



STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of Marcus Fuller,
Paterson

CSC Docket No. 2024-1441

Request for Interim Relief

ISSUED: June 12, 2024 (JET)

Marcus Fuller, a Laborer 1 with Paterson, represented by Lisa Fittipaldi, Esq., petitions the Civil Service Commission (Commission) for interim relief of his immediate suspension without pay.

By way of background, on October 3, 2023, the appointing authority issued a “Minor Notice of Disciplinary Action” to the petitioner, alleging that he was observed entering and exiting a liquor store on October 2, 2023 with a bag in hand, and that he violated *N.J.A.C.* 4A:2-2.3,¹ as well as federal regulations with respect to alcohol use by employees who perform duties related to the operation of commercial motor vehicles and State and local policies issued thereunder.² Thereafter, on October 11, 2023, the appointing authority issued a Preliminary Notice of Disciplinary Action (PNDA), charging the petitioner with conduct unbecoming a public employee, neglect of duty, and misuse of public property, including motor vehicles, suspending the petitioner, and seeking his removal, effective October 2, 2023.³ The specifications indicated, in relevant part that:

¹ The Minor Notice of Disciplinary Action listed the charges that are listed under *N.J.A.C.* 4A:2-2.3 and appears to have also checked off “conduct” on that list of charges.

² The Minor Notice of Disciplinary Action did not recommend a penalty, but rather, indicated that the corrective action was pending a hearing. However, the petitioner confirms that on October 3, 2024, he was also notified that he was immediately suspended.

³ As noted above, although the PNDA indicates the suspension was effective on October 2, 2023, the petitioner confirms that he was immediately suspended effective October 3, 2023.

. . . on or about October 2, 2023 while on duty [the petitioner] was observed by DPW Director William Rodriguez and Deputy Director Manuel Ojeda exiting a liquor store . . . and at approximately 11:36 a.m. several minutes they observed him carrying a brown paper bag as he entered a motor vehicle . . . Director Rodriguez then directed that [the petitioner] . . . [be] transported . . . for substance testing . . . [and] a breath test showed a .043 BAC [Blood Alcohol Concentration] positive confirmation for alcohol in his system . . . [The petitioner] was not the driver of the car as it left the liquor store in question.”⁴

It is noted that the appointing authority has not yet scheduled a departmental hearing, and the petitioner has been out of work since October 3, 2023. The record indicates that the petitioner did not have any prior disciplinary history or workplace performance issues.

In his petition, the petitioner argues, in pertinent part, that the appointing authority improperly and immediately suspended⁵ him without a departmental hearing. The petitioner maintains that he was retaliated against due to his pending lawsuit against the appointing authority which alleged a failure to accommodate his disabilities.⁶ The petitioner adds that there was no basis to suspend him as the appointing authority did not demonstrate that he was intoxicated at work or that he violated any of its policies. In this regard, the petitioner explains that there is no evidence to show that he was drinking at the time of the incident, or that he failed to perform his duties. He notes that he had been drinking the night before. As such, the petitioner maintains there was no legitimate reason to send him for a blood alcohol test. Rather, the petitioner contends that the appointing authority only alleged that “he was ‘seen with a brown bag in his hand leaving the liquor store,’” and he explains that no one saw him with actual alcohol. In this regard, the petitioner contends that he watches sports at the liquor store.

In addition, the petitioner states that, contrary to the appointing authority’s Alcohol and Drug-Free Workplace Policy,⁷ his supervisors did not complete a “report

⁴ It is noted that driving while intoxicated is defined, pursuant to *N.J.S.A. 39:4-50*, as a BAC of .08 percent or higher, and pursuant to *N.J.S.A. 39:3-10.24*, for a holder of a commercial driver’s license (CDL) as a BAC of .04 percent or higher.

⁵ Although the petitioner claims that he was indefinitely suspended in this matter, the record establishes that no criminal charges were issued against the appellant, and as such, he was immediately suspended. *See N.J.S.A. 11A:2-13* and *N.J.A.C. 4A:2-2.5(a)2*.

