



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Egberto Colon, City
of Elizabeth

CSC Docket No. 2016-2070

Reconsideration

ISSUED: NOV 16 2016 (SLK)

The City of Elizabeth (Elizabeth), represented by Raymond T. Bolanowski, Esq., requests reconsideration of the decision rendered on November 18, 2015, which granted in part the petitioner's request for interim relief regarding his immediate suspension. Egberto Colon, represented by James M. Mets, Esq., requests reconsideration of the determination not to immediately reinstate him.

By way of background, on August 11, 2015, the petitioner was involved in a domestic dispute that resulted in a temporary restraining order (TRO) and disorderly persons charge against him. On August 13, 2015, the appellant's firearms were surrendered to the Elizabeth Police Department (Police Department). On August 14, 2015, the petitioner was issued a Preliminary Notice of Disciplinary Action (PNDA), immediately suspending him without pay since he was issued a TRO prohibiting him from possessing any and all firearms which, in effect, prohibited him from carrying out the duties of a law enforcement officer.

On August 19, 2015, the TRO was dismissed and the petitioner requested a departmental hearing regarding his immediate suspension. Rather than having an in-person *Loudermill* hearing, the petitioner submitted a letter dated August 24, 2015 requesting the suspension be reversed and he be assigned modified duty or changed to a suspension with pay. On August 27, 2015, the appointing authority advised that since the Union County Prosecutor's Office (Prosecutor's Office) had not yet authorized the return of his weapons, he could not be reinstated to duty and he could not serve desk duty pending the Prosecutor's Office review since he had a prior domestic violence and assault charge. Subsequently, on September, 9, 2015,

the simple assault charges against the petitioner were dismissed and on September 21, 2015 the Prosecutor's Office requested that the appointing authority conduct an investigation into the petitioner's background, directed that the petitioner submit to a Fitness for Duty Evaluation, and indicated that it would consider the matter of returning the petitioner's weapons after reviewing the Police Department's investigation and the Fitness for Duty Evaluation. Thereafter, he petitioned the Civil Service Commission (Commission) for interim relief regarding his immediate suspension. The Commission granted his request in part by ordering back pay and benefits from September 13, 2015, and ending on the date of commencement of the departmental hearing or on the date of his reinstatement if the petitioner is returned to his position without the need for a departmental hearing.

On reconsideration, the appointing authority asserts that the Commission's reasoning for awarding back pay was based upon an erroneous conclusion that it unilaterally delayed in holding the departmental hearing. However, the appointing authority highlights that the PNDA that was served to the petitioner on August 14, 2015 indicated that the departmental hearing was to be held on September 10, 2015. The appointing authority submits a letter from the petitioner's attorney dated August 26, 2015, requesting an adjournment of the departmental hearing since he would be out of the country. Thereafter, the appointing authority, in a letter dated September 23, 2015, confirmed with the petitioner's attorney that the departmental hearing was rescheduled for October 6, 2015. However, as confirmed in the petitioner's attorney's October 5, 2016 letter, the parties agreed to adjourn the departmental hearing pending the outcome of the Fitness for Duty exam.

In response, the petitioner asserts that he must be reinstated immediately. The petitioner presents that under *N.J.A.C. 4A:2-2.5(a)1* and 2, an employee may be suspended immediately and prior to a hearing when that employee has been charged with certain crimes, the employee has been determined unfit for duty, or is a hazard to any person if permitted to remain on the job. However, he maintains that none of these factors exist as the disorderly persons charge and (TRO) have been dismissed. Further, the petitioner contends that the appointing authority has not established why he cannot return to duty in a modified capacity or be suspended with pay. In the alternative, the petitioner states that the Commission must uphold its decision to award back pay and benefits pending a departmental hearing or reinstatement. He argues that the standard for reconsideration has not been met as the Commission did not err. The petitioner indicates that he was issued a PNDA on August 14, and on August 19, 2015 he requested a hearing and discovery. Instead of having a *Louderhill* hearing, the petitioner states that he submitted the August 24, 2015 request that his suspension be reversed and he be assigned modified duty or suspended with pay. The petitioner argues that the appointing authority's response that he could not be reinstated until his weapon could be returned was effectively an issuance of a decision. Thus, the fact that it was responsible for the initial delay in holding the departmental hearing entitles him to

