STATE OF NEW JERSEY

In the Matter of Telina Hairston, City of East Orange	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC Docket Nos. 2017-4013 and 2018-739	:	Request for Enforcement Court Remand

ISSUED: MARCH 29, 2018 (DASV)

The Superior Court of New Jersey, Appellate Division, has vacated the decision of the Administrative Law Judge (ALJ), which was deemed adopted as the final decision of the Civil Service Commission (Commission), reversing the 100 calendar day suspension of Telina Hairston, a Police Officer with the City of East Orange, and remanded the matter to the Commission for further proceedings. *See In the Matter of Telina Hairston, City of East Orange Police Department,* Docket No. A-4850-15T2 (App. Div. September 7, 2017). The court did not retain jurisdiction. Copies of the Appellate Division's decision and the ALJ's decision are attached. Additionally, Hairston requests enforcement of the Commission's decision, *In the Matter of Telina Hairston* (CSC, decided February 8, 2017), which denied the appointing authority's stay request and granted her back pay and counsel fees.

By way of background, Hairston was served with a Preliminary Notice of Disciplinary Action (PNDA), dated June 26, 2014, proposing a six-month suspension or removal from employment and charging her with various infractions based on allegations that she willfully disobeyed a direct order from her supervisor on December 28, 2013 to relieve another officer and for subsequently reporting out-of-work due to a bogus illness.[1] The appointing authority also claimed that Hairston had violated a "Last Chance Agreement" that she and the appointing authority entered into on March 24, 2014. This agreement, which was not approved by the Commission until June 18, 2014 in *In the Matter of Telina Hairston* (decided, June

[1] The City Administrator signed the PNDA as the appointing authority for the City of East Orange.

18, 2014),[2] resolved disciplinary charges from January and March 2013 concerning attendance infractions and placed Hairston on probation from March 24, 2014 to March 23, 2015. Hairston requested that the Commission order the deletion of the reference to her violating the "Last Chance Agreement" in the June 26, 2014 PNDA. Upon its review, the Commission found that it was simply not possible for Hairston to have violated the "Last Chance Agreement" or to consider it for progressive discipline purposes if it did not exist in December 2013, when the alleged current infractions occurred. Thus, similar to the appellant in *In the Matter of Vanessa Warren* (CSC, decided November 21, 2012), *modified on remand*, Docket No. A-5092-09T3 (App. Div. August 3, 2012), Hairston did not have a "realistic" opportunity to have corrected her behavior in December 2013 based on a March 2014 agreement, notwithstanding the fact that she was not charged until June 2014 for the December 2013 incident and the agreement dealt with charges from January and March 2013. Accordingly, the Commission granted interim relief and ordered the appointing authority to amend the PNDA and delete any reference to the "Last Chance Agreement." *See In the Matter of Telina Hairston* (CSC, decided December 17, 2014).

On January 8, 2015, a new PNDA was issued against Hairston, which related back to the June 26, 2014 PNDA regarding the December 28, 2013 incident. The amended PNDA charged Hairston with "other sufficient cause" pursuant to *N.J.A.C.* 4A:2-2.3(a)12 and violations of departmental rules and regulations relating to insubordination, neglect of duty, malingering, and sick leave procedures. As ordered by the Commission in Hairston's interim relief petition, the reference to the "Last Chance Agreement" in the specifications was deleted. A departmental hearing was then held, and on March 24, 2015, a Final Notice of Disciplinary Action (FNDA) [3] was issued upholding the charges against Hairston and suspending her for 100 calendar days, from April 6, 2015 through July 14, 2015. Thereafter, Hairston appealed her suspension, and the matter was transmitted to the Office of Administrative Law (OAL) for a hearing before an ALJ.

As indicated in the initial decision, the ALJ found that on December 28, 2013, Hairston refused a direct order to relieve a fellow officer, which constituted insubordination. She was guilty of neglecting her duty by not remaining at work and using sick leave when there was no indication she was ill. Thus, the ALJ

---

[2] Hairston had been issued Final Notices of Disciplinary Action on January 22, 2013 and May 12, 2013, on charges of chronic and excessive absenteeism, for which she received a suspension for 30 days and 45 days, respectively. Upon her appeal to the Commission, the matters were transmitted to the Office of Administrative Law for a hearing and consolidated. Subsequently, the parties entered into a settlement agreement, which included the "Last Chance Agreement" and Hairston's acceptance of a 60-day suspension and 15 days of back pay for withdrawal of her appeal and request for a hearing. The settlement agreement was acknowledged by the Commission at its June 18, 2014 meeting.

[3] The FNDA incorrectly indicated a "3/24/14" date, but it is evident from the other dates noted in the FNDA that the FNDA was issued on March 24, 2015.

determined that the charge of malingering had been proven and Hairston violated the Police Department's sick leave policy. However, Hairston argued that the charges against her should be dismissed since the appointing authority allegedly violated the "45-day rule" as set forth in *N.J.S.A.* 40A:14-147. That statutory provision indicates in relevant part that "a complaint charging a violation of the [police department's] internal rules and regulations established for the conduct of a law enforcement unit shall be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based." Upon her review, the ALJ found that a detective from the Professional Standards Unit issued a memorandum to the Police Chief on May 12, 2014 regarding the investigation of Hairston's alleged conduct, but the charges were not filed until January 2015. The ALJ stated that "[t]his was not complex; the City had all the necessary information in May, and for whatever reason did not bring charges until the following year well beyond the forty-five days." It is noted that the May 12, 2014 memorandum was admitted into evidence. The memorandum reveals that various statements and interviews were taken and documents and computer programs were reviewed regarding Hairston's alleged conduct on December 28, 2013. The dates of the items or events spanned throughout the period from December 28, 2013 through May 7, 2014. The Professional Standards Unit recommended that the Police Chief review the investigation if disciplinary action against Hairston was warranted. Thereafter, the June 26, 2014 PNDA was filed against Hairston and signed by the acting City Administrator.

Additionally, the ALJ noted that the appointing authority did not offer separate evidence to sustain the charge of "other sufficient cause" and focused solely on the departmental rules and regulations. Thus, the ALJ concluded that the administrative charge of "other sufficient cause" held no substance "to save a set of stale internal-rule charges." Therefore, the ALJ recommended that the charges against Hairston be dismissed and her 100 calendar day suspension be reversed. However, the Commission did not have a quorum at the time of the ALJ's initial decision, and Hairston did not consent to an additional extension of time for the Commission to render its decision. By letter dated June 20, 2016, the parties were advised that the ALJ's recommended decision, reversing the suspension and awarding back pay and counsel fees, was deemed adopted as the Commission's final decision pursuant to *N.J.S.A.* 52:14B-10(c). *See In the Matter of Telina Hairston* (CSC, Deemed Adopted, June 20, 2016).

Thereafter, the appointing authority pursued an appeal of the final decision with the Appellate Division. As set forth in *In the Matter of Telina Hairston, City of East Orange Police Department,* Docket No. A-4850-15T2 (App. Div. September 7, 2017), the Appellate Division vacated the decision, finding that the ALJ erroneously relied on the date that the amended PNDA was issued to Hairston for tolling the 45-day deadline, rather than June 26, 2014, the date that the original PNDA was

issued. She maintained that the final decision was proper because the appointing authority failed to introduce the June 26, 2014 PNDA into evidence. However, the court was not persuaded and found that Hairston had ignored the fact that she filed a request for interim relief challenging the original PNDA that had been issued on June 26, 2014. Moreover, the court indicated that there was no requirement that the June 26, 2014 PNDA be introduced into evidence, noting that the Commission had already determined in its December 17, 2014 decision that the charges were first filed on June 26, 2014. However, the court did not reverse the final decision since Hairston challenged the timeliness of the charges. It noted that the disagreement presented factual disputes that must first be decided by the Commission after the development of an evidentiary record. Consequently, the court remanded the matter to the Commission to determine when the appointing authority obtained sufficient information to file the original PNDA. Additionally, since both the original and amended PNDAs included a charge of "other sufficient cause," which the court determined was not subject to the 45-day deadline, it stated that a separate determination should be made on that charge. Lastly, the court concluded that if the Commission determines that the charges relating to the departmental rules and regulations were timely issued on Hairston or there was sufficient cause to impose discipline, the Commission should evaluate whether the penalty imposed was proper and award counsel fees as appropriate.

