



STATE OF NEW JERSEY

**DECISION OF THE
CIVIL SERVICE COMMISSION**

In the Matters of F.B., *et al.*,
Township of West Orange

CSC Docket Nos. 2022-1079, *et al.*

Requests for Interim Relief

ISSUED: MARCH 4, 2022 (HS)

F.B., J.D., D.K., J.N., and S.R., Fire Fighters; and S.G. and C.R., Fire Captains, all with the Township of West Orange (Township), represented by Craig S. Gumpel, Esq., petition the Civil Service Commission (Commission) for interim relief regarding their unpaid leaves of absence, commencing October 23, 2021. These matters have been consolidated herein due to similar issues presented.

In the instant matters, the petitioners indicate that the Township issued a COVID-19 Vaccination and Testing Policy (Policy) on or about October 1, 2021 that mandated that all Township employees be vaccinated against COVID-19 as a condition of continued employment. The Policy provided in part:

REASONABLE ACCOMMODATION REQUESTS

An employee may request a reasonable accommodation to getting vaccinated due to a disability or a sincerely held religious belief. To do so, the employee must submit a Request for Accommodation form to the Office of the Business Administrator in a sealed envelope marked "Personal and Confidential," which will be maintained as a confidential document, no later than October 15, 2021. This form may be obtained from the Human Resources Department. The Township will engage in the interactive process with the employee to determine if a reasonable accommodation can be granted without causing an undue hardship to

the Township or pose a direct threat to the health and safety of others. All requests for reasonable accommodations will be considered on an individual, case-by-case basis.

Where an employee would otherwise be entitled to a reasonable accommodation but a reasonable accommodation cannot be provided without causing an undue hardship or pose a direct threat to the health and safety of others, that employee may be offered the option of performing alternative assignments or jobs which do not have to be performed by fully vaccinated employees, provided such an assignment or job is currently available.

...

Employees who are granted a reasonable accommodation will be required to be COVID-19 tested, within 72 hours prior to each workday (i.e. approximately twice per week) at the County of Essex testing operation at the K-Mart Plaza in the Township of West Orange.

Employees who decide not to become vaccinated who are not entitled to any reasonable accommodations will be granted an unpaid leave of absence for up to a maximum of 180 calendar days or until such time as COVID-19 vaccination is no longer required if that occurs first.

Employees may NOT utilize accrued paid time off (PTO) benefits to continue being compensated during the leave of absence. Health Benefit coverage for unvaccinated Employees will continue during the 180-day unpaid leave of absence if Employees pay the Township their portion of health benefits during the leave of absence. Employees will NOT receive pension credits during this unpaid leave of absence.

COMPLIANCE

Any employee who does not comply with this policy will be required to remain on unpaid leave until proof of compliance in accordance with the deadlines in this policy. Non-compliance with this policy for more than 6 months will result in progressive discipline, up to and including termination.

Those employees who fail to comply with this policy will be considered to be unfit and unable to perform their duties and subject to disciplinary charges.

Employees who have previously tested positive for COVID-19 are not exempt from this policy and should consult with their physician on the appropriate timeframe to receive a vaccination.

The petitioners explain that they submitted formal exemption requests, and asked for reasonable accommodations in the form of regular PCR testing, mask wearing, social distancing, quarantining if symptomatic, personal hygiene, and other reasonable accommodations in addition to those protections that are associated with natural and herd immunity. The petitioners state that the reasonable accommodation requests were denied, and they were placed on involuntary, unpaid leaves of absence, effective October 23, 2021, for failure to comply with the Policy. Specifically, in letters dated October 22, 2021 letters from John Gross, Chief Financial Officer, the petitioners were advised:

As a [Fire Fighter or Fire Captain], you are required to enter into Township residences and businesses to perform the duties indicated on the . . . New Jersey Civil Service Commission job [specification]. In performing these duties, you are required to come into close contact and interact with members of the public including, but not limited to, vulnerable citizens such as seniors, individuals with disabilities, children and the sick who can more readily contract COVID-19 (Delta variant) since it is a highly contagious airborne disease. As such your continued performance of your duties while being unvaccinated creates a public safety risk and health hazard to the residents and businesses of the Township, not to mention other Township employees.

