



## I.

### A.

The Commission's findings may be summarized as follows. Moore was employed by ACHA as Assistant Executive Director for approximately ten years. Mark Mullen (Mullen) was employed by ACHA as Facilities Manager from February 2006 to October 2012. Mullen handled maintenance for ACHA and supervised 32 employees. Mullen was a salaried employee and did not work regular hours. Mullen's hours depended on what that day required and he worked extra hours if necessary. Mullen worked the seven-hour day that ACHA expected, but he typically arrived at 7:00 a.m. and left at 5:00 p.m. or 5:30 p.m. When necessary, Mullen worked twelve to fourteen to sixteen-hour days. Mullen's subordinates worked 8:00 a.m. to 4:30 p.m.; they did not work at ACHA, but all over Allegheny County. While

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**(continued...)**

(c) In the case of any employe removed, ... the commission may modify or set aside the action of the appointing authority. Where appropriate, the commission may order reinstatement, with the payment of so much of the salary or wages lost, including employe benefits, as the commission may in its discretion award.

Thus, "the Commission may modify the appointing authority's disciplinary action in an appropriate case, even where the underlying charges against the civil service employee are proven." *Department of Corrections v. State Civil Service Commission (Mason)*, 837 A.2d 1273, 1277 (Pa. Cmwlth. 2003) (citations omitted). However, the Commission's authority is not without boundaries, in that it needs to be "appropriate." *Id.* The appropriateness of a modification has been considered under an abuse of discretion standard. *Department of Corrections v. Roche*, 654 A.2d 64, 68 (Pa. Cmwlth.), *appeal denied*, 541 Pa. 644, 663 A.2d 695 (1995). An abuse of discretion is not merely an error in judgment; rather, "[a]n abuse of discretion occurs if, in reaching a conclusion, the law is overridden or misapplied or judgment exercised is manifestly unreasonable or is the result of partiality, prejudice, bias, or ill will." *Henderson v. Unemployment Compensation Board of Review*, \_\_\_ A.3d \_\_\_, \_\_\_ (Pa. Cmwlth., No. 1332 C.D. 2012, filed October 8, 2013), slip op. at 16.

Mullen could not be everywhere his subordinates were, he needed to be available to them until 4:30 p.m.

Moore was Mullen's direct supervisor from 2007 to April 16, 2012. Moore asked the Executive Director, Frank Aggazio (Aggazio), to hire a second Assistant Facilities Manager to help Mullen. Instead, ACHA created a new position of Associate Director of Facilities Management which supervised Mullen's Facilities Manager position. While Mullen applied for the new position, on April 16, 2012, ACHA hired Paul Reiber (Reiber) as Associate Director. Reiber is also a salaried employee. He typically works 8:00 a.m. to 4:30 p.m., but he also works "extra hours" if there is a problem or a manager needs help.

## **B.**

The events that led to Moore's termination occurred in early 2010. In late 2009, Moore admired a picture of Mullen's kitchen and he offered to do similar work on her kitchen. In late February and early March 2010, Mullen installed new cabinets, a tile countertop and a dishwasher in Moore's kitchen. Moore only permitted Mullen to work on her house on Monday to Thursday evenings and on Sunday. Mullen left ACHA at 3:00 p.m. and worked on the kitchen from about 3:30 p.m. to 7:30 or 8:30 p.m. If Mullen left ACHA at 3:00 p.m. to work on Moore's kitchen, he returned to ACHA if there was a problem. Mullen did not work on the kitchen on weekday mornings; he went there on one morning at 6:30 a.m. to measure plywood, but he arrived at ACHA by 8:00 a.m. Mullen did not tell Moore that he left ACHA at 3:00 p.m. to work on her kitchen and Moore did not know the specific times or days that he worked on her kitchen. Typically, Moore's husband let Mullen

into the house and Moore did not return home until 8:30 or 9:30 p.m. because she teaches evenings at Carlow University. On or about March 1, 2010, at 1:10 p.m., Mullen took a photograph of the work he did on the kitchen on his lunch hour. In June or July 2010, Mullen spent two evenings tiling a center island in Moore's kitchen. Mullen's work on Moore's kitchen totaled about four or five days. Otherwise, Mullen worked on Moore's house on weekday afternoons and evenings. Mullen did not feel pressured or obligated to work on her kitchen because she was his supervisor.