It is noted that the appointing authority requested a stay of the Commission's final decision pending its appeal with the Appellate Division. In denying the stay, the Commission emphasized that it did not render a formal determination on Hairston's suspension, as the ALJ's recommended decision, including the order of back pay and counsel fees, was deemed adopted. Thus, it stated that it would be inappropriate to review the merits of the appointing authority's case given that the Commission did not reach an actual decision in the first instance and neither party petitioned the Commission for reconsideration of that decision. The Commission concluded that the issues raised by the appointing authority as to whether or not the "45-day rule" was violated was best addressed by the Appellate Division. Additionally, since the stay was denied, the Commission ordered back pay to be paid to Hairston as well as reasonable counsel fees paid within 30 days of the issuance of the decision. *See In the Matter of Telina Hairston* (CSC, decided February 8, 2017).

On or about June 2, 2017, the Commission received a request for enforcement from Hairston. She indicated that the appointing authority did not pay her back pay or counsel fees as ordered by the Commission on February 8, 2017. Therefore, Hairston requested that since the appointing authority failed to make a good faith effort to comply with the Commission order, it be assessed a fine and that interest be awarded on her back pay. The appointing authority, despite being provided the opportunity, did not respond to the request for enforcement.

On remand to the Commission, the parties were given the opportunity to provide additional argument and documentation in accordance with the Appellate Division's determination. In response, the appointing authority, represented by Patricia C. Melia, Esq., submits that a sufficient factual record has already been established before the OAL to find that the June 26, 2014 PNDA was not time-barred by the "45-day rule." Thus, there is no need to remand the matter to the OAL for further fact finding. The appointing authority maintains that the June 26, 2014 PNDA was issued within 45 days of when the investigation closed on May 12, 2014. Moreover, it contends that no evidence adduced at the OAL hearing suggests that there was sufficient information prior to the May 12, 2014 memorandum to have filed the charges against Hairston, nor was there evidence of "bureaucratic delay" during the investigation. Additionally, the appointing authority argues that the ALJ found that Hairston was insubordinate, violated the prohibition on malingering, and violated the sick leave policy. The appointing asserts that, but for the ALJ's error in dismissing the charges pursuant to the "45-day rule," the ALJ would have upheld the charges against Hairston. Furthermore, it contends that it has met its burden of proving the charge of "other sufficient cause" in that Hairston "violated the implicit standard of good behavior expected of a police officer." The appointing authority states that, although the proofs are the same, this charge is separate and distinct from the charges relating to the violation of departmental rules and regulations. It is noted that in its exceptions to the ALJ's initial decision, the appointing authority maintained that the credible testimony of the witnesses and the results of the departmental investigation established that Hairston violated departmental rules and regulations and sufficient cause had been shown to impose "progressive discipline."

In addition, the appointing authority contends that the 100 calendar day suspension was an appropriate penalty given Hairston's prior disciplinary history. The appointing authority emphasizes that Hairston received a 45-day suspension for separate charges in the "same month" that the current incident occurred, proving that "such major discipline did not seem to thwart her unacceptable behavior." As previously noted, Hairston was suspended for 45 days and 30 days and settled the matters to a 60-day suspension on appeal. Thus, the appointing authority maintains that it has followed the principle of progressive discipline in imposing a 100 calendar suspension on Hairston, noting that, in addition to the 60-day suspension, Hairston received a written reprimand in 2008, a one-day suspension in 2009, and a 10-day suspension in 2011. The ALJ indicated that these disciplinary actions were for sick leave infractions. Accordingly, the appointing authority urges the Commission to uphold the penalty.

In response, Hairston, represented by Paul W. Tyshchenko, Esq., requests that her appeal be remanded to the OAL to develop an evidentiary record as contemplated by the Appellate Division. She maintains that the court found it

necessary to develop an evidentiary record to resolve the factual disputes present in her case.

CONCLUSION

Initially, Hairston requests that this matter be remanded to the OAL per the Appellate Division's directive for development of an evidentiary record. However, the Appellate Division did not actually direct that the matter be remanded to the OAL for further hearing. The court indicated that it was the appointing authority's positon that sufficient information to issue the PNDA was first supplied to the Police Chief by way of the May 12, 2014 memorandum from the Professional Standard's Unit. Hairston argued that the appointing authority had sufficient information prior to the issuance of the report. The court stated that this "disagreement presents factual disputes that must first be decided in the first instance by the Commission after the development of an evidentiary record." The Appellate Division's directive to develop an evidentiary record need not be in the form of a hearing, as a hearing has already taken place. Rather, in accordance with the Appellate Division's determination, the parties were given the opportunity to supplement the record with argument and documentation. The parties have submitted additional information for the Commission's review. This information, as well as the OAL hearing record, constitute the full evidentiary record. Accordingly, the Commission does not find it necessary to remand this matter to the OAL for further hearing.

It is undisputed that Hairston was issued a PNDA, dated June 26, 2014. This PNDA related to the incident which occurred on December 28, 2013. Hairston subsequently requested interim relief, which the Commission granted. The appointing authority was ordered to delete the reference to the "Last Chance Agreement" and amend the PNDA. On January 8, 2015, the new PNDA was issued. The Appellate Division indicated that the ALJ erroneously relied on the amended PNDA to find that the charges were time-barred. However, as noted previously, the ALJ's initial decision was deemed adopted. In other words, the Commission did not have an opportunity to review the matter *de novo* on appeal due to a lack of quorum and the parties did not unanimously consent to an extension. Had the Commission reviewed this matter in the first instance, it would have concluded that the charges were first filed on June 26, 2014. Further, as the Appellate Division indicated, there was no requirement that the June 26, 2014 PNDA be admitted to evidence. Hairston was fully aware of this PNDA, having challenged the same in her petition for interim relief. However, the question remains as to whether the "45-day rule" applies to these charges and if the charges should be dismissed.

N.J.S.A. 40A:14-147 provides in relevant part that "a complaint charging a violation of the [police department's] internal rules and regulations established for the conduct of a law enforcement unit shall be filed no later than the 45th day after

the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based." This statute is designed to protect Police Officers from an appointing authority unduly and prejudicially delaying the imposition of disciplinary action. However, the statute does not prohibit an appointing authority from doing a proper investigation into a matter to determine whether disciplinary charges are necessary and appropriate.[4] The fact that such normal and necessary investigation may span a period of time, which may exceed 45 days, does not automatically call for the dismissal of such charges. Rather, for the purposes of *N.J.S.A.* 40A:14-147, the charges must be brought within 45 days of the "person filing the complaint" obtaining sufficient information to bring such charges. The "person filing the complaint" is generally acknowledged to be the Police Chief. *See N.J.S.A.* 40A:14-118. Therefore, the 45 days start when the Police Chief has sufficient knowledge to bring the charges against an officer. *See Joseph McCormick v. Lawrence Township*, Docket No. A-2811-01T3 (App. Div., April 23, 2003); *See also, In the Matter of Christopher Silva* (MSB, decided January 30, 2001); *Compare, In the Matter of Joseph F. Richardson, City of Camden,* Docket No. A-2740-05T5 (App. Div., August 27, 2007) (Former Police Chief had sufficient knowledge of the appellant's alleged misconduct on July 22, 2002, after he met with all principals involved in the June 18, 2002 incident. Since disciplinary charges were not brought until July 2004, well outside the 45-day time frame, Appellate Division affirmed the former Merit System Board's conclusion that the statute required dismissal of the disciplinary charges.) However, this provision does not allow an appointing authority to unnecessarily delay the bringing of charges by not promptly attempting to obtain sufficient information to bring charges and promptly forwarding such information to the person responsible for filing the complaint.[5] Under such circumstances, it would be appropriate to dismiss charges against a police officer based on the "45-day rule." Conversely, the statute is undoubtedly not designed to force an appointing authority to bring disciplinary charges without properly investigating the matter to ensure that sufficient information to bring such charges is obtained.

