



STATE OF NEW JERSEY

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

In the Matter of Omar Polanco

CSC Docket No. 2024-814

Reconsideration and Enforcement

ISSUED: July 24, 2024 (EG)

Jersey City, represented by Arthur R. Thibault, Esq., petitions the Civil Service Commission (Commission) for reconsideration and a stay of its decision in *In the Matter of Omar Polanco, Jersey City Police Department* (CSC, decided September 20, 2023) in which the Commission reversed the removal of Omar Polanco. Additionally, Polanco, represented by Michael P. Rubas, Esq., petitions the Commission for enforcement of *Polanco, supra*.¹ These matters have been consolidated herein.

As background, the record indicates Polanco, a Police Officer, was issued a Preliminary Notice of Disciplinary Action (PNDA) on January 9, 2023, charging him with incapacity, insubordination, inability to perform duties, conduct unbecoming public employee, neglect of duty and other sufficient cause. Specifically, Polanco had tested positive for cannabinoids after a random drug test on September 20, 2022. Polanco was immediately suspended upon issuance of the PNDA, and a penalty of removal was indicated. Thereafter, Polanco received a departmental hearing, and a Final Notice of Disciplinary Action (FNDA) was issued on March 1, 2023, upholding the charges and the penalty of removal, effective March 23, 2023. Subsequently, Polanco appealed to the Commission and his appeal was transmitted to the Office of Administrative Law (OAL).

¹ Polanco also petitioned for back pay and counsel fees to be determined by the Commission. However, this petition was not accepted as Polanco did not provide the required appeal fee.

The Administrative Law Judge (ALJ) in the matter determined that there were no material issues of fact in dispute. In this regard, the ALJ concluded that reversing the removal was proper under the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA). She further found that federal law did not preempt CREAMMA. In this regard, the ALJ relied in part on the Commission's decision in *In the Matter of Norhan Mansour* (CSC, decided August 2, 2023). In that matter, which was essentially factually identical to Polanco's matter, the Commission adopted the ALJ's granting of summary decision reversing Mansour's removal. In that case, the Commission also agreed with the ALJ that federal law does not preempt CREAMMA; that Mansour could carry a service weapon without violating federal law; and that the facts of that matter demonstrated that Mansour's termination violated CREAMMA. As the ALJ's analysis in Polanco's matter comported with *Mansour*, *supra*, the Commission found that federal law did not preempt CREAMMA; that Polanco could carry a service weapon without violating federal law; and that the facts demonstrated that Polanco's termination violated CREAMMA. Accordingly, the Commission ordered reversal of the removal and that Polanco be immediately reinstated with mitigated back pay, benefits, seniority, and reasonable counsel fees.

In the instant matter, the appointing authority claims that the Commission made a clear and material error in reversing Polanco's removal. It reiterates its prior arguments that it raised in a prior interim relief request, during the hearing at OAL, and in its exceptions to the ALJ's initial decision. In this regard, it argues that the Commission failed to address *Ortiz v. Department of Corrections*, 368 So. 3d 33 (Fla. Dist. Ct. App. 2023), in which the three judge appellate panel concluded that a corrections officer who used prescription marijuana could not lawfully possess a firearm, which was an essential function of his job and that permitting him to remain employed in such function would not only require him to violate federal law, but also require his colleagues to violate federal law. The appointing authority argues that similarly, Polanco is prohibited by federal law from carrying a firearm. Additionally, the appointing authority asserts that in the event the Commission denies its request for reconsideration, it should grant a stay pending a final decision and appeal in this matter. It maintains that it is likely to succeed on the merits and asserts that Polanco will not suffer any irreparable harm due to a stay as he could recover back pay should he ultimately prevail. However, the appointing authority claims it will suffer irreparable harm as its employees supplying Polanco with ammunition would be violating federal law and be subject to criminal liability, fines, and imprisonment.

