

CSC

B-2



STATE OF NEW JERSEY  
CIVIL SERVICE COMMISSION

In the Matter of Michael Denham

CSC Docket No. 2015-293

Request for Interim Relief

ISSUED

APR 17 2015

(EG)

Michael Denham, a Police Officer with Freehold Township, represented by John Anello, Esq., petitions the Civil Service Commission (Commission) for interim relief of his termination.

The record indicates that the appointing authority issued the petitioner a Preliminary Notice of Disciplinary Action (PNDA) on April 2, 2014, via personal service, which indicated a suspension for 60 working days and a removal. The PNDA indicated charges of incompetency, inefficiency or failure to perform duties, insubordination, inability to perform duties, conduct unbecoming a public employee, neglect of duty, violation of policies and other sufficient cause. Specifically, it was alleged that during the processing of an arrestee, the petitioner took possession of the arrestee's cell phone and read aloud incoming text messages. The text messages were of a highly personal and sexual nature. Additionally, it alleges that the petitioner made inappropriate comments to the arrestee, failed to notify Monmouth County Communications that the arrestee had been placed in a holding cell, and improperly searched the arrestee's handbag. Moreover, while the arrestee remained incarcerated, GPS records indicated that the petitioner was near the arrestee's apartment. Furthermore, the petitioner had taken the arrestee's keys to his home. A Final Notice of Disciplinary Action (FNDA) was issued on July 18, 2014, indicating a removal effective March 23, 2014. The petitioner filed an appeal of his removal which was transmitted to the Office of Administrative Law (OAL) for a hearing before an Administrative Law Judge.

In the instant matter, the petitioner requests that the FNDA be stayed and that he be immediately returned to work as there is a clear likelihood of success on the merits. The petitioner argues that when the alleged victim testified at the departmental hearing, she had trouble recollecting certain facts until her recollection was refreshed. Additionally, no one was present when the petitioner allegedly made these remarks to the arrestee. Further, the petitioner has no prior major disciplinary record. Moreover, the petitioner argues that he will suffer irreparable harm because he is no longer receiving wages or healthcare coverage. In this regard, he claims that he may lose his home. He also states that he suffered an on-the-job injury and needs his healthcare to receive the care he needs. The petitioner adds that it would not be a hardship for the appointing authority to pay his wages. Finally, he argues that the public interest would be served if he were restored to his position because the appointing authority's illegal conduct in terminating him should not be allowed to continue.

In response, the appointing authority, represented by Robert F. Munoz, Esq., argues that the petitioner's disciplinary hearing was held before an independent Hearing Officer, who was a retired New Jersey Supreme Court Justice. The Hearing Officer issued a 24-page written opinion in which all the charges and discipline imposed were sustained. In addition, it argues that the petitioner has not demonstrated a clear likelihood of success on the merits. The petitioner's argument that the arrestee lacked credibility and that the doctrine of progressive discipline has been violated fails to point to any evidence or any point of law that was overlooked during the departmental hearing. Further, the petitioner has presented no evidence of irreparable harm. The only harm he showed was economic which is insufficient to obtain interim relief. Moreover, the appointing authority contends that it and the community as a whole would suffer harm if the petitioner was restored to his position based on his alarming conduct with a female arrestee.

### CONCLUSION

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

The information provided in support of the instant petition does not clearly demonstrate likelihood of success on the merits. A critical issue in any disciplinary

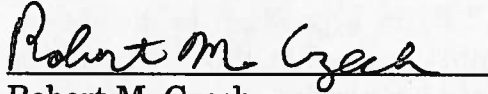
appeal is whether or not the petitioner has actually committed the alleged infractions. In this regard, the petitioner's only arguments are that the alleged victim is not credible and that the penalty violates the tenets of progressive discipline. The petitioner points to a few instances in which the victim needed her memory refreshed or could not recall certain details. The Commission will not attempt to determine the charges and any proper disciplinary penalty based on an incomplete written record. Such disciplinary appeals need a full plenary hearing before an Administrative Law Judge (ALJ) who will hear live testimony, assess the credibility of witnesses and weigh all the evidence in the record before making an initial decision. At that point, the Commission will be in a position to decide the propriety of the recommended penalty should the charges against the petitioner be sustained. It is also noted that the Commission, after receiving the ALJ's initial decision will, in addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, utilize, where appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). Further, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 N.J. 571 (1980). It is settled that the principle of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 N.J. 474 (2007). However, without the benefit of a full hearing record before it, the Commission cannot determine if the charges should be upheld or if the penalty imposed is appropriate. Therefore, based on the foregoing, the petitioner has not shown a clear likelihood of success on the merits.

Moreover, the petitioner has failed to show the danger of immediate or irreparable harm or how the public interest would be served by granting his request. In this regard, there are available mechanisms for relief, such as payment of salary pursuant to *N.J.A.C. 4A:2-2.13* or back pay in appropriate cases pursuant to *N.J.A.C. 4A:2-2.10* where the petitioner's termination is not sustained or modified. Accordingly, under these circumstances, the record does not demonstrate a basis for granting interim relief.

### ORDER

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

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 15TH DAY OF APRIL, 2015



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