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STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of Telina Hairston,
City of East Orange

CSC Docket No. 2017-145

Request for Stay

ISSUED: FEB 13 2017 (DASV)

The City of East Orange, represented by Joy B. Tolliver, Esq., petitions the Civil Service Commission (Commission) for a stay of the attached decision, *In the Matter of Telina Hairston* (CSC, Deemed Adopted, June 20, 2016), pending its appeal to the Superior Court of New Jersey, Appellate Division.

By way of background, Hairston, a Police Officer with the City of East Orange, was served with a Preliminary Notice of Disciplinary Action (PNDA), dated June 26, 2014, proposing a six-month suspension or removal from employment. The PNDA charged Hairston with infractions of departmental rules and regulations, namely insubordination, neglect of duty, malingering, and a violation of the sick leave procedures. Hairston was also charged with other sufficient cause pursuant to *N.J.A.C. 4A:2-2.3(a)12*, based on allegations that she willfully disobeyed a direct order from her supervisor on December 28, 2013 to relieve another officer and for subsequently reporting off work due to a false illness. In addition, the appointing authority asserted that Hairston violated a March 24, 2014 "Last Chance Agreement." Hairston filed a request for interim relief to delete the reference to the "Last Chance Agreement." Upon its review, the Commission, among other things, found that it was simply not possible for Hairston to have violated the "Last Chance Agreement" or to consider it for progressive discipline purposes if it did not exist in December 2013, when the alleged current infractions occurred. Accordingly, the Commission ordered the appointing authority to amend the PNDA and delete any reference to the "Last Chance Agreement." See *In the Matter of Telina Hairston* (CSC, decided December 17, 2014).

On January 8, 2015, a new PNDA was issued against Hairston, which related back to the June 26, 2014 PNDA regarding the December 28, 2013 incident. Specifically, the amended PNDA charged Hairston with other sufficient cause pursuant to *N.J.A.C. 4A:2-2.3(a)12* and violations of departmental rules and regulations relating to insubordination, neglect of duty, malingering, and sick leave procedures. However, as ordered by the Commission in Hairston's interim relief petition, the reference to the "Last Chance Agreement" in the specifications was deleted. A departmental hearing was then held, and on March 24, 2014, a Final Notice of Disciplinary Action was issued upholding the charges against Hairston and suspending her for 100 calendar days, from April 6, 2015 through July 14, 2015. Thereafter, Hairston appealed her suspension, and the matter was transmitted to the Office of Administrative Law (OAL) for a hearing before an Administrative Law Judge (ALJ).

As set forth in the attached initial decision, the ALJ found that Hairston refused a direct order to relieve a fellow officer, which constituted insubordination. She was guilty of neglecting her duty by not remaining at work and using sick leave when there was no indication she was ill. Thus, the ALJ determined that the charge of malingering had been proven and Hairston violated the Police Department's sick leave policy. However, Hairston argued that the charges against her should be dismissed since the appointing authority allegedly violated the "45-day rule" as set forth in *N.J.S.A. 40A:14-147*. That statutory provision indicates in relevant part that "a complaint charging a violation of the [police department's] internal rules and regulations established for the conduct of a law enforcement unit shall be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based." Upon her review, the ALJ found that a detective issued a memorandum to the Police Chief on May 12, 2014 regarding the investigation of Hairston's alleged conduct, but the charges were not filed until January 2015. The ALJ stated that "[t]his was not complex; the City had all the necessary information in May, and for whatever reason did not bring charges until the following year well beyond the forty-five days." Additionally, the ALJ noted that the appointing authority did not offer separate evidence to sustain the charge of "other sufficient cause" and focused solely on the departmental rules and regulations. Thus, the ALJ concluded that the administrative charge of "other sufficient cause" held no substance "to save a set of stale internal-rule charges." Therefore, the ALJ recommended that the charges against Hairston be dismissed and her 100 calendar day suspension be reversed. However, the Commission did not have a quorum at the time of the ALJ's initial decision, and Hairston did not consent to an additional extension of time for the Commission to render its decision. In the attached letter, dated June 20, 2016, the parties were advised that the ALJ's recommended decision, reversing the suspension and awarding back pay and counsel fees, was deemed adopted as the final decision pursuant to *N.J.S.A. 52:14B-10(c)*.