While ACHA assigned Mullen a truck which was identified on the door as an ACHA vehicle, he switched trucks with an Assistant Facilities Manager, John Owen (Owen), before he went to Moore's house because he did not want anyone to see a truck with ACHA identification at her house. ACHA's vehicle usage log for Mullen's vehicle shows that from February 4 to 12, 2010, February 26 to March 1, 2010, April 13 to 16, 2010, and April 30 to May 6, 2010, Owen initialed the log as the vehicle's driver.

Moore and Mullen did not have a written contract for his work on her kitchen and they did not discuss the price before he began the work. Moore paid for the materials that Mullen needed for the kitchen and a Lowe's receipt shows Moore's purchase of a dishwasher and a stove. Moore's husband removed the old kitchen cabinets and the old dishwasher and cleaned up after the removal. Mullen brought the new cabinets to the house and Moore's husband brought the new tiles. On or about March 4, 2010, Moore paid Mullen \$1,000.00 for his work. Moore asked him if it was enough, and Mullen affirmed that it was. Mullen believed that \$1,000.00

was below the market value of his work, but he did not complain to Moore because he has given other people a “break” as to the amount he charged for his work. Moore did not pay Mullen any additional money for the work that he did on her center island after March 4, 2010. He also did not ask Moore to pay him for caulking her window.

In 2010, Moore asked Mullen to recommend a roofing company because her roof was leaking and Mullen volunteered to check the roof himself. Mullen checked the roof on his lunch hour and he fixed the leak on a Sunday. Mullen also recommended a worker who fixed Moore’s furnace and, when Moore complained about the workmanship, Mullen told the worker that he would pay for the bracket to correct it. Mullen felt obligated to pay for the bracket not because Moore pressured him, but because he had recommended the worker to Moore. Moore acknowledged that other ACHA employees, Assistant Residential Manager Lou Sanchez and Carpenter Lamar Johnson, also worked on her house.

ACHA’s Employee Handbook provides that employees may pursue outside employment that does not: result in a conflict of interest with their ACHA duties; involve income or gain for materials or services rendered in connection with their ACHA duties; or negatively impact the performance of their duties. ACHA’s Assistant General Counsel Tom McPoyle (McPoyle) acknowledged that ACHA does not prohibit employees from doing work for each other. A construction manager, Bob Cashia (Cashia), reattached loose aluminum siding to McPoyle’s house. Cashia did the work on a Saturday and McPoyle paid him with a box of steaks.

### C.

The Department of Housing and Urban Development (HUD) annually inspects ACHA's properties and, while ACHA's properties received a high score in 2011, it was issued a poor score in 2012. By a January 26, 2012 memorandum, Moore notified Mullen and Owen that they were receiving a "written warning" for the disappointing score. In May 2012, Mullen sent ACHA's Deputy Executive Director/General Counsel John Joyce (Joyce) a letter to explain the circumstances underlying the poor inspection because Mullen believed that he was being unfairly blamed for the score. In July 2012, Mullen met with Joyce and Aggazio regarding the letter.

In July 2012, ACHA's Network Manager Jeffrey Kier (Kier) read a three-page document on Mullen's desk while he was installing Microsoft Office on Mullen's computer. The document contained three lists accusing ACHA of improper conduct. The lists represented notes that Mullen intended to take to a meeting with another agency and included, "Working on Ms. Moore's kitchen on county time." Kier copied the document and it was ultimately sent to Joyce and McPoyle. No one told Moore about Mullen's documents.

By e-mail dated August 3 or 5, 2012, Mullen indicated to Aggazio, Joyce and McPoyle that he would take his concerns to other parties and address the ACHA Board with his concerns because ACHA was ignoring his concerns. On August 13, 2012, Reiber submitted a written statement to Aggazio and Moore which stated that Mullen was angry and bitter that he was not offered Reiber's position. In a letter dated August 17, 2012, Joyce responded to Mullen's August 2012 e-mail

stating that Mullen's letters have made clear his disappointment over not being chosen for Reiber's position, and he asked Mullen to bring instances to his attention where employees are performing or directed to perform work unrelated to ACHA's mission. Mullen never told Joyce that employees were performing nor directed to perform work unrelated to ACHA's mission.

