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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
James LIIK, Joseph Socolos, Antonio Delacalle, Akeisha Walters, James Pittman, and Policemen's Benevolent Association State Corrections Local 105, Individually and on behalf of a class of similarly situated current and/or former Correction Officer Recruit Trainees, Appellants,
v.
NEW JERSEY DEPARTMENT OF PERSONNEL, Commissioner Rolando Torres, New Jersey Department of Corrections and Commissioner George Hayman, Respondents.
Argued Feb. 23, 2009.
Decided July 23, 2009.

West KeySummary
Officers and Public Employees 283 ⚿11.2

283 Officers and Public Employees
283I Appointment, Qualification, and Tenure
283I(B) Appointment
283k11 Restrictions of Civil Service Laws or Rules
283k11.2 k. Classification. Most Cited Cases
Department of Personnel (DOP) violated the regulations regarding trainee titles and improperly created a new title below entry level employment associated with trainee titles when it made the decision to treat recruit trainees as non-employee students. A new program was created for correctional trainees in which they were considered students who attended a year long training program that was a prerequisite to permanent appointment as a correction officer recruit. The continuation of the program was an administrative rule so it was subject to the requirements of the Administrative Procedure Act, but the DOP did not comply with the requirements. N.J.S.A. 52:14B-2(e); N.J.A.C. 4A:3-3.7.

On appeal from a Final Agency Decision of the New Jersey Department of Personnel and the New Jersey Department of Corrections.
Colin M. Lynch argued the cause for appellants (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys; Robert A. Fagella, of counsel; Mr. Lynch, on the brief).

Pamela N. Ullman, Deputy Attorney General, argued the cause for respondents (Anne Milgram, Attorney General, attorney; Melissa H. Raksa, Deputy Attorney General, of counsel; Susan M. Scott, Deputy Attorney General, and Ms. Ullman, on the brief).

Before Judges REISNER, SAPP-PETERSON and ALVAREZ.

PER CURIAM.

***1** Appellants are present and former corrections officer recruit trainees and their union representatives for collective negotiations. Respondents are the New Jersey Department of Personnel (DOP), Commissioner Rolando Torres, New Jersey Department of Corrections (DOC), and Commissioner George Hayman (collectively respondents). On March 27, 2007, appellants commenced an action in the Law Division seeking declaratory relief and damages arising out of respondents' continuation of the Corrections Officer Recruit Trainee Pilot Demonstration Program ("the program"). The parties stipulated to the dismissal of appellants' complaint, without prejudice, and agreed to have the dispute resolved in the Appellate Division. Although no final agency action was taken, we view the stipulation of dismissal and removal of the matter to the Appellate Division as the equivalent of a decision declining to grant the relief appellants sought. The issues on appeal are identical to those

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asserted in appellants' complaint.

Appellants allege continuation of the program violates the Civil Service Act (Act), *N.J.S.A.* 11A:1-1 to 12-6; the Administrative Procedure Act (APA), *N.J.S.A.* 52:14B-1 to 24; and the Fair Labor Standards Act (FLSA), 29 *U.S.C.A.* §§ 201-219. We agree the program violates the Act and APA and therefore declare it void. We decline to address appellants' FLSA claims as there has been no waiver of sovereign immunity, and even in the instance of waiver, appellants' proofs are insufficient to warrant relief.

The salient facts are derived from appellants' statement of items comprising the record, the pleadings, and respondents' responses to appellants' Open Public Records Act (OPRA), *N.J.S.A.* 47:1A-1 to -13, request. In November 1996, the Policemen's Benevolent Association, Law Enforcement Officers Local No. 105 (Local 105), requested that DOP consider a pilot program for the pre-employment training of corrections officers. Already in existence at the time Local 105 submitted its request to DOC was a "correction officer recruit" program. Under this program, prospective corrections officers obtained appointment to career service [FN1] with the DOC through the successful completion of a pre-employment examination administered by the DOP. After successful completion of the examination process, those individuals were hired by the DOC as employees with the title "correction officer recruit" and thereafter received the necessary training and instruction to perform their job duties. As employees of the DOC, "correction officer recruits" received all of the benefits available to employees under the Act, including, but not limited to, a salary set by the DOP pursuant to the State Compensation Plan, overtime compensation, medical and pension benefits, and union representation.

> FN1. "Career Service" means those positions and job titles subject to the tenure provisions of Title 11A, New Jersey Statutes.

According to Local 105, the pilot program it proposed would eliminate candidates who may not be suitable for the position. Moreover, Local 105 believed if there was a distinction in the employment status between recruits and officers, it would not have to accept recruits into its representation.

