



STATE OF NEW JERSEY

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

In the Matter of Victor Bermudez,
Cumberland County

CSC Docket No. 2019-1431

Request for Interim Relief

ISSUED: JANUARY 22, 2019 (SLK)

Victor Bermudez, a County Correction Officer with Cumberland County, represented by Stuart J. Alterman, Esq., petitions the Civil Service Commission (Commission) for interim relief regarding his immediate suspension without pay commencing on May 22, 2018.

By way of background, on May 22, 2018, the petitioner was issued a Preliminary Notice of Disciplinary Action (PNDA) immediately suspending him without pay pending removal and charging him with violating various administrative policies and conduct unbecoming a public employee.¹ Specifically, the appointing authority indicated that, on April 5, 2018, the petitioner transported an inmate to a treatment center located in Paterson. After turning the inmate over for treatment and upon exiting the facility, the petitioner met with a Paterson mayoral candidate and a film crew. While filming a public service announcement, the petitioner identified himself as being from Cumberland County and displayed the Cumberland County Department of Corrections insignia and equipment. Further, the petitioner proceeded to engage in a political interview with the mayoral candidate where he discussed the opioid issue and endorsed the mayoral candidate. Additionally, during the petitioner's interview with the Special Investigations Unit, the petitioner made false and misleading statements concerning the incident. The departmental hearing commenced on October 26, 2018, but did not conclude on that date. It is noted that there is no record that

¹ The initial date of the departmental hearing listed on the PDNA was May 24, 2018.

subsequent hearing dates have taken place or that a Final Notice of Disciplinary Action (FNDA) has been issued in this matter.²

In his request for interim relief, the petitioner presents that under *N.J.S.A. 40A:14-201*, a final determination regarding disciplinary charges against law enforcement officers must be adjudicated within 180 days, and if not, an officer who is suspended without pay beyond the 180-day threshold shall be reinstated to full pay pending the disposition of the matter. Therefore, the petitioner argues that he should be reinstated to full-pay status, effective November 18, 2018, which is the date that he calculates as being the 181st date from his suspension without pay. Further, the petitioner acknowledges that under *N.J.S.A. 40A:14-201*, if the petitioner is the cause of the delay, then those days which accrue within that delayed period are not used to calculate the 180-days. However, he indicates that the delays in this matter were not his fault as he did not request or agree to a postponement of the departmental hearing and the only delays were the result of the appointing authority's failure to provide adequate and responsive discovery. Additionally, the petitioner states that the Hearing Officer also caused unnecessary delay. Specifically, during the October 26, 2018 hearing, the Hearing Officer accused the petitioner's counsel of "acting like this is the O.J. Simpson trial" and the petitioner's counsel responded that he was only trying to represent the petitioner in this manner because the matter involved the petitioner's livelihood and the support of his family. Thereafter, the Hearing Officer immediately adjourned the hearing. The petitioner argues that he should not bear the burden, encumbrance, and hardship associated with these unacceptable and unnecessary delays.

In response, the appointing authority, represented by Theodore E. Baker, Esq., presents that the PNDA was issued on May 22, 2018 and discovery was immediately provided. It indicates that the departmental hearing could not be scheduled in June because the petitioner claimed that discovery was inadequate. However, the appointing authority states that the petitioner never followed-up on the discovery request. Further, it represents that it made several attempts to schedule the hearing, but the petitioner's counsel never provided any dates. Moreover, the appointing authority indicates that no additional discovery had to be provided and it is still unaware as to what discovery the petitioner is claimed that he is owed. The appointing authority submits June 8, 2018, June 21, 2018, August 17, 2018, September 27, 2018, and October 3, 2018 letters and e-mails requesting dates for a departmental hearing. Additionally, the appointing authority submits an August 17, 2018 e-mail from the petitioner's counsel's office stating that his office will be in touch, a September 27, 2018 e-mail from petitioner's counsel which

