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January 20, 2023

Via eCourts Supreme

Heather Joy Baker, Clerk
Supreme Court of New Jersey
Richard J. Hughes Justice Complex
25 Market Street
PO Box 970
Trenton, New Jersey 08625

Re: Victoria Usachenok v. State of New Jersey Department of the
Treasury, John Mayo, Bulisa Sanders, and Deidre Webster-
Cobb
Docket No. 086861
Appellate Division Docket No. A-004567-18

On Petition for Certification to the Superior Court, Appellate
Division

Sat Below:

Hon. Jose L. Fuentes, P.J.A.D.

Hon. Robert J. Gilson, J.A.D.

Hon. Katie A. Gummer, J.A.D.

Supplemental Letter Brief on Behalf of Respondent State of
New Jersey in Opposition to Petitioner's Petition for
Certification



Dear Ms. Baker:

Please accept this supplemental letter brief on behalf of Respondent, State of New Jersey Department of the Treasury (“State”), in opposition to Petitioner Victoria Usachenok’s Petition for Certification. The Department continues to rely on its initial brief in opposition to Usachenok’s Petition for Certification and its Appellate Division brief, as supplemented here.

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COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY¹

Usachenok challenges the facial validity of N.J.A.C. 4A:7-3.1(j), a provision of the State Policy Prohibiting Discrimination in the Workplace (“State Policy”). (PCa022)². This Civil Service Commission (“CSC”) regulation, promulgated in 2002,³ originally required that Equal Employment Opportunity and Affirmative Action (“EEO/AA”) investigations be subject to confidentiality. Ibid.

On July 21, 2017, Usachenok initiated a civil rights action in the Law Division, alleging hostile work environment and retaliation, among other claims, against her former employer, the State of New Jersey Department of Treasury, Bulisa Sanders and Deidre Webster-Cobb (“the State”). (PCa024). She amended the complaint various times, which eventually culminated in a

¹ Because the Procedural History and Counterstatement of Facts are closely intertwined, they are being combined and summarized to avoid repetition and for the convenience of the court. A more detailed summary of the procedural and factual history are contained in the Letter Brief on Behalf of Respondent State of New Jersey in Opposition to Petitioner’s Petition for Certification.

² “PCa” refers to Usachenok’s Appendix, filed with her brief in support of her Petition for Certification.

³ The regulation was promulgated by the Merit System Board, whose functions were later reassigned to the Civil Service Commission, 34 N.J.R. 261(a)(Jan. 7, 2002).

Fourth Amended Complaint containing a claim for Declaratory Judgment, in which she sought to invalidate N.J.A.C. 4A:7-3.1(j). (PCa024-025).⁴ Upon motion of the State, the Declaratory Judgment claim was transferred to the Appellate Division as an appeal of a final agency decision pursuant to R. 1:13-4 and 2:2-3(a). (PCa025). Ibid. The Law Division matter was stayed pending resolution of the appeal.

On February 28, 2022, the Appellate Division dismissed Usachenok's facial challenge to the regulation, holding that the current version of the regulation was valid. (PCa035). In so doing, the court followed the principles of statutory interpretation, construed the ordinary meaning and significance of the words of the regulation, and "discern[ed] no constitutional infirmity" with the amended regulation. (PCa030-PCa033). The court also held that the current version of the regulation did not violate "the legislative or public policies behind LAD." (PCa033).

Previously, the regulation read:

(j) All complaints and investigations shall be handled, to the extent possible, in a manner that will protect the privacy interests of those involved. To the extent practical and appropriate under the circumstances, confidentiality

⁴ Usachenok's Fourth Amended Complaint also asserts an "as applied" challenge to the validity of N.J.A.C. 4A:7-3.1(j). However, her "as applied" challenge, which is still pending in the Law Division, pertains exclusively to the version of the regulation that existed before it was amended in 2020.

shall be maintained throughout the investigative process. In the course of an investigation, it may be necessary to discuss the claims with the person(s) against whom the complaint was filed and other persons who may have relevant knowledge or who have a legitimate need to know about the matter. **All persons interviewed, including witnesses, shall be directed not to discuss any aspect of the investigation with others in light of the important privacy interests of all concerned. Failure to comply with this confidentiality directive may result in administrative and/or disciplinary action, up to and including termination of employment.**

[N.J.A.C. 4A:7-3.1(j) (effective before April, 20, 2020)(emphasis added); see PCa023; Usachenok, 2022 WL 588546 at *1].