back pay and benefits. Additionally, the petitioner emphasizes that the appointing authority has not requested a stay of the Commission's order nor has it paid him back pay and benefits. He states that he is suffering a financial hardship and requests that the Commission enforce its decision. The petitioner indicates that on January 4, 2016, the Prosecutor's Office issued a decision allowing him to possess a weapon under certain conditions and he has been complying with those conditions including meeting with a clinical psychologist. However, he presents that the appointing authority has refused to reinstate him even though the Prosecutor's Office has confirmed that he can possess a firearm while on duty. Therefore, he argues that there is no justification for his suspension. In the alternative, he argues that he should be paid pending a departmental hearing.

In reply, the appointing authority presents that in a letter dated January 4, 2016, the Prosecutor's Office indicated that the petitioner could possess a weapon for duty under certain conditions. The appointing authority requested that the Prosecutor's Office reconsider its decision. Further, in a letter dated January 25, 2016, the Chief of Police requested that the Prosecutor's Office reconsider its decision to allow the petitioner to carry a firearm for duty since his psychological evaluation indicated that he is in need of serious psychological help. Thereafter, in a letter dated January 28, 2016, the Prosecutor's Office reconsidered its decision and determined that the petitioner cannot possess a weapon for at least six months and until other conditions are met, including a determination regarding his fitness for duty evaluation.

It is noted that the petitioner's departmental hearing was held on February 10, 2016 which resulted in the petitioner's removal effective that same date. Further, the appellant appealed his removal and that matter has been transferred to the Office of Administrative Law for a hearing.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

N.J.A.C. 4A:2-2.5(d) states that a departmental hearing, if requested, shall be held within 30 days of the PNDA unless waived by the employee or at a later date as agreed to by the parties.

In the instant matter, the appointing authority has met the standard for reconsideration. Based on the evidence presented in the original proceeding, it appeared that the appellant was suspended on an on-going basis without the

opportunity to have a departmental hearing. Therefore, the Commission ordered that the petitioner receive back pay and benefits from 30 days after the petitioner received the PNDA until either the departmental hearing was held or he was reinstated. However, in this matter, the appointing authority has presented evidence that a departmental hearing was initially delayed due to the petitioner's attorney's schedule and the rescheduled hearing was postponed due to the parties' agreement that the departmental hearing should take place pending the outcome of the petitioner's fitness for duty examination. Although the appointing authority should have provided the aforementioned evidence regarding the postponement of the departmental hearing as part of the original proceeding, the petitioner agreed to waive the departmental hearing pending the outcome of his fitness for duty evaluation. Consequently, the petitioner should not benefit from a procedural error when he actually was afforded the right to a departmental hearing. Further, the Prosecutor's Office's final determination that the appellant cannot carry a firearm for duty was not issued until January 28, 2016. As the departmental hearing was scheduled on February 10, 2016, this hearing was scheduled to be held in a timely fashion. Accordingly, the Commission grants reconsideration and reverses its original decision.

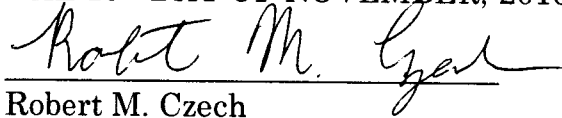
With respect to the petitioner's request, the standard for reconsideration has not been met. As stated in the original decision, Civil Service jurisdictions and their employment practices are governed by both the provisions of Title 40A and Title 11A of the New Jersey Statutes. Therefore, since the latter permits the immediate suspension of employees on administrative disciplinary charges in addition to criminal charges, the petitioner's immediate suspension was appropriate. *See In the Matter of George Bello* (MSB, decided May 10, 2006). Further, the petitioner was not initially denied the right to a departmental hearing for the on-going suspension as stated above. Moreover, the rescheduled February 10, 2016 departmental hearing was timely as it was scheduled in a reasonable time after the Prosecutor's Office's January 28, 2016 determination as stated above. Finally, the appellant is not permitted to carry a weapon which is necessary to perform the duties of a Police Sergeant. Therefore, he cannot be reinstated as he is currently unable to perform the duties of a Police Sergeant.