As part of the investigation into whether Mullen worked on Moore's house on ACHA time, McPoyle and Program Accessibility Assistant Katharine Gilboy (Gilboy) interviewed Kier, Owen, Reiber, Mullen, Sanchez, Johnson and Moore. Sanchez and Johnson each stated that they had worked on Moore's house, but not on ACHA time. By e-mail dated October 11, 2012, Mullen told McPoyle that he did not perform work on Moore's home during working hours, but he did work on her house on a weekend or two and on weekdays after 3:00 p.m. Mullen also stated that the document Kier found was a draft that he created prior to a meeting with an FBI special agent and an agent with the Attorney General's Office, and it was nothing more than a question he was asking these outside agencies if it was a conflict of interest to have others work on Moore's house during county work hours because they were representing him.

On October 11, 2012, ACHA placed Moore on administrative leave, noting that it was investigating reports that Mullen performed work on her house on ACHA time. (Reproduced Record (R.R.) at 18a). On October 26, 2012, ACHA terminated Moore's employment because Mullen "did perform work on your behalf, off the worksite, including your residence, while on [ACHA] time" and that she "knew or reasonably should have known" that Mullen was performing this work on

ACHA time; and that she inquired of other ACHA employees about their interest in potentially performing personal work for her, but unlike Mullen’s work, ACHA was unsure if this work would be on personal or ACHA time. (*Id.* at 19a).

## II.

Moore appealed her removal to the Commission. Where an employee alleges the appointing authority lacked “just cause” for removal under Section 807 of the Act,<sup>2</sup> the Commission hearings are governed by Section 951(a) of the Act<sup>3</sup> and Section 105.15 of the Commission’s regulations, 4 Pa. Code §105.15. *Chittister v. State Civil Service Commission (Department of Community and Economic Development)*, 789 A.2d 814, 817-18 (Pa. Cmwlth. 2002). The burden of proving a *prima facie* case of just cause is upon the appointing authority. Section 105.15(a) of the Rules of the Civil Service Commission;<sup>4</sup> *Thompson v. State Civil Service*

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<sup>2</sup> Act of August 5, 1941, P.L. 752, *as amended*, 71 P.S. §741.807. Section 807 states that “[n]o regular employe in the classified service shall be removed except for just cause.”

<sup>3</sup> Added by the Act of August 27, 1963, P.L. 1257, *as amended*, 71 P.S. §741.951(a). Section 951(a) provides that any regular employee in the classified service who has been permanently separated may appeal in writing to the Commission within 20 calendar days of receipt of notice of the action from the appointing authority. *Id.*

<sup>4</sup> Section 105.15(a) states:

(a) The appointing authority shall go forward to establish the charge or charges on which the personnel action was based. If, at the conclusion of its presentation, the appointing authority has, in the opinion of the Commission, established a *prima facie* case, the employee shall then be afforded the opportunity of presenting his case.

4 Pa. Code §105.15(a).

*Commission (Beaver County Area Agency on Aging)*, 863 A.2d 180, 184 (Pa. Cmwlth. 2004), *appeal denied*, 583 Pa. 685, 877 A.2d 463 (2005). Just cause for removal must be merit-related and touch upon the employee's competency and ability. *Id.* Merit-related criteria include whether the employee failed to properly execute his work duties or has acted in such a way that hampers or frustrates the execution of his duties. *Id.* The question of whether an employee's actions constitute "just cause" for removal is a question of law that will be fully reviewed by this Court in this appeal. *Ellerbee-Pryer v. State Civil Service Commission*, 803 A.2d 249, 253 n.2 (Pa. Cmwlth. 2002).

Hearings were conducted before Commissioner Odelfa Preston. The facts set forth above come from the testimony of Mullen, Kier, McPoyle and Joyce who testified for ACHA and Moore, Mullen, Joyce, Gilboy, Reiber, Aggazio and James Bulls (Bulls), Director of Housing Management Operations, who testified on behalf of Moore and whom the Commission found credible.

In June 2013, Commissioner Preston and Commissioner James Martin issued an Adjudication disposing of Moore's appeal. The Commission rejected ACHA's argument that Mullen necessarily fixed Moore's roof and tiled her kitchen island on ACHA time because Mullen credibly testified that he checked the roof on his lunch hour and fixed it on a Sunday and that he spent two evenings tiling the center island.