In its request, the appointing authority argues that a stay of the Commission's decision pending its appeal to the Appellate Division should be granted "as the balancing of the equities in this matter" warrants it. It contends that the ALJ erred in dismissing the charges against Hairston, as there was no violation of the "45-day rule" because the first PNDA was issued on June 26, 2014, within 45 days of the May 12, 2014 memorandum to the Police Chief. In that regard, it claims that there was confusion as to the two PNDAs and Hairston "disingenuously presented" that the PNDA issued on January 8, 2015 was the only PNDA when clearly it was an amended PNDA resulting from the Commission's decision on Hairston's interim relief petition. Additionally, the appointing authority states that it charged Hairston with an administrative charge of "other sufficient cause." As such, Hairston's discipline is not subject to the "45-day rule."¹ Thus, given these reversible errors by the ALJ, the appointing authority maintains that it has a meritorious claim that will succeed in the Appellate Division. Moreover, the appointing authority submits that there is a clear likelihood of success on the merits of its case. It emphasizes that, notwithstanding the reversal on procedural grounds, the ALJ determined that it had met its burden of proving the charges against Hairston. Further, the appointing authority asserts that it is at risk of irreparable harm, as it "will suffer tremendous financial loss" because it will not be able to recoup the back pay from Hairston if it is successful in the Appellate Division. In addition, the appointing authority indicates that Hairston would not be injured if the stay request is granted. She has returned to work and her relief is monetary, which can be remedied. Additionally, the appointing authority states that to reverse Hairston's suspension and award her back pay and counsel fees "in light of her blatant disregard for the rules and regulations . . . is without question" a great concern to the public interest.

In response, Hairston, represented by Paul W. Tyshchenko, Esq., contends that it would be "a gross abuse of the Commission's discretion" to grant this stay request. First, Hairston submits that the appointing authority failed to address the merits of the "45-day rule" issue because it could not "meaningfully argue against it." Second, Hairston contends that monetary loss is not irreparable. Any harm to fall on the appointing authority and herself could be redressed through monetary relief. Nonetheless, she maintains that she is the prevailing party and there is no reason for her back pay or counsel fees award to be delayed. Hairston also points

¹ It is noted that the 45-day time limitation contained in *N.J.S.A. 40A:14-147* only expressly applies to charges related to violations of departmental rules and regulations. See e.g., *Hendricks v. Venettone*, Docket No. A-1245-91T5 (App. Div. October 29, 1992); *In the Matter of Bruce McGarvey v. Township of Moorestown*, Docket No. A-684-98T1 (App. Div. June 22, 2000). See also, *In the Matter of James Cassidy* (MSB, decided August 12, 2003); *In the Matter of Steven Palamara* (MSB, decided April 10, 2002). Compare, *In the Matter of Kason Cheeks* (CSC, decided August 19, 2009) (An appointing authority cannot resurrect a time-barred internal rule charge by using a Title 4A charge. To do so would undermine the intent of the "45-day rule" since it would essentially permit an appointing authority to charge an employee outside of the 45-day time limit with a Title 4A charge for a violation of any internal rule).

out that the appointing authority failed to explain why it believes that it could not recoup these damages. Third, Hairston indicates that if the stay is granted, she would be subject to an additional injury. She reiterates that she should not be deprived of her salary any longer. Hairston states that she is a single mother of several young children, and the appointing authority cannot "seriously argue" that it would suffer greater harm given its multimillion dollar budget. Additionally, she indicates that there has been no press coverage concerning her discipline, nor has there been a "public outcry" regarding its reversal. In other words, there is no great public interest for the stay request to be granted. Furthermore, Hairston disputes that she was disingenuous. During the OAL proceedings, she argued that the initial PNDA was not issued until June 26, 2014, well beyond 45 days after the alleged December 28, 2013 incident had been known. It was also not until January 27, 2014, a month later, when the Professional Standards Unit was asked to investigate the matter. In addition, Hairston was not interviewed until March 21, 2014. Thus, Hairston maintains that, even considering the June 26, 2014 issuance of the PNDA, the charges against her were untimely. She states that "this is a textbook case of inexcusable bureaucratic inefficiencies delaying the timely issuance of a PNDA." Moreover, Hairston submits that there is no substance to the charge of "other sufficient cause." The only cause that allegedly exists is the claimed violation of the departmental rules and regulations. Therefore, she submits that the ALJ properly dismissed the charges against her pursuant to the "45-day rule."