ORDER

Therefore, it is ordered that the appointing authority's request for reconsideration be granted and the Commission reverses its decision granting the petitioner back pay and benefits from September 13, 2015. The petitioner's request for reconsideration is denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 10th DAY OF NOVEMBER, 2016



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
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Attachment

c: Egberto Colon
James M. Mets, Esq.
Raymond T. Bolanowski, Esq.
James Cosgrove, Director
Records Center

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STATE OF NEW JERSEY

DECISION OF THE CIVIL SERVICE COMMISSION

In the Matter of Egberto Colon, City of Elizabeth

CSC Docket No. 2016-1303

Request for Interim Relief

ISSUED: NOV 19 2015 (SLK)

Egberto Colon, a Police Sergeant with the City of Elizabeth (Elizabeth), represented by James M. Mets, Esq., petitions the Civil Service Commission (Commission) for interim relief regarding his immediate suspension.

By way of background, on August 11, 2015, the petitioner was involved in a domestic dispute with his former girlfriend that resulted in the parties obtaining temporary restraining orders (TROs) against each other. Disorderly persons offenses were also issued to each person. On August 13, 2015, the appellant's police and personal firearms were surrendered to the Elizabeth Police Department (Police Department). On August 14, 2015, the petitioner was issued a Preliminary Notice of Disciplinary Action (PNDA), immediately suspending him without pay on charges of violating Police Department Rules and Regulations pertaining to police image and accountability, conduct unbecoming a public employee and other sufficient cause. Specifically, the appointing authority asserted that on August 13, 2015, the petitioner was arrested for Simple Assault under Domestic Violence and was issued a TRO prohibiting him from possessing any and all firearms which, in effect, prohibited him from carrying out the duties of a law enforcement officer.

On August 19, 2015, the TRO was dismissed and on that same day the petitioner requested a departmental hearing regarding his immediate suspension. Rather than having an in-person *Loudermill* hearing, the petitioner submitted a letter dated August 24, 2015 requesting the suspension be reversed and he be assigned modified duty or changed to a suspension with pay as he was no longer

subject to the TRO. On August 27, 2015 the appointing authority responded and advised the petitioner that the return of his weapons was solely at the discretion of the Union County Prosecutor's Office (Prosecutor's Office). Thus, since the Prosecutor's Office had not yet authorized the return of his weapons, the petitioner could not be reinstated to duty. Further, the appointing authority indicated that it could not permit him to serve on desk duty pending the Prosecutor's Office review of his authorization to possess weapons since the petitioner had a prior domestic violence and assault charge. Therefore, the appointing authority indicated that the appellant's immediate suspension was necessary in order to maintain the safety, health, order and effective direction of public services of the Police Department. Subsequently, on September, 9, 2015, the simple assault charges against the petitioner were dismissed and on September 21, 2015 the Prosecutor's Office requested that the appointing authority conduct an investigation into the petitioner's background, directed that the petitioner submit to a Fitness for Duty Evaluation, and indicated that it would consider the matter of returning the petitioner's weapons after reviewing the Police Department's investigation and the Fitness for Duty Evaluation.