Thus, the Township is unable to grant your request to continue performing your duties without being vaccinated against the COVID-19 virus.

Since the Township does not have another alternative assignment to appoint you to that is currently open, you are being placed on an unpaid leave effective October 23, 2021 for up to 180 days or until the COVID-19 vaccination requirement is no longer required. You may appeal this decision by submitting a written notice of appeal by October 29, 2021. The Township will notify you when your appeal will be heard within 5 business days of receipt.

Be advised that you may still come back to work with no loss of time or wages by getting your first inoculation on or before October 25, 2021, committing to become fully vaccinated by December 7, 2021. If you elect this option, you may return to work as usual with no interruption to your wages after your first inoculation.

Afterwards, should your vaccination status change, you can submit same at any time within the 180-day period for reconsideration after becoming fully vaccinated.

The petitioners argue that in accordance with *In the Matter of Wesley Peters, et al.* (CSC, decided April 24, 2019), being involuntarily placed on an administrative leave without pay is a major disciplinary action. They assert that they were not issued Preliminary Notices of Disciplinary Action (PNDAs) setting forth the underlying facts and the basis for the charges against them; provided with an opportunity for departmental hearings; and issued Final Notices of Disciplinary Action (FNDAs). The Township, according to the petitioners, has failed to satisfy the requirements of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) and Civil Service law and rules. Instead, the petitioners argue, they have been placed on immediate suspensions without pay in violation of their rights.

In response, the Township, represented by Kenneth Rosenberg, Esq., counters that the petitioners cannot establish any of the interim relief factors. Specifically, the Township maintains that the petitioners do not have a clear likelihood of success on the merits because the Township did not discipline the petitioners when it placed them on unpaid leave but rather provided them with an alternative accommodation in accordance with the Policy and federal and State law, and *Peters, supra*, does not stand for the broad proposition that *every* unpaid leave of absence is a major disciplinary action. Elaborating on this argument, the Township argues that the Commission has found leaves of absence to be non-disciplinary where there was no disciplinary intent and cites *In the Matter of K.W., City of Asbury Park* (CSC, decided September 30, 2020) and particularly the Commission's statement therein that "requiring an employee to demonstrate his physical and/or mental fitness for duty, particularly when employed in such a sensitive public safety position, does not necessarily constitute disciplinary action." The Township also highlights *Newark v. Bellezza*, 159 N.J. Super. 123 (App. Div. 1978) and particularly the court's statement that "[o]bviously, an inquiry into the physical condition of an employee concerning his ability to perform his duty is not a disciplinary action as commonly understood" Additionally, in the Township's view, it gave the petitioners notice and an opportunity to be heard through the October 22, 2021 letters and thus did not violate their due process rights. In this regard, the Township notes that through letters dated November 12, 2021 to each petitioner, it indicated:

Per your request, the Township has scheduled a hearing to address your appeal of the Township's denial of your reasonable accommodation request . . . from the Township's mandatory COVID-19 vaccination requirement and its decision to provide you with the alternative accommodation of unpaid leave as your continued employment without being vaccinated would constitute an undue hardship and a risk to the health and safety of the community and your co-workers.

The Township explains that these hearings were scheduled between November 15, 2021 and December 6, 2021; J.D. requested to adjourn his hearing on November 15, 2021; and the remaining petitioners requested to adjourn their hearings on November 22, 2021. However, according to the Township, even if there were due process infirmities at the Township level, these can be cured at the Commission level through *de novo* review at the Office of Administrative Law (OAL) per, for example, *In the Matter of Anthony Ricks* (CSC, decided June 26, 2019) (citing *Ensslin v. Township of North Bergen*, 275 N.J. Super. 352, 361 (App. Div. 1994), *cert. denied*, 142 N.J. 446 (1995)). Elaborating on this argument, the Township contends that even if its actions were disciplinary and the petitioners should have been provided with PNDAs when it placed them on unpaid leave, the petitioners suffered no prejudice because they received notice and an opportunity to be heard through the October 22, 2021 letters. Even if the petitioners suffered prejudice by the non-service of PNDAs, the Township proffers, this procedural deficiency could thereafter be cured at the Commission.