² The petitioner's November 20, 2018 submission indicates that the next hearing date was scheduled for November 30, 2018 and that several more days were likely to be necessary to complete these proceedings. However, there is no record as to whether further proceedings took place on this date or any other date.

says that his office will get back to the appointing authority's counsel by the next week, an October 3, 2018 e-mail from the petitioner's office which says that it will get back to the appointing authority the next day, and an October 4, 2018 e-mail from the petitioner's counsel's office which says that the petitioner would be available on October 26, 2018. Additionally, the appointing authority submits November 7, 2018 and November 8, 2018 e-mails attempting to reschedule the continued hearing for November 16, 2018. Further, the appointing authority submits a November 14, 2018 e-mail requesting from petitioner's counsel a date for a continued hearing, a second November 14, 2018 e-mail where the appointing authority states that it has come to learn that the petitioner is out of the country³ so it assumes that they are not going forward with the November 16th date and asking petitioner's counsel to confirm that the petitioner and his counsel are available on November 30th, and a reply from petitioner's counsel confirming that they are scheduled to proceed on November 30th.

Additionally, the appointing authority argues that *N.J.S.A. 40A:14-201* is inapplicable as it believes that under *N.J.S.A. 40A:14-201(b)(1)*, the 180-day rule only refers to matters that have been transmitted to the Office of Administrative Law (OAL) because that section states that the days between termination and the appeal filed with OAL shall not be used to calculate the 180-day time period. Further, it argues, even if the 180-day period is applicable, the delay is the petitioner's fault as his counsel has been unresponsive to its numerous attempts to schedule the hearing.

In reply, the petitioner highlights that there is nothing in *N.J.S.A. 40A:14-201* that limits the 180-day rule to matters that have been transmitted to the OAL. Instead, he presents that this statute requires that the disposition of a law enforcement officer must be concluded within 180 days, or otherwise, that officer shall receive pay commencing on the 181st day. The petitioner asserts that the delays in this matter were caused by the appointing authority not providing discovery as requested and the Hearing Officer arbitrarily terminating the proceedings. Therefore, he believes he should receive pay commencing on the 181st day of his suspension without pay. The petitioner submits the transcript from the October 26, 2018 hearing to show that the Hearing Officer stated, "you guys are treating this like the O.J. trial, right?", the petitioner's counsel's response, "It is the O.J. trial," the petitioner's counsel's statement explaining the negative financial impact that this incident has had on the petitioner and his family which was why he was conducting this hearing just like the O.J. trial, and the Hearing Officer's reply, "Okay. We're going to stop today and we will re-convene at another day."

³ The appointing authority's response states that it never received a response concerning its attempt to reschedule the continued hearing on November 16th and that it was never informed that the petitioner's family was taking a two-week vacation to the Dominican Republic and that they were not returning until November 21st and that it learned this information through another employee.

In further response, the appointing authority asserts that the petitioner cannot demonstrate that he is likely to succeed on the merits of the case as he clearly engaged in political activities while on duty and in uniform. Specifically, it states that the petitioner endorsed a mayoral candidate while in uniform and even pointed to his uniform and patch insignia during the interview that was being filmed and stated that he was there because he was transporting an inmate. Therefore, it argues that the petitioner is attempting to reinvent the incident to make it appear that he was ambushed by a friend who was running for office. The appointing authority presents that this is a clear violation of County and Department of Corrections policy and that the petitioner was provided training on this issue. Additionally, it indicates that while the petitioner claims he questioned the mayoral candidate as to whether the interview would be posted, the evidence shows that the petitioner posted the interview himself on his union's website. It asserts that the public interest is jeopardized by a public employee who uses his or her position to advance political objectives of any candidate. Further, the appointing authority states that the petitioner is not irreparably harmed if he is not immediately restored to full pay status as he is receiving unemployment benefits, he can seek alternative employment while this matter is being resolved, and he will be awarded back pay if he is successful on appeal. Moreover, it contends that the petitioner's suspension without pay does not harm others as no other parties are adversely impacted by this matter. The appointing authority reiterates its position that the delay in this matter has been caused by the petitioner and it states that there is no evidence to support the petitioner's claim that the appointing authority caused the delay in this matter.