In the present case, the record shows that a detective from the Professional Standards Unit issued a memorandum to the Police Chief on May 12, 2014 regarding the investigation of Hairston's alleged conduct. The memorandum reveals that various statements and interviews were taken and documents and computer programs were reviewed from December 28, 2013 through May 7, 2014 regarding Hairston's alleged conduct on December 28, 2013. Based on this information, it does not appear that the investigation was unduly delayed. Indeed,

---

[4] In fact, the Internal Affairs Policies and Procedures promulgated by the Attorney General (AG Guidelines), under the section covering the investigation of internal complaints, requires that all allegations of officer misconduct *shall* be thoroughly and objectively investigated to their logical conclusion. AG Guidelines at 18-23.

[5] The AG Guidelines state that an agency would have a difficult time justifying an extensive bureaucratic delay once any member of that agency has established sufficient information. *Id.*

Hairston does not dispute the foregoing. Rather, as the ALJ noted in the initial decision, the "[a]ppellant points out that the memo issued by Detective Charles Hinton of the Department's Professional Standards Unit to Chief [William] Robinson was dated May 12, 2014. But the charges were not filed until January 2015, and, as the appellant points out, no evidence supports any continuing investigation." What the ALJ and the Hairston erroneously concluded was that the charges were filed on January 2015. Thus, the Commission is persuaded that the investigation concluded and the Police Chief had sufficient information as of the May 12, 2014 memorandum to file the charges against Hairston. Therefore, since the PNDA was filed on June 26, 2014 PNDA, on the 45th day from the May 12, 2014 memorandum, there is no need for further inquiry in that regard as there has been no violation of the "45-day rule."

Furthermore, Hairston was charged with "other sufficient cause," a violation of Title 4A of the New Jersey Administrative Code. The Commission notes that the 45-day time limitation contained in the AG Policy and *N.J.S.A.* 40A:14-147 only expressly applies to charges related to violations of departmental rules and regulations. *See e.g.*, *Hendricks v. Venettone*, Docket No. A-1245-91T5 (App. Div. October 29, 1992); *In the Matter of Bruce McGarvey v. Township of Moorestown*, Docket No. A-684-98T1 (App. Div. June 22, 2000). *See also, In the Matter of James Cassidy* (MSB, decided August 12, 2003); *In the Matter of Steven Palamara* (MSB, decided April 10, 2002). *Compare*, *In the Matter of Kason Cheeks* (CSC, decided August 19, 2009) (An appointing authority cannot resurrect a time-barred internal rule charge by using a Title 4A charge. To do so would undermine the intent of the "45-day rule" since it would essentially permit an appointing authority to charge an employee outside of the 45-day time limit with a Title 4A charge for a violation of any internal rule.) Regardless, since the Commission has found that the charges were filed within the required 45 days, it is clear that the charge of "other sufficient cause," which essentially was comprised of a number of upheld violations of department rules and regulations, should not be dismissed.

As to the merits of the charges, the Commission has reviewed the record in this matter, including the ALJ's initial decision, the exceptions and replies to the exceptions to the ALJ's initial decision, and the supplemental information submitted by the parties on remand, and agrees with the ALJ's findings of fact that Hairston violated departmental rules and regulations relating to insubordination, neglect of duty, malingering, and sick leave procedures. Hairston refused to follow a direct order to relieve a fellow officer. She neglected her duty to remain at work, especially at a time when the department was experiencing a high volume of priority calls. Additionally, there was no competent evidence which demonstrated that Hairston was ill, although she used sick leave to excuse her from duty. Thus, Hairston is guilty of the department rule that prohibits malingering or feigning illness. Moreover, the ALJ found that Hairston appeared at a late night party, which "generally undercuts any inference that watching her minor children was her

primary objective, or that she actually was ill." Accordingly, the Commission agrees with the ALJ that Hairston violated the sick leave policy of the department.

With regard to the penalty, the Commission's review is *de novo*. In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway State Prison*, 81 *N.J.* 571, 580 (1980). It is settled that the principle of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007). In the instant matter, Hairston's disciplinary record does not provide any mitigating circumstance. Her record reflects a written reprimand in 2008, a one-day suspension 2009, a 10-day suspension in 2011, and a 60-day suspension as agreed to by settlement in 2014. These suspensions include attendance-related infractions, which are also at issue in the current disciplinary action. Thus, the Commission finds that a 100 calendar day suspension, imposed in 2015, was not unduly harsh considering Hairston's overall disciplinary history, her recent infractions prior to 2015, and the seriousness of the subject offense. The Commission emphasizes that attendance at work is the most basic duty of an employee, especially in the area of public safety, and employees who cannot maintain an acceptable attendance record can expect to be subject to disciplinary action, up to and including removal. Further, it is recognized that a municipal Police Officer is 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).

Hairston's insubordination and neglect of duty contradict the high standard expected of a Police Officer. Therefore, the Commission finds that the penalty imposed by the appointing authority was consistent with progressive discipline principles. Accordingly, based on the totality of the record, the Commission upholds the 100 calendar day suspension.

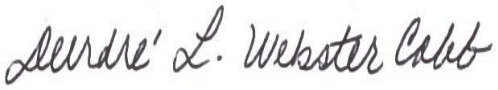
Since the Commission has upheld Hairston's suspension, the Commission vacates its prior order in *In the Matter of Telina Hairston* (CSC, decided February 8, 2017), which directed that Hairston be paid back pay with interest and counsel fees. Additionally, Hairston's request for enforcement is now moot.

ORDER

The Commission finds that the action of the appointing authority in imposing a 100 calendar day suspension was justified. The Commission, therefore, affirms that action and dismisses the appeal of Telina Hairston. Additionally, the Commission vacates its prior order in *In the Matter of Telina Hairston* (CSC, decided February 8, 2017).

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 27TH DAY OF MARCH, 2018



Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachments

c: Patricia C. Melia, Esq.
Solomon Steplight
Paul W. Tyshchenko, Esq.
Telina Hairston
Pamela Ullman, DAG
Kelly Glenn
Walker Ristau
Clerk, Appellate Division
Records Center

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4850-15T2

IN THE MATTER OF TELINA HAIRSTON,
CITY OF EAST ORANGE POLICE DEPARTMENT.

Submitted August 30, 2017 – Decided September 7, 2017

Before Judges Rothstadt and Vernoia.

On appeal from the New Jersey Civil Service Commission, Docket No. 7114-15.

Weiner Law Group, LLP, attorneys for appellant City of East Orange Police Department (Mark A. Tabakin, of counsel; Patricia C. Melia, on the briefs).

Caruso Smith Picini, PC, attorneys for respondent Telina Hairston (Timothy R. Smith, of counsel; Wolodymyr P. Tyshchenko, on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent Civil Service Commission (Pamela N. Ullman, Deputy Attorney General, on the statement in lieu of brief).