The Township argues that there is no danger of immediate or irreparable harm because the petitioners have not and cannot identify any harm from being placed on unpaid leave other than lost wages, which harm could be fully remedied by the issuance of backpay if the petitioners ultimately prevail.¹ The Township further proffers that the petitioners have waived any argument that they can show immediate harm because months have passed since they were placed on unpaid leave and they requested or consented to numerous extensions delaying the Commission's decision in these matters. Also, in the Township's view, ordering petitioners' reinstatement when the Township has determined that they cannot safely perform their duties without posing a risk to residents, businesses, and their co-workers would undermine the Township's ability to provide public services. Further, the Township contends that the public interest would be impacted because firefighters frequently interact with the public, and particularly with populations more vulnerable to severe COVID-19 such as the elderly, children, individuals with disabilities, and individuals with underlying physical and/or mental health conditions. In support, the Township submits Gross's certified statement.

In reply, the petitioners maintain that they can demonstrate a clear likelihood of success on the merits. In this regard, they argue that the Township cannot "short circuit" the Civil Service process and must follow detailed notice procedures before it may impose major discipline. The petitioners insist that the Township has taken an adverse employment action against them. They maintain that they are qualified individuals who are ready, willing, and able to perform their essential job duties with a reasonable accommodation of testing, mask wearing, and other health and safety protocols which had been in place prior to their suspensions. In the petitioners' view,

¹ Citing *N.J.A.C. 4A:2-2.10(d)4*, the Township argues that any award of back pay would be subject to the petitioners' duty to mitigate their damages by making reasonable efforts to find suitable employment. This argument, however, is not ripe for the Commission's review and will not be addressed in this decision.

while the Township may label the suspension of each petitioner as an unpaid leave of absence for up to a maximum of 180 calendar days, such characterization is misplaced. This is not, according to the petitioners, a reasonable form of accommodation. They claim that no other employees are placed on an unpaid leave of absence for any other purpose. The petitioners maintain that their unpaid leaves of absence constitute major disciplinary actions subject to the procedural and substantive rights that are afforded to them under Civil Service law, rules, and regulations, as well as *Loudermill, supra*. They also proffer that they meet the threshold requirements for a reasonable accommodation in that the Policy expressly permits COVID-19 testing as a reasonable accommodation. Thus, according to the petitioners, the Township has opted to suspend them from duty for up to 180 days notwithstanding a testing option for those who are exempt due to disability or religious reasons. The petitioners note that testing is permitted for a large number of public employees at the federal, State, and local levels. Thus, they assert that they do not seek an accommodation that is extraordinary or unique to them.

The petitioners argue that there is a danger of immediate or irreparable harm because they have a statutory right to a reasonable accommodation for their disability or religious exemption from the COVID vaccine mandate. They maintain that they meet the criteria for an accommodation in that they are qualified and can continue to perform the essential functions of their jobs with an accommodation. The Township, according to the petitioners, has violated their statutory rights by suspending them from employment. The deprivation of their constitutional property right to continued employment is also *per se* irreparable, in the petitioners' view. Further, the petitioners state that they cannot be unvaccinated once they receive the COVID-19 vaccination. They object that the Township is forcing compliance under the pretext that petitioners are exempt from the Policy but cannot work, earn a livelihood, or provide services as a productive Township employee because there is no acceptable reasonable accommodation that would include working in the firehouse. The petitioners state that prior to their suspensions, they did work in the firehouse without issue. The Township, in their view, cannot demonstrate that the working conditions on September 23, 2021 (when petitioners were working) are any different from those on October 23, 2021 (when petitioners were suspended). In fact, the petitioners assert, within the Fire Department, from September 17, 2021 to October 15, 2021, unvaccinated members were assigned to fire stations which performed duties that did not include interaction with the public or unnecessary exposures. They insist that these duties were performed with all of the health and safety precautions in place that has kept the Fire Department fully operational while other Township employees and members of the public worked remotely.