The amendment removed the language stating that all persons interviewed in the course of an investigation “shall be directed not to discuss any aspect of the investigation with others.” 51 N.J.R. 1311(a) (August 19, 2019). Instead, the regulation now provides that “[i]n order to protect the integrity of the investigation, minimize the risk of retaliation against individuals participating in the investigative process, and protect the important privacy interests of all concerned,” the person conducting the investigation “shall request that all persons interviewed. . . not discuss any aspect of the investigation with others, unless there is a legitimate business reason to disclose such information.” N.J.A.C. 4A:7-3.1(j)(effective after April 20, 2020). In addition, the CSC deleted the final sentence of the prior version of the regulation that had stated that “[f]ailure to comply with this confidentiality

directive may result in administrative and/or disciplinary action, up to and including termination of employment.” (PCa027-028; 53 N.J.R. 887(a) (April 20, 2020)).

The Appellate Division held that a request for confidentiality, as stated in the amended regulation, was “not a command,” and was rather a “permissive request” that, “at most” was an “attempt to convince and not an attempt to coerce.” (PCa030-PCa031). As such, the amended regulation did not chill speech, and was neither a constitutional violation, nor a violation of the LAD or its public policies.

The Appellate Division also took into account the intent of CSC in amending the regulation, stating that, in proposing and adopting these changes to N.J.A.C. 4A:7-3.1(j), the CSC’s purpose was “to eliminate a confidentiality requirement and its potential chilling effect rather than create one.” (PCa031). The court also acknowledged that if the CSC intended the regulation to maintain a confidentiality requirement, it “could have left unamended the language in the prior version.” Ibid. The court dismissed Usachenok’s appeal, holding “that the current version of the regulation is enforceable” and remanded to the Law Division with instructions to dismiss the Declaratory Judgement claim with prejudice. (PCa035).

On March 30, 2022, Usachenok filed her notice of Petition for Certification with this Court. On April 27, 2022, she filed her Petition. On May 12, 2022, Respondents filed their brief in opposition to Petitioner's Petition. On May 23, 2022, Usachenok filed her brief in reply.

On October 14, 2022, Petitioner filed her motion for leave to file a supplemental brief, arguing that new facts have come to her attention that are relevant to this Court's review of her Petition for Certification. On October 18, 2022, Petitioner filed her motion to expand the record, making the same arguments as asserted in her October 14, 2022, motion. On December 9, 2022, this Court granted Petitioner's motions. The Civil Service Commission is currently in the process of updating its website to conform its guidance documents to the amended regulation. The Law Division matter remains stayed pending this Court's actions.

ARGUMENT

POINT I

**USACHENOK’S PETITION FOR
CERTIFICATION SHOULD BE DENIED
BECAUSE THE “NEW FACTS” ASSERTED IN
HER SUPPLEMENTAL BRIEF HAVE NO
BEARING ON HER FACIAL CHALLENGE TO
THE AMENDED REGULATION.**

The only issue raised by Usachenok in this appeal, and indeed the only issue determined by the Appellate Division, is the facial constitutionality of N.J.A.C. 4A:7-3.1(j)(effective after April 20, 2020). (See PCa005) (“Plaintiff Viktoria Usachenok, a former Department of the Treasury employee, challenges the **facial validity** of paragraph (j) of N.J.A.C. 4A:7-3.1....”) (emphasis added). But Usachenok’s recitation of allegations as to how the amended regulation may have been applied by the State of New Jersey and its agencies lacks any relevance to her facial challenge. Indeed, such matters are have no bearing on whether the regulation, as written, is facially compliant with the Constitution.

This Court has made clear that “when confronted with a facial challenge,” Courts must “take care not to go beyond the statute’s facial requirements and speculate about hypothetical or imaginary cases under which constitutional problems might be present.” In re Contest of Nov. 8, 2011 Gen. Election of Off. of New Jersey Gen. Assembly, 210 N.J. 29, 64 (2012) (internal quotes omitted)

(quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450 (2008)). Indeed, “the fact that a future as-applied challenge might lie does not provide a sufficient foundation for . . . analysis that focuses on the problems that can arise” later. Id. at 64. “Although there might exist a significant issue in the context of an as-applied challenge where a [plaintiff has been harmed by the statute or regulation], . . . [t]he possibility of that arising is not relevant in a facial challenge, no matter the test that is employed.” Id. at 65.

In In re Contest, this Court reviewed, and upheld, the constitutionality of the durational residency requirement for members of the New Jersey General Assembly, found in the New Jersey Constitution. Id. at 36-37. There, the Petitioner’s candidacy was voided because she did not live in the district for at least one year. Id. at 36. In upholding the constitutionality of the residency requirement, the Court disregarded Petitioner’s argument that future reapportionment of districts could result in an otherwise qualifying candidate being disqualified, finding that that circumstance could be addressed in a future “as applied” challenge, but that such a hypothetical situation was not relevant to the facial challenge. Id. at 65-66.