⁶ The record reflects that, on August 24, 2021, the petitioner filed a complaint pursuant to the New Jersey Law Against Discrimination (LAD) against the appointing authority for failure to accommodate a physical disability, which is still pending. *See N.J.S.A. 10:5-1, et. seq.*

⁷ It is noted that the appointing authority’s policy indicates, in relevant part, what constitutes a violation of the policy; testing requirements for employees holding a CDL; when alcohol and drug testing can occur, for example, when there is a “reasonable suspicion to believe that an employee is under the influence of alcohol or using illegal drugs;” and the proper procedures. The Policy also

of reasonable suspicion” alleging that he was intoxicated prior to sending him for a blood test, based on “specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the employee.” In addition, the petitioner asserts that the appointing authority’s Disciplinary Action Policy requires that concepts of progressive discipline be applied in all violation matters, and it therefore inappropriately placed him on an “indefinite suspension” and removed him without sufficient evidence. In this regard, the petitioner contends that the Disciplinary Action Policy indicates that progressive discipline:

. . . shall be progressive in nature as follows:

- informal, private discussion with the Division Head
- letter of admonition from the Department Head
- written memorandum of censure by the Department Head
- suspension without pay[.]

Moreover, the petitioner states that there is no evidence that he violated any other policies or federal regulations, as his position does not require him to operate a motor vehicle or to possess a CDL license. As such, the petitioner maintains that the appointing authority’s allegations are without merit.

Further, the petitioner asserts that he has a clear likelihood of success in this matter, as the appointing authority’s failure to provide him with a hearing constitutes a violation of *N.J.A.C.* 4A:2-2.3. He also asserts that, although he was approved for unemployment benefits, he is experiencing irreparable harm, as he continues to go without pay, health insurance, and is encountering difficulty obtaining other employment. The petitioner adds that, since there is no evidence of any behavioral issues or any prior disciplinary history at work, there is no danger to the public or the appointing authority if he is reinstated. The petitioner asserts that, given that he has been unjustly suspended since October 3, 2023, he has already served a 90-day suspension as of the date he filed his appeal, and as such, he meets the requirements for interim relief in this matter. Accordingly, the petitioner requests to be reinstated with pay, benefits, and seniority pending a hearing and counsel fees.

In response, the appointing authority, represented by Charles C. Festa, III, Esq., asserts that it has a clear likelihood of success in this matter, as it issued a PNDA including major disciplinary charges. In this regard, the appointing authority maintains that the petitioner was observed by his supervisors with a brown paper bag after leaving a liquor store. The appointing authority contends that, although the contents of the brown bag could not be ascertained, it had “probable cause” to investigate the matter, and as such, the petitioner’s supervisors

states that the “reasonable suspicion” “must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the employee.”

requested that the petitioner report for an alcohol blood test, which revealed a .043 BAC, demonstrating the presence of alcohol in his system. Thus, the appointing authority indicates that it is pursuing an appropriate penalty for the petitioner's actions and will present such information at the time a departmental hearing is conducted.⁸ The appointing authority argues that, given the allegations, there is a likelihood of irreparable harm and substantial injury if the petitioner is reinstated to duty as there is a possibility that someone will experience harm. In this regard, the appointing authority explains that, although the petitioner was provided with an accommodation, he is required to clean city streets, sidewalks, and other common public areas, and he utilizes a mobile trash can with cleaning tools. The appointing authority adds that, since the petitioner is routinely in contact with his coworkers and the public, he could put his coworkers and the public at risk of harm if he consumes alcohol while on duty. Therefore, the appointing authority maintains that the public interest would not be served by reinstating petitioner at this time.