The petitioners contend that there is no evidence of substantial injury to the Township if they are returned to employment. In this regard, they argue that the Township has failed to provide any evidence that their immediate suspensions were necessary to maintain safety, health, order, or effective direction of public services.

Further, according to the petitioners, the Fire Department does not operate in isolation; rather, it has mutual aid agreements with other contiguous municipalities in Essex County. The petitioners state that these agreements require interaction between Fire Department personnel and fire personnel from other jurisdictions at the scene of an emergency. According to the petitioners, these jurisdictions do not have a vaccination mandate, yet unvaccinated fire personnel are permitted to work side-by-side with Township fire personnel and will continue to do so.

The petitioners further contend that the public interest is best served by reinstating them to duty pending a hearing because in the fire service, adequate staffing is critical to the success of responding to an emergency. They also argue that the public interest is not served by implementing the harsh consequence of an immediate suspension without pay without evidence justifying such action and that the public interest would be served by compliance with Civil Service law, rules, and regulations regarding procedural and substantive due process. In support, the petitioners submit the certified statement of Angelo Tedesco, President, Firefighters Mutual Benevolent Association Local 28; the certified statement of Frank Noborine, President, Firefighters Mutual Benevolent Association Local 228; and their individual certified statements.

In reply, the Township reiterates that it did not discipline the petitioners when it placed them on unpaid leave. Rather, the Township insists that when it determined that it could not grant their accommodation requests and that there were no open alternative positions available, the only viable alternative was to place the petitioners on unpaid leave as a reasonable accommodation. The Township argues that a review of the facts in *Peters, supra*, shows that the circumstances here are completely different from that case and thus, its holding is inapplicable here. There, the Township notes, the Commission concluded that the placement of the correction officers on administrative leave constituted disciplinary action because they were under investigation for engaging in serious misconduct. The Township notes that the petitioners have not been required to surrender their badges, identification cards, radios, or turnout gear and that their unpaid leave status will not be considered in any future employment decisions such as promotions, assignments, or as evidence of progressive discipline. The Township maintains that unpaid leaves were provided to the petitioners regardless of whether they were seeking an accommodation for disability or religious reasons and that they failed to produce any evidence to suggest that the Township does not offer unpaid leaves to other employees for other reasons. Also, according to the Township, the petitioners are incorrect in their assertion that the Township was required to grant them the accommodation request they sought regardless of the impact it would have on the Township. With respect to the testing language in the Policy, the Township argues that when it is read in the context of the remainder of the Policy, it is evident that this language does not affirmatively state that COVID-19 testing is a reasonable accommodation that may be granted. Rather, according to the Township, testing is an additional requirement that employees must

comply with where they (1) are granted a reasonable accommodation to enable them to continue performing their duties or (2) have been offered an alternative assignment. In the Township's view, since neither of those circumstances occurred here, the testing requirement is irrelevant to the petitioners' situation. The Township insists that employers do not have to provide testing as a reasonable accommodation to a mandatory vaccination requirement. To the contrary, in the Township's view, federal law affords employers the right to determine whether and what type of reasonable accommodation they should provide to employees who seek same from a mandatory COVID-19 vaccine mandate. The Township argues that every employer is different as to the levels of interactions that its employees have with the public and each other. As such, some employees may have infrequent or low-level interactions while others may have intense and frequent ones. Consequently, the Township asserts, what constitutes an undue hardship for one employer may not constitute an undue hardship for another. Also, according to the Township, the policies and steps that other entities have implemented to combat COVID-19 are not binding on the Township.

