

B-26



STATE OF NEW JERSEY

DECISION OF THE CIVIL SERVICE COMMISSION

In the Matter of Felix Rivera and Bruce Cornish, City of Millville

CSC Docket Nos. 2016-323 and 2016-324

Requests for Interim Relief

ISSUED: OCT 23 2015 (DASV)

Felix Rivera and Bruce Cornish, Police Officers with the City of Millville, represented by Michael L. Testa, Esq., petition the Civil Service Commission (Commission) for interim relief of their immediate suspensions without pay. Since these matters address similar issues, they have been consolidated herein.

By way of background, the petitioners were served Preliminary Notices of Disciplinary Action (PNDAs) on June 19, 2015, immediately suspending them without pay and seeking their removal, effective June 18, 2015, on charges of incompetency, inefficiency or failure to perform duties, conduct unbecoming a public employee, neglect of duty, other sufficient cause, and violation of various rules, regulations, and general orders of the Millville Police Department, including truthfulness. Specifically, the appointing authority asserted that on various dates throughout 2012 and 2013, the petitioners wrongfully and improperly closed out investigations by neglecting to follow up on crimes in order to solve them and failed to conduct appropriate investigations on numerous cases. It was also claimed that the petitioners prepared inadequate reports on various cases. The PNDAs listed the alleged investigations by case number. It is noted that the departmental hearings in these matters have not yet been held.¹

¹ Per N.J.A.C. 4A:2-2.5(d), absent agreement of the parties to a later date, a departmental hearing is to be held within 30 days of issuance of a PNDA. In this matter, the parties have not addressed the timeliness of the departmental hearings. Accordingly, the Commission will not address that issue.

In his request, Rivera explains that on May 13, 2015, the appointing authority reassigned him from active patrol to administrative duties, such as dispatch and processing fingerprints. On May 26, 2015, he was interviewed by a Police Sergeant from the Professional Standards Unit (internal affairs) and questioned about his recollection on how certain police investigations were handled. Cornish explains that the Police Sergeant e-mailed him on May 7, 2015 and advised that he was subject to an internal affairs complaint. Cornish states that the e-mail was "extremely vague" and alleged that between 2011 and 2014 he failed to adequately perform his duties. It is noted that the e-mail also informed Cornish that the complaint against him involved allegations of a false report, incompetency, inefficiency or failure to perform duties, conduct unbecoming a public employee, neglect of duty, and violation of rules and regulations pertaining to the performance of his duty and ethical standards. Cornish was then interviewed on June 2, 2015. The petitioners note that there is no allegation that they were dishonest during their respective interviews. Thereafter, on June 19, 2015, the petitioners were served with the PNDAs and immediately suspended.

The petitioners assert that there is a clear likelihood of success on the merits of their case. In that regard, they contend that it was "merely alleged that [they] handled a few investigations in an imperfect manner." Even if the claims were true, the petitioners maintain that they should only be subject to counseling or additional training. Further, they state that they were not charged with a crime or being unfit for duty. The petitioners also indicate that their immediate suspensions are not needed to preserve the safety, health, order or effective direction of the police department. They did not engage in excessive force or civil rights violations. Moreover, the investigations in question were conducted in 2012 and 2013, and the petitioners emphasize that they have worked since that time without incident. The petitioners argue that, given the publicized shootings in Millville, public services are actually hurt by their suspension because it reduces personnel in the police department.

Furthermore, the petitioners allege that they were not afforded with due process protections pursuant to *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). While the petitioners acknowledge that they received the PNDAs with the written charges, they claim that the descriptions of the charges are vague because they did not state "how" they improperly handled investigations or followed up on the investigations. Additionally, the PNDAs only listed the case numbers and did not describe the specifics of what the petitioners allegedly did. The petitioners also indicate that they did not receive a Loudermill hearing prior to being suspended in order "to tell [their] side of the story" and contest their suspensions. In addition, the petitioners argue that there is immediate and irreparable harm if their requests for interim relief are not granted. In that regard, not only are the petitioners and their families suffering the loss of salary, which may not be reimbursed for months or years as an award of back pay, the petitioners' ability to