In response, the petitioner argues that the appointing authority has not established its contentions in this matter, as its policies do not indicate that "probable cause" is required to conduct an alcohol blood test of its employees. Rather, the petitioner explains that such policies only require a "reasonable suspicion" to be articulated by supervisors in order to conduct a blood alcohol test. The petitioner contends that, although "reasonable suspicion" of intoxication at work is defined by the appointing authority as "based on specific, contemporaneous articulable observations concerning the appearance, behavior, speech or body odors of the employee," he did not demonstrate any signs of inebriation or an inability to perform his duties that would establish "reasonable suspicion" which would warrant a blood test. Rather, the petitioner asserts that his supervisors' observations were based on unsubstantiated hunches. Moreover, the petitioner argues that the appointing authority ignores the language and procedures in its Alcohol and Drug-Free Workplace Policy, which indicates that:

Leaping to conclusions or making a public display of sending an employee to a clinic could expose the employer to claims of defamation, intentional infliction of emotional distress, invasion of privacy, or other legal actions.

As such, the petitioner maintains that the appointing authority has not established that it will succeed on the merits of its case. The petitioner adds that the appointing authority has not established its contentions that he may cause irreparable harm or is a danger to the public, nor has it demonstrated that he operates a motor vehicle in the performance of his duties, that he is a danger to other employees, or that he is unfit for duty. The petitioner also argues that an

⁸ The appointing authority does not provide a reason for the delay in scheduling a departmental hearing.

immediate suspension should only last for 55 days from the time of its implementation, which is the maximum amount of time allotted to schedule a departmental hearing. See *N.J.A.C. 4A:2-2.5(a)1*, *N.J.A.C. 4A:2-2.5(d)*, and *N.J.A.C. 4A:2-2.6(d)*. The petitioner states that, since he has been suspended for well over 55 days, and based on the lack of evidence against him in this matter, he should be immediately returned to employment.

CONCLUSION

N.J.S.A.11A:2-13 provides, in pertinent part, that except as otherwise provided herein, before any disciplinary action in subsection a.(1), (2) and (3) of *N.J.S.11A:2-6* is taken against a permanent employee in the career service or a person serving a working test period, the employee shall be notified in writing and shall have the opportunity for a hearing before the appointing authority or its designated representative. The hearing shall be held within 30 days of the notice of disciplinary action unless waived by the employee. Both parties may consent to an adjournment to a later date. This section shall not prohibit the immediate suspension of an employee without a hearing if the appointing authority determines that the employee is unfit for duty or is a hazard to any person if allowed to remain on the job or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services. In addition, where a suspension is based on a formal charge of a crime of the first, second or third degree, or a crime of the fourth degree if committed on the job or directly related to the job, the suspension may be immediate and continue until a disposition of the charge. The Commission shall establish, by rule, procedures for hearings and suspensions with or without pay.

N.J.A.C. 4A:2-2.5(a) provides that an employee must be served with a PNDA setting forth the charges and statement of facts supporting the charges (specifications), and afforded the opportunity for a hearing prior to imposition of major discipline, except:

(1) 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 . . . However, a [PNDA] with opportunity for a hearing must be served in person or by certified mail within five days following the immediate suspension.

(2) An employee may be suspended immediately when the employee is formally charged with a crime of the first, second or third degree, or a crime of the fourth degree on the job or directly related to the job. See *N.J.A.C. 4A:2-2.7*.

N.J.A.C. 4A:2-2.5(b) provides that where suspension is immediate under (a)1 and 2 above, and is without pay, the employee must first be apprised either orally or in writing, of why an immediate suspension is sought, the charges and general evidence in support of the charges and provided with sufficient opportunity to review the charges and the evidence in order to respond to the charges before a representative of the appointing authority. The response may be oral or in writing, at the discretion of the appointing authority.

N.J.A.C. 4A:2-2.5(c) provides that the employee may request a departmental hearing within five days of receipt of the PNDA. If no request is made within this time or such additional time as agreed to by the appointing authority or as provided in a negotiated agreement, the departmental hearing may be considered to have been waived and the appointing authority may issue a Final Notice of Disciplinary Action (FNDA).