In support of his request for interim relief, the petitioner asserts that he has a clear likelihood of success on the merits as, under *N.J.A.C. 4A:2-2.5(a)*, he is entitled to a departmental hearing prior to being suspended unless it is determined that he is unfit for duty or the suspension is necessary in order to maintain the safety, health, order or effective direction of public services. The petitioner claims that at least eight other Police Officers have been placed on modified duty with pay pending charges relating to domestic violence complaints and therefore no basis exists to suspend him without pay, especially since domestic civil or criminal charges against him have been dismissed. Further, he maintains that his suspension is not necessary for safety purposes as all the charges against him have been dismissed. In the alternative, the petitioner states that under *N.J.S.A. 40A:14-149.1*, a Police Officer may be suspended with pay pending the disposition of charges and only permits a suspension without pay if the officer is charged with an offense that constitutes "a high misdemeanor, or conduct that involves moral turpitude or dishonesty, or one in which an indictment has been returned. Therefore, since he was only charged with a disorderly persons offense and the charge has been dismissed, his suspension without pay is not permitted. The petitioner argues that he will suffer irreparable harm if he is not granted interim relief as he has been unable to provide financial support and health benefits for himself and his two daughters since his suspension without pay became effective. Additionally, the petitioner claims that the Police Department and the public interest will not be harmed if he is either reinstated to his position, placed in a modified duty position, or suspended with pay as he is clearly fit for duty, since the charges against him have been dismissed and providing him with modified duty is consistent with the Police Department's past practice for matters stemming from domestic violence complaints.

In response, the appointing authority, represented by Raymond T. Bolanowski, Esq., argues that the petitioner was required to surrender his weapons as a result of the domestic violence charge against him and the return of his weapons is solely within the Prosecutor's Office's discretion. Further, under the Civil Service definition, the petitioner cannot perform the duties of a Police Sergeant without his weapon. Additionally, it presents that the Prosecutor's Office has required him to undergo a Psychological Fitness for Duty Evaluation which will then be reviewed by the Police Department and the Prosecutor's Office. The appointing authority asserts that the petitioner is not being irreparably harmed by his immediate suspension without pay since monetary loss does not constitute irreparable harm and can be remedied through an award of back pay. Further, it indicates that if there is an adverse decision against the petitioner after the Fitness for Duty Evaluation is reviewed, he will be afforded his rights to an administrative hearing as well as any appeal rights.

CONCLUSION

N.J.A.C. 4A:2-1.2(c) provides the following factors for consideration in evaluating petitions for interim relief:

1. Clear likelihood of success on the merits by the petitioner;
2. Danger of immediate or irreparable harm;
3. Absence of substantial injury to other parties; and
4. The public interest.

However, in reviewing this matter, it is not necessary to address the merits of the charges against the petitioner. Rather, the issues to be determined are whether the appointing authority presented a valid basis to immediately suspend the petitioner and whether the appointing authority was justified in delaying the departmental hearing.

N.J.S.A. 11A:2-13 and *N.J.A.C.* 4A:2-2.5(a)1 and 2 provide that an employee may be suspended immediately and prior to a hearing when the employee has been formally charged with certain crimes or where it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order, or effective direction of public services. In the instant matter, the Commission finds that the petitioner's immediate suspension on August 13, 2015 was necessary as he was required to surrender his weapons due to a restraining order that was issued against him prohibiting him from possessing firearms and therefore, he was unable to perform the duties of a Police Sergeant. Although the petitioner argues that *N.J.S.A.* 40A:14-149.1 only permits the immediate suspension of a Police Officer without pay when he or she has been charged with a criminal offense, Civil Service jurisdictions and their employment practices are governed by both the provisions of

Title 40A and Title 11A of the New Jersey Statutes. Therefore, since the latter permits the immediate suspension of employees on administrative disciplinary charges in addition to criminal charges, the petitioner's immediate suspension was appropriate. In *In the Matter of George Bello* (MSB, decided May 10, 2006),