CONCLUSION

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

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.

Initially, it must be emphasized that the Commission did not render a formal determination on Hairston's suspension, as the ALJ's recommended decision, including the order of back pay and counsel fees, was deemed adopted. Thus, it would be inappropriate to review the merits of the appointing authority's case given that the Commission did not reach an actual decision in the first instance and neither party petitioned the Commission for reconsideration of that decision. It is thus best that the issues raised by the appointing authority as to whether or not the "45-day rule" was violated be addressed by the Appellate Division, which will be fully briefed on the issue. Nonetheless, the Commission notes that an appellate court will reverse the final decision of an administrative agency only if it is arbitrary, capricious or unreasonable or if it is not supported by substantial credible evidence in the record as a whole, or if it violates legislative policy expressed or

fairly to be implied in the statutory scheme administered by the agency. *See Karins v. City of Atlantic City*, 152 N.J. 532, 540 (1998); *Henry v. Rahway State Prison*, 81 N.J. 571, 579-80 (1980); *Mayflower Securities Co. v. Bureau of Securities*, 64 N.J. 85, 93 (1973); *Campbell v. Civil Service Department*, 39 N.J. 556, 562 (1963). In the instant matter, the ALJ set forth her reasoning and considered the arguments of the parties regarding the "45-day rule" issue. As such, it is appropriate for the Appellate Division to determine whether the ALJ's decision was factually and legally correct or otherwise not supported by the record.

Moreover, the appointing authority has not shown that it will suffer immediate or irreparable harm in paying Hairston what she is entitled to by rule. On the contrary, Hairston will suffer additional harm if this request is granted. In this regard, *N.J.A.C. 4A:2-2.10(a)* provides that "where a disciplinary penalty has been reversed, the Commission **shall** award back pay, benefits, seniority or restitution of a fine." [Emphasis added]. *See also, N.J.S.A. 11A:2-22*. While the appointing authority argues that it would not be able to recover any back pay award, that harm is financial in nature, and as such, can be remedied. Further, the appointing authority has provided no support for its belief that any back pay award will not be recoverable in the event of a successful appeal to the Appellate Division, especially since Hairston is a current employee. This argument is merely speculative and does not provide a basis to grant a stay. Contrary to what the appointing authority suggests, there are means to recoup the back pay and counsel fees awards if the Appellate Division upholds Hairston's suspension. Moreover, the Commission finds it in the public interest to require compliance with orders issued by an administrative agency. The public interest is not served when a final administrative decision is not implemented in a timely fashion. Therefore, the appointing authority has not demonstrated a sufficient basis for a stay in this matter.

The appointing authority is also advised that *N.J.A.C. 4A:2-2.11* provides for an award of interest on back pay when an appointing authority has unreasonably delayed compliance with an order or where the Commission finds sufficient cause based on the particular case. *See In the Matter of Rene Selph* (MSB, decided November 15, 1994); *In the Matter of Samuel Naro* (MSB, decided May 19, 1998). Therefore, if the appointing authority does not provide Hairston with the award of back pay within 30 days of the issuance this decision, interest on the back pay award is ordered.

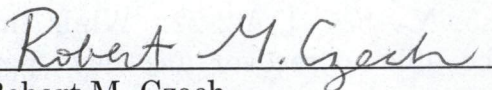
ORDER

Therefore, it is ordered that the appointing authority's request for a stay be denied. Additionally, if back pay is not paid to Telina Hairston within 30 days of the issuance of this decision, it is ordered that interest be assessed on the back pay award at an annual rate set forth in the New Jersey Court Rules, *R. 4:42-11*.

Hairston is also entitled to reasonable counsel fees pursuant to the prior order. Thus, it is ordered that counsel fees be paid within 30 days of the issuance of this decision.

