



STATE OF NEW JERSEY
DECISION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Christopher
Chervenyak, Township of Hillside

CSC Docket No. 2017-929

Request for Interim Relief

ISSUED: DEC 12 2016 (JET)

Christopher Chervenyak, a Fire Fighter with Township of Hillside, represented by Craig S. Gumpel, Esq., petitions the Civil Service Commission (Commission) for relief of his immediate suspension effective August 30, 2016.

By way of background, on August 30, 2016, the petitioner was issued a Preliminary Notice of Disciplinary Action (PNDA) immediately suspending him and seeking "one-year suspension, indefinite suspension, and removal or resignation not in good standing effective August 30, 2016." The petitioner was charged with incompetency, inefficiency or failure to perform duties, conduct unbecoming a public employee, inefficiency or failure to perform duties, conduct unbecoming a public employee, neglect of duty, and violations of rules, regulations, and directives. Specifically, the appointing authority asserted that the petitioner had sick leave violations on August 6, 2016 and August 10, 2016.

In his request, the petitioner maintains that the appointing authority failed to provide him with a *Loudermill* hearing or a departmental hearing within 30 days of issuing disciplinary charges against him on August 30, 2016. In this regard, he asserts that the appointing authority did not respond to his request for a departmental hearing or provide him with the opportunity to review the charges against him prior to the suspension. Further, the petitioner contends that he has been subjected to irreparable harm, as he is unable to maintain his home and provide for his family as a result of his immediate suspension and that he has been deprived of his due process rights since he was not provided with a departmental hearing. Additionally, the petitioner asserts that he has a clear likelihood of

success on the merits as he was immediately suspended as a result of his authorized absences from work even though he provided the appointing authority a doctor's note confirming that he was under doctor's care for the days the incidents were alleged to have occurred. Moreover, there is no evidence that his immediate suspension is necessary to maintain safety, health, order, or effective direction of public services or that such services would be jeopardized if he is returned to duty. As such, the petitioner requests relief in the form of back pay, benefits, seniority, and immediate reinstatement to employment.

In support, the petitioner submits a certification indicating that he was suspended without pay on August 30, 2016. He states that while replacing some windows on August 4, 2016, he injured his wrist and, as a result, he called out sick from work on August 6, 2016. Further, the petitioner avers that, on August 9, 2016, he was treated by his physician who diagnosed him with tendonitis and authorized him off duty on August 6, 2016, August 10, 2016, and August 14, 2016. The petitioner adds that on August 10, 2016, Deputy Chief Douglas Ferrigno visited his home and confirmed that he was on sick leave. The petitioner contends that, on August 14, 2016, he was scheduled to start vacation leave, however, he lost a vacation day because he called out sick prior to the start of his vacation leave. The petitioner states that he was on vacation on August 18, 2016, August 22, 2016, and August 26, 2016 and immediately suspended when he returned to work on August 30, 2016. The petitioner states that the August 30, 2016 charges constitute a continuous pattern of harassment against him. In this regard, he was served with a PNDA on December 22, 2015 and January 24, 2016, and departmental hearings were not scheduled for those matters.

In response, the appointing authority, represented by Robert F. Varady, Esq., presents a protracted explanation regarding the PNDAs issued on December 22, 2015 and January 24, 2016, and the scheduling of the departmental hearings in those matters. Regarding the current matter, the appointing authority maintains that at the time of its October 20, 2016 response to the instant petition, it had been less than two months since the August 30, 2016 PNDA and it "has every intention of scheduling a hearing at the first mutually acceptable date."