PER CURIAM

The City of East Orange Police Department appeals the Civil Service Commission's final agency decision reversing the City's 100 calendar day suspension of police officer Telina Hairston.

The Commission adopted an administrative law judge's determination that a reversal of the suspension was required because the City failed to file its disciplinary complaint against Hairston within the forty-five day time period required by N.J.S.A. 40A:14-147. We vacate the Commission's decision and remand for further proceedings.

The incident giving rise to the disciplinary action against Hairston occurred on December 28, 2013, when the police department experienced a high volume of emergencies and had too few officers on duty. To address the shortage of officers, Hairston was ordered to continue working beyond her scheduled 8:00 a.m. to 4:00 p.m. shift. She refused the order, alleging she could not continue to work because she was required to attend to her children at her home. Hairston reported she was sick and left work at approximately 7:00 p.m.

Later that evening, Hairston went to a birthday party at a hotel. Other police officers who also attended the party reported seeing Hairston there to the police department.

The department's Professional Standards Unit conducted an investigation of Hairston's refusal to comply with the order to continue working, her claim she could not work because she was required to care for her children, her report of being sick, and

her attendance at the party. The Unit issued a May 12, 2014 investigative report to the Chief of Police.

On June 26, 2014, the police department issued a preliminary notice of disciplinary action (PNDA) charging that on December 28, 2013, Hairston willfully refused a direct order, neglected her duties, and "reported out of duty due to illness knowing she was not ill." The PNDA also alleged Hairston violated a March 24, 2014 "Last Chance Agreement" between her and the City, and charged Hairston with violating department rules, regulations and a general order. It also cited Hairston for violating N.J.A.C. 4A:2-2.3(a)(12), which permits the imposition of discipline for "[o]ther sufficient cause." The PNDA advised Hairston that the City might take action to suspend her for 180 working days or remove her from her position.

Hairston filed a motion with the Commission requesting dismissal of the portion of the PNDA charging her with violating the Last Chance Agreement. In a December 19, 2014 decision and order, the Commission granted Hairston's motion and directed the City "to amend the [June 26, 2014] PNDA and delete any reference to the 'Last Chance Agreement.'"

In accordance with the Commission's order, on January 8, 2015, the City filed an amended PNDA, deleting only the charge alleging a violation of the Last Chance Agreement, and reducing

the potential suspension period from 180 to 100 days. The amended PNDA otherwise asserted charges identical to those in the original June 26, 2014 PNDA.

A City hearing officer sustained the charges and determined Hairston should be suspended for 100 days. The City subsequently issued a final notice of disciplinary action implementing the 100-day suspension. Hairston appealed to the Commission.

Following an evidentiary hearing, an administrative law judge issued a written initial decision reversing the 100-day suspension. The judge found Hairston was insubordinate by failing to comply with a direct order to continue working, committed neglect of duty by invoking sick leave when she was not ill, and violated the department's rules and regulations prohibiting malingering by feigning illness to avoid performing her duties. The judge also found Hairston violated the City's sick leave policy.

Nevertheless, the judge dismissed the charges against Hairston, finding the City failed to file the charges within the forty-five day period required under N.J.S.A. 40A:14-147. Noting the statute requires that charges be filed within forty-five days of the time the department "obtain[s] sufficient information to file the matter upon which the complaint if based," N.J.S.A. 40A:14-147, the judge observed that the Professional Services Unit

investigation report was completed on May 12, 2014, and found the charges were not filed until January 2015. The judge dismissed the charges, finding they were not filed within the statute's forty-five day deadline, and entered an order reversing the 100-day suspension.

The City filed exceptions to the judge's initial decision and order with the Commission,[1] but the Commission never directly considered them. A lack of a quorum caused multiple adjournments, but the Commission ultimately adopted by default the judge's initial decision as its final agency decision in accordance with N.J.S.A. 52:14B-10(c), and awarded Hairston counsel fees pursuant to N.J.A.C. 4A:2-2.12. This appeal followed.

Our review of an agency's decision is limited. In re Stallworth, 208 N.J. 182, 194 (2011). We "afford[] a 'strong presumption of reasonableness' to an administrative agency's exercise of its statutorily delegated responsibilities." Lavezzi v. State, 219 N.J. 163, 171 (2014) (quoting City of Newark v. Nat. Res. Council, Dep't of Envtl. Prot., 82 N.J. 530, 539, cert. denied, 449 U.S. 983, 101 S. Ct. 400, 66 L. Ed. 2d 245 (1980)). A reviewing court "should not disturb an administrative agency's

[1] Hairston did not file any exceptions to the judge's findings that she committed the offenses charged in the final notice of disciplinary action.

determinations or findings unless there is a clear showing that (1) the agency did not follow the law; (2) the decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial evidence." In re Virtua-West Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422 (2008). The party challenging the agency's action has the burden of proving that the action was arbitrary, capricious, or unreasonable. Lavezzi, supra, 219 N.J. at 171.

Here, the Commission's determination that the charges were filed beyond the time permitted by N.J.S.A. 40A:14-147 was based on the erroneous finding that the charges were first filed on January 8, 2015. That was simply not the case. The record establishes the charges were first filed on June 26, 2014.[2] Indeed, Hairston filed a motion challenging the inclusion of the Last Chance Agreement charge in the June 26, 2014 PNDA, and the Commission, in its December 19, 2014 decision on the motion, found the charges were first filed on June 26, 2014. Of course, Hairston could not have filed a motion in 2014 challenging charges that had not yet been filed, and the Commission could not have issued a decision in December 2014 concerning charges that were first filed one month later in January 2015. Nor could the Commission have

[2] Hairston does not dispute that the original charges were first filed on June 26, 2014.

directed in December 2014 that the City amend charges that had not been previously filed.

The Commission's dismissal of the charges based on the finding they were first filed in January 2015 is not supported by the record and, for the reasons stated, contradicts the Commission's prior factual findings and decision. The Commission therefore erred in concluding the charges were time-barred under N.J.S.A. 40A:14-147.

Hairston contends the Commission's determination was proper because the City failed to introduce the June 26, 2014 PNDA into evidence. She argues that because only the January 2015 PNDA was introduced into evidence, the record supports the Commission's determination that the charges were first filed in 2015. We are not persuaded. Hairston ignores that she filed a motion in 2014 challenging the charges contained in the June 26, 2014 PNDA and, as such, is fully aware the original charges were filed on June 26, 2014.

Moreover, there was no requirement that the June 26, 2014 PNDA be introduced into evidence. The Commission had already determined in its December 19, 2014 decision and order that the charges were first filed on June 26, 2014. We are satisfied the administrative law judge and Commission erred by ignoring the Commission's prior determination that the charges were filed on

June 26, 2014, and finding the charges were time-barred under N.J.S.A. 40A:14-147.

We do not, however, reverse the Commission's final agency decision. Hairston's challenge to the timeliness of the charges requires a determination as to when the department obtained sufficient information to file the June 26, 2014 PNDA. See N.J.S.A. 40A:14-147; Grubb v. Borough of Hightstown, 331 N.J. Super. 398, 405 (Law Div. 2000) (holding that "a violation of the internal rules and regulations established for the conduct of a law enforcement unit," N.J.S.A. 40A:14-147, must be filed within forty-five days "after the date on which the department obtain[ed] 'sufficient information' to file the complaint"), aff'd, 353 N.J. Super. 333 (App. Div. 2002). Although the Commission erred in finding the charges were first filed in January 2015 and incorrectly dismissed the charges on that basis, the record is inadequate to permit a determination as to whether the charges were otherwise timely filed under N.J.S.A. 40A:14-147.

