroy confidence and trust in the integrity of the judiciary." (Pa198). In a letter dated June 11, 2021, the Director and Chief JWC provided a copy of the CJP's report to Kernan, notified her of formal charges of major discipline, and advised her of her right to a final hearing under N.J.A.C. 12:235-10.9 to be conducted by an independent hearing officer. (Pa185).

Kernan requested a final *de novo* hearing under N.J.A.C. 12:235-10.9 on July 16, 2021, which commenced in September 2021. (Pa204). On June 21, 2022, Kernan elected to withdraw her request for a hearing under N.J.A.C. 12:235-10.9. (Ra82). Following the Governor's review of the record, he issued an order removing her from office. (Pa1).

Here, Kernan alleges that she was deprived of due process because: (1) she did not receive formal charges; (2) the CJP considered new evidence; (3) the State was not required to present live witness testimony; (4) she was not permitted to take depositions; and (5) the penalty deprived her of substantive due process. As explained below, these contentions should be rejected.

Kernan claims that the administrative process was flawed because she did not receive "formal charges." (Ab33-34). But there is no constitutional or regulatory requirement that notice prior to the hearing be provided through a particular format. Instead, under N.J.A.C. 12:235-10.8, Kernan received a copy of the detailed CJP report discussing the findings of the investigation and recommending her removal. Along with that report, she received a letter from the Director and Chief JWC of the Division on Workers' Compensation, informing her that the Division was pursuing major discipline against her based on the CJP's findings, and that she had the right to a *de novo* hearing. (Pa185). Kernan does not claim, nor could she, that she was not aware of the basis of the charges against her. Under these circumstances, the notices she received, which included the complaints and supporting materials considered by the CJP and the CJP's extensive report and conclusions of its investigation, provided her more than adequate notice to satisfy the constitutional requirements.

Kernan further argues that the CJP considered things beyond the issues

that were originally referred. (Ab44). To start, that is a red herring, because the CJP investigatory process is not the matter on appeal here. But in any event, the CJP followed the appropriate procedures. After it received the Judicial Complaint against Kernan, the CJP requested that the Department provide it with witness statements and other evidence to support the allegations against Kernan so the CJP could determine if there was a basis to further investigate Kernan for judicial misconduct. (Pa106).

On October 10, 2019, the Commissioner provided the CJP with the witness statements that were taken as part of the ODC investigation into allegations against Kernan. (Pa106). The Commissioner also provided certifications from several employees alleging that subsequent to the filing of the Judicial Complaint, Kernan retaliated against the employees by yelling at them and slamming doors and file drawers, hiring a private investigator to question them, and wearing a bodycam while at work because Kernan believed people were out to get her. Ibid. While not asserted in the initial complaint to the CJP, the allegations in the certifications directly flowed from that initial complaint, and involved Kernan's actions following the filing of the original complaint. And Kernan had the right to view the evidence, call and cross-examine witnesses and fully participate in the CJP hearing to challenge the veracity of any of that evidence.

The remainder of Kernan's procedural due process arguments relate to the *de novo* hearing procedure itself; they should be rejected because she refused to participate in the process. "In order to state a claim for failure to provide due process, a plaintiff must have taken advantage of the processes that are available to him or her, unless those processes are unavailable or patently inadequate." Alvin v. Suzuki, 227 F.3d 107, 116 (3d Cir. 2000). Thus "'a state cannot be held to have violated due process requirements when it has made procedural protection available and the plaintiff has simply refused to avail himself of them.'" Alvin, 227 F.3d at 116 (quoting Dusanek v. Hannon, 677 F.2d 538, 543 (7th Cir. 1982); see also Plemmons v. Blue Chip Ins. Services, Inc., 387 N.J. Super. 551, 567 (App. Div. 2006).

Kernan's first argument perfectly illustrates why that is so. Kernan claims that her rights were violated because the State was not required to produce live witnesses to support the charges against her. Not only did she fail to raise that below, but it is pure speculation on her part; there is nothing in the record to support her bare assertion that the State would produce no witnesses during the *de novo* hearing. In fact, the State listed potential witnesses in its responses to Kernan's interrogatories. (Ra50-51). And having withdrawn from the *de novo* hearing, Kernan cannot legitimately claim that the State didn't produce live

witnesses in a hearing that didn't take place because Kernan refused to participate.