In the event that the appointing authority has not made a good faith effort to comply with this decision within the time frames noted above, the Commission orders that a fine be assessed against the City of East Orange in the amount of \$100 per day, beginning on the 31st day if it fails to pay back pay or counsel fees, and continuing for each day of continued violation, up to a maximum of \$10,000.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 8TH DAY OF FEBRUARY, 2017


Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

c: Joy B. Tolliver, Esq.
William Senande
Paul W. Tyshchenko, Esq.
Telina Hairston
Pamela Ullman, DAG
Kelly Glenn
Records Center



CHRIS CHRISTIE
Governor
Kim Guadagno
Lt. Governor

STATE OF NEW JERSEY
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ROBERT M. CZECH
Chair/Chief Executive Officer

June 20, 2016

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Re: *In the Matter of Telina Hairston, East Orange, Police Department* (CSC
Docket No. 2015-2851; OAL Docket No. CSV 7114-15)

Dear Mr. Tyshchenko and Ms. Tolliver:

The appeal of Telina Hairston, a Police Officer with the East Orange Police Department, of her 100 calendar day suspension, was before Acting Director and Chief Administrative Law Judge Laura Sanders (ALJ), who rendered her initial decision on February 4, 2016, recommending reversing the 100 calendar day suspension. Exceptions and replies to exceptions were filed on behalf of the appellant and the appointing authority.

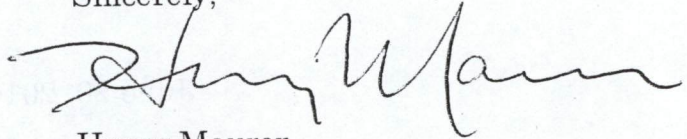
The time frame for the Civil Service Commission (Commission) to make its final decision was to initially expire on March 20, 2016. See *N.J.S.A. 52:14B-10(c)* and *N.J.A.C. 1:1-18.6*. Prior to that time the Commission secured an initial 45-day extension of time and a subsequent 45-day extension, with the consent of the parties, as required, to allow it to render a final decision no later than June 18, 2016.¹ See *N.J.A.C. 1:1-18.8*. However, the appellant declined to consent to a third extension. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter per *N.J.S.A. 52:14B-10(c)*.

Since the appellant's suspension has been reversed, she is entitled to 100 calendar days of back pay, benefits and seniority. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. Additionally, the appellant is entitled to reasonable counsel fees pursuant to *N.J.A.C. 4A:2-2.12*.

¹ Since June 18, 2016, was a Saturday, the expiration date was actually June 20, 2016 pursuant to *N.J.A.C. 1:1-1.4*.

Proof of income earned and an affidavit in support of reasonable counsel fees should be submitted to the appointing authority within 30 days of receipt of this letter. Pursuant to *N.J.A.C. 4A:2-2.10* and *N.J.A.C. 4A:2-2.12*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and/or counsel fees.

Sincerely,



Henry Maurer
Director

Attachment

- c: The Honorable Laura Sanders, ALJ
Kelly Glenn
Joseph Gambino



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 07114-15

AGENCY DKT. NO. 2015-2851

**IN THE MATTER OF TELINA HAIRSTON,
CITY OF EAST ORANGE POLICE DEPARTMENT.**

Paul W. Tyshchenko, Esq., for appellant Telina Hairston (Caruso Smith Picini,
PC, attorneys)

Joy B. Tolliver, Esq., for respondent City of East Orange (Weiner Lesniak, LLP,
attorneys)

Record Closed: January 19, 2016

Decided: February 4, 2016

BEFORE **LAURA SANDERS**, Acting Director & Chief ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, police officer Telina Hairston, appeals the action by respondent, the City of East Orange Police Department, imposing a 100-day suspension effective April 6, 2015. As a threshold matter, she contends that the City was outside the forty-five-day rule, such that the charges must be dismissed. Additionally, she argues that she did not violate the sick-time policy, was not malingering, and was not insubordinate.

Officer Hairston was served with a Preliminary Notice of Disciplinary Action (PNDA) on January 8, 2015. She requested a departmental hearing, which was held on February 18, 2015. The Final Notice of Disciplinary Action (FNDA) affirming a 100-day suspension beginning on April 6, 2015, and ending on July 14, 2015, was served on April 13, 2015. Her appeal of the discipline was dated April 15, 2015, and the Civil Service Commission transmitted the contested case to the Office of Administrative Law, where it was filed on May 15, 2015. The hearing was held on December 8, 2015. The record was left open until January 19, 2016, for submission of closing briefs, then closed upon their receipt.