N.J.A.C. 4A:2-2.5(d) provides that a departmental hearing, if requested, shall be held within 30 days of the PNDA unless waived by the employee or a later date as agreed to by the parties.

N.J.A.C. 4A:2-2.6(d) provides that within 20 days of the hearing, or such additional time as agreed to by the parties, the appointing authority shall make a decision on the charges and furnish the employee either by personal service or certified mail with a FNDA. *See N.J.A.C.* 4A:2-2.13 for the issuance of a Final Notice in removal appeals by certain law enforcement officers and firefighters.

N.J.A.C. 4A:2-2.7 provides, in pertinent part, that an indefinite suspension can only be imposed where there is a “pending criminal complaint or indictment.”

Pursuant to *N.J.A.C.* 4A:2-1.2(c), the standards to be considered regarding a petition for interim relief are:

1. Clear likelihood of success on the merits by the petitioner;
2. Danger of immediate or irreparable harm if the request is not granted;
3. Absence of substantial injury to other parties if the request is granted;
- and
4. The public interest.

In the instant matter, it is not necessary to address the merits of the charges against the petitioner at this juncture. Rather, the issue to be determined is whether the nature and seriousness of the charges support the necessity for an immediate suspension pursuant to *N.J.S.A.* 11A:2-13 and *N.J.A.C.* 4A:2-2.5. Initially, in a prior case addressing the requirements of *N.J.A.C.* 4A:2-2.5(b), *In the Matter of Anthony Recine* (MSB, decided March 10, 1998), it was found that the Township of Hamilton did not provide a proper pretermination hearing since Recine

was not made aware of the charges and the general evidence supporting the charges prior to being suspended. By contrast, as set forth below, the petitioner in the instant matter was well aware of the charges against him and the evidence in support of the charges at the time of his suspension.

In that regard, the record reflects that the petitioner was notified that he was immediately suspended on October 3, 2023, and was provided the basis for his suspension by way of “Minor Notice of Disciplinary Action,” which listed that he was being charged under *N.J.A.C.* 4A:2-2.3, for his conduct and violations of federal, State and local policies regarding alcohol use, as he was observed entering and exiting a liquor store on October 2, 2023. Therefore, the presentation of the “Minor Notice of Disciplinary Action,” that listed both general charges and the specification that those charges were based on, provided the appellant sufficient notice to satisfy the requirements under *N.J.A.C.* 4A:2-2.5(b). Additionally, the record evidences that the PNDA was issued on October 11, 2023, within the required five days of his October 3, 2023 suspension. In this regard, the appellant’s immediate suspension occurred on Tuesday, October 3, 2023. October 7 and 8, 2023 were the weekend, and Monday, October 9, 2023 was a holiday. Therefore, the fifth business day after his immediate suspension was October 11, 2023. *See N.J.A.C.* 1:1-1.4 and *New Jersey Court Rules* 1:3-1. Therefore, the PNDA was served within the required five-day time period.

Further, the petitioner claims that he was improperly “indefinitely” suspended, and the appointing authority failed to conduct a departmental hearing. Since there is no indication that criminal charges were ever pending against the petitioner, pursuant to the above listed rules, he could not have been subjected to an indefinite suspension. *See N.J.A.C.* 4A:2-2.7. Nonetheless, the record reflects that he received an October 11, 2023 PNDA imposing a suspension and seeking his removal. Thus, the inquiry turns to whether the nature and seriousness of the charges support the necessity for an immediate suspension. In that regard, the Commission finds that the charges against the petitioner are undoubtedly serious. If the petitioner, a Laborer 1, was determined to be intoxicated while on the job, his continued employment would negatively impact the order and effective direction of public services and would compromise the integrity of the appointing authority. As such, the petitioner’s immediate suspension was warranted. The Commission also notes that it will not attempt to determine the propriety of the charges or the proper disciplinary penalty based on an incomplete written record. Such matters need a full plenary hearing before an Administrative Law Judge 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 after a departmental hearing and further appeal to the Commission. Regardless, given the serious nature of the charges, the standard for an immediate suspension enunciated in *N.J.A.C.* 4A:2-2.5(a)1 has been

met. Moreover, the petitioner has not shown that he is in danger of immediate or irreparable harm, as the harm that he is experiencing is financial in nature, and as such, can be remedied. The public is best served when a public employee facing such serious charges is kept out of the workplace pending adjudication of the charges.