And the same is true for Kernan's argument that she was denied due process because she did not have the ability to take depositions in the CJP or *de novo* hearing processes. To the extent that she contends that she could not obtain a fair hearing without depositions, it was incumbent upon her to participate in the hearing, make her due process arguments to the independent hearing officer, and build a record from which her procedural due process claim could be evaluated. Her failure to do so is fatal to her claim on appeal.

But her argument fails for multiple other reasons. First, it ignores all of the opportunities that Kernan had to fully litigate her case in both forums. In the CJP investigative process, Kernan had the opportunity to make a statement under oath, to present evidence on her own behalf, and to confront or cross-examine witnesses. But she chose not to do any of those things, relying instead on the arguments of counsel. (Ra4). She had similar opportunities in the *de novo* hearing process, including presenting her own witnesses and cross-examining the State's witnesses, but she ultimately refused to participate in that proceeding.

Also, in the *de novo* hearing, under N.J.A.C. 12:235-10.9, the parties agreed to follow the Administrative Procedure rules for the hearing process,

(Ra6), which permit depositions only on a motion for good cause. N.J.A.C. 1:1-10.2(c). In determining a motion for depositions, the judge shall "weigh the specific need for the deposition. . . the extent to which the information sought cannot be obtained in other ways; the requested location and time for the deposition. . . undue hardship; and matters of expense, privilege, trade secret or oppressiveness." Ibid. So, depositions are not completely forbidden; they are permitted upon a showing of good cause.

Here, Kernan filed a motion to take depositions, but addressed none of the factors set forth in N.J.A.C. 1:1-10.2(c). (Pa206-208). Judge Berman orally denied Kernan's motion, finding that Kernan did not establish good cause for the taking of depositions. But that did not prevent her from fully engaging in other forms of discovery, preparing witnesses, testifying at the hearing, calling others to testify in her support, and cross-examining the State's witnesses.

Kernan appears to suggest that unless she is automatically afforded the right to take depositions, her due process rights are violated, but she cites no caselaw to support that extraordinary claim. Cf. Depos v. Depos, 307 N.J. Super. 396, 402-03 (Ch. Div. 1997) (holding that defendant's due process rights weren't violated when defendant failed to establish good cause to take the deposition of plaintiff). Similar to N.J.A.C. 1:1-10.2(c), the court rule at issue

in Depos was R. 5:5-1(d), which provides that depositions in summary (family) actions are only permitted "for good cause shown."

Finally, Kernan's claim that imposing the penalty of removal violated her right to substantive due process is without merit. (Ab47). Under the Code of Judicial Conduct for Judges of Workers' Compensation, JWCs shall respect and comply with the law at all times. N.J.A.C. 12:235-10 app, R. 1.2. Violations of the Code of Conduct or N.J.A.C. 12:235-10 that reflect on a JWC's honesty, temperament, or fitness for office constitute failure to respect or comply with the law. Ibid. The conduct of a JWC while performing her duties and in her everyday life should be free from impropriety, and her personal demeanor must be beyond reproach. N.J.A.C. 12:235-10 app, R. 2.1.

Here, the record shows that Kernan's actions of constantly denigrating her colleagues, making them fearful of interacting with her, and fostering a toxic work environment were "contrary to basic principles of proper judicial conduct" (Pa199) and rendered Kernan unfit to continue serving as a JWC. Kernan on numerous occasions maligned other JWCs in front of office staff, she made racist comments about other judges, and she openly humiliated employees. (Pa198). As the CJP, the Commissioner, and later the Governor found, these behaviors did not meet the standard of proper judicial conduct for JWCs. Kernan's misbehavior, as was substantiated in the CJP investigation that led to

her removal, only served to erode public confidence in the integrity of the judiciary. And as a supervising judge, Kernan had a duty to discharge the administrative responsibilities of the office without bias or prejudice, and to maintain professional competence in her administrative responsibilities, which she failed to do.

On top of that, Kernan had been previously investigated by the CJP in a matter that resulted in a six-month suspension and demotion. (Pa191). And Kernan's veracity and credibility were found to be questionable in two previous CJP proceedings. (Pa192-193). Based on all of these considerations, the Governor's decision to remove Kernan from her position was reasonable and accorded with substantial justice, was consistent with the law and supported by the record, and should therefore be affirmed.

Because Kernan received notice and a full opportunity to be heard, the record demonstrates that she was afforded all due process prescribed by law and the New Jersey Constitution. Accordingly, the Governor's order removing Kernan should be affirmed.