The Township maintains that there is no danger of immediate or irreparable harm because the petitioners' alleged harm, the loss of their wages, can be adequately remedied by backpay. The Township also argues that the petitioners overlook the fact that their underlying request does not challenge whether the Township's Policy should be enjoined but rather seeks to have the Commission rule that the Township was required to serve them with a PNDA and provide a departmental hearing when it denied their reasonable accommodation requests under the Policy. As such, in the Township's view, the petitioners' argument that they meet the irreparable harm standard because the Policy forces them to get vaccinated is irrelevant to this proceeding.

The Township argues that there would be substantial injury to the Township if the petitioners are returned to employment because the Township's ability to provide safe services would be endangered due to the petitioners' regular interaction with members of the public and their co-workers when performing their job duties. According to the Township, since the petitioners are unvaccinated, there is a significant risk that the petitioners will spread the COVID-19 virus to vulnerable members of the public including, but not limited to, the elderly, children, individuals with disabilities, and individuals with underlying health conditions. The Township adds that the petitioners' allegation that the Fire Department interacts with other departments in contiguous municipalities in Essex County through mutual aid agreements and that these fire departments do not have mandatory vaccination policies also does not undermine the Township's showing that it will suffer substantial harm. Specifically, the Township contends that aside from their bare assertions, the petitioners have failed to submit any evidence as to the nature, frequency, or extent of the interactions between other municipal fire departments and the Township, and it states that mutual aid is infrequent in reality. The

Township states that the petitioners have not identified the municipalities that allegedly do not have vaccination mandates or the basis of their knowledge that they do not require same.

With respect to the public interest, the Township argues that the petitioners' staffing argument is speculative at best as they have not offered any actual evidence of problems caused to the Fire Department or the public by their absence. Perhaps more importantly, according to the Township, the petitioners' staffing argument is clearly outweighed by the undisputed record which shows that allowing the unvaccinated petitioners to continue working poses a greater risk to the safety and health of the Township's residents, businesses, and employees given their duties and regular interaction with the public and the highly contagious nature of COVID-19. In support, the Township submits Gross's reply certified statement.

In reply, the petitioners reiterate that they have established a clear likelihood of success on the merits. In this regard, they note that the October 22, 2021 letters stated that each request for an accommodation "creates a public safety risk and health hazard" This, the petitioners argue, is the standard used by an appointing authority to determine whether an employee should be immediately suspended prior to a hearing. Specifically, they note that *N.J.A.C. 4A:2-2.5(a)1* provides:

An employee may be suspended immediately and prior to a hearing 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 (petitioners' emphases).

The petitioners state that the October 22, 2021 notifications did not indicate that they were being placed on an unpaid leave of absence as an accommodation. Rather, according to the petitioners, they are simply placed on an involuntary unpaid leave of absence without the Township indicating that such placement was an accommodation pursuant to the petitioners' requests for exemption from the vaccination mandate policy. The petitioners contend that the Township is now claiming, for the first time, that their placement on an involuntary unpaid leave of absence was an accommodation pursuant to their requests to be exempt from the COVID vaccination mandate. The petitioners insist that they did not receive due process because the appeal rights they were afforded in the October 22, 2021 letters are not equivalent to the serving of administrative charges and an opportunity for a departmental hearing before the appointing authority as provided by Civil Service law, rules, and regulations. They maintain that those appeal rights were only with respect to the Township's accommodation determination. The petitioners add that *K.W.*, *supra*, and *Bellezza*, *supra*, cases cited by the Township, are inapplicable. They state that *K.W.* involved a *paid* leave of absence during which Asbury Park sought a medical inquiry, which is not the case here. *Bellezza* too does not apply here,

according to the petitioners, because that case involved a medical inquiry and the right to counsel fees under *N.J.S.A. 40A:14-155*, which are not before the Commission here. The petitioners also suggest that it is no coincidence that the Township placed them on an involuntary unpaid leave of absence for up to 180 days because *N.J.A.C. 4A:2-2.4*, with an exception not relevant here, limits suspensions to no more than six months. Thus, the petitioners proffer that the Township chose an involuntary unpaid leave of absence for up to 180 days in order to comply with that regulation but failed to meet all Civil Service requirements. While the petitioners agree that the Commission can cure procedural deficiencies at the local level, they maintain that they must receive interim relief until the Township complies with procedural requirements.