FACTUAL DISCUSSION

Because Officer Hairston did not testify on her own behalf, the facts turn on the credibility of the City's witnesses. Some portions of their testimony essentially went unchallenged. Thus, it is clear that on December 28, 2013, Officer Hairston worked her regular 8:00-a.m.-to-4:00-p.m. shift, then was held over about three hours, because she was completing work related to a person found dead of natural causes. That particular day was unusually busy for the East Orange Police Department, as in addition to the death there was a car theft followed by a chase and a crash, the sighting of a suspect in a burglary that occurred the day before, and toward the end of the shift a double domestic-violence stabbing, which resulted in four officers having to wait with each of the victims in the hospital emergency ward for several hours. Because the Department was short-handed, the shift commander, Lt. Berkely Jest, told Sgt. Derrick Moses to direct Officer Hairston to go to the hospital and relieve Officer Amena Wright.¹ When Sergeant Moses could not reach Officer Hairston by radio, he went to the home where she was working. He found her there with the medical examiner, who was preparing to remove the body. All of the above is **FOUND** as **FACT**.

As other parts of the events of that evening are subject to some dispute, the discussion of testimony and documents concerning the disagreements are below. The City contends that Officer Hairston refused a direct order to remain at work, took sick

¹ At the time, she was Amena Waller, but she has since married.

leave when it was not appropriate to take it, and then violated the sick-leave policy by going to a party when she should have been home.

Sergeant Moses testified credibly that when he gave her the order from Lieutenant Jest to go relieve Officer Wright, Officer Hairston refused. She said that she did not feel well, as she had not eaten all day, and that she had no one at home to care for her children. Also, she was especially concerned because the Child Protection and Permanency agency² had opened a case on her. (Tr. at 19.) Sergeant Moses said he pleaded with her to follow the order, because he knew she would get in trouble, but she replied that she would book herself out on sick leave. On hearing this from Sergeant Moses, Lieutenant Jest directed that Officer Hairston file a report, which she did. Lieutenant Jest testified that there is no departmental procedure in place to accommodate an officer who needs to care for his or her minor children. (Tr. at 20.)

Lieutenant Jest testified that sometime around 9:30 p.m., which was about two hours after Officer Hairston left work, he received a call from Officer Amena Wright on his cell phone. She told him she was at a birthday party for another police officer, and Officer Hairston was at the party. This report resulted in a decision to investigate the appellant's conduct that evening, and eventually, the disciplinary charges.

Officer Amena Wright testified that she finally got off work on December 28, 2013, around 10 p.m., after working approximately a fourteen-hour day. Once the domestic-violence victims had been treated, she still had to return to the station to fill out the required forms for all domestic-violence incidents. She said it was about midnight before she arrived at the party where she saw Officer Hairston, although she did not specify that Officer Hairston was there when she arrived. (Tr. at 48.) She confirmed that she called Lieutenant Jest about Officer Hairston's presence.

Officer Lashawn Valerie Kearsse testified that after her own twelve- to thirteen-hour shift, she picked up Officer Hairston to drive her to the party. She estimated it was

² On June 29, 2012, the Governor signed A-3101, reorganizing the Department of Children and Families and renaming the Division of Youth and Family Services as the Division of Child Protection and Permanency. L. 2012, c. 16, eff. June 29, 2012.

about midnight when she arrived at the officer's home, and somewhat later when they finally got to the party at the Robert Treat Hotel in Newark. They had spoken much earlier in the day about attending the party together.

As there was no true challenge to the testimony concerning the giving of an order to remain at work, I **FIND** that Officer Hairston refused a direct order to remain at work. I further **FIND** that she took sick leave as a means of avoiding the order. Whether she actually did have to go home to her seven children because she lacked child care is unknown. But nothing in the record shows that any of her children were sick on that date, and her attendance at a party later tends to undercut the rationale about leaving her children alone. Additionally, if the reason for not feeling well is that one has not eaten, a first solution would be to eat something instead of refusing an order.

There also was testimony indicating that Officer Hairston had more seniority than Officer Wright, and that in the main, unplanned overtime goes first to the less senior members of the police force. However, the testimony also made clear that in the end, the determination as to who needs to remain at work is made by the shift commander, based on the needs of the department and the community. Thus, I **FIND** as **FACT** that Lieutenant Jest was exercising his authority to decide the distribution of work when he gave Officer Hairston the order to relieve Officer Wright, so that Officer Wright could return to the station and start the lengthy process of filling out the required domestic-violence reports.