D. Kernan's Remaining Arguments Lack Merit.

Kernan attacks the CJP process in general, claiming that she should have been able to pursue an appeal of the ODC's decision on the State Anti-Discrimination Policy violations to the Civil Service Commission ("CSC").

(Ab31). Kernan ignores that the different investigations involved separate and distinct State policies. And here, as the CSC determined, where disciplinary charges flow from alleged State Policy violations, the entire matter should be decided through the disciplinary process, rather than by the CSC. (Pa104). That is precisely what happened here – the allegations of State Anti-Discrimination Policy violations were included in the complaints considered by the CJP and later referred for a *de novo* hearing.

And, while Kernan acknowledges that the procedures afforded Superior or Municipal Court judges do not apply to JWCs, she still claims that she was entitled as a policy matter to some different, unspecified level of process in her removal proceedings. (Ab37-40). But the Constitution itself prescribed different procedures for removal of judicial officers and other officers and employees, including JWCs, and that distinction is reflected in current law. As set forth above, the process here fully comported with the governing laws and regulations and the New Jersey and federal Constitutions, and there is no legal basis to find that she was entitled to any different procedure.

Finally, Kernan claims the administrative process is deficient because it does not specify what burden of proof applies in the removal proceedings. But she overlooks decades of caselaw, which has long held that in administrative proceedings the charging party must establish the truth of the claims by a

preponderance of the believable evidence. See Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

Simply put, Kernan's constitutional attacks on the removal process, as well as her collateral attacks on some of the elements of that process, are without merit. The Governor's decision to remove Kernan as a JWC was reasonable, fully comported with Article 5 of the New Jersey Constitution, and afforded Kernan the due process she was entitled to. Accordingly, the Governor's decision should be affirmed.

CONCLUSION

For these reasons, the Governor's order terminating Kernan's employment should be affirmed.

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

Audrey Kernan, Plaintiff/Appellant, Vs. State Of New Jersey, New Jersey Department of Labor and Workforce Development; Commissioner Robert Asaro-Angelo, and Governor Phillip D. Murphy, Defendants/Respondents	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-001199-22-T04 ON APPEAL FROM THE GOVERNOR'S LETTER OF TERMINATION PURSUANT TO N.J.A.C. §12:235-10.9, DATED JULY 25, 2022 and THE GOVERNOR'S DENIAL OF RECONSIDERATION DATED AUGUST 12, 2022

REPLY BRIEF ON BEHALF OF PLAINTIFF/APPELLANT AUDREY KERNAN

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Statement of Facts

The Brief submitted by Respondents, the State of New Jersey Department of Labor and Workforce Development ("DLWD"), Commissioner Robert Asaro-Angelo ("Commissioner") and Philip D. Murphy ("Governor"), collectively referred to as the "State," is primarily notable for a glaring omission. The State fails to explain how a disciplinary system comports with due process and the New Jersey Constitution when the individual who advocates for removal at the inception of the process also makes either the final decision or recommendation for discipline at the end of the process. As it stands, the Administrative Code vests immense power upon one individual – the Commissioner – when neither the Constitution of the State of New Jersey nor the existing case law interpreting the Constitution ever contemplated such power residing in anyone but the Governor.

The State also takes substantial liberties with some of the facts of this case. To illustrate, the State creates the impression that the complaints in this matter followed an orderly process, extending from one phase to the other. It argues:

> …the conduct alleged in the complaints against Kernan was investigated sequentially by the Office of Labor Relations ("OLR"), which administers the Workplace Violence Policy; the Office of Diversity Compliance ("ODC"), which administers the New Jersey State Policy Prohibiting Discrimination in the Workplace; and the Commission on Judicial Performance ("CJP") … .

(Db5). That description is patently false. The OLR did not complete its investigation until October 19, 2018. McCoy, without any connection to the ODC,

then conducted and directed *her own investigation commencing on October 4, 2018*, before the OLR investigation had even been completed. (Pa62-65).

If the matter had been handled "sequentially" and appropriately as the State has represented, the next stage would have been an appeal of the ODC's adverse finding. In fact, McCoy stated: "If you wish to appeal this determination, you must submit a written appeal to the New Jersey Civil Service Commission (NJCSC) … postmarked or delivered within 20 days …." (Pa64). That is precisely what Judge Kernan did, yet McCoy for a second time diverted the process from its proper channels. McCoy filed the CJP complaint, based on her own adverse findings reached in her own investigation, causing the NJCSC to decline jurisdiction over the appeal. Although the CJP is not an appellate forum (and certainly did not act as one here), NJCSC deemed it "the appropriate venue for this appeal…." (Pa104).

