



STATE OF NEW JERSEY

**DECISION OF THE
CIVIL SERVICE COMMISSION**

In the Matters of O.C., *et al.*,
Township of West Orange

CSC Docket Nos. 2022-2281, *et al.*

Requests for Interim Relief

ISSUED: JUNE 20, 2022 (HS)

O.C., R.F., G.L., S.M., J.M., D.R., F.R., and G.W., Police Officers; and R.K., Police Sergeant, all with or formerly with¹ the Township of West Orange (Township), represented by Jeffrey D. Catrambone, 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 requests for interim relief, postmarked March 15, 2022, 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

¹ J.M. resigned in good standing, effective May 11, 2022.

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 each requested a reasonable accommodation, *i.e.*, exemption from the vaccination requirement, based on sincerely held religious beliefs or disability. The petitioners state that the reasonable accommodation requests were denied, and they were placed on unpaid leaves of absence, effective October 23, 2021. Specifically, in letters dated October 22, 2021 from John Gross, Chief Financial Officer, the petitioners were advised:

As a [Police Officer or Police Sergeant], 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 maintain that the identical Policy and requests for reasonable accommodations for an exemption from the vaccination requirement were the subject of the Commission's decision in *In the Matter of F.B., et al., Township of West Orange* (CSC, decided March 2, 2022). In that decision, the Commission held that the unpaid leaves of absence imposed upon members of the Fire Department were in fact disciplinary in nature. The Commission specifically held that because the Fire Department members had been disciplined without any of the requisite procedural safeguards provided by Chapter 2 of Title 4A of the New Jersey Administrative Code, they were to receive back pay, benefits, and seniority from October 23, 2021 until whichever of the following occurred first: the members were reinstated to duty; the members were properly immediately suspended without pay; or disciplinary action was properly imposed upon issuance of Final Notices of Disciplinary Action (FNDAs). The petitioners contend that they should be afforded the same relief. They argue that *F.B.* is on all fours with these matters as it addressed the identical issue presented herein, and the members of the Fire Department are identically situated to them.

The petitioners state that they previously filed for the identical relief noted in *F.B.* in Superior Court on November 9, 2021 by way of an Order to Show Cause (OTSC) and Verified Complaint. In those proceedings, the petitioners asserted that the court had jurisdiction to grant relief under *N.J.S.A.* 40A:14-147 based on the Township's failure to provide them with the procedural safeguards afforded to them under that statute. Specifically, they alleged:

By way of [the Township]'s removal of [the petitioners] from their position without any notice of charges or a hearing, and without just cause, [the Township is] in violation of this statute[, *N.J.S.A.* 40A:14-147,] governing disciplinary action in the law enforcement context.

The court denied relief on December 1, 2021, and the petitioners note that that decision is currently on appeal before the Appellate Division. Nonetheless, the petitioners maintain that given the Commission's decision in *F.B.*, they are entitled to the identical relief. They argue that they are identically situated to the Fire Department members, whose requests to the Commission addressed the same legal issues and set of facts and considered the same Policy and denial of reasonable accommodations to be exempt from the vaccination requirement.

The petitioners argue that they have demonstrated a clear likelihood of success on the merits in light of *F.B.* Although the petitioners acknowledge that they returned to work, effective March 25, 2022, with a mask and test option, they suffered unnecessary harm in being deprived of their ability to serve the public and their

salaries for about five months. The petitioners argue that the Township, by implementing a mask and test option, has demonstrated that there can be no substantial injury resulting from their choice not to get vaccinated. Further, the petitioners contend that the public interest is served by compliance with Civil Service law and rules regarding substantive and procedural due process. In support, they submit various exhibits.

In response, the Township, represented by Kenneth A. Rosenberg, Esq., argues that the petitioners cannot establish a clear likelihood of success because their requests for interim relief are barred by the doctrine of *res judicata*, under which claims or issues that have already been adjudicated in a prior suit based on the same cause of action cannot be re-litigated. *Res judicata* can be invoked when the subsequent action involves “substantially similar or identical causes of action, issues, parties and relief as were involved in the prior action” and a final judgment was rendered in the prior action by a court of competent jurisdiction. *Pittman v. LaFontaine*, 756 F. Supp. 834, 841 (D.N.J. 1991) (citing *Culver v. Ins. Co. of N. America*, 115 N.J. 451, 460 (1989)). Two causes of action are considered to be substantially similar or identical where:

- (1) the wrong for which redress is sought is the same in both actions (that is, whether the acts complained of and the demand for relief are the same), (2) the theory of recovery is the same, (3) the witnesses and documents necessary at trial are the same and (4) the material facts alleged are the same.

Pittman, 756 F. Supp. at 841 (citing *Culver*, 115 N.J. at 461-462). Here, the petitioners filed an OTSC and Verified Complaint seeking, among other things, an “Order of this Court immediately placing Plaintiffs on paid status, and/or reinstating Plaintiffs to their position as police officers for the Township of West Orange with full duties” and an “Order of this Court awarding Plaintiffs all back pay, health care benefits, pension credits, and any and all other benefits due and owing Plaintiffs by way of Defendant’s illegal removal of Plaintiffs from their position.” The Township emphasizes that the petitioners here have admitted they previously filed for the *identical relief* in Superior Court. According to the Township, the petitioners’ theory of recovery here—that they are entitled to reinstatement with back pay because they were disciplined without any procedural safeguards—is the same theory they argued in Superior Court and that was denied.² The Township also notes that the facts, witnesses, and documents are the same in both matters.

² In the court’s December 1, 2021 order, the court denied the petitioners’ request for relief and reinstatement and dismissed the OTSC and Verified Complaint “for the reasons set forth by the Court on the record at the hearing held on December 1, 2021, and for good cause shown.” It is noted that the Township has not provided a hearing transcript.