Additionally, the appointing authority asserts that the petitioner's supervisor allegedly observed him working at his home business on various dates that he was authorized out sick from work in August 2016. Thus, since the December 22, 2015 and January 24, 2016 involve similar incidents to those of the subject matter, the appointing authority maintains that it is necessary to address all of the charges at one departmental hearing. As to the merits of the instant petition, the appointing authority maintains that the petitioner was properly charged on August 30, 2016 with violations of its sick leave policy. In this regard, an investigation revealed that he was working at a self-owned construction company while he was on sick leave. The appointing authority adds that the petitioner has not established a clear

likelihood of success, as the charges against him are serious and he has not attempted to schedule a departmental hearing. The appointing authority contends that the petitioner cannot be reinstated to employment without disposing of the charges, as it would have an adverse impact on services to the public. In this regard, given the charges, it is potentially harmful to the public and the township if the petitioner is allowed to remain on the job. Moreover, the appointing authority asserts that the petitioner has failed to show that he has been subjected to irreparable harm, as his situation can be remedied by back pay and benefits should the charges in this matter be dismissed.

In response, the petitioner asserts that the appointing authority submits no supporting documentation of its claim that it desires to consolidate the separate 2015 disciplinary charges with the August 30, 2016 charges. Further, the petitioner states that there is no connection between the 2015 disciplinary charges and those issued on August 30, 2016. He adds that it is the appointing authority's responsibility to schedule separate hearings for the charges that are still pending. In addition, the petitioner reiterates that he has continuously requested that the immediate suspension be rescinded and to schedule a *Loudermill* hearing. The petitioner states that he has not waived a hearing within 30 days of the August 30, 2016 disciplinary charges against him. He adds that the appointing authority does not refute that it has not scheduled a departmental hearing. In support, the petitioner submits a letter from the appointing authority dated August 30, 2016 indicating that he requested a departmental hearing and discovery. He also submits an e-mail dated September 21, 2016, requesting an update regarding the status of the petitioner's disciplinary matter. Petitioner also submits a letter dated September 23, 2015, where he requests, among other things, a date for the departmental hearing.

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 record reflects that the appointing authority complied with the requirements of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), and *N.J.A.C.* 4A:2-2.5(b). In a prior case addressing this issue, *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 in support of the charges at the

time of his suspension. By contrast, here, the petitioner received written charges against him and general evidence in support of the charges at the time of his suspension. Specifically, the petitioner was served with a PNDA at the time he was immediately suspended, setting forth the charges and specifications for the charges. It is noted that the specification portion of the PNDA constitutes the general evidence in support of the charges. Moreover, the petitioner was provided with sufficient opportunity to respond to the charges before the appointing authority and he filed his request for a departmental hearing on the day he was issued the PNDA.

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 the safety, health, order or effective direction of public services. The present record is devoid of a sufficient explanation justifying the appellant's immediate suspension without pay, pursuant to the standards set forth in *N.J.S.A.* 11A:2-13 and *N.J.A.C.* 4A:2-2.5(a)1. The appointing authority fails to articulate how the petitioner's alleged conduct made him unfit for duty. Moreover, the petitioner was not criminally charged or indicted. See *N.J.A.C.* 4A:2-2.7. Although the appointing authority states that it contemplated criminal charges against the petitioner at some point, there is no evidence that criminal charges were filed. See *In the Matter of Thomas Condento* (MSB, decided June 21, 2006) (It was found that the appellant's alleged operation of a motorcycle while out of work due to a foot injury did not constitute a valid basis for an immediate suspension); *In the Matter of Kenneth Poole* (MSB, decided May 18, 2005) (It was found that the appellant's alleged misrepresentation of his medical condition in a Workers' Compensation proceeding did not constitute a sufficient basis for an immediate suspension); *In the Matter of Thomas Pappas* (MSB, decided December 15, 2004) (It was found that the appellant's alleged participation in physical activities while out of work and collecting Workers' Compensation benefits did not constitute a sufficient basis for an immediate suspension without pay, pending a departmental hearing). Accordingly, the appointing authority has not shown that an immediate suspension was warranted under the circumstances and the petitioner has established his entitlement to reinstatement with back pay and benefits from August 30, 2016. If, after the departmental hearing charges are sustained, then a disciplinary penalty may be imposed upon issuance of a Final Notice of Disciplinary Action (FNDA).