The State's terminology further creates the impression that multiple individuals and agencies were involved to create the impression of checks and balances. It claims that the ODC "determin[ed] that Kernan had violated the State Policy, … expressed concerns about Kernan's unprofessional conduct and referred the matter to the Department for appropriate action." It argues "[b]ased on the ODC's findings and referral, … Tennille McCoy, the Department's Assistant Commissioner, filed a Judicial Complaint with the CJP …." (Db10). The State ignores the undisputed fact that McCoy was the sole ODC investigator and arbiter

in this case; she "referred" her own findings to herself, short-circuiting the NJCSC's jurisdiction so that she could file the Verified Complaint with the CJP.

The notion that any "investigation" occurred by the ODC is a mere fallacy, yet the State nonetheless boldly proclaims, "The ODC conducted a thorough and impartial investigation, which included interviewing Kernan and other witnesses and reviewing the documentation submitted into the record...." (Db9). First, the extent of McCoy's unilateral control over the process obviates any concept of an impartial investigation. More importantly, the only citation to the record to support the existence of "a thorough and impartial investigation" is McCoy's self-serving conclusion that she conducted one. (Pa62). Notably, the administrative agency is in charge of the record in this case and could have included McCoy's investigatory file to support its allegations; its failure to do speaks volume about McCoy's lack of transparency and failure to conduct any actual investigation whatsoever.

The State again advocates an orderly, unbiased and dispassionate process whereby the CJP requested "witness statements and other evidence supporting the allegations against Kernan." (Db12-13). The State creates the impression that the Commissioner merely supplied requested information, when it is undisputed that the Commissioner did so much more. He not only expanded the scope of the proceedings to include unverified and unproven allegations, he literally told the CJP exactly what he wanted the CJP to find and acted as an advocate for Kernan's removal. (Pa106). Ironically, one of the primary issues in this matter is the abject

abuse of the orderly process, which allowed two individuals (McCoy and Asaro-Angelo) to manufacture the removal of a Worker's Compensation Judge. The State's quixotic manipulation of the facts to create *the impression* of an orderly process in the face of undisputed facts substantiates Kernan's arguments.

Betraying the weakness of its arguments as to the actual facts and procedure, the State then resorts to painting Kernan in a negative light, with allegations that are irrelevant to the procedural issues under appeal. The State details "a history of complaints and disciplinary actions against" Kernan commencing in 2012 where "she agreed to a six-month suspension as a JWC in a settlement of charges against her." (Db4). The State then details four co-worker complaints filed against Kernan, even though it is undisputed that the OLR found them to be unsubstantiated. (Db5-9). Finally, at various point in the Brief, the State vilifies Kernan by reference to facts that were not part of the Verified Complaint, often occurred after the Complaint was filed, and have nothing to do with the procedural issues Kernan has raised in this appeal. (Db12-13; Db15-16).

Notably, the Complaint that commenced the entire removal process, which McCoy herself drafted and controlled in terms of allegations that Kernan would face, contained absolutely none of these charges, and was restricted in this matter to two simple allegations. Ironically then, the State's continued reliance on the substance of the underlying charges (as opposed to the procedure employed) strengthens, rather than weakens, Kernan's arguments. The Verified Complaint

charges Kernan with specific, isolated violations while the investigation and adjudication of those violations during the CJP Process involved a host of allegations unconnected to the charges in the Complaint. The CJP failed to even discuss the two allegations that formed the sole basis of the complaint, instead basing its findings on information that should never have been part of the proceedings to begin with. (Pa195-197). It is absurd to maintain due process has been served when a disciplinary complaint alleges specific allegations, while the hearing on that complaint concerns anything and everything but those allegations.

In short, the substance underlying Kernan's removal is entirely irrelevant, and ultimately prejudicial, in an appeal challenging the *procedure* through which she was removed. The State's position here is equivalent to arguing a criminal defendant's substantive guilt when that defendant challenged the propriety of a search under the Fourth Amendment. Whether the defendant in that scenario committed the crime charged is irrelevant to the issue of whether the Government followed the Constitutional requirements. Whether Kernan's conduct warranted removal is similarly irrelevant to whether the State complied with the Constitution in effectuating her removal, and Kernan's appeal focused solely upon the procedure through which she was removed. Any reference to the substantive allegations was precisely to show that, from a procedural perspective, the history of allegations against Kernan should not have even been considered by the CJP as they were not included in the CJP Complaint.