In reply, Polanco argues that the appointing authority's request for reconsideration should not be granted and it is merely reiterating arguments that it had previously made and had been rejected by the Commission. Additionally, he asserts that the stay request should be denied because the appointing authority has not offered a clear likelihood of success on the merits as it is relying on previously

rejected arguments. Further, it would be in the public's best interest if the appointing authority follows the Commission's order and reinstates him to his position. In this regard, Polanco requests enforcement of the Commission's reinstatement order as the appointing authority has refused to return him to his position.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding. Further, *N.J.A.C.* 4A:2-1.2(c) provides the following factors for consideration in evaluating petitions for a stay:

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.

In the instant matter, the appointing authority reiterates its prior arguments that Polanco is prohibited by federal law from carrying a weapon and the Commission's adoption of the ALJ's initial decision in error. It also claims that the Commission failed to address *Ortiz, supra*, in which an appellate panel concluded that a corrections officer who used prescription marijuana could not lawfully possess a firearm under federal law. The Commission is not persuaded. The appointing authority previously made these same arguments, including *Ortiz*, and they were reviewed and rejected by the Commission. *Ortiz* is a Florida District Court decision, not interpreting New Jersey law. Further, this case does not serve as a mandatory precedent in this matter. The Commission has addressed the appointing authority's argument several times in this and other matters and has concluded that federal law does not preempt CREAMMA; that Polanco could carry a service weapon without violating federal law; and Polanco's termination violated CREAMMA. This conclusion is further supported by 18 *U.S.C.* 925(a)(1) of the Gun Control Act, which expressly exempts from its proscriptions, firearms or ammunition "issued for the use of...any State or ... political subdivision thereof." Courts have consistently interpreted Section 925(a)(1) to apply to firearms or ammunition used by local police departments. As Petitioner's acquisition, possession, and use of firearms and ammunition in his capacity as a police officer fits squarely within the exemption outlined in Section 925(a)(1), no conflict exists between the Gun Control Act and CREAMMA. Therefore, the appointing authority's claim of preemption fails. Accordingly, the appointing authority has not met its burden of proof and its request for reconsideration is denied.

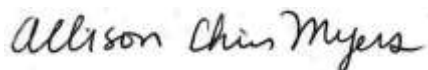
As reconsideration is denied, the appointing authority's stay request is moot. As previously indicated, the appointing authority has failed to present a clear likelihood of success on the merits of its appeal. Here the appointing authority relies on the same exact arguments that the Commission has repeatedly rejected. Further, the Commission rejects the appointing authority's claim that it would suffer irreparable harm if a stay is not granted. In this regard, it is noted that in CREAMMA, the New Jersey Legislature expressly directs law enforcement agencies in New Jersey not to cooperate with or assist the federal government in enforcing federal laws in conflict with CREAMMA. Moreover, it would be in the public's best interest for the appointing authority to follow the Commission's order and reinstate Polanco to his position. Accordingly, the Commission directs the appointing authority to comply with its order in *Polanco, supra*, and immediately reinstate Polanco to his position. Polanco's request for enforcement is thus granted.

ORDER

Therefore, it is ordered that Jersey City's request for reconsideration be denied, it's request for a stay be dismissed as moot, and that Jersey City immediately reinstate Omar Polanco to his position with mitigated back pay, benefits, seniority and reasonable counsel fees as previously directed. In the event that Jersey City has not made a good faith effort to comply with this decision within 30 days of issuance of this decision, the Commission orders that a fine be assessed against Jersey City in the amount of \$100 per day, beginning on the 31ST day from the issuance of this decision, and continuing for each day of continued violation, up to a maximum of \$10,000.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 24TH DAY OF JULY, 2024



Allison Chris Myers
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

c: Omar Polanco
Arthur R. Thibault, Esq.
Brittany Murray, Acting Corporation Counsel
Michael P. Rubas, Esq.
Records Center
Division of Human Resource Information Services