With regard to Officer Hairston's attendance at a party after work, Lieutenant Jest recalled receiving an anonymous call telling him about her appearance at about 9:30 p.m., while Officer Wright testified that she placed the call sometime after midnight. As it was Officer Wright who made the call, and her testimony was consistent with Officer Kearse's credible testimony, I **FIND** that the call occurred sometime after midnight and before about 1:30 a.m.

The more complicated issue is whether Officer Hairston abused the part of the sick-leave policy that requires officers to remain at home for eight hours. I **FIND** that the actual language, which appears in bold, states:

Members are also restricted to their primary residence during their regularly scheduled duty hours.

[P-2.]

Detective Tommy Wright, who has worked ten years in the Professional Standards Unit at the Department, testified that in his experience, an officer who notifies the Department that he or she is sick is expected to remain at his or her residence for at least an eight-hour period. (Tr. at 83.) Thus, in his view, if Officer Hairston booked out at 9 p.m., she would be expected to be available at her residence for the next eight hours. If, as she did, she booked out around 7:30 p.m., she would need to remain at her home until 2:30 a.m. (Tr. at 87.) Since she left for a party before that time was up, she violated the primary-residence-restriction segment of the policy. He also noted that the Professional Standards Unit frequently goes to the homes of officers who are utilizing sick time, and checks on them.

However, Detective Wright acknowledged that Officer Hairston's regularly scheduled duty hours were the 8:00-a.m.-to-4:00-p.m. shift, and that, if you viewed the overtime she worked on December 28, 2013, as assignment to the 4:00-p.m.-to-12:00-a.m. shift, that shift ended at midnight.

LEGAL ANALYSIS AND CONCLUSIONS

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant, and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). Here, the City has charged appellant with violation of the department rules prohibiting insubordination, neglect of duty, and malingering, as well as a violation of the sick-leave procedure. Additionally, the appellant is charged with violating N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause.

With regard to insubordination, the Civil Service Commission utilizes a more expansive definition of insubordination than a simple refusal to obey an order. In re Chaparro, 2011 N.J. CSC LEXIS 102 (N.J. CSC 2011) (CSC decision citing In re Stanziale, No. A-3492-00T5 (App. Div. April 11, 2002) (the appellant's conduct in which he refused to provide complete and accurate information when requested by a superior constituted insubordination)); In re Lyons, No. A-2488-07T2 (App. Div. April 26, 2010), <<http://njlaw.rutgers.edu/collections/courts/>>; In re Moreno, CSV 14037-09, Initial Decision (June 10, 2010), modified, CSC (August 9, 2010), <<http://njlaw.rutgers.edu/collections/oal/>>; In re Bell, CSV 4695-09, Initial Decision (May 12, 2010), modified, CSC (June 24, 2010), <<http://njlaw.rutgers.edu/collections/oal/>>; In re Pettiford, CSV 08801-07, Initial Decision (March 13, 2008), adopted, Merit System Board (June 13, 2008), <<http://njlaw.rutgers.edu/collections/oal/>> (Moreno, Bell, and Pettiford all concerning disrespect of a supervisor). The Civil Service Commission also has determined that a law-enforcement officer is required to comply with an order of his or her superior, even if he or she believes the orders to be improper or contrary to established rules and regulations. See Palamara v. Twp. of Irvington, No. A-6877-02T1 (App. Div. March 30, 2005). Cf. In re Allen, CSV 11166-04, Initial Decision (May 23, 2005), remanded, Merit System Board (July 14, 2005), CSV 09132-05, Initial Decision (November 22, 2005), adopted, Merit System Board (January 26, 2006), <<http://njlaw.rutgers.edu/collections/oal/>> (Merit System Board determined that the appellant's disobedience was justified by concerns for the safety of the clients on a bus and reversed his removal). Here, Officer Hairston refused to follow the order to relieve Officer Wright. I **CONCLUDE** that this constitutes insubordination within the meaning of the case law.