The City contends that sufficient information to file the PNDA was first supplied with the Professional Standards Unit's May 12, 2014 report. Hairston argues the City had sufficient information prior to the issuance of the report. The disagreement presents factual disputes that must be decided in the first

instance by the Commission after the development of an evidentiary record.

The City correctly states that the forty-five day deadline applies only to charges alleging violations of the department's "internal rules and regulations." N.J.S.A. 40A:14-147. The PNDA alleges violations of the department's rules and regulations, but also charges there is "other sufficient cause" for the imposition of discipline. See N.J.A.C. 4A:2-2.3(a)(12). We agree the separate charge alleging "other sufficient cause" for the imposition of discipline is not subject to the time-bar under N.J.S.A. 40A:14-147. The Commission erred in finding otherwise. We also observe that neither the administrative law judge nor the Commission made a separate determination on that charge. On remand, they shall do so.

We are therefore constrained to vacate the final agency decision in its entirety and remand for a determination as to whether those portions of the June 26, 2014 charges (as amended in January 2015), alleging a violation of the department's rules and regulations were timely under N.J.S.A. 40A:14-147. The Commission shall also determine and make findings as to whether the department proved there was "other sufficient cause" for the imposition of discipline. If it is determined that the rules and regulations charges were timely, or that there was other sufficient

cause for the imposition of discipline, the Commission shall determine if the discipline imposed was appropriate. Any determination by the Commission on an award of attorney's fees shall abide its decisions on the other issues on remand.

We vacate the final agency decision and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

B-32

STATE OF NEW JERSEY

In the Matter of Telina Hairston, City of East Orange

CSC Docket No. 2017-145

DECISION OF THE CIVIL SERVICE COMMISSION

Request for Stay

ISSUED: FEB 13 2017 (DASV)

The City of East Orange, represented by Joy B. Tolliver, Esq., petitions the Civil Service Commission (Commission) for a stay of the attached decision, *In the Matter of Telina Hairston* (CSC, Deemed Adopted, June 20, 2016), pending its appeal to the Superior Court of New Jersey, Appellate Division.

By way of background, Hairston, a Police Officer with the City of East Orange, was served with a Preliminary Notice of Disciplinary Action (PNDA), dated June 26, 2014, proposing a six-month suspension or removal from employment. The PNDA charged Hairston with infractions of departmental rules and regulations, namely insubordination, neglect of duty, malingering, and a violation of the sick leave procedures. Hairston was also charged with other sufficient cause pursuant to *N.J.A.C.* 4A:2-2.3(a)12, based on allegations that she willfully disobeyed a direct order from her supervisor on December 28, 2013 to relieve another officer and for subsequently reporting off work due to a false illness. In addition, the appointing authority asserted that Hairston violated a March 24, 2014 "Last Chance Agreement." Hairston filed a request for interim relief to delete the reference to the "Last Chance Agreement." Upon its review, the Commission, among other things, found that it was simply not possible for Hairston to have violated the "Last Chance Agreement" or to consider it for progressive discipline purposes if it did not exist in December 2013, when the alleged current infractions occurred. Accordingly, the Commission ordered the appointing authority to amend the PNDA and delete any reference to the "Last Chance Agreement." *See In the Matter of Telina Hairston* (CSC, decided December 17, 2014).

On January 8, 2015, a new PNDA was issued against Hairston, which related back to the June 26, 2014 PNDA regarding the December 28, 2013 incident. Specifically, the amended PNDA charged Hairston with other sufficient cause pursuant to *N.J.A.C.* 4A:2-2.3(a)12 and violations of departmental rules and regulations relating to insubordination, neglect of duty, malingering, and sick leave procedures. However, as ordered by the Commission in Hairston's interim relief petition, the reference to the "Last Chance Agreement" in the specifications was deleted. A departmental hearing was then held, and on March 24, 2014, a Final Notice of Disciplinary Action was issued upholding the charges against Hairston and suspending her for 100 calendar days, from April 6, 2015 through July 14, 2015. Thereafter, Hairston appealed her suspension, and the matter was transmitted to the Office of Administrative Law (OAL) for a hearing before an Administrative Law Judge (ALJ).

As set forth in the attached initial decision, the ALJ found that Hairston refused a direct order to relieve a fellow officer, which constituted insubordination. She was guilty of neglecting her duty by not remaining at work and using sick leave when there was no indication she was ill. Thus, the ALJ determined that the charge of malingering had been proven and Hairston violated the Police Department's sick leave policy. However, Hairston argued that the charges against her should be dismissed since the appointing authority allegedly violated the "45-day rule" as set forth in *N.J.S.A.* 40A:14-147. That statutory provision indicates in relevant part that "a complaint charging a violation of the [police department's] internal rules and regulations established for the conduct of a law enforcement unit shall be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based." Upon her review, the ALJ found that a detective issued a memorandum to the Police Chief on May 12, 2014 regarding the investigation of Hairston's alleged conduct, but the charges were not filed until January 2015. The ALJ stated that "[t]his was not complex; the City had all the necessary information in May, and for whatever reason did not bring charges until the following year well beyond the forty-five days." Additionally, the ALJ noted that the appointing authority did not offer separate evidence to sustain the charge of "other sufficient cause" and focused solely on the departmental rules and regulations. Thus, the ALJ concluded that the administrative charge of "other sufficient cause" held no substance "to save a set of stale internal-rule charges." Therefore, the ALJ recommended that the charges against Hairston be dismissed and her 100 calendar day suspension be reversed. However, the Commission did not have a quorum at the time of the ALJ's initial decision, and Hairston did not consent to an additional extension of time for the Commission to render its decision. In the attached letter, dated June 20, 2016, the parties were advised that the ALJ's recommended decision, reversing the suspension and awarding back pay and counsel fees, was deemed adopted as the final decision pursuant to *N.J.S.A.* 52:14B-10(c).

In its request, the appointing authority argues that a stay of the Commission's decision pending its appeal to the Appellate Division should be granted "as the balancing of the equities in this matter" warrants it. It contends that the ALJ erred in dismissing the charges against Hairston, as there was no violation of the "45-day rule" because the first PNDA was issued on June 26, 2014, within 45 days of the May 12, 2014 memorandum to the Police Chief. In that regard, it claims that there was confusion as to the two PNDAs and Hairston "disingenuously presented" that the PNDA issued on January 8, 2015 was the only PNDA when clearly it was an amended PNDA resulting from the Commission's decision on Hairston's interim relief petition. Additionally, the appointing authority states that it charged Hairston with an administrative charge of "other sufficient cause." As such, Hairston's discipline is not subject to the "45-day rule."[1] Thus, given these reversible errors by the ALJ, the appointing authority maintains that it has a meritorious claim that will succeed in the Appellate Division. Moreover, the appointing authority submits that there is a clear likelihood of success on the merits of its case. It emphasizes that, notwithstanding the reversal on procedural grounds, the ALJ determined that it had met its burden of proving the charges against Hairston. Further, the appointing authority asserts that it is at risk of irreparable harm, as it "will suffer tremendous financial loss" because it will not be able to recoup the back pay from Hairston if it is successful in the Appellate Division. In addition, the appointing authority indicates that Hairston would not be injured if the stay request is granted. She has returned to work and her relief is monetary, which can be remedied. Additionally, the appointing authority states that to reverse Hairston's suspension and award her back pay and counsel fees "in light of her blatant disregard for the rules and regulations . . . is without question" a great concern to the public interest.