Nonetheless, the petitioner is entitled to relief. Although the petitioner has been out of work since October 3, 2023, the appointing authority has not yet conducted a departmental hearing, nor has it explained the reason for the delay in scheduling the departmental hearing. Additionally, the appointing authority's arguments that it had probable cause to suspend the petitioner and that it is pursuing an appropriate penalty are unpersuasive, as those are not valid reasons for not holding the departmental hearing as required under *N.J.A.C. 4A:2-2.5(d)*. Pursuant to *N.J.A.C. 4A:2-2.5(a)1*, *N.J.A.C. 4A:2-2.5(d)* and *N.J.A.C. 4A:2-2.6(d)*, an immediate suspension can only generally span 55 days from its inception, allowing for the maximum time for the departmental hearing process to be completed. Accordingly, in this case, given the procedural due process violations committed by the appointing authority regarding the indefinite suspension, the Commission orders that the petitioner's immediate suspension from October 3, 2023, shall be considered without pay for 55 days through November 27, 2023, and thereafter with pay⁹ until he is either reinstated or a departmental hearing on the merits is held and a FNDA is issued. Moreover, as noted above, the appointing authority has failed to present any reason for its delay in holding the departmental hearing. Therefore, the appointing authority is ordered to conduct a departmental hearing within 20 days after issuance of this decision, absent any agreed to adjournment by the parties. If the appointing authority fails to commence a departmental hearing within the specified time frame, upon the Commission finding that it has not complied with this order, the Commission may impose fines up to \$10,000 pursuant to *N.J.A.C. 4A:10-2.1*.

Finally, with regard to the petitioner's request for counsel fees, *N.J.S.A. 11A:2-22* provides that the Commission may award reasonable counsel fees to an employee as provided by rule, and *N.J.A.C. 4A:2-2.12* provides that for disciplinary appeals, reasonable counsel fees are awarded where an employee has prevailed on all or substantially all of the primary issues in an appeal. While the Commission has awarded reasonable counsel fees in the past where employees have successfully challenged the imposition of immediate suspensions, the instant matter is distinguishable. *See e.g., In the Matter of Debora U. Brown* (MSB, decided June 9, 2004) (Reasonable counsel fees awarded where the appointing authority did not possess a valid basis to impose an immediate suspension); *In the Matter of Andrew Kullen* (MSB, decided September 26, 2000) (Back pay, benefits, and counsel fees granted where the appointing authority did not have a sufficient basis for an

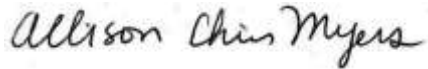
⁹ If the petitioner has or is receiving unemployment benefits, that amount shall be deducted from his back pay award. *See N.J.A.C. 4A:2-2.10(d)3*.

immediate suspension). *See also In the Matter of James Campbell* (MSB, decided January 11, 2000); *In the Matter of Abnathy Mason* (MSB, decided July 7, 1999). Here, the Commission has determined that the petitioner's immediate suspension was appropriate, and thus, he has not prevailed on substantially all of the primary issues in his request for interim relief. Accordingly, he is not entitled to an award of counsel fees in this matter.

ORDER

Therefore, it is ordered that Marcus Fuller's request for interim relief be granted in part. Absent any agreed to adjournment by the parties, within 20 days of the issuance date of this decision, the departmental hearing on the merits of the charges must be commenced. Further, the petitioner is awarded back pay from November 28, 2023 until his reinstatement or issuance of a FNDA.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 12TH DAY OF JUNE, 2024



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