***2** In the fall of 1997, DOP and DOC proposed a new classification and title of "correction officer trainee." Under the proposal, the trainees would receive their training through a corrections officer training program, during which they would receive fourteen weeks of instruction overseen by the New Jersey Police Training Commission. This training would take place prior to permanent appointment to the rank and title of "correction officer recruit" and the commencement of their one-year working test period.

The pilot program was expected to operate from January 1, 1998, through December 31, 1998. As proposed, the trainees would be considered "students" during the training program. They would, however, be "temporary employees" for purposes of FLSA. Additionally, the actual training would not take place during employment but would become part of the examination process, with the training portion of the examination scored on a pass/fail basis. The successful completion of the training program would be a prerequisite to permanent appointment as a correction officer recruit. Further, recruit trainees would not be entitled to a salary or wages, but instead would receive a "stipend" of $300 per week. Moreover, they would not be eligible for pension benefits, overtime, or union membership during the period of their training program.

Because they were in an "in-residence" training program, the recruit trainees would be required to remain at the training facility five days per week. The training would generally consist of forty hours per week, and include a twelve-week in-residence portion, with an additional two weeks of on-site training at a correctional facility. The "student trainees" would be responsible for learning the

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various rules, regulations, polices, procedures, operational processes, and methods related to a correctional institution including: law enforcement responsibilities, weapons training, self-defense, custodial duties, patrolling, inmate control, maintaining institutional order, cell inspections, inmate escorting, and other essential tasks.

On August 11, 1998, DOP formalized the program informally and internally without notice to the public or rulemaking. It was essentially adopted as proposed with an anticipated one-year duration period. The program proved successful and DOC's Bureau of Training, which oversaw the program, submitted two separate requests to extend the program beyond the one-year period. DOP made no formal response to these extension requests. Its position was that the program was not a true "pilot program" within the meaning of *N.J.S.A.* 11A:2-11(i); consequently, there was no need to terminate the program after one year or a need for formal rulemaking in order to continue the program. Nonetheless, DOC issued Standard Operating Procedure ("SOP") # 35, entitled "Correction Officer Training Hiring Procedure" on August 26, 1999 that extended the program.

On appeal, appellants raise the following points for our consideration:

***3** *POINT I*

THE CONTINUATION OF THE PILOT PROGRAM BEYOND ITS ONE-YEAR MAXIMUM DURATION VIOLATES THE EXPRESS TERMS OF THE NEW JERSEY CIVIL SERVICE ACT, *N.J.S.A.* 11A:2-11(i).

POINT II

THE DOP AND THE DOC'S INDEFIN[I]TE CONTINUATION OF THE PILOT PROGRAM VIOLATES THE ADMINISTRATIVE PROCEDURE ACT, *N.J.S.A.* 52:14B-1, ET SEQ.

POINT III

THE CONTINUATION OF THE PILOT PROGRAM VIOLATES THE EXPRESS PURPOSES OF THE CIVIL SERVICE ACT, *N.J.S.A.* 11A:1-1, ET SEQ.

POINT IV

THE DESIGNATION OF RECRUIT TRAINEES AS NON-EMPLOYEES EXCLUDED FROM PAYMENT OF OVERTIME COMPENSATION VIOLATES THE FAIR LABOR STANDARDS ACT, 29 *U.S.C.* § 201, ET SEQ.

I.

We initially dispense with respondents' contention that the appeal should be dismissed as untimely. Respondents argue appellants filed this appeal over seven years after they were aware that DOC intended to implement the program on a permanent basis, which is well-beyond the forty-five-day time period in which to appeal from final administrative agency actions. Moreover, respondents contend that because appellants failed to show good cause for their failure to file in a timely manner, we lack jurisdiction to consider this appeal. We disagree.

Rule 2:4-1(b) provides that "[a]ppeals from final decisions or actions of state administrative agencies or officers ... shall be taken within forty-five days from the date of service of the decision or notice of the action taken." This rule, however, applies only to an agency's quasi-judicial decisions that adjudicate the rights of a particular individual. *See Northwest Covenant Med. Ctr. v. Fishman,* 167 *N.J.* 123, 135, 770 A.2d 233 (2001) (holding that "the forty-five[-]day rule applies only to agencies adjudicating the rights of particular individuals.") Respondents' action of continuing the program cannot be considered a quasi-judicial act because it did not involve an "adjudication" of the rights of any certain person or persons. Rather, it involved the treatment of all future recruit trainees. Therefore, the forty-five-day time period set forth in *Rule* 2:4-1(b) is inapplicable to the present appeal, and respondents' reliance on that rule is misplaced.