The petitioners insist that there is a danger of immediate or irreparable harm because their harm is more than just the loss of their wages. Rather, the petitioners proffer, they have a protected property interest in remaining employed as Fire Fighters and Fire Captains, and this protected property interest has been held to trigger due process requirements. The petitioners also reject the suggestion that they have waived their rights. In this regard, they state that there were extensions in these matters because the parties were engaged in good faith settlement efforts, but those efforts do not meet the legal requirements of a waiver because a waiver must be clearly and unequivocally established.

Further, the petitioners argue that other than conjecture and speculation, the Township has provided no substantial credible evidence that reinstating them to their positions as Fire Fighters and Fire Captains would cause the Township substantial injury. They also contend that there is no evidence that the petitioners have neglected their primary firefighting duties or that the Township will be unable to provide fire and emergency medical services to its residents if they are reinstated to their positions.

The petitioners request that the Township be directed to reinstate them immediately with back pay, benefits, and other emoluments of employment and that counsel fees be awarded.

CONCLUSION

As a threshold issue, the Commission must decide whether the petitioners were subjected to disciplinary action when they were placed on unpaid leave. The Township insists that it did not discipline the petitioners when it placed them on unpaid leave but rather provided them with an alternative accommodation and that it is not the case that every unpaid leave of absence is a major disciplinary action. While the Commission has no occasion here to doubt the general assertions that unpaid leave can be a reasonable accommodation and that not every unpaid leave of absence will constitute major discipline, the question here is whether the *particular*

leaves of absence at issue here were disciplinary in nature. Upon the Commission's review of the record, it finds that they were. Several factors support this finding:

- Although the Policy uses the term “granted” with respect to the unpaid leave, this leave was in fact *imposed*. By placing the petitioners on unpaid leave, when none had requested it, the Township effected an involuntary separation from employment, which is the basis of all major disciplinary actions under Civil Service rules. *See N.J.A.C. 4A:2-2.2.*
- By stating that “[a]ny employee who does not comply with this policy will be required to remain on unpaid leave until proof of compliance in accordance with the deadlines in this policy,” the Policy connects the unpaid leave to *noncompliance* with Township policy, evidencing the disciplinary nature of the action.
- The Policy provides that “[t]hose employees who fail to comply with this policy will be considered to be *unfit* and *unable to perform their duties . . .*” (emphases added). Unfitness for duty is a basis for an immediate suspension under Civil Service rules. *See N.J.A.C. 4A:2-2.5(a)1.* “Inability to perform duties” is a general cause for discipline under Civil Service rules. *See N.J.A.C. 4A:2-2.3(a)3.*
- The Policy explicitly prohibits employees from utilizing accrued PTO benefits to continue being compensated during the leave of absence, further evidencing the punitive nature of the action.
- The Policy’s statement that progressive discipline will follow only after six months of non-compliance does not render the unpaid leave non-disciplinary where the leave, in this particular case, was *itself* an adverse action.
- The Policy states that “[e]mployees who decide not to become vaccinated who are not entitled to *any reasonable accommodations* will be granted an unpaid leave of absence . . .” (emphasis added). Thus, the Policy, as written, seems not to consider the unpaid leave itself to be a reasonable accommodation. In other words, the language used suggests that the unpaid leave follows after it has been determined that the employee is not entitled to *any reasonable accommodation*, but the employee still decides not to become vaccinated. The October 22, 2021 letters also did not state that the unpaid leave was being provided as a reasonable accommodation. As such, the Township’s description of the unpaid leave as a reasonable accommodation would appear to be an attempt at recharacterization after-the-fact.
- The October 22, 2021 letters advised the petitioners that their “continued performance of . . . duties while being unvaccinated creates a public *safety* risk and *health hazard . . .*” (emphases added).