Here, the only issue before this Court is the facial constitutionality of N.J.A.C. 4A:7-3.1(j)(effective after April 20, 2020). Usachenok’s citation to

allegations pertinent only to the manner in which the State of New Jersey, through its agencies, are acting post amendment, do not bear on this issue. She argues that the New Jersey Civil Service Commission's website has not been updated to track the present regulation. As noted, the website is being updated, but even if it were not, and assuming that other state employees have been "directed" or even been "coerced" into confidentiality upon threats of discipline, these would form the basis of a future "as applied" challenge (by those employees), and are not relevant to the facial constitutionality of the amended regulation, which depends on the language of the regulation and the intent of its framers. The language on certain websites does not override or change the actual language or intent of the amended regulation itself.

Plaintiff's brief itself makes clear that she is attempting to turn her facial challenge into an "as-applied" challenge, something not addressed by the Appellate Division. The final sentences of her brief states that the supplemental information is relevant because it allegedly shows "that the EEO/AA interprets **and has implemented** the Amended Regulation as a requirement, not the 'mere request.'" (Usachenok's Supplemental Brief at pages 11-12) (emphasis added). A challenge to how a facially constitutional regulation is implemented is an "as-applied" challenge.

This is no more evident than Usachenok's citation to the recently filed Superior Court matter of Ryan v. State of New Jersey, where the plaintiff asserts unconstitutional prior restraint because he allegedly was expressly told "you should not discuss this matter with employees outside of the Office of the EEO." (Petitioner's Brief at page 4). By definition, this is an as applied challenge, as it challenges the manner in which the regulation was applied to him. Importantly, the Ryan matter is still pending, and thus the asserted facts have not yet been proven. But even assuming, for the sake of this brief, that Ryan was "required" to keep his EED matter confidential, that would have no bearing on whether the language of the amended regulation passes constitutional muster. Nor does Usachenok have standing to challenge an allegedly improper application of the regulation to Ryan. Usachenok is merely raising a set of allegations that hypothetically resulted in Ryan being harmed by an erroneous interpretation of the amended confidentiality provision. Ryan has not been harmed by the regulation as interpreted by the Appellate Division, which is the sole question before this court. Consequently, the "possibility of that arising is not relevant in a facial challenge, no matter the test that is employed." In re Contest, 210 N.J. at 65.

The Appellate Division, in denying Usachenok’s facial challenge to the amended language of N.J.A.C. 4A:7-3.1(j), held that a request for confidentiality was “not a command,” as made clear by its plain wording and the Civil Service Commission’s intent behind amending the regulation. (PCa030). Like any other source of law, the language and intent of this regulation can be subject to varying implementations by employees, but such practices do not change the language or intent, and thus do not invalidate an otherwise valid source of law. Rather, a law should be upheld as valid “if it can be shown to operate constitutionally in some, even if not all or most, instances.” Whirlpool Properties, Inc. v. Dir., Div. of Tax’n, 208 N.J. 141, 156, 26 A.3d 446, 455 (2011).

Courts will “defer to the interpretation of the agency charged with [a] statute's enforcement . . . ‘as long as it is not plainly unreasonable.’” Ibid. (quoting Koch v. Dir., Div. of Tax’n, 157 N.J. 1, 8 (1999)). The Appellate Division, “discern[ed] no constitutional infirmity” with the amended regulation, based, in part, on the Civil Service Commission’s interpretation when amending the regulation. (PCa029-PCa030). That is the true meaning of the amended regulation, and any challenges to the manner in which the regulation is implemented can be reviewed through future “as applied” challenges. But as

the Court has made clear, the possibility of future “as applied” challenges, and the facts that support them, are not relevant to facial challenges. Accordingly, Usachenok’s Petition for Certification should be denied.

POINT II

NOTWITHSTANDING THAT THE “NEW FACTS” LACK RELEVANCE TO USACHENOK’S FACIAL CHALLENGE, THE CIVIL SERVICE COMMISSION IS UPDATING ITS WEBSITE TO REFLECT THE LANGUAGE AND INTENT OF THE AMENDED REGULATION.

This matter is undisputedly a facial challenge to the amended version of N.J.A.C. 4A:7-3.1(j). And as discussed above, the manner in which it has been applied may give rise to potential “as applied” challenges, as is the case in the Ryan matter. However, the website updates that are underway underscore the State’s argument that these “new facts” are relevant only to “as applied” challenges, and thus bear no probative value to this Court’s review of Usachenok’s Petition.

Common sense dictates that a facial constitutional challenge to language on a website would not stand. But if that language injured an employee, that employee may bring an “as applied” challenge, as Ryan has. Thus, with these forthcoming updates, the Civil Service Commission, and, indeed, other state

agencies, are helping to protect themselves against future “as applied” challenges. But these updates do nothing to inform, alter or direct the meaning and intent of N.J.A.C. 4A:7-3.1(j), as amended. Accordingly, Usachenok’s Petition for Certification should be denied.

CONCLUSION

For these reasons, Usachenok’s Petition for Certification should be denied.

Respectfully submitted,

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