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Additionally, although *N.J.S.A.* 52:14B-4(d) provides, "[a] proceeding to contest any rule on the ground of noncompliance with the procedural requirements of [this Act] shall be commenced within one year from the effective date of the rule," this appeal is not governed by this statutory provision as it only applies where there has been notice of the proposed adoption of a rule and the rule has been published. *State v. Leary,* 232 *N.J.Super.* 358, 367, 556 A.2d 1328 (Law Div.1989) (citing *Nat'l Assn. of Metal Finishers v. Envtl. Prot. Agency,* 719 *F.*2d 624, 638 (3rd Cir.1983)). It is undisputed here that notice of the proposed adoption of the program through rulemaking was not given and no rule has ever been published.

II.

Appellants contend that continuation of the program beyond one year violates the express terms of *N.J.S.A.* 11A:2-11(i). Respondents urge that the program is not a true pilot program as contemplated under the Act. We reject respondents' contention and find the record supports the conclusion that the program was established as a pilot program pursuant to *N.J.S.A.* 11A:2-11(i).

***4** *N.J.S.A.* 11A:2-11(i) provides that the DOP "[m]ay establish pilot programs and other projects for a maximum of one year outside of the provisions of [the Act]." *See also N.J.A.C.* 4A:1-4.3(a) (stating that "The Commissioner [of the DOP] may establish pilot programs, not to exceed one year, outside of the provisions of Title 11A, New Jersey Statutes, and these rules.") Here the program was conceived, developed and implemented by the DOP and the DOC as a pilot program pursuant to *N.J.S.A.* 11A:2-11(i). The "Program Description" starts by indicating that "[p]ursuant to *N.J.S.A.* 11A:2-11 ([i]), the Commissioner ... is authorized to establish pilot programs for a maximum period of one year outside the provisions of Title 11A...." It also notes that "[t]his pilot program is established for the employment of correction officer trainees in the New Jersey Department of Corrections...." Also, the duration of the program was set for one year.

Moreover, inter-agency correspondence discussing the program referred to it as a "pilot program." Both the "interim" and "final" reports on the program analyzed the program as a "pilot program." Further, the program was initiated in conformity with the DOP's regulations governing the development of pilot programs. *See N.J.A.C.* 4A:1-4.3, which permits the Commissioner to establish pilot programs "outside of" the duly adopted rules of the DOP, but requires that the appointing authority who requests the pilot program consult with the affected "negotiations representatives" before the submission of a proposal.

Accordingly, contrary to respondents' contention, the program was a "pilot program" developed outside the provisions of the Act.

III.

We also agree with appellants' contention that by treating recruit trainees as non-employee students, respondents violated the existing regulations regarding "trainee titles" and improperly created a new title below "entry level employment" associated with "trainee titles."

"Administrative agencies possess wide latitude in selecting the appropriate procedures to effectuate their regulatory duties and statutory goals." *St. Barnabas Med. Ctr. v. N.J. Hosp. Rate Setting Comm'n,* 250 *N.J.Super.* 132, 142, 593 A.2d 806 (App.Div.1991) (citations omitted). However, that latitude or rather "flexibility does not allow an agency to ignore the dictates of the [APA]." *Ibid.*

The APA generally defines an administrative rule as any "agency statement of general applicability and continuing effect that implements or interprets law or policy." *N.J.S.A.* 52:14B-2(e). "[A]n agency determination can be regarded as a 'rule' when it effects a material change in existing law." *Fishman, supra,* 167 *N.J.* at 136, 770 A.2d 233 (citing *Metro-*

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media, Inc. v. Dir., Div. of Taxation, 97 *N.J.* 313, 330, 478 A.2d 742 (1984)). The APA itself recognizes that an agency action or determination "that implements or interprets law or policy" can constitute an "administrative rule." *N.J.S.A.* 52:14B-2(e). Indeed, "[i]t has been consistently recognized that the widespread, continuing, and prospective effect of an agency pronouncement is the hallmark of an 'administrative rule.' " *Metromedia, supra,* 97 *N.J.* at 329, 478 A.2d 742. "An agency determination that is intended to be applied as a general standard and with widespread coverage and continuing effect can also be considered an administrative rule if it is not otherwise expressly authorized by or obviously inferable from the specific language of the enabling statute." *Ibid.*

***5** "If an agency's action or determination constitutes" rulemaking, "it must comply with the specific procedures of the [APA]." *St. Barnabas, supra,* 250 *N.J.Super.* at 143, 593 A.2d 806 (citing *Metromedia, supra,* 97 *N.J.* at 330-31, 478 A.2d 742). *Metromedia* lists six relevant factors to be assessed in determining whether agency action constitutes rulemaking. Those factors are:

> [I]f it appears that the agency determination ... (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy. These relevant factors can, either singly or in combination, determine in a given case whether the essential agency action must be rendered through rulemaking or adjudication.
>
> [*Metromedia, supra,* 97 *N.J.* at 331-32].