This language is similar to that found in *N.J.A.C. 4A:2-2.5(a)1*, which sets forth standards for an immediate suspension.

- The maximum length of the unpaid leave, 180 days, tracks the longest suspension (barring an exception not relevant here) that may be imposed under Civil Service law and rules. *See N.J.S.A. 11A:2-20* and *N.J.A.C. 4A:2-2.4(a)*.

Additionally, the Commission is not convinced that *K.W.*, *supra*, and *Bellezza*, *supra*, cases cited by the Township, support its argument that the petitioners' unpaid leaves were non-disciplinary. In *K.W.*, K.W., a Police Sergeant, had been separated from duty *with pay* and ordered to undergo a fitness for duty evaluation, which revealed that he was unable to perform the functions of his position. Asbury Park asserted that it mandated such an evaluation because K.W. had stated that he "want[ed] to slit [his] own wrists." The Commission noted that in light of K.W.'s position, the reference to self-harm presented a cause for concern. The Commission emphasized that requiring an employee to demonstrate his physical and/or mental fitness for duty, particularly when employed in such a sensitive public safety position, did not necessarily constitute disciplinary action. The Commission noted that where an employer had legitimate concerns regarding a public safety employee's *psychological fitness for duty*, the employer was entitled, perhaps required, to act in the best interests of the public it serves. Thus, the Commission found that K.W. had appropriately been referred for a psychiatric evaluation at his employer's discretion and that such a requirement did not violate the mandate that an employee shall not be required to testify in a hearing before the appointing authority, as set forth in *N.J.A.C. 4A:2-2.6(c)*. Following K.W.'s first psychiatric evaluation, the doctor concluded that K.W.'s statement did not exhibit a risk of self-harm but did demonstrate that he was unfit for duty. Thereafter, K.W. obtained an independent psychological fitness for duty examination from another doctor, who concluded that K.W. was fit for duty. However, Asbury Park advised K.W. that it would require him to undergo another fitness for duty evaluation due to the passage of time since the prior evaluations. Although K.W. argued that Asbury Park's decision to request a new fitness for duty examination was unlawful, the Commission did not agree. Moreover, due to the doctors' conflicting reports and the passage of time, it was not unreasonable for Asbury Park to request a new fitness for duty examination. *K.W.* is distinguishable from these matters as the petitioners were not placed on paid leave, and the Township is not seeking to inquire into their psychological fitness for duty.

In *Bellezza*, Bellezza, a patrolman, injured his back. A laminectomy was performed, and Bellezza later attempted to report back to duty after being released by his doctor. Newark served Bellezza with a PNDA, which indicated an intent to remove him from his position because of his inability to perform his duties due to his physical condition. An orthopedist retained by Newark to examine Bellezza opined that Bellezza should not perform strenuous work but conceded on cross-examination that Bellezza could do anything that he wanted to do. In addition, the police surgeon

testified that he had permitted another policeman who had had a laminectomy to return to active duty. The court upheld the Commission's determination ordering Bellezza's reinstatement with mitigated back pay. However, it disagreed with the determination that Bellezza was entitled to counsel fees under *N.J.S.A.* 40A:14-155, which concerns the legal expenses of police officers and provides, in pertinent part, that if a disciplinary proceeding instituted by or on complaint of the municipality shall be dismissed or finally determined in favor of the member or officer, the member or officer shall be reimbursed for the expense of his or her defense. The court observed that an inquiry into the physical condition of an employee concerning his ability to perform his duty is not a disciplinary action as commonly understood. The court further noted that the inquiry at issue was an inquiry as to whether or not he had the physical capacity or ability to continue to perform his duties, and it related to his physical ability to actually perform his job. *Bellezza* is distinguishable from these matters as the petitioners have not suffered some injury and undergone a medical procedure that has led the Township to seek to inquire into their medical fitness for duty.