The State also correctly notes that Kernan did not participate in the de novo hearing before retired Superior Court Judge Glenn Berman precisely because it would have been futile. As the State pointed out, at the conclusion of the hearing, Judge Berman would have rendered an initial decision and then transmitted it to the agency for a final decision. At that point, "[t]he agency head may then reject or modify conclusions of law, interpretations of agency policy, or findings of fact not relating to issues of credibility of lay witness testimony. N.J.A.C. 1:1-18.6." (Db17). The "agency head" was Robert Asaro-Angelo, the same individual who authored the scathing indictment of Kernan to the CJP, forcefully advocating for her removal. The Commissioner acutely expressed his bias in that letter; and Kernan's participation in a process where he becomes the ultimate arbiter is manifestly futile. Based on the foregoing denial of her procedural rights, Kernan objected to the entire process from the very beginning (Pa75-84) to the very end (Pa111-166) raising the identical issues that form the basis for this appeal. The administrative hearing simply did not comply with the Constitution. (Pa2-3).

Finally, the State often cites to Kernan's litigation in the Law Division filed on September 1, 2022. Everything that transpired in the Law Division is irrelevant to the current appeal, as the lower court determined that it lacked jurisdiction. The parties should not have been in the Law Division at all, and should have filed in the Appellate Division. The Law Division further deemed the action to have been filed within the 20-day time frame and transferred the matter, which constituted the

Notice of Appeal. The State's entire argument premised upon arguments raised in the Law Division (Db18-19; 22-25), and further restricting Kernan's current arguments to what was raised in the Law Division, are without merit.

Legal Argument

I. THE STATE'S FAILURE TO APPEAL THE LOWER COURT'S DECISION THAT KERNAN ACTED WITHIN THE 20-DAY PERIOD, WHICH WAS PROPER, ESPECIALLY IN LIGHT OF THE FACT THAT THE GOVERNOR HAS NEVER ENTERED AN ORDER, CONSTITUTES WAIVER OF THAT ARGUMENT.

Once again, the State appears to take substantial liberties with the record, nearing the point of misrepresentation. It argues that the Law Division "questioned the timeliness of Kernan's complaint in light of the requirement in N.J.S.A. 52:14-17.3 that any appeal to the Appellate Division from an order of removal occur 'within twenty days from the date of the making of the removal order.'" (Db19). This is the precise opposite of what the Court found. After detailing all of the allegations that had been made, the Court effectively ruled them to be without effect, as N.J.S.A. 52:14-17.2 required the appeal to go to the Appellate Division within 20 days of "the making **of the removal order**." (pa18)(emphasis added). The Court then determined that the Law Division could only transfer the matter directly to the Appellate Division under R.1:13-4 if it was filed within the 20-day period. Finally, the Court unequivocally determined "Plaintiff filed suit with the Law Division on September 1, 2022, within 20 days from her effective removal." (Pa19). The Law Division did not question timeliness at all.

The lower court's finding of timeliness was also entirely proper, as it was premised on the fact that Kernan sought reconsideration before seeking appellate relief. Our Appellate Rules contemplate that the time for appeal will be tolled, in a variety of contexts, if the appellant seeks reconsideration. R. 2:4-3; Van Horn v. Van Horn, 415 N.J. Super. 398, 413 (App. Div. 2010); In re Crowley, 193 N.J. Super. 197, 208 (App. Div. 1984)("Thus if we declined to entertain this appeal on the merits we would be hypertechnical.") The Appellate Division may also in its own discretion extend the time for appeal if it finds good cause and the absence of prejudice. R. 2:4-4; In re Rodriguez, 423 N.J. Super. 440, 447 (App. Div. 2011).

Our Appellate jurisprudence further deems it "well-settled that appeals are taken from orders and judgments and not from opinions, oral decisions, informal written decisions, or reasons given for the ultimate conclusion." Hayes v. Delamotte, 231 N.J. 373, 387 (2018)(quoting Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001)). It is a basic tenet of "appellate review that if the order of the lower tribunal is valid, the fact that it was predicated upon an incorrect basis will not stand in the way of its affirmance." Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968). Our courts have long maintained that "[a] trial court judgment that reaches the proper conclusion must be affirmed even if it is based on the wrong reasoning." Hayes, 231 N.J. at 387 (citing Isko, 51 N.J. at 175).