"All six of the *Metromedia* factors need not be present to characterize agency action as rulemaking, and the factors should not be merely tabulated, but weighed." *In re Request for Solid Waste Util. Customer Lists,* 106 *N.J.* 508, 518, 524 A.2d 386 (1987). Here, the program was applied generally and uniformly to all similarly situated persons, namely, those seeking employment as correction officers. The program operated only prospectively. Treatment of recruit trainees as "non-employees" was not "previously expressed in any official and explicit agency determination, adjudication or rule." Furthermore, the continuation of the program "constitutes a material and significant change from a clear, past agency position," specifically, the treatment of trainee titles as entry level employees as mandated by *N.J.A.C.* 4A:3-3.7. Finally, the continuation of the program reflects a decision by the DOP on administrative regulatory policy in the nature of the interpretation of law, specifically, the Act and its regulations.

Simply put, the continuation of the program was an "administrative rule." Therefore, the DOP, acting in its rulemaking capacity, was subject to the requirements of the APA. Here, DOP did not comply with those requirements and respondents do not allege that they did.

In view of our determination that the program is a pilot program under the Act and subject to the one-year limitation, and our further determination that its continuation constitutes an administrative rule subject to the requirements of the APA, to which respondents failed to adhere, we deem it unnecessary to address appellants' contention that continuation of the program violates the purposes of the Act.

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IV.

***6** Appellants argue that the designation of recruit trainees as non-employee students violated the FLSA. According to appellants, the recruit trainees were and are "employees" as that term is defined in the FLSA, and therefore were and are entitled to the minimum wage prescribed by the FLSA, as well as overtime compensation.

Appellants also contend that the Legislature has effectively waived the State's sovereign immunity from suit under the FLSA. However, they say, even if there was no waiver of the State's sovereign immunity, the Commissioners of the DOP and the DOC remain subject to a declaration that the program is in violation of the FLSA, as well as prospective injunctive relief to end the ongoing violation of the FLSA.

Respondents respond that the State and its employees are entitled to sovereign immunity from suit for damages under the FLSA, and that this immunity has not been waived. Respondents also contend that appellants' demand for declaratory and prospective injunctive relief under the FLSA must be denied because the program is a pre-employment program during which the recruit trainees are not "employees" under the FLSA.

In view of our decision that continuation of the program violates the Act and APA, we need not address whether the designation of recruit trainees as non-employee students violates the FLSA for two reasons. First, appellants acknowledge that respondents may be entitled to sovereign immunity from suit for damages under the FLSA. They, nonetheless, without recitation to any legal authority, claim the Legislature has effectively waived that immunity. It is not our function, as a reviewing court, to search for the legal authority to support appellants' asserted position. It is well settled, however, that waiver of immunity requires a clear and unequivocal statement of the Legislature that sovereign immunity is waived. *See Allen v. Fauver,* 167 *N.J.* 69, 73, 768 A.2d 1055 (2001) (citing *Alden v. Maine,* 527 U.S. 706, 119 S.Ct. 2240, 144 *L. Ed.*2d 636 (1999)). *See also,* for example, the New Jersey Tort Claims Act, *N.J.S.A.* 59:1-1 to 12-3, re-establishing sovereign immunity except in limited circumstances.

Moreover, even in the absence of waiver, appellants are not entitled to declaratory and prospective injunctive relief on this record because they have failed to adequately demonstrate any actual violation of the FLSA. They simply assert "there is no dispute that [the recruit trainees] are engaged in employment during their training in excess of 40 hours per week and receive no overtime compensation whatsoever." To support this contention, appellants cite SOP # 35, which provides that "[t]raining hours at the Academy *may exceed 40 hours per week;* however, Student Trainees are not entitled to compensation over and above the $300 stipend." (emphasis added). The record is completely devoid of any evidence that the recruit trainees actually exceeded forty hours of training during any one-week period. Therefore, there is no evidence of any actual violation of the FLSA.

***7** In summary, respondents' failure to comply with the Act and the APA in their continuation of the program renders the continuation of the program beyond one year, without rulemaking, void.

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