Neglect of duty is not defined under the New Jersey Administrative Code, but the charge has been interpreted to mean that an employee has failed to perform and act as required by the description of the employee's job title. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). It has been applied both to not fully carrying out duties and to acting incorrectly. See, e.g., In re Marucci, CSV 07241-09, Initial Decision (January 1, 2010), modified, CSC (March 16, 2010), <<http://njlaw.rutgers.edu/collections/oal/>>.

aff'd, No. A-3607-09T1 (App. Div. January 3, 2012), <<http://njlaw.rutgers.edu/collections/courts/>> (removal of a police officer with no disciplinary record where he failed to remove drugs from under a sewer grate and then lied about his actions); see also In re Dona, CSV 10782-08, Initial Decision (August 3, 2009), modified, CSC (October 8, 2009), <<http://njlaw.rutgers.edu/collections/oal/>> (affirming twenty-day suspension for failing to pat down inmate properly, missing wooden shank). Here, as the appointing authority notes, the City was experiencing a high volume of priority calls, on a day when it lacked enough officers to cover all the activity without demanding overtime. The appellant violated an order to remain on duty, and instead invoked sick leave under circumstances that offer no indication she was ill. Thus, I **CONCLUDE** that the respondent has carried its burden on this charge.

The East Orange Police Department rules and regulations define malingering. Specifically they state:

Malingering: Department members shall not feign illness, injury, or incapacity to perform required duties, nor shall they fail to follow a lawful order issued by the Medical Officer.

[Resp't's Br., Jan. 15, 2016, at 9.]

As no competent evidence supports the hearsay report that appellant actually was ill, I **CONCLUDE** that the violation of the prohibition on malingering has been proved.

With regard to the sick-time issue, it is true that respondent's policy does not spell out what occurs when officers work past their assigned eight-hour shifts. Detective Walker also acknowledged that if one views Officer Hairston's shift as the full 4:00-p.m.-to-12:00-a.m. shift, she would be outside the shift if she went to the party. However, Detective Walker's testimony concerning his experience of the policy in his ten years working in the unit that helps to enforce the sick-leave policy was persuasive. The spirit of the policy is clear: sick time is for use when one is sick, or when one's family member requires sick care. It is not intended as a convenient means of avoiding one's duty. If such use is allowed or condoned, such use would slowly degrade the ability of the shift commanders to deploy resources effectively. A police department is a

paramilitary organization, and police officers are held to a higher standard of conduct. Here, the fact that Officer Hairston appeared at a late-night party generally undercuts any inference that watching her minor children was her primary objective, or that she actually was ill. Thus I **CONCLUDE** that she did violate the sick-leave policy.

Nonetheless, appellant contends that the charges must be dismissed because the City violated N.J.S.A. 40A:14-147, commonly known as "the forty-five-day rule," by failing to file the PNDA within forty-five days of the date on which the police chief obtained "sufficient evidence to support the complaint." The statute states in pertinent part:

[N]o permanent member or officer of the police department or force shall be . . . suspended, removed, fined or reduced in rank from or in office . . . except for just cause . . . and then only upon a written complaint setting forth the charge or charges against such member or officer. . . . A complaint charging a violation of the internal rules and regulations established for the conduct of a law enforcement unit shall be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based. . . . A failure to comply with said provisions as to the service of the complaint and the time within which a complaint is to be filed shall require a dismissal of the complaint.

[N.J.S.A. 40A:14-147.]

The appellant notes that the PNDA was not filed until January 8, 2015, when the actual incident occurred on December 28, 2013. Both the PNDA and the FNDA charge her with violation of N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, along with violation of a number of internal rules prohibiting insubordination, neglect of duty, malingering and violating sick-leave procedures. N.J.A.C. 4A:2-2.3(a) includes a lengthy list of specific charges, among them incompetency, inefficiency or failure to perform duties (N.J.A.C. 4A:2-2.3(a)(1)); insubordination (N.J.A.C. 4A:2-2.3(a)(2)); and neglect of duty (N.J.A.C. 4A:2-2.3(a)(7)). However, the City elected to charge only a violation of N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause. Appellant contends that since there

was no other generalized cause for discipline, and all the charges involve internal rules, the forty-five-day rule applies, and the charges must be dismissed.