In the present case, the lower court made a ruling that Kernan's appeal was timely as Kernan sought reconsideration of her termination through her counsel's

correspondence dated August 8, 2022, which was subsequently denied on August 12, 2022. (Pa2-5). Kernan's September 1, 2022 filing was therefore within 20 days of August 12, 2022. Although the Court's ruling is proper in terms of the ultimate finding of timeliness, our Appellate rules dictate that in reality the 20-day period never began to run. Kernan has emphasized the language "the making **of the removal order**" above because N.J.S.A. 52:14-17.2 specifically states, "Any such appeal shall be taken within twenty days **from the date of the making of the removal order** by filing a notice of appeal with the Appellate Division and the Secretary of State." In the present case, the Governor's office never to this date has entered a removal order nor executed an Executive Order removing Kernan from office. Neither correspondence from counsel (nor correspondence directly from the Governor) should suffice as a formal removal order. (Pa1; Pa4).

The Law Division's determination that Kernan's application was timely, however, *was* a final order and the State never filed a Notice of Appeal seeking to challenge that decision. Even though the court's order stated that "[n]othing in this Order eliminates any defenses that Defendants may have regarding timeliness and exhaustion," the lower court is not a position to determine what constitutes waiver at the Appellate level. The lower court found that Judge Kernan acted within the applicable time frame, and the State now seeks to challenge that findings without having filed a Notice of Appeal. Its failure to do so waives that argument.

II. THE ONLY ARGUMENTS THAT ARE RELEVANT ARE THOSE RAISED DURING THE CJP PROCESS, WHICH PRESERVED THE ARGUMENTS MADE ON APPEAL, WHILE ARGUMENTS MADE TO THE COURT BELOW ARE IRRELEVANT IN LIGHT OF THE FACT THAT THE COURT DID NOT HAVE JURISDICTION.

The State once again engages in wishful thinking when it states, "Kernan has forfeited these arguments because she failed to raise them during the administrative process when she had the opportunity to do so." (Db22). Each and every one of the arguments that Kernan has advanced in this appeal were first raised either by Kernan's counsel in the administrative process prior to the commencement of proceedings (Pa75); her attempted appeal to the NJCSC (Pa102); counsel's arguments during the proceedings (Pa111; Pa126); or her subsequent counsel's request for reconsideration (Pa2). The only argument currently raised that did not appear below was the lack of an Executive Order, as that issue would only arise after culmination of the entire administrative process. Ironically, Kernan "voluntarily withdrew from that process" (Db23) citing the precise problems that she has raised in the current appeal. The State continually loses sight of the fact that Kernan's arguments raise facial and as-applied constitutional challenges, as the following section will further elucidate.

III. THE STATE HAS RELIED UPON THE SUBSTANCE OF KERNAN'S REMOVAL, WHICH IS IRRELEVANT IN AN APPEAL OF THE PROCEDURE EMPLOYED AND WHETHER IT SATISFIED THE CONSTITUTIONAL MANDATE.

Finally, the State has continually argued that there was sufficient evidence to remove Judge Kernan, and thus her appeal must be denied. It argues "courts should not disturb the decision to remove a public officer unless that decision appears to be inconsistent with substantial justice." (Db25). Although an accurate statement of the law, the statement has no bearing on this appeal. Kernan relied upon the "substantial justice" standard of review within her main brief NOT to argue the substantive issues, but rather to highlight that deference does not apply in this context. Again, the State continually repeats *the allegations which have never been proven nor even made under oath*, spanning multiple pages, in order to cast her in a negative light and engender prejudice against her. (Db5-9; 15-6 and 25).

Ironically, the State takes issue with the fact that "[o]n appeal, Kernan generally avoids discussion of the merits of the case against her, and instead attacks the constitutionality of the administrative process at N.J.A.C. 12:235-10.1 to -10.11." (Db27). That is because Kernan's appeal only involves the constitutionality of the process. Thus even if "Kernan's outrageous behavior, that consisted of repeated violations of the Code of Judicial Conduct and undermined the very institution she was to serve" is accurate (Db27) that finding of the CJP is based in its consideration of evidence that it never should have received in the first place. The State notes the salient reported decisions in this area (i.e. Russo v. Governor of New Jersey, 22 N.J. 156 (1956), Grzankowski v. Heymann, 128 N.J. Super. 563 (App. Div. 1974) and Bonafield v. Cahill, 125 N.J. Super. 78 (Ch. Div.