In response, Hairston, represented by Paul W. Tyshchenko, Esq., contends that it would be "a gross abuse of the Commission's discretion" to grant this stay request. First, Hairston submits that the appointing authority failed to address the merits of the "45-day rule" issue because it could not "meaningfully argue against it." Second, Hairston contends that monetary loss is not irreparable. Any harm to fall on the appointing authority and herself could be redressed through monetary relief. Nonetheless, she maintains that she is the prevailing party and there is no reason for her back pay or counsel fees award to be delayed. Hairston also points

[1] It is noted that the 45-day time limitation contained in *N.J.S.A.* 40A:14-147 only expressly applies to charges related to violations of departmental rules and regulations. *See e.g., Hendricks v. Venettone*, Docket No. A-1245-91T5 (App. Div. October 29, 1992); *In the Matter of Bruce McGarvey v. Township of Moorestown*, Docket No. A-684-98T1 (App. Div. June 22, 2000). *See also, In the Matter of James Cassidy* (MSB, decided August 12, 2003); *In the Matter of Steven Palamara* (MSB, decided April 10, 2002). *Compare, In the Matter of Kason Checks* (CSC, decided August 19, 2009) (An appointing authority cannot resurrect a time-barred internal rule charge by using a Title 4A charge. To do so would undermine the intent of the "45-day rule" since it would essentially permit an appointing authority to charge an employee outside of the 45-day time limit with a Title 4A charge for a violation of any internal rule).

out that the appointing authority failed to explain why it believes that it could not recoup these damages. Third, Hairston indicates that if the stay is granted, she would be subject to an additional injury. She reiterates that she should not be deprived of her salary any longer. Hairston states that she is a single mother of several young children, and the appointing authority cannot "seriously argue" that it would suffer greater harm given its multimillion dollar budget. Additionally, she indicates that there has been no press coverage concerning her discipline, nor has there been a "public outcry" regarding its reversal. In other words, there is no great public interest for the stay request to be granted. Furthermore, Hairston disputes that she was disingenuous. During the OAL proceedings, she argued that the initial PNDA was not issued until June 26, 2014, well beyond 45 days after the alleged December 28, 2013 incident had been known. It was also not until January 27, 2014, a month later, when the Professional Standards Unit was asked to investigate the matter. In addition, Hairston was not interviewed until March 21, 2014. Thus, Hairston maintains that, even considering the June 26, 2014 issuance of the PNDA, the charges against her were untimely. She states that "this is a textbook case of inexcusable bureaucratic inefficiencies delaying the timely issuance of a PNDA." Moreover, Hairston submits that there is no substance to the charge of "other sufficient cause." The only cause that allegedly exists is the claimed violation of the departmental rules and regulations. Therefore, she submits that the ALJ properly dismissed the charges against her pursuant to the "45-day rule."

CONCLUSION

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

Initially, it must be emphasized that the Commission did not render a formal determination on Hairston's suspension, as the ALJ's recommended decision, including the order of back pay and counsel fees, was deemed adopted. Thus, it would be inappropriate to review the merits of the appointing authority's case given that the Commission did not reach an actual decision in the first instance and neither party petitioned the Commission for reconsideration of that decision. It is thus best that the issues raised by the appointing authority as to whether or not the "45-day rule" was violated be addressed by the Appellate Division, which will be fully briefed on the issue. Nonetheless, the Commission notes that an appellate court will reverse the final decision of an administrative agency only if it is arbitrary, capricious or unreasonable or if it is not supported by substantial credible evidence in the record as a whole, or if it violates legislative policy expressed or

fairly to be implied in the statutory scheme administered by the agency. *See Karins v. City of Atlantic City*, 152 *N.J.* 532, 540 (1998); *Henry v. Rahway State Prison*, 81 *N.J.* 571, 579-80 (1980); *Mayflower Securities Co. v. Bureau of Securities*, 64 *N.J.* 85, 93 (1973); *Campbell v. Civil Service Department*, 39 *N.J.* 556, 562 (1963). In the instant matter, the ALJ set forth her reasoning and considered the arguments of the parties regarding the "45-day rule" issue. As such, it is appropriate for the Appellate Division to determine whether the ALJ's decision was factually and legally correct or otherwise not supported by the record.

Moreover, the appointing authority has not shown that it will suffer immediate or irreparable harm in paying Hairston what she is entitled to by rule. On the contrary, Hairston will suffer additional harm if this request is granted. In this regard, *N.J.A.C.* 4A:2-2.10(a) provides that "where a disciplinary penalty has been reversed, the Commission **shall** award back pay, benefits, seniority or restitution of a fine." [Emphasis added]. *See also, N.J.S.A.* 11A:2-22. While the appointing authority argues that it would not be able to recover any back pay award, that harm is financial in nature, and as such, can be remedied. Further, the appointing authority has provided no support for its belief that any back pay award will not be recoverable in the event of a successful appeal to the Appellate Division, especially since Hairston is a current employee. This argument is merely speculative and does not provide a basis to grant a stay. Contrary to what the appointing authority suggests, there are means to recoup the back pay and counsel fees awards if the Appellate Division upholds Hairston's suspension. Moreover, the Commission finds it in the public interest to require compliance with orders issued by an administrative agency. The public interest is not served when a final administrative decision is not implemented in a timely fashion. Therefore, the appointing authority has not demonstrated a sufficient basis for a stay in this matter.

The appointing authority is also advised that *N.J.A.C.* 4A:2-2.11 provides for an award of interest on back pay when an appointing authority has unreasonably delayed compliance with an order or where the Commission finds sufficient cause based on the particular case. *See In the Matter of Rene Selph* (MSB, decided November 15, 1994); *In the Matter of Samuel Naro* (MSB, decided May 19, 1998). Therefore, if the appointing authority does not provide Hairston with the award of back pay within 30 days of the issuance this decision, interest on the back pay award is ordered.

ORDER

Therefore, it is ordered that the appointing authority's request for a stay be denied. Additionally, if back pay is not paid to Telina Hairston within 30 days of the issuance of this decision, it is ordered that interest be assessed on the back pay award at an annual rate set forth in the New Jersey Court Rules, *R.* 4:42-11.

Hairston is also entitled to reasonable counsel fees pursuant to the prior order. Thus, it is ordered that counsel fees be paid within 30 days of the issuance of this decision.

In the event that the appointing authority has not made a good faith effort to comply with this decision within the time frames noted above, the Commission orders that a fine be assessed against the City of East Orange in the amount of $100 per day, beginning on the 31st day if it fails to pay back pay or counsel fees, and continuing for each day of continued violation, up to a maximum of $10,000.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 8TH DAY OF FEBRUARY, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

c: Joy B. Tolliver, Esq.
William Senande
Paul W. Tyshchenko, Esq.
Telina Hairston
Pamela Ullman, DAG
Kelly Glenn
Records Center

CHRIS CHRISTIE
Governor
Kim Guadagno
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

ROBERT M. CZECH
Chair/Chief Executive Officer

June 20, 2016

Paul W. Tyshchenko, Esq.
Caruso, Smith & Picini
60 Route 46 East
Fairfield, New Jersey 07004

Joy B. Tolliver, Esq.
Weiner Lesniak, LLC
629 Parsippany Road
P.O. Box 438
Parsippany, New Jersey 07054-0438

Re: *In the Matter of Telina Hairston, East Orange, Police Department* (CSC Docket No. 2015-2851; OAL Docket No. CSV 7114-15)

Dear Mr. Tyshchenko and Ms. Tolliver:

The appeal of Telina Hairston, a Police Officer with the East Orange Police Department, of her 100 calendar day suspension, was before Acting Director and Chief Administrative Law Judge Laura Sanders (ALJ), who rendered her initial decision on February 4, 2016, recommending reversing the 100 calendar day suspension. Exceptions and replies to exceptions were filed on behalf of the appellant and the appointing authority.