Case law makes clear that the forty-five-day rule applies only to charges of violations of departmental rules and regulations. McElwee v. Borough of Fieldsboro, 400 N.J. Super. 388 (App. Div. 2008). If the crux of the charges is violation of the New Jersey Administrative Code, then the charges would not be subject to dismissal under the rule. In re Clarke, 2009 N.J. CSC LEXIS 1662 (N.J. CSC 2009). In Clarke, the Commission refused to dismiss a charge of "other sufficient cause" under N.J.A.C. 4A:2-2.3(a)(11)³ because the charges were very serious, the appointing authority had demonstrated a need for lengthy investigation of a complex matter, and, finally, the officer had not lost any pay. On the other hand, as noted in Clarke, "an appointing authority cannot resurrect a time-barred internal rule charge by using a Title 4A charge." Thus, charges of inappropriately engaging in outside conduct were dismissed, where the appointing authority had known about the conduct for a decade. In re Cheeks, CSV 12674-08, Initial Decision (June 2, 2009), affirmed in part, modified in part, remanded in part, CSC (September 17, 2009), <<http://njlaw.rutgers.edu/collections/oal/>>. Cheeks also relies in part on an earlier decision, In re Richardson, No. A-2740-05T5 (App. Div. August 27, 2007), dismissing misconduct charges against an officer where the police chief had sufficient knowledge of the misconduct in 2002, but disciplinary charges were not brought until 2004. Ibid. "The 45-day rule specifically states that if the time frame is violated, the complaint must be dismissed. Accordingly, once the complaint incorporating the underlying charges is dismissed, no disciplinary penalty of any kind may be imposed." In re McCormick, CSV 06319-00, CSC (December 27, 2001), <<http://njlaw.rutgers.edu/collections/oal/>>.

For purposes of N.J.S.A. 40A:14-147, the charges must be brought within forty-five days of the time the person filing the complaint had sufficient information to bring the charges. In general, the person filing the complaint is the police chief. Aristizabal v. City of Atl. City, 380 N.J. Super. 405 (App. Div. 2005). Appellant points out that the memo issued by Detective Charles Hinton of the Department's Professional Standards

³ Effective March 5, 2012, former (a)(11) was recodified as (a)(12).

Unit to Chief Robinson was dated May 12, 2014. But the charges were not filed until January 2015, and, as appellant points out, no evidence supports any continuing investigation. This was not complex; the City had all the necessary information in May, and for whatever reason did not bring charges until the following year, well beyond the forty-five days. Moreover, at the hearing, the respondent did not offer any separate evidence concerning "other sufficient cause"; it focused solely on the departmental rules and regulations. Unfortunately, the lengthy gap between the May report and the January filing created a situation in which an administrative charge with no substance to it is being used to save a set of stale internal-rule charges. Thus, I **CONCLUDE** that the charges must be dismissed.

Progressive discipline is the general rule in civil service cases. W. New York v. Bock, 38 N.J. 500, 523 (1962). In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline and the employee's prior record. George v. N. Princeton Dev. Ctr., 96 N.J.A.R.2d (CSV) 463. For the sake of completeness, it is noted that Officer Hairston's disciplinary record across the past fifteen years shows a series of five disciplinary actions for sick-leave use, ranging from a written reprimand in December 2008 to one-day, ten-day and thirty-day suspensions in 2009, 2011, and 2012, respectively, and, finally, a forty-five-day suspension in December 2013, which would be about the time this infraction occurred. (R-3.)

However, as noted above, where charges must be dismissed for violation of the forty-five-day rule, no discipline may be imposed. Therefore, I **CONCLUDE** that the 100-day suspension must be lifted.

ORDER

For the reasons cited above, the 100-day suspension is hereby **REVERSED**.

I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 4, 2016
DATE

Laura Sanders
LAURA SANDERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency:

February 4, 2016

Date Mailed to Parties:

February 4, 2016

/caa

WITNESSES

For Appellant:

No witnesses

For Respondent:

Berkely Jest

Derrick Moses

Amena Wright

Lashawn Valerie Kearse

Gloria Corbett

Tommy Wright

EXHIBITS

For Appellant:

P-1 Preliminary Notice of Disciplinary Action dated January 8, 2015

P-2 East Orange Police Department General Order, Sick Leave—Procedures,
effective January 1, 2010

For Respondent:

R-1 Memorandum to Captain Phyllis Bindi from Lt. Berkely E. Jest, dated January 16,
2014

R-2 Memorandum to Lt. Berkely Jest from Sgt. Derrick Moses, dated December 28,
2013

R-3 Report from Professional Standards Unit to Chief William C. Robinson, dated
May 12, 2014

R-4 Final Notice of Disciplinary Action delivered on April 13, 2015