obtain promotions is also adversely affected. Further, they argue that their suspensions cause irreparable harm to the citizens of Millville, since all police should be on duty given the shootings that have recently occurred. Moreover, the petitioners state that no one will be injured if they are restored to duty or if their suspensions are with pay. Rivera reiterates that he was reassigned to administrative duties on May 13, 2015, which appears to have been in contemplation of his disciplinary charges, and he could continue such duties pending the outcome of the charges. Cornish reiterates that he is not charged with a crime, accused of using excessive force, or found to have engaged in civil rights violations. There was also no allegation that Cornish was unfit for duty. Therefore, the petitioners maintain that the public interest is best served by restoring them to duty.

In response, the appointing authority, represented by Stephen D. Barse, Esq., submits that by improperly closing out investigations, the petitioners jeopardized the effective direction of services to the citizens of Millville. Further, if proven, the petitioners' untruthfulness and improper handling of reports will likely cause a negative impact on the public's perception of law enforcement and the morale of the police department. Moreover, if the charges are sustained, the appointing authority contends that it will have to disclose to every criminal defendant in cases where the petitioners were involved that they were untruthful. Thus, to minimize this effect and to prevent any "further contamination" of cases, the appointing authority states that it immediately suspended the petitioners. In addition, the appointing authority explains that on June 19, 2015, the petitioners separately met with the City Clerk/Administrator and a Police Captain. The City Clerk/Administrator informed the petitioners that the meeting was a hearing to provide them with the written charges and an opportunity to respond. According to the appointing authority, Rivera did respond by stating that he had "nothing to say that he thought would change" the appointing authority's mind and he would discuss the matter with his attorney. Cornish also responded by stating that he did what he was told to do by his supervisors. Additionally, he discussed and questioned the charges against him. Therefore, the appointing authority maintains that the petitioners' due process rights were not violated.²

Moreover, the appointing authority submits that the petitioners have not met the standard for interim relief since they have failed to establish a clear likelihood of success on the merits of their case. In that regard, it indicates that each petitioner "significantly downplays the seriousness" of the allegations against him. The petitioners were each charged with mishandling more than 20 cases. Further, the appointing authority was not aware of such actions until sometime in February 2014, at which time a lawsuit had been filed against the City of Millville by another officer who alleged retaliation for complaining that officers, including the

² The appointing authority also presents the affidavit of the Police Sergeant who investigated and interviewed the petitioners and the affidavit of the City Clerk/Administrator.

petitioners, were improperly closing files.³ Thus, the appointing authority investigated the matter and found that the petitioners violated the rules and regulations of the police department. The appointing authority states that it cannot “simply turn a blind eye” because the petitioners’ conduct may have happened several years ago. Furthermore, the appointing authority indicates that regardless of whether it needs additional police personnel, the City of Millville and the public have a paramount interest in ensuring that criminal cases are investigated properly and addressed. It maintains that every case that the petitioners handle could potentially be called into question given the charges against them. In addition, the appointing authority indicates that the law authorizes the petitioners’ suspension without pay because their alleged conduct involves dishonesty. See *N.J.S.A. 40A:14-149.1*. Moreover, the appointing authority asserts that any hardship that the petitioners will suffer is monetary in nature, and therefore, can be remedied with back pay. Accordingly, it contends that the petitioners will not suffer irreparable harm. In addition, the petitioners argue that they should be restored to duty because there is an “escalating problem with violent crime.” The appointing authority states that this argument underscores the reason why it cannot risk restoring the petitioners back to work because of their questionable conduct. Therefore, the public interest is best served by upholding the petitioners’ immediate suspensions.

In response, the petitioners submit affidavits attesting to the truth of the information that they present. With regard to the June 19, 2015 meeting, the petitioners indicate that they recall a brief conversation with the City Clerk/Administrator and the Police Captain. However, they did not realize or appreciate that the meeting was a Loudermill hearing. The petitioners also claim that they were not explained the circumstances, the alleged facts, or other pertinent details regarding the appointing authority’s decision to suspend them without pay. Cornish asserts that because of this lack of explanation, his questions were limited and “basically unanswered.” Moreover, the petitioners contend that they were “certainly not prepared to defend [themselves] at that point from the charges set forth in the PNDA.” In addition, Rivera states that he needs his income to support himself and his family and notes that his wife is due to give birth to their child in November 2015. Cornish indicates that he lost his health insurance, which covered himself, his wife, and their five children. He notes that his children play certain sports which could result in injury at any time, and without health insurance, an extreme hardship and dilemma would occur.