The Commission also rejected ACHA's argument that Mullen necessarily performed the other kitchen work on ACHA time because his work hours

were 8:00 a.m. to 4:30 or 5:00 p.m., and Mullen knew that he had left at 3:00 p.m. because he switched vehicles with Owen. However, the Commission noted that Mullen acknowledged that he switched vehicles because he did not want anyone to see a truck with ACHA's name on it at Moore's house and he was concerned that his working on Moore's house might be perceived as his working there on ACHA time. (R.R. at 103a-105a, 142a-143a). The Commission also noted Moore's and Mullen's credible testimony that as the Facilities Manager, Mullen worked irregular hours up to 16 hours per day. (*Id.* at 86a, 125a-126a, 305a-307a, 311a). The Commission also noted Reiber's corroborating testimony that he works extra hours as necessary (*id.* at 932a-935a), and Moore's testimony that she was satisfied that Mullen always worked the total seven hours a day that ACHA expected, even if he did not always work those hours consecutively from 8:00 a.m. to 4:30 p.m. but, instead, at various times throughout the day and night. (*Id.* at 306a-307a).

The Commission also rejected ACHA's argument that Mullen necessarily performed the work on ACHA time because the work hours of his subordinates were 8:00 a.m. to 4:30 p.m. As the Commission explained:

[ACHA]'s argument appears to be that if Mullen was not physically present at [ACHA], then he could not supervise his crew. The Commission is not persuaded by this argument because [Moore] credibly testified that Mullen's subordinates worked all over Allegheny County such that if Mullen was not physically present at [ACHA], it did not affect his ability to supervise them. It was only necessary that he be "available" to his subordinates, and Mullen credibly testified that if he left [ACHA] at 3:00 p.m. to work on Moore's kitchen, he returned if there was a problem. We are also not persuaded by [ACHA]'s argument that Mullen could not vary his "work day" from 8:00 a.m. to 4:30 p.m. or 5:00 p.m. because Mullen already

did so by working up to sixteen hours a day. Also, [ACHA] presented no evidence showing that when Mullen left [ACHA] at 4:30 p.m. to work on [Moore]'s kitchen that it affected the work he did for [ACHA]. [ACHA]'s Employee Handbook, at page eighteen, provides that "employees may pursue outside employment that does not ... negatively affect the performance of their [ACHA] duties," and Mullen's work for [Moore] appears to fall into that category. The Commission respects [ACHA]'s contention that as the employer it is entitled to establish the expected work day of its employees, but given that Mullen typically worked irregular hours, we conclude that he was an employee who did not have an expected work day.

(R.R. at 1356a-1357a) (citations and footnote omitted).

The Commission also rejected as not relevant ACHA's claim that Moore knew or should have known that Mullen left at 3:00 p.m. to work on her kitchen based on the above finding that it was not inappropriate for Mullen to leave at that time. Nevertheless, the Commission also cited Moore's credible testimony that she did not know that he left at that time and her and Mullen's testimony that they did not discuss when he worked at her house. (R.R. at 101a, 317a-321a). The Commission also did not accept that Moore knew that she did not pay fair market value for Mullen's work because Moore and Mullen credibly testified that Mullen told her that the \$1,000.00 was enough; Moore's husband helped Mullen with the work; and Moore paid for the materials. (*Id.* at 108a-109a, 129a-130a, 324a-325a, 326a-327a, 348a-349a).

The Commission also rejected ACHA's argument that Moore lost her judgment and control as a supervisor because Mullen felt that she owed him for the

work he did on her house. In support, ACHA cited Moore's testimony that she told Mullen that the written warning that she gave him after the poor HUD inspection did not constitute discipline and Mullen's resentment over Reiber's hire. As the Commission explained:

The Commission is not persuaded by this argument because [ACHA] does not prohibit its employees from working for each other and it is not so unusual as to necessarily affect their workplace relationships. For example, McPoyle acknowledged that one of [ACHA]'s construction managers did some work on his house and McPoyle paid him with a box of steaks. Also, in addition to Mullen, two other [ACHA] employees worked on [Moore]'s house. As to the written warning, the Commission finds that it does not show [Moore]'s loss of judgment and control as a supervisor; instead, it reflects the difference in [Moore]'s management style and Aggazio's. Aggazio wanted to discipline Mullen for the poor HUD inspection, and, at his behest, [Moore] used the words "written warning." But [Moore] did not want to discipline Mullen, so she notified him that the written warning was not discipline. Mullen thought that [Moore] unfairly blamed him for the poor HUD inspection, and he was angry when [ACHA] did not select him for the position of Associate Director of Facilities Management. But it is clear that Mullen's anger was directed at [ACHA] in general, and not [Moore] alone, given that Mullen directed his complaints to Aggazio and Joyce, and he made allegations to the FBI and the Attorney General's Office about general [ACHA] wrongdoing.