In further reply, the petitioner states that he contacted the mayoral candidate for Paterson, who is his friend, for lunch recommendations while he was in Paterson transporting an inmate. In response, his friend said that he would meet him at the treatment facility. The petitioner represents that he was unaware that his friend was going to bring a videographer. Further, his friend then proceeded to ask him questions about the opioid crisis. The petitioner claims that any time his friend guided the interview to an area that could be considered political, he guided it back to the general issue of the opioid crisis. He contends that he has asked his friend not to use any footage in any campaign-related materials. However, his friend's social media coordinator mistakenly uploaded it to the campaign's social media account. The petitioner states that once he learned that the video was being shared contrary to his wishes, he contacted his friend who promptly had the video removed. He argues that he acted as a concerned citizen and public employee when he engaged in a discussion concerning the opioid crisis. Therefore, the petitioner contends that even in the unlikely event that some portion of his behavior is found to have violated departmental policy, removal is completely disproportionate to the offense and, therefore, he is likely to succeed in this matter. He highlights how the lack of health insurance and pay has caused irreparable harm to himself and his family. The petitioner states that the appointing authority

is not harmed if it pays him as he would be paid if these charges had not been made against him. Further, if he is unsuccessful, he will have to reimburse the appointing authority. Moreover, he argues that the legislature enacted the 180-day rule to prevent abuse in the disciplinary system, which is what has happened here.

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.

N.J.S.A. 40A:14-201(a) provides, in pertinent part, that when a law enforcement employee is suspended without pay for a complaint or charges, a final determination on the officer's suspension and termination shall be rendered within 180 days from the date the officer is suspended without pay. If a final determination is not rendered within those 180 days, commencing on the 181st calendar day, the officer shall begin to receive the base salary he was being paid at the time of his suspension and shall continue to do so until a final determination on the officer's termination is rendered.

N.J.S.A. 40A:14-201(b)(1) provides, in pertinent part, that the calendar days that accrue between the date the officer is terminated by his employing agency or department and the date on which the officer files his appeal of his termination with the OAL shall not be used in calculating the 180-day period.

N.J.S.A. 40A:14-201(b)(3) provides, in pertinent part, that if the officer or his representative causes by his actions a postponement, adjournment or delay of hearing before the 181st calendar day, the calendar days that accrue during that postponement, adjournment or delay shall not be used in calculating the date upon which the officer is entitled to receive his base salary pending a final determination on his appeal. *See also N.J.A.C.* 4A:2-2.13(i)(1).

N.J.S.A. 40A:14-202(a) provides, in pertinent part, that an employing agency shall conduct a hearing on the charges within 30 days of the date on which the officer was suspended, unless the officer agrees to waive his right to a hearing or the parties agree to an adjournment to a later date. The calendar days that accrue during any such waiver or adjournment shall not be used in calculating the date upon which the officer is entitled to receive his base salary pending a final determination on the officer's appeal.

N.J.A.C. 4A:2-2.13(b) provides, in pertinent part, if the law enforcement officer requests a departmental hearing regarding his or her removal in accordance with *N.J.A.C.* 4A:2-2.5, the appointing authority shall conduct a hearing within 30 days of the removal's effective date, unless the officer waives his or her right to a hearing or agrees to an adjournment of the hearing to a later date.

N.J.A.C. 4A:2-2.13(h) provides, in pertinent part, that if the Commission fails to render a final administrative determination of an appeal of an officer's removal from employment within the required 180 days, the appellant shall begin receiving the base salary that he or she was receiving at the time of his or her removal and shall continue to receive such salary until the Commission renders a final administrative determination, provided, however, that the following days shall not be counted toward the 180-day period:

- (2) The period of agreed-upon adjournment of a departmental hearing;
- (7) The period of time during which the appellant or his or her attorney or negotiations representative causes by his or her actions a postponement, adjournment or delay of a hearing; and
- (8) The period of time for which the appellant or his or her attorney or negotiations representative agrees with the appointing authority to a postponement or delay of a hearing.