The time frame for the Civil Service Commission (Commission) to make its final decision was to initially expire on March 20, 2016. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that time the Commission secured an initial 45-day extension of time and a subsequent 45-day extension, with the consent of the parties, as required, to allow it to render a final decision no later than June 18, 2016.[1] *See N.J.A.C.* 1:1-18.8. However, the appellant declined to consent to a third extension. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter per *N.J.S.A.* 52:14B-10(c).

Since the appellant's suspension has been reversed, she is entitled to 100 calendar days of back pay, benefits and seniority. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Additionally, the appellant is entitled to reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

[1] Since June 18, 2016, was a Saturday, the expiration date was actually June 20, 2016 pursuant to *N.J.A.C.* 1:1-1.4.

Proof of income earned and an affidavit in support of reasonable counsel fees should be submitted to the appointing authority within 30 days of receipt of this letter. Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2-2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and/or counsel fees.

Sincerely,

Henry Maurer
Director

Attachment

c: The Honorable Laura Sanders, ALJ
Kelly Glenn
Joseph Gambino

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 07114-15
AGENCY DKT. NO. 2015-2851

IN THE MATTER OF TELINA HAIRSTON,
CITY OF EAST ORANGE POLICE DEPARTMENT.

Paul W. Tyshchenko, Esq., for appellant Telina Hairston (Caruso Smith Picini, PC, attorneys)

Joy B. Tolliver, Esq., for respondent City of East Orange (Weiner Lesniak, LLP, attorneys)

Record Closed: January 19, 2016 Decided: February 4, 2016

BEFORE **LAURA SANDERS**, Acting Director & Chief ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, police officer Telina Hairston, appeals the action by respondent, the City of East Orange Police Department, imposing a 100-day suspension effective April 6, 2015. As a threshold matter, she contends that the City was outside the forty-five-day rule, such that the charges must be dismissed. Additionally, she argues that she did not violate the sick-time policy, was not malingering, and was not insubordinate.

Officer Hairston was served with a Preliminary Notice of Disciplinary Action (PNDA) on January 8, 2015. She requested a departmental hearing, which was held on February 18, 2015. The Final Notice of Disciplinary Action (FNDA) affirming a 100-day suspension beginning on April 6, 2015, and ending on July 14, 2015, was served on April 13, 2015. Her appeal of the discipline was dated April 15, 2015, and the Civil Service Commission transmitted the contested case to the Office of Administrative Law, where it was filed on May 15, 2015. The hearing was held on December 8, 2015. The record was left open until January 19, 2016, for submission of closing briefs, then closed upon their receipt.

FACTUAL DISCUSSION

Because Officer Hairston did not testify on her own behalf, the facts turn on the credibility of the City's witnesses. Some portions of their testimony essentially went unchallenged. Thus, it is clear that on December 28, 2013, Officer Hairston worked her regular 8:00-a.m.-to-4:00-p.m. shift, then was held over about three hours, because she was completing work related to a person found dead of natural causes. That particular day was unusually busy for the East Orange Police Department, as in addition to the death there was a car theft followed by a chase and a crash, the sighting of a suspect in a burglary that occurred the day before, and toward the end of the shift a double domestic-violence stabbing, which resulted in four officers having to wait with each of the victims in the hospital emergency ward for several hours. Because the Department was short-handed, the shift commander, Lt. Berkely Jest, told Sgt. Derrick Moses to direct Officer Hairston to go to the hospital and relieve Officer Amena Wright.[1] When Sergeant Moses could not reach Officer Hairston by radio, he went to the home where she was working. He found her there with the medical examiner, who was preparing to remove the body. All of the above is **FOUND** as **FACT**.

As other parts of the events of that evening are subject to some dispute, the discussion of testimony and documents concerning the disagreements are below. The City contends that Officer Hairston refused a direct order to remain at work, took sick

[1] At the time, she was Amena Waller, but she has since married.

leave when it was not appropriate to take it, and then violated the sick-leave policy by going to a party when she should have been home.

Sergeant Moses testified credibly that when he gave her the order from Lieutenant Jest to go relieve Officer Wright, Officer Hairston refused. She said that she did not feel well, as she had not eaten all day, and that she had no one at home to care for her children. Also, she was especially concerned because the Child Protection and Permanency agency[2] had opened a case on her. (Tr. at 19.) Sergeant Moses said he pleaded with her to follow the order, because he knew she would get in trouble, but she replied that she would book herself out on sick leave. On hearing this from Sergeant Moses, Lieutenant Jest directed that Officer Hairston file a report, which she did. Lieutenant Jest testified that there is no departmental procedure in place to accommodate an officer who needs to care for his or her minor children. (Tr. at 20.)

Lieutenant Jest testified that sometime around 9:30 p.m., which was about two hours after Officer Hairston left work, he received a call from Officer Amena Wright on his cell phone. She told him she was at a birthday party for another police officer, and Officer Hairston was at the party. This report resulted in a decision to investigate the appellant's conduct that evening, and eventually, the disciplinary charges.

Officer Amena Wright testified that she finally got off work on December 28, 2013, around 10 p.m., after working approximately a fourteen-hour day. Once the domestic-violence victims had been treated, she still had to return to the station to fill out the required forms for all domestic-violence incidents. She said it was about midnight before she arrived at the party where she saw Officer Hairston, although she did not specify that Officer Hairston was there when she arrived. (Tr. at 48.) She confirmed that she called Lieutenant Jest about Officer Hairston's presence.

Officer Lashawn Valerie Kearse testified that after her own twelve- to thirteen-hour shift, she picked up Officer Hairston to drive her to the party. She estimated it was

[2] On June 29, 2012, the Governor signed A-3101, reorganizing the Department of Children and Families and renaming the Division of Youth and Family Services as the Division of Child Protection and Permanency. L. 2012, c. 16, eff. June 29, 2012.

about midnight when she arrived at the officer's home, and somewhat later when they finally got to the party at the Robert Treat Hotel in Newark. They had spoken much earlier in the day about attending the party together.

As there was no true challenge to the testimony concerning the giving of an order to remain at work, I **FIND** that Officer Hairston refused a direct order to remain at work. I further **FIND** that she took sick leave as a means of avoiding the order. Whether she actually did have to go home to her seven children because she lacked child care is unknown. But nothing in the record shows that any of her children were sick on that date, and her attendance at a party later tends to undercut the rationale about leaving her children alone. Additionally, if the reason for not feeling well is that one has not eaten, a first solution would be to eat something instead of refusing an order.

There also was testimony indicating that Officer Hairston had more seniority than Officer Wright, and that in the main, unplanned overtime goes first to the less senior members of the police force. However, the testimony also made clear that in the end, the determination as to who needs to remain at work is made by the shift commander, based on the needs of the department and the community. Thus, I **FIND** as **FACT** that Lieutenant Jest was exercising his authority to decide the distribution of work when he gave Officer Hairston the order to relieve Officer Wright, so that Officer Wright could return to the station and start the lengthy process of filling out the required domestic-violence reports.

With regard to Officer Hairston's attendance at a party after work, Lieutenant Jest recalled receiving an anonymous call telling him about her appearance at about 9:30 p.m., while Officer Wright testified that she placed the call sometime after midnight. As it was Officer Wright who made the call, and her testimony was consistent with Officer Kearse's credible testimony, I **FIND** that the call occurred sometime after midnight and before about 1:30 a.m.

The more complicated issue is whether Officer Hairston abused the part of the sick-leave policy that requires officers to remain at home for eight hours. I **FIND** that the actual language, which appears in bold, states:

> Members are also restricted to their primary residence during their regularly scheduled duty hours.
>
> [P-2.]