Having determined that the petitioners were subjected to discipline, the Commission next notes that none of the disciplinary rules in Chapter 2 of Title 4A of the New Jersey Administrative Code were observed in these matters. Although the Township highlights the appeal rights the petitioners were afforded in the October 22, 2021 letters, those were no substitute for following the disciplinary procedures found in Chapter 2. The scope of the appeal rights that were afforded was limited to the issue of the Township's accommodation decision. As the petitioners have been disciplined without any of the requisite procedural safeguards, it is appropriate to institute a remedy based on the particular circumstances of this case. Accordingly, the petitioners are to receive back pay, benefits, and seniority from October 23, 2021 until whichever of the following occurs first: the petitioners are reinstated to duty; the petitioners are properly immediately suspended without pay, *see N.J.A.C.* 4A:2-2.5; or disciplinary action is properly imposed upon issuance of FNDAs. It is noted that the petitioners' mere entrance into settlement efforts, without more, is hardly sufficient to constitute a waiver of their right to receive a remedy in these matters. Further, although the Township suggests that procedural irregularities at the departmental level could be cured by a hearing at the OAL, the Commission declines to order that these matters be transmitted to the OAL at this juncture. Such order would be inappropriate where, as here, the Township provided the petitioners with *no* disciplinary process at the departmental level, and the Township continues to assert that the petitioners were not disciplined.

However, the petitioners are not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), an award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges. *See Johnny Walcott v. City of Plainfield*, 282 *N.J. Super.* 121, 128 (App. Div.

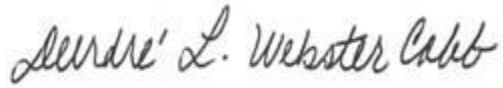
1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. Mar. 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). Assuming, *arguendo*, that these matters are considered major discipline appeals, the petitioners have not prevailed on all or substantially all of the primary issues. Rather, the Commission has only determined that discipline was imposed without the proper procedures. In other words, the Commission is not questioning that the Township, as the employer, had the right to seek to discipline the petitioners—a right that is in place irrespective of whether such discipline would ultimately be upheld. The Commission, however, does emphasize in these matters that the appropriate *procedures* must be followed in conjunction with the imposition of discipline. Thus, since the Commission is not addressing the merits of the discipline here, the petitioners cannot be said to have prevailed on all or substantially all of the primary issues.

The petitioners are also not entitled to counsel fees if the request is considered under *N.J.A.C.* 4A:2-1.5(b). That regulation states, in pertinent part, that in all appeals other than disciplinary and good faith layoff appeals, counsel fees may be granted as a remedy where an appointing authority has unreasonably failed or delayed in carrying out an order of the Commission or where the Commission finds sufficient cause based on the particular case. *N.J.A.C.* 4A:2-1.5(b) further provides that a finding of sufficient cause may be made based on an appointing authority's bad faith or invidious motivation. *See also In the Matter of Anthony Hearn*, 417 *N.J. Super.* 289 (App. Div. 2010) (In the absence of a rule to define "sufficient cause" for purposes of the application of *N.J.A.C.* 4A:2-1.5(b), the court evaluated the various merits of Hearn's case and concluded that sufficient cause had been established). Although the Township did not observe the requisite disciplinary procedures, there is no indication that it acted in bad faith or with invidious motivation. Thus, sufficient cause to award counsel fees is not present in this matter.

ORDER

Therefore, it is ordered that the petitioners receive back pay, benefits, and seniority from October 23, 2021 until whichever of the following occurs first: the petitioners are reinstated to duty; the petitioners are properly immediately suspended without pay; or disciplinary action is properly imposed upon issuance of FNDAs.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 2ND DAY OF MARCH, 2022



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Allison Chris Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

c: F.B. (2022-1079)
J.D. (2022-1080)
S.G. (2022-1082)
D.K. (2022-1083)
J.N. (2022-1084)
C.R. (2022-1086)
S.R. (2022-1085)
Craig S. Gumpel, Esq.
John K. Sayers
Kenneth A. Rosenberg, Esq.
Division of Agency Services
Records Center