The Township argues that the petitioners cannot establish a clear likelihood of success because their requests for interim relief are also barred by the doctrine of collateral estoppel, which applies if:

- (1) the issue to be precluded is identical to the issue decided in the prior proceeding;
- (2) the issue was actually litigated in the prior proceeding;
- (3) the court in the prior proceeding issued a final judgment on the merits;
- (4) the determination of the issue was essential to the prior judgment; and
- (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.

First Union Nat'l Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 352 (2007) (citations omitted). Here, according to the Township, the acts and issues complained of and the redress sought is identical in both this matter and the Superior Court matter. According to the Township, the petitioners already had the opportunity to litigate the interim relief factors in court and had their arguments rejected. It also maintains that the parties, exhibits, and facts are the same in both matters, and the determination of the issue, the only one, was essential to the court's judgment. Thus, in the Township's view, since the petitioners seek to re-litigate the same issues here that were denied in the court action, these requests are barred as they cannot get two bites at the same apple.

The Township maintains that even if the petitioners' requests are not barred by *res judicata* or collateral estoppel, they are still not entitled to interim relief. Specifically, the Township asserts that the petitioners do not have a clear likelihood of success on the merits because the petitioners are simply attempting to piggyback on *F.B.*, *supra*. It also maintains that 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. 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 argues that any argument that there is a danger of immediate or irreparable harm has been waived because more than *four* months have elapsed

since the petitioners were placed on unpaid leave, and in that time, they failed to file any action before the Commission. The Township also notes that the petitioners all returned to work as of March 25, 2022. The Township further argues that the petitioners have not and cannot identify any harm from being placed on unpaid leave other than lost wages.³ Further, the Township contends that interim relief is not in the public interest because the petitioners were returned to work. In support, the Township submits Gross's certified statement.

CONCLUSION

Initially, the Commission is not persuaded by the Township's contention that the doctrine of *res judicata* applies. According to the case law cited by the Township, two causes of action are considered to be substantially similar or identical where, among other factors, the theory of recovery is the same. In court, the petitioners alleged:

By way of [the Township]'s removal of [the petitioners] from their position without any notice of charges or a hearing, and without just cause, [the Township is] in violation of this statute[, *N.J.S.A.* 40A:14-147,] governing disciplinary action in the law enforcement context.

Here, the petitioners are requesting nothing more than that they be afforded the identical relief the Commission afforded members of the Fire Department in *F.B., supra*. In *F.B.*, the Commission determined that the members had been subjected to discipline when they were placed on unpaid leave without any of the disciplinary rules in Chapter 2 of Title 4A of the New Jersey Administrative Code⁴ being observed. As such, the Commission ordered that the members receive back pay, benefits, and seniority from October 23, 2021 until whichever of the following occurred first: the members were reinstated to duty; the members were properly immediately suspended without pay; or disciplinary action was properly imposed upon issuance of FNDAs. The theory of recovery the petitioners argued in Superior Court is not the same as that they are effectively arguing here. In court, the petitioners contended that they had been removed from their positions without notice of charges or a hearing *and without just cause*, in violation of *N.J.S.A. 40A:14-147*. However, the Commission in *F.B. at no point* addressed the merits of the discipline or whether the Township had just cause to impose it, *nor* did it rest its decision on Title 40A. The Commission in fact did not question that the Township, as the employer, had the right to seek to discipline the members—a right that is in place irrespective of

³ 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.

⁴ Title 4A consists of the rules adopted to carry out Title 11A, New Jersey Statutes, *i.e.*, the Civil Service Act. See *N.J.S.A. 11A:2-6d* and *N.J.A.C. 4A:1-1.2(c)*.

whether such discipline would ultimately be upheld—and this understanding was incorporated into the Commission’s order in that the Township retained the options to properly immediately suspend the members without pay or properly impose discipline upon issuance of FNDAs. The Commission did emphasize that the disciplinary procedures found in the regulations adopted pursuant to the *Civil Service Act* must be followed in conjunction with the imposition of discipline. Thus, *res judicata* is inapplicable. For the same reasons, the Commission is not persuaded by the Township’s contention that the doctrine of collateral estoppel applies. For collateral estoppel to apply, among other factors, the issue to be precluded must be identical to the issue decided in the prior proceeding. However, for the reasons already discussed above in connection with the discussion of whether *res judicata* applies, the issue here is not identical to that decided in the court action.

Having determined that the petitioners’ instant requests are not precluded, the Commission proceeds to 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. While the Commission has no occasion here to doubt that unpaid leave can be a reasonable accommodation, 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).

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 and taking into account the petitioners’ reinstatement to duty, effective March 25, 2022. Accordingly, the petitioners are to receive back pay, benefits, and seniority from October 23, 2021 through March 24, 2022.

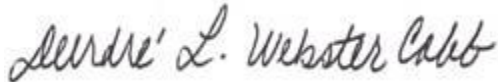
That the petitioners’ requests were filed more than four months after their unpaid leaves commenced is not sufficient to constitute a waiver of their right to receive a remedy in these matters. In this regard, the petitioners did attempt to redress their situation by filing the November 9, 2021 Superior Court action—albeit

under a different theory of recovery and arguing a different issue—only 17 days after the commencement of the unpaid leaves. Thus, there is no evidence of a lack of pursuit on the petitioners' part. Moreover, the Township never provided the petitioners with appeal rights to the Commission. Further, it would be inequitable to deny the petitioners relief when the Commission has already afforded relief to the identically situated members of the Fire Department. *See F.B., supra.*

ORDER

Therefore, it is ordered that the petitioners receive back pay, benefits, and seniority from October 23, 2021 through March 24, 2022.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF JUNE 2022



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