Further, the petitioners claim that there are some inaccuracies in the Police Sergeant’s affidavit. The Police Sergeant failed to mention that after the other officer made internal complaints, but before his lawsuit, there had been an investigation conducted by a law firm into the officer’s complaints in 2013. As a result of the investigation, Rivera states that he received a written letter of

³ The complaint was filed in the Superior Court of New Jersey on January 15, 2014.

reprimand on December 17, 2013. Thereafter, he was sent for training in February 2015. Thus, Rivera maintains that there is no reason why he cannot be restored to duty pending the outcome of his disciplinary charges, since he believes that the reprimand already addressed the officer's complaints. Rivera states that the appointing authority wants a "second bite of the apple," as it is attempting to change a reprimand into a removal. It is noted that the written letter of reprimand served as a warning to Rivera to refrain from playing video games while on duty. In support of their request, the petitioners present a copy of the other officer's retaliation complaint filed in the Superior Court of New Jersey and related documents. The complaint alleges numerous allegations against Millville Police Officers, which includes video game playing on duty, mishandling of investigations, and filing false reports. As for Cornish, he contends that the officer did not specifically identify Cornish in his complaint as one of the officers who engaged in mishandling of files or improperly closing them. Moreover, he claims that the police department's computer reporting system has several flaws and malfunctions. Cornish emphasizes that he was not the subject of any disciplinary proceeding regarding the officer's complaint until his June 19, 2015 suspension. Given the foregoing, the petitioners urge the Commission to restore them to duty, or at the very least, order that their suspension be with pay and their family's health insurance coverage be reinstated.

CONCLUSION

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

Initially, the issue to be determined is whether the nature and seriousness of the charges support the necessity for an immediate suspension. In this regard, *N.J.S.A.* 11A:2-13 and *N.J.A.C.* 4A:2-2.5(a)1 provide that an employee may be suspended immediately 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.

The Commission finds that the petitioners continued employment would negatively impact the order and effective direction of public services in light of the findings of the internal affairs investigation. Clearly, the allegations against the petitioners, which involve serious neglect of their duty and dishonesty, cannot be casually regarded by the Commission. The Commission emphasizes that the

petitioners are Police Officers, who must enforce and promote adherence to the law. A Police Officer is a special kind of public employee.

His primary duty is to enforce and uphold the law. He carries a service revolver on his person and is constantly called upon to exercise tact, restraint and good judgment in his relationship with the public. He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public . . . See *Moorestown v. Armstrong*, 89 N.J. Super. 560, 566 (App. Div. 1965), cert. denied, 47 N.J. 80 (1966). See also *In re Phillips*, 117 N.J. 567 (1990).

Therefore, given the serious allegations against the petitioners and the fact that they are Police Officers, who are held to a higher standard, the public interest is best served by not having them on the job pending the outcome of their departmental proceedings. The Commission also finds that the immediate suspensions are necessary under the circumstances, notwithstanding the fact that the petitioners' alleged wrongdoing occurred in 2012 and 2013 and they continued employment after 2013. See e.g., *In the Matter of William Price* (MSB, decided December 20, 2006) (The fact that appellant remained on the job for four months during the investigation into his serious misconduct does not establish that appointing authority lacked basis to immediately suspend him). Further continuance of the petitioners' employment after the internal affairs investigation would have impugned the integrity of the Millville Police Department. Moreover, it is noted that although Rivera may have been reprimanded regarding his video game playing in December 2013 as a result of the other officer's internal complaints, Rivera was not charged with such conduct on the PNDA. The PNDA contained other allegations. In addition, regardless of whether Cornish was specifically identified in the other officer's retaliation complaint as having mishandled investigations, the formal internal affairs investigation which commenced after the complaint discovered the alleged wrongdoing on the part of the petitioners. Accordingly, the charges against the petitioners support the necessity for an immediate suspension.