N.J.A.C. 4A:2-2.5(d) states that a departmental hearing, if requested, shall be held within 30 days of the PNDA unless waived by the employee or at a later date as agreed to by the parties. A review of the record indicates that the petitioner was served the PNDA on August 14, 2015 and he requested a departmental hearing on August 19, 2015. The appointing authority presents that the decision to return the petitioner's weapon is completely within the Prosecutor's Office's discretion and it has not yet made its determination as the Fitness for Duty Evaluation and the appointing authority's background investigation and recommendation are still pending. Therefore, the appointing authority asserts that the petitioner shall then be entitled to a disciplinary hearing if there is an adverse decision and the petitioner can make a request for back pay if he is successful at a disciplinary hearing or any subsequent appeal. However, the Commission finds that the appointing authority's position is not persuasive as the appointing authority was under no legal obligation to postpone the administrative proceedings pending the results of an external investigation. See *In the Matter of Kenneth Poole* (MSB, decided May 18, 2005); *In the Matter of Francis Salensky* (MSB, decided April 6, 2005). Accordingly, the appointing authority is to provide the petitioner with an expedited departmental hearing in compliance with Civil Service law and rules and timely issue a Final Notice of Disciplinary Action either upholding the charges and imposing a penalty or dismissing the charges.

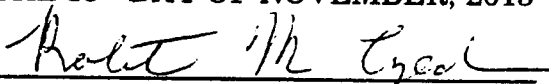
Regarding the petitioner's request to dismiss the charges, an appointing authority's unilateral delay in holding a departmental hearing does not warrant a dismissal of the charges. See *Goodman v. Department of Corrections*, 367 N.J. Super. 591 (App. Div. 2004). However, petitioner is entitled to some form of relief for such a delay. See *In the Matter of Patrick Dunican*, Docket No. A-5937-99T1 (App. Div. November 9, 1999); *In the Matter of Edward Wise* (MSB, decided July 19, 1999); *In the Matter of Kenneth Hixenbaugh* (MSB, decided February 24, 1998). Thus, the Commission finds that the petitioner is entitled to an award of back pay and benefits, commencing 30 days from the date of service of the PNDA, September 13, 2015, and ending on the date of commencement of the departmental hearing or on the date of his reinstatement if the petitioner is returned to his position without the need for a departmental hearing. See also *In the Matter of David Negra* (CSC, decided May 21, 2014); *In the Matters of Russell Bouffard and Richard Lasco* (MSB, decided June 21, 2006); *In the Matter of George Herriott* (MSB, decided June 21, 2006); *In the Matter of James Porch* (MSB, decided April 5, 2006) *aff'd on reconsideration* (MSB, decided May 10, 2006).

With regard to the petitioner's request for counsel fees, *N.J.S.A.* 11A:2-22 provides that the Commission may award reasonable counsel fees to an employee as provided by rule, and *N.J.A.C.* 4A:2-2.12 provides that for disciplinary appeals, reasonable counsel fees are awarded where an employee has prevailed on all or substantially all of the primary issues in an appeal. While the Commission has awarded reasonable counsel fees in the past where employees have successfully challenged the imposition of immediate suspensions, the instant matter is distinguishable. *See e.g., In the Matter of Debora U. Brown* (MSB, decided June 9, 2004) (Board awarded reasonable counsel fees where the appointing authority did not possess a valid basis to impose an immediate suspension); *In the Matter of Andrew Kullen* (MSB, decided September 26, 2000) (Back pay, benefits and counsel fees granted where the appointing authority did not have a sufficient basis for an immediate suspension). *See also In the Matter of James Campbell* (MSB, decided January 11, 2000); *In the Matter of Abnathy Mason* (MSB, decided July 7, 1999). Here, while the Commission has determined that the petitioner is entitled to a limited award of back pay and benefits, based on procedural deficiencies related to his immediate suspension during that time period, it has also concluded that the appointing authority possessed a valid basis to impose an immediate suspension, based on the nature of the charges against him and that he is unable to perform his duties without his weapon. Thus, the petitioner has not prevailed on substantially all of the primary issues in the instant matter and is not entitled to an award of counsel fees in the instant matter.

ORDER

Therefore, it is ordered that the petitioner's request for relief be granted in part and that he be granted back pay and benefits from September 13, 2015, and ending on the date of commencement of the departmental hearing or on the date of his reinstatement if the petitioner is returned to his position without the need for a departmental hearing. The petitioner's request for counsel fees is denied.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION
THE 18th DAY OF NOVEMBER, 2015



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