1973)) yet then fails to show how the procedures utilized in this case conformed to the procedures set forth in the case law. Presumably, this failure is unavoidable because they did not.

In fact, that is the crux of the appeal, and not "Kernan's assertion, raised first on appeal, that the Governor must be personally involved in every stage of a removal proceeding involving a JWC, including but not limited to personally presiding over any hearing." (Db33). That is not what Kernan has argued at all; she has argued that existing case law contemplates Governor involvement, and has interpreted the Constitution to require certain procedures which the current Administrative Code CJP process completely ignores. Although the State argues, "there is no basis for drawing that distinction in the Constitution's text, which treats all covered officers and employees equally," (Db33) Russo, Grzankowski, and Bonafield did precisely that, establishing that removal proceedings involving Worker's Compensation judges differ from the average officer or employee.

Almost laughably, the State argues that "absent a showing of actual bias, there is nothing constitutionally infirm about this process." (Db35). The Commissioner demonstrated his bias when he submitted his letter to the CJP at the very start of the process; that same Commissioner than makes the decision at the end or the recommendation for removal. Similarly, the State ignores the undisputed facts when it argues that "the Commissioner's role in the proceedings here was limited to providing requested information to the CJP, and then acting on the

recommendations of the CJP and independent hearing officer. N.J.A.C. 12:235-10.9." (Db38). The absurdity of this statement is best displayed by comparing the Commissioner's letter to the CJP's findings and the ultimate decision. The Commissioner did not "provide requested information;" he actively advocated for removal and tainted the proceedings with information that went well beyond the two substantiated allegations. The CJP then parroted his letter in its findings, and came to the precise result that he advocated. Our Constitution demands more.

The State flat out distorts the facts by arguing that "here, the ultimate decision involving removal is made by the Governor, **based on his independent review of the record** and subject to review by this court." (Db38-39). Therein lies the precise problem – whereas the case law shows extensive Governor involvement, the record in the current case shows the exact opposite. There is no proof that the Governor conducted anything close to an "**independent review of the record,**" and the circumstances surrounding the Governor's letter (i.e. the use of a literal rubber stamp) shows that he may not have been aware of the proceedings at all. Ironically, if the Governor had conducted an independent review of the record, that would have gone a long way in making the procedure constitutional. The framers of our 1947 Constitution clearly wanted to repose greater powers in the Governor; they did not repose that power in the Commissioner, which is precisely what the Code does in this case.

Finally, the State has continually advanced the fiction that Kernan had an opportunity to "fully litigate" the matter, including the right to "confront and cross-examine" witnesses. (Db11, 14, 30, 40, 43 and 45). Again, this fanciful argument ignores the actual facts. It is undisputed that the witnesses against her did not verify the CJP complaint. It is undisputed that the CJP did not hear testimony from a single, live witness and relied solely upon the Commissioner's letter. It is undisputed that, although the CJP was supposed to "investigate complaints," it did nothing more than restate the findings the Commissioner encouraged it to make. (Pa125, 128, 147-48; 188-199). The CJP itself made clear on the date of the hearing "there is no prosecutor," and thus no party would be examining witnesses. (Pa165). As a result, *none of the allegations against Kernan were ever made under oath*, which is precisely why she sought depositions under oath before proceeding to the de novo hearing. Of course, the failure to permit depositions is not a per se due process violation, as the State distorts Kernan's argument. (Db46). It just happened to be a small part of the due process violation in this case, as no party should face discipline in the absence of sworn testimony and, in the administrative context, "a fact finding or a legal determination cannot be based upon hearsay alone." Weston v. State, 60 N.J. 36, 51 (1972). Here, there was nothing but hearsay offered throughout the entire process. Yet this case suffers from the additional fatal flaw that in the absence of direct, sworn testimony, the right "to confront and cross-examine" those witnesses is an empty right, devoid of substance.

Conclusion

The State in this matter has effectively argued what it wished had occurred during the CJP process to bolster its claims of constitutionality. The actual facts of what transpired, and the actual procedure employed, are a shambolic facsimile of what our Constitution demands. This Appellate Court should determine that the removal procedure contemplated by the Administrative Code is unconstitutional both on its face and as applied against Judge Audrey Kernan.

Respectfully Submitted,

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/s/ Pasquale Guglietta
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