Additionally, there is no requirement that an employee be given a formal hearing to determine the sufficiency of an immediate suspension.⁴ Rather, with regard to the requirements articulated in *Loudermill*; *supra*, N.J.S.A. 11A:2-13 and N.J.A.C. 4A:2-2.5(b) provide, in pertinent part, that when an employee is suspended immediately and without pay, the employee must be apprised, either orally or in

⁴ Compare N.J.A.C. 4A:2-2.7(a)1, which provides in part that when an appointing authority suspends an employee based on a pending criminal complaint or indictment, the employee must be served with a PNDA and the employee may request a departmental hearing within five days of receipt of the notice. A hearing shall be limited to the issue of whether the public interest would best be served by suspending the employee until disposition of the criminal complaint or indictment.

writing of why the suspension is sought, the charges and general evidence in support of the charges, and provided 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. In the present case, the Commission finds that the petitioners were served with PDNAs, which outlined why the immediate suspensions were sought and the charges and general evidence in support of the charges. Although the petitioners argue that the appointing authority representatives did not provide them with detailed information as to the basis for their suspension, due process requirements are satisfied by presenting *general* evidence in support of the suspension. The specifications as indicated in the PNDAs are the general evidence supporting the charges. Moreover, the record demonstrates that the petitioners were provided with sufficient opportunity to respond since they were personally served with PNDAs by appointing authority representatives during a meeting. The City Clerk/Administrator specifically advised the petitioners that the meeting was a hearing to provide them with the written charges and an opportunity to respond, which they apparently did. *See e.g., In the Matter of Joseph Auer* (MSB, decided October 23, 2002) (The requirements of *Loudermill* were met when a representative of the appointing authority personally served a Police Inspector with a PNDA, which stated the written charges against him and the reasons for the charges, at the same time of his immediate suspension).

As to the petitioners' request for interim relief, a critical issue in any disciplinary appeal is whether or not an employee has actually committed the alleged infractions. In this case, there are material issues of fact present. As such, the Commission will not attempt to determine the petitioners' major disciplinary appeals on the written record prior to the conclusion of the departmental proceedings. Likewise, the Commission cannot make a determination on whether the petitioners' proposed penalty of removal was inappropriate without the benefit of a full hearing record before it. Since the petitioners have not conclusively demonstrated that they will succeed in having the underlying charges dismissed, they have not shown a clear likelihood of success on the merits.

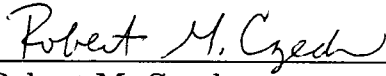
In addition, the petitioners have not shown that there is a danger of immediate or irreparable harm if their requests are not granted. While the Commission is cognizant of the petitioners' financial situations, the harm that they are suffering is financial in nature, and as such, can be remedied by the granting of back pay should they prevail at the departmental level. Moreover, if successful, the petitioners would receive additional amounts expended to maintain their health insurance coverage during the period of improper suspension or removal. *See N.J.A.C. 4A:2-2.10(d)*. Additionally, *N.J.A.C. 4A:4-2.9(e)* states in part that employees who have been removed for disciplinary reasons and are thereafter exonerated shall have an opportunity to take promotional examinations that have not yet been administered, or make-up examinations for active promotional lists, if

the suspension or removal resulted in the employee's non-participation in the promotional examination. Therefore, while the petitioners' separation would adversely affect their ability to obtain a promotion, the effect is not irreparable if they succeed in defending their case. In addition, the petitioners have failed to show that there would be no substantial harm to the public interest if they are reinstated in light of the seriousness of the allegations against them. As previously explained, the public interest is best served by not having the petitioners on the job until issues in their case are determined. Furthermore, since the Commission has upheld the petitioners' immediate suspensions, it would be contrary to the public interest for the petitioners' suspension to be with pay. Accordingly, the petitioners' requests for interim relief are denied.

ORDER

Therefore, it is ordered that these requests be denied.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 21ST DAY OF OCTOBER, 2015



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