(R.R. at 1358a-1359a) (citations omitted). The Commission determined that ACHA did not meet its burden of proving its grounds for removal because it did not show that Moore's subordinate, Mullen, worked for her at times when he was supposed to

be working for ACHA and that Moore knew or should have known about it. (*Id.* at 1359a).<sup>5</sup>

Based on its findings, the Commission issued an order sustaining Moore's appeal and reversing ACHA's removal effective October 26, 2012. It also ordered that Moore be reimbursed for all wages and fringe benefits that she would have received during that time less any wages that she earned or benefits that she received since her removal. In doing so, the Commission rejected ACHA's argument that it may not order back pay because Moore did not present any evidence of her salary, wages or benefits. Rather, as part of its order, the Commission directed Moore to submit a sworn statement containing this information. ACHA then filed the instant appeal.<sup>6,7</sup>

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<sup>5</sup> Based on this determination, the Commission did not address Moore's claim that her removal was discriminatory. (*Id.*)

<sup>6</sup> Our standard of review of a Commission adjudication is limited to determining whether Commission findings are supported by substantial evidence; whether errors of law have been committed; and whether constitutional rights have been violated. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704; *Pennsylvania Game Commission v. State Civil Service Commission (Toth)*, 561 Pa. 19, 26, 747 A.2d 887, 890-91 (2000). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Bowman v. Department of Environmental Resources*, 549 Pa. 65, 68 n.4, 700 A.2d 427, 428 n.4 (1997).

<sup>7</sup> By order dated August 15, 2013, we granted ACHA's motion for a stay of the Commission's order during the pendency of the instant appeal.

### III.

#### A.

ACHA first claims that the Commission invaded its managerial authority to establish the working hours of its employees by finding that Mullen was not on ACHA time when he left at 3:00 p.m. to work on Moore's kitchen. However, the Commission's findings regarding what hours constituted Mullen's workday in no way infringes on ACHA's managerial authority because it was free and is free to set the hours of employment for its managerial employees. Rather, the Commission found that ACHA failed to credibly establish that Mullen's workday ended at 4:30 p.m. or that Mullen, as a seven-hour employee, worked on Moore's kitchen during a period for which he was simultaneously being compensated by ACHA on the days in question.

ACHA also claims that the Commission capriciously disregarded overwhelming evidence of Mullen's misconduct, including his admissions that he performed the work on Moore's kitchen while he was on ACHA time. The "capricious disregard of evidence," is a question of law and occurs when an agency expressly refuses to resolve conflicts in the evidence and make essential credibility determinations or where the agency completely ignores overwhelming evidence without comment. *Hinkle v. City of Philadelphia*, 881 A.2d 22, 27 (Pa. Cmwlth. 2005). "The capricious disregard standard then is nothing more than a shorthand way of referring to an amalgam of existing overlapping legal and constitutional standards ... that safeguard against arbitrariness by state and local administrative agencies by requiring a meaningful explanation of why the losing party's overwhelming evidence was not accepted." *Id.* (footnote omitted). We have characterized the capricious

disregard of evidence as “a deliberate and baseless disregard of apparently reliable evidence.” *Taliaferro v. Darby Township Zoning Hearing Board*, 873 A.2d 807, 814 (Pa. Cmwlth.), *appeal denied*, 585 Pa. 692, 887 A.2d 1243 (2005).

ACHA does not allege that the Commission did not make essential credibility determinations<sup>8</sup> regarding the evidence cited in support of this assertion. Rather, ACHA argues that the Commission erred in rejecting critical portions of their evidence as not credible where it contradicted that of Mullen or Moore or supported a finding of just cause. As outlined herein, such credibility determinations are for the Commission as fact-finder, and the record demonstrates that the Commission did not act arbitrarily because it amply explained why ACHA failed to establish just cause in this case. Simply, we will not accede to ACHA’s request to reweigh the evidence in this case.