In reviewing this matter, it is not necessary to address the merits of the charges against the petitioner. Rather, the issue to be determined is whether the petitioner is entitled to receive back pay prior to the matter's final disposition.

Initially, it is noted that contrary to the appointing authority's argument, *N.J.S.A.* 40A:14-201, as well as the regulatory provisions found in *N.J.A.C.* 4A:2-2.13, are applicable as both mandate that all suspensions of law enforcement officers without pay must be disposed within 180 days or that the officer must be returned to pay status on the 181st day, subject to the exceptions concerning the calculation of the 180-day period. The statute and rules do not limit the 180-day period only to matters that have been transmitted to the OAL. However, the 180 days is subject to tolling as indicated above in *N.J.S.A.* 40A:14-202 and *N.J.A.C.* 4A:2-2.13(h).

In this matter, a review of the record indicates that the petitioner was suspended without pay, effective May 22, 2018 upon the issuance of a PNDA. Thereafter, beginning on June 8, 2018, the appointing authority made numerous attempts to schedule a departmental hearing. However, the record indicates that October 26, 2018 was the first date that the petitioner agreed to schedule the departmental hearing. Further, the departmental hearing did commence on that

date. While the petitioner claims that he did not agree to an earlier date due to his allegation that the appointing authority failed to adequately comply with his discovery requests, the petitioner has not provided any evidence to show that he was not agreeing to an early date due to this alleged failure. Additionally, the petitioner has not provided any evidence that clearly indicates what discovery the appointing authority failed to produce in a complete and timely fashion that prevented him from scheduling the hearing sooner. Moreover, any such issues at the departmental levels are beyond the review of the Commission which, per *N.J.A.C. 4A:2-2.5* and *N.J.A.C. 4A:2-2.6* has limited jurisdiction over departmental proceedings. Therefore, the Commission finds that any delay in holding the departmental hearing prior to October 26, 2018 was caused by the petitioner or his representative.⁴ The record further indicates that the hearing was not completed on October 26, 2018. While the petitioner argues that in the middle of the hearing the Hearing Officer abruptly and unnecessarily postponed the hearing on that date, the record is unclear if the Hearing Officer concluded the hearing on that date at an appropriate time. Regardless, the petitioner has indicated that multiple days would be required for the departmental hearing. Therefore, even if the Hearing Officer's actions were unwarranted, the hearing could not have concluded on that date.

Concerning the continued hearing and the issuance of the FNDA, the record indicates that the next agreed upon hearing date was November 30, 2018. Further, the record indicates that the hearing could not take place earlier in November as the petitioner was out of the country. However, the record is unclear if the hearing continued November 30, 2018, if further hearing dates are necessary, if an FNDA has been issued, and if not, when an FNDA will be issued. Therefore, if it has not already done so, the Commission encourages the appointing authority to conclude the hearings in this matter and issue a FNDA as soon as reasonably possible. Regardless, and in response to petitioner's claim of irreparable harm, if the petitioner is successful in his appeal at the departmental level, he will receive back pay. Further, if he is unsuccessful and ultimately removed, he can appeal this matter to the Commission. Therefore, as the Commission finds that the 180-day period has not yet expired but that the record as to the exact expiration of the 180-day period is unclear, this issue can be decided at the OAL if the petitioner is unsuccessful at the departmental level and he further appeals the matter to the Commission.

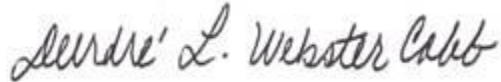
ORDER

Therefore, it is ordered that the petitioner's request for interim relief is denied.

⁴ Given this finding, it is clear that the 180-day period has not yet expired. However, given the current record, the exact date it will expire cannot be determined.

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 16th DAY OF JANUARY, 2019



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