Further, appointing authority has violated *N.J.A.C.* 4A:2-2.5. In this regard, pursuant to *N.J.A.C.* 4A:2-2.5(d), a departmental hearing, if requested, shall be held within 30 days of the PNDA unless waived by the employee or at a later date as agreed to by the parties. An appointing authority's unilateral delay in holding a departmental hearing does not warrant a dismissal of the charges. See *Goodman v. Department of Corrections*, 367 *N.J. Super.* 591 (App. Div. 2004). However, the petitioner is entitled to some form of relief for such a delay in violation of the rules.

See In the Matter of Patrick Dunican, Docket No. A-5937-99T1 (App. Div. November 9, 1999); *In the Matter of Edward Wise* (MSB, decided July 19, 1999); *In the Matter of Kenneth Hixenbaugh*, *supra*. In this case, the appellant requested a departmental hearing when he was immediately suspended as a result of the PNDA that was issued on August 30, 2016. It is irrelevant to this matter that the appointing authority had two hearings pending to be scheduled as a result of the PNDAs issued at an earlier time. The record in this matter shows that the appointing authority did not attempt to schedule a hearing for the August 30, 2016 charges as it desired to consolidate three pending disciplinary actions. Although such procedural deficiencies do not warrant the dismissal of the charges, the appointing authority is reminded that in the future it is required to abide by *N.J.A.C. 4A:2-2.5(d)* when immediately suspending an employee who is subject to Civil Service law and rules. Further, as noted above, since the Commission has already determined that there was not a sufficient basis to warrant the appellant's immediate suspension and awarded reinstatement with back pay and benefits to the date of the imposed suspension, no further remedy is warranted.

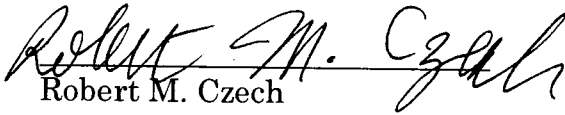
Finally, the appellant is entitled to reasonable counsel fees pursuant to *N.J.S.A. 11A:2-22*, which provides that the Commission may award reasonable counsel fees to an employee as provided by rule, and *N.J.A.C. 4A:2-2.12*, which provides that for disciplinary appeals, reasonable counsel fees are awarded where an employee has prevailed on all or substantially all of the primary issues in an appeal. While this matter is not specifically a disciplinary appeal, since the Commission is not reviewing the merits of the charges or the recommended penalty at this time, it is clear that the effect of the appellant's improperly imposed immediate suspension from duty was an involuntary separation from employment, which is the basis of all major disciplinary actions. Further, it is clear that the appointing authority misapplied the disciplinary rules in its treatment of the petitioner. Therefore, under these particular circumstances, the Commission finds that this matter is substantially equivalent to an appeal of a major disciplinary action. Since he has prevailed on the primary issue of his appeal, the petitioner is entitled to an award of reasonable counsel fees. *See 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 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). However, it is noted that the appellant is only entitled to counsel fees regarding his attorney's actions in respect to the instant petition on the issue of the immediate suspension.

ORDER

The Civil Service Commission orders that the petitioner be immediately reinstated to his position as a Fire Fighter and granted back pay, benefits, and seniority from the effective date of his immediate suspension, August 30, 2016, until the actual date of his reinstatement or the date of any imposed disciplinary action, whichever occurs first. If, after the departmental hearing charges are sustained, a disciplinary penalty may be imposed upon issuance of a FNDA. Additionally, the Commission grants reasonable counsel fees as described above. An affidavit in support of reasonable counsel fees shall be submitted to the appointing authority within 30 days of the issuance of this decision. Moreover, it is ordered that the appointing authority immediately schedule a departmental hearing on this matter, which shall commence not later than 30 days from the issuance of this decision, unless otherwise agreed to by the parties.

In the event that this Order is not fully complied with within ten (10) days of issuance of this decision, the Commission orders that a fine be assessed against the appointing authority in the amount of \$100 per day beginning on the 11th day from the issuance of this decision and continuing for each day of continued violation, up to a maximum of \$10,000.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 7th DAY OF DECEMBER, 2016



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