Finally, ACHA argues that it had a separate basis for just cause to terminate Moore’s employment because she demonstrated a lack of judgment by

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<sup>8</sup> Questions of credibility and the weight to be accorded the evidence are determined by the Commission, and this Court will not re-weigh the evidence or substitute its judgment even though it might have reached a different factual conclusion. *Thompson*, 863 A.2d at 184. Thus, this Court must accept the Commission’s findings if they are supported by substantial evidence. *Daily v. State Civil Service Commission (Northampton County Area Agency on Aging)*, 30 A.3d 1235, 1239-40 (Pa. Cmwlth. 2011), *appeal denied*, 616 Pa. 647, 48 A.3d 1250 (2012). As fact finder, the Commission is free to reject uncontradicted evidence as not credible. *See Adonizio Brothers, Inc. v. Department of Transportation Board of Review*, 529 A.2d 59, 61 (Pa. Cmwlth. 1987), *appeal denied*, 518 Pa. 627, 541 A.2d 1138 (1988), *citing Williams v. State Civil Service Commission*, 306 A.2d 419 (Pa. Cmwlth. 1973). On appeal, the prevailing party before the Commission is entitled to every inference that can be logically and reasonably drawn from the evidence viewed in a light most favorable to that party. *Western Center, Department of Public Welfare v. Hoon*, 598 A.2d 1042, 1045 (Pa. Cmwlth. 1991).

failing to establish the contractual terms to ensure that she did not take advantage of her subordinate. However, the record supports the Commission's finding that ACHA only terminated Moore's employment because she knew or should have known that Mullen performed work in her kitchen on ACHA time and because she asked other ACHA employees about their interest in potentially performing personal work for her without determining as to whether it was on personal or ACHA time. (R.R. at 19a). ACHA cannot now assert a new and different basis for just cause for terminating Moore's employment in this appeal.<sup>9</sup>

## B.

ACHA next claims that the Commission erred in permitting Moore to present evidence of lost wages and benefits after the close of the record. ACHA argues that Moore had the burden of proving her wages and benefits at the hearing and that the Commission's regulation, 4 Pa. Code §105.15(c)(15),<sup>10</sup> precludes the

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<sup>9</sup> The constitutional guarantee of due process of law is equally applicable to administrative proceedings as it is to judicial proceedings. *McClelland v. State Civil Service Commission*, 322 A.2d 133, 135 (Pa. Cmwlth. 1974). The essential elements of due process require that notice be given and that the notice "contain a sufficient listing and explanation of any charges so that the individual can know against what charges he must defend himself if he can." *Jacobs v. Department of Public Welfare*, 377 A.2d 1289, 1290-91 (Pa. Cmwlth. 1977). Thus, "[i]n addition to proving just cause, the appointing authority also has the burden to prove the substance of the charges underlying the removal." *Long v. Pennsylvania Liquor Control Board*, 535 A.2d 1233, 1235 (Pa. Cmwlth. 1988) (citing *Jacobs*).

<sup>10</sup> Section 105.15(c)(15) states:

(c) While in each case the Commission may adapt the procedures and conduct of the hearing in accordance with the requirements of justice and due process, generally the routine shall follow the following order:

**(Footnote continued on next page...)**

Commission from reopening the record for the receipt of additional evidence after the record has been closed.

However, in *Snipas v. Department of Public Welfare*, 405 A.2d 1366 (Pa. Cmwlth. 1979), at a hearing on the propriety of a civil service employee’s furlough, the Commission Chairman requested that additional evidence be submitted post-hearing on the contested funding issue that purportedly caused the furlough. On appeal, citing Section 35.128 of the General Rules of Administrative Practice and Procedure (GRAPP),<sup>11</sup> we rejected the employee’s claim that the Commission improperly solicited and accepted such post-hearing evidentiary material. *See id.* at 1369 (“The record reveals that at the November hearing, Chairman McCarthy requested additional evidence demonstrating the fiscal problem, and that copies of the various exhibits went to Petitioner, who did not object to their introduction. Accordingly, we find no impropriety in the Commission's action, and must disagree

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**(continued...)**

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(15) The record shall be considered as closed upon receipt of transcripts, depositions and briefs and the hearing shall be deemed concluded at that time. The Commission will determine the facts upon the evidence of record and decide relevant questions of law within 90 calendar days after the conclusion of the hearing.

<sup>11</sup> 1 Pa. Code §35.128. Section 35.128 provides, in pertinent part, that “[a]t any stage of the hearing the agency head or the presiding officer may call for further evidence upon an issue, and require the evidence to be presented by the party or parties concerned or by the staff counsel, either at that hearing or at the adjournments thereof....”

with Petitioner’s contention that the exhibits constitute ‘unethical support’ for DPW’s position.”).

Likewise, Section 35.233 of the GRAPP permits a quorum of the Commission to reopen the record for the reception of additional evidence. *See* 1 Pa. Code §35.233 (“Prior to the issuance by the agency head of an adjudication in a proceeding the agency head, after notice to the participants, may without motion reopen the proceeding for the reception of further evidence, if the agency head has reason to believe ... that the public interest requires, the reopening of the proceeding.”). In addition, the Commission’s grant or denial of a participant’s motion to reopen the record under Section 35.231(a) of the GRAPP<sup>12</sup> is reviewed by this Court under an abuse of discretion standard. *See, e.g., Fritz v. Department of Transportation*, 468 A.2d 538, 539 (Pa. Cmwlth. 1983) (“A decision to grant a rehearing or to reopen a record is within the discretion of an administrative agency, and the exercise of that discretion by the agency will not be reversed unless a clear abuse is shown. *See Muehleisen v. State Civil Service Commission*, [443 A.2d 867 (Pa. Cmwlth. 1982), *aff’d*, 501 Pa. 335, 461 A.2d 615 (1983)]; *Department of Justice v. State Civil Service Commission*, [319 A.2d 692 (Pa. Cmwlth. 1974).”].

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<sup>12</sup> 1 Pa. Code §35.231(a). Section 35.231(a) states:

(a) *Petition to reopen.* After the conclusion of a hearing in a proceeding or adjournment thereof sine die, a participant in the proceeding may file with the presiding officer, if before issuance by the presiding officer of a proposed report, otherwise with the agency head, a petition to reopen the proceeding for the purpose of taking additional evidence. The petition shall set forth clearly the facts claimed to constitute grounds requiring reopening of the proceeding, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing.

Moreover, as noted above, Section 105.15(c)(15) of the Commission's regulations states, in pertinent part, that "in each case the Commission may adapt the procedures and conduct of the hearing in accordance with the requirements of justice and due process...." 4 Pa. Code §105.15(c)(15). In addition, Section 951(d) of the Civil Service Act provides, in pertinent part, that the Commission "may, upon its own motion ... make such orders as it deems appropriate to assure observance of the provisions of this act and the rules and regulations thereunder." 71 P.S. §741.951(d). Contrary to ACHA's assertion, then, the Commission did not abuse its discretion or err as a matter of law in reopening the record post-hearing for the receipt of additional evidence in order to fashion its award of back pay.

### C.

Finally, ACHA claims that the Commission violated its due process rights by allowing Commissioner Martin to make credibility determinations in the adjudication because only Commissioner Preston was present at the hearing in which the witnesses testified and the evidence was submitted. However, ACHA acknowledges that this Court has long held that it is not a violation of due process for Commissioners who did not attend the hearings to join in adjudications provided that they indicate that they have reviewed the testimony and exhibits. *See, e.g., Caldwell v. Clearfield County Children and Youth Services*, 476 A.2d 996, 997 (Pa. Cmwlth. 1984) ("We have held that due process does not require that all the commissioners rendering a decision be present at the hearing; all that is required is that those not present review and consider the record before an adjudication is issued.") (citations omitted). Both Commissioner Martin and Commissioner Preston stated that they "reviewed the Notes of Testimony and exhibits introduced at the hearing, as well as

the Briefs submitted by the parties” in issuing the instant Adjudication. (R.R. at 1333a). As a result, ACHA’s due process claim is without merit. *Caldwell*.

Accordingly, the Commission’s order is affirmed.

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DAN PELLEGRINI, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Allegheny County Housing	:
Authority,	:
Petitioner	:
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v.	: No. 1244 C.D. 2013
	:
State Civil Service Commission	:
(Moore),	:
Respondent	:

**ORDER**

AND NOW, this 9<sup>th</sup> day of December, 2013, the order of the State Civil Service Commission dated June 21, 2013, at Appeal No. 27651 is affirmed.

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DAN PELLEGRINI, President Judge