Detective Tommy Wright, who has worked ten years in the Professional Standards Unit at the Department, testified that in his experience, an officer who notifies the Department that he or she is sick is expected to remain at his or her residence for at least an eight-hour period. (Tr. at 83.) Thus, in his view, if Officer Hairston booked out at 9 p.m., she would be expected to be available at her residence for the next eight hours. If, as she did, she booked out around 7:30 p.m., she would need to remain at her home until 2:30 a.m. (Tr. at 87.) Since she left for a party before that time was up, she violated the primary-residence-restriction segment of the policy. He also noted that the Professional Standards Unit frequently goes to the homes of officers who are utilizing sick time, and checks on them.

However, Detective Wright acknowledged that Officer Hairston's regularly scheduled duty hours were the 8:00-a.m.-to-4:00-p.m. shift, and that, if you viewed the overtime she worked on December 28, 2013, as assignment to the 4:00-p.m.-to-12:00-a.m. shift, that shift ended at midnight.

LEGAL ANALYSIS AND CONCLUSIONS

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant, and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). Here, the City has charged appellant with violation of the department rules prohibiting insubordination, neglect of duty, and malingering, as well as a violation of the sick-leave procedure. Additionally, the appellant is charged with violating N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause

With regard to insubordination, the Civil Service Commission utilizes a more expansive definition of insubordination than a simple refusal to obey an order. In re Chaparro, 2011 N.J. CSC LEXIS 102 (N.J. CSC 2011) (CSC decision citing In re Stanziale, No. A-3492-00T5 (App. Div. April 11, 2002) (the appellant's conduct in which he refused to provide complete and accurate information when requested by a superior constituted insubordination)); In re Lyons, No. A-2488-07T2 (App. Div. April 26, 2010), <http://njlaw.rutgers.edu/collections/courts/>; In re Moreno, CSV 14037-09, Initial Decision (June 10, 2010), modified, CSC (August 9, 2010), <http://njlaw.rutgers.edu/collections/oal/>; In re Bell, CSV 4695-09, Initial Decision (May 12, 2010), modified, CSC (June 24, 2010), <http://njlaw.rutgers.edu/collections/oal/>; In re Pettiford, CSV 08801-07, Initial Decision (March 13, 2008), adopted, Merit System Board (June 13, 2008), <http://njlaw.rutgers.edu/collections/oal/> (Moreno, Bell, and Pettiford all concerning disrespect of a supervisor). The Civil Service Commission also has determined that a law-enforcement officer is required to comply with an order of his or her superior, even if he or she believes the orders to be improper or contrary to established rules and regulations. See Palamara v. Twp. of Irvington, No. A-6877-02T1 (App. Div. March 30, 2005). Cf. In re Allen, CSV 11166-04, Initial Decision (May 23, 2005), remanded, Merit System Board (July 14, 2005), CSV 09132-05, Initial Decision (November 22, 2005), adopted, Merit System Board (January 26, 2006), <http://njlaw.rutgers.edu/collections/oal/> (Merit System Board determined that the appellant's disobedience was justified by concerns for the safety of the clients on a bus and reversed his removal). Here, Officer Hairston refused to follow the order to relieve Officer Wright. I **CONCLUDE** that this constitutes insubordination within the meaning of the case law.

Neglect of duty is not defined under the New Jersey Administrative Code, but the charge has been interpreted to mean that an employee has failed to perform and act as required by the description of the employee's job title. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). It has been applied both to not fully carrying out duties and to acting incorrectly. See, e.g., In re Marucci, CSV 07241-09, Initial Decision (January 1, 2010), modified, CSC (March 16, 2010), <http://njlaw.rutgers.edu/collections/oal/>,

aff'd, No. A-3607-09T1 (App. Div. January 3, 2012), <http://njlaw.rutgers.edu/collections/courts/> (removal of a police officer with no disciplinary record where he failed to remove drugs from under a sewer grate and then lied about his actions); see also In re Dona, CSV 10782-08, Initial Decision (August 3, 2009), modified, CSC (October 8, 2009), <http://njlaw.rutgers.edu/collections/oal/> (affirming twenty-day suspension for failing to pat down inmate properly, missing wooden shank). Here, as the appointing authority notes, the City was experiencing a high volume of priority calls, on a day when it lacked enough officers to cover all the activity without demanding overtime. The appellant violated an order to remain on duty, and instead invoked sick leave under circumstances that offer no indication she was ill. Thus, I **CONCLUDE** that the respondent has carried its burden on this charge.

The East Orange Police Department rules and regulations define malingering. Specifically they state:

> Malingering: Department members shall not feign illness, injury, or incapacity to perform required duties, nor shall they fail to follow a lawful order issued by the Medical Officer.
>
> [Resp't's Br., Jan. 15, 2016, at 9.]

As no competent evidence supports the hearsay report that appellant actually was ill, I **CONCLUDE** that the violation of the prohibition on malingering has been proved.

With regard to the sick-time issue, it is true that respondent's policy does not spell out what occurs when officers work past their assigned eight-hour shifts. Detective Walker also acknowledged that if one views Officer Hairston's shift as the full 4:00-p.m.-to-12:00-a.m. shift, she would be outside the shift if she went to the party. However, Detective Walker's testimony concerning his experience of the policy in his ten years working in the unit that helps to enforce the sick-leave policy was persuasive. The spirit of the policy is clear: sick time is for use when one is sick, or when one's family member requires sick care. It is not intended as a convenient means of avoiding one's duty. If such use is allowed or condoned, such use would slowly degrade the ability of the shift commanders to deploy resources effectively. A police department is a

paramilitary organization, and police officers are held to a higher standard of conduct. Here, the fact that Officer Hairston appeared at a late-night party generally undercuts any inference that watching her minor children was her primary objective, or that she actually was ill. Thus I **CONCLUDE** that she did violate the sick-leave policy.

Nonetheless, appellant contends that the charges must be dismissed because the City violated N.J.S.A. 40A:14-147, commonly known as "the forty-five-day rule," by failing to file the PNDA within forty-five days of the date on which the police chief obtained "sufficient evidence to support the complaint." The statute states in pertinent part:

> [N]o permanent member or officer of the police department or force shall be . . . suspended, removed, fined or reduced in rank from or in office . . . except for just cause . . . and then only upon a written complaint setting forth the charge or charges against such member or officer. . . . A complaint charging a violation of the internal rules and regulations established for the conduct of a law enforcement unit shall be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based. . . . A failure to comply with said provisions as to the service of the complaint and the time within which a complaint is to be filed shall require a dismissal of the complaint.
>
> [N.J.S.A. 40A:14-147.]

The appellant notes that the PNDA was not filed until January 8, 2015, when the actual incident occurred on December 28, 2013. Both the PNDA and the FNDA charge her with violation of N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, along with violation of a number of internal rules prohibiting insubordination, neglect of duty, malingering and violating sick-leave procedures. N.J.A.C. 4A:2-2.3(a) includes a lengthy list of specific charges, among them incompetency, inefficiency or failure to perform duties (N.J.A.C. 4A:2-2.3(a)(1)); insubordination (N.J.A.C. 4A:2-2.3(a)(2)); and neglect of duty (N.J.A.C. 4A:2-2.3(a)(7)). However, the City elected to charge only a violation of N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause. Appellant contends that since there

was no other generalized cause for discipline, and all the charges involve internal rules, the forty-five-day rule applies, and the charges must be dismissed.

Case law makes clear that the forty-five-day rule applies only to charges of violations of departmental rules and regulations. McElwee v. Borough of Fieldsboro, 400 N.J. Super. 388 (App. Div. 2008). If the crux of the charges is violation of the New Jersey Administrative Code, then the charges would not be subject to dismissal under the rule. In re Clarke, 2009 N.J. CSC LEXIS 1662 (N.J. CSC 2009). In Clarke, the Commission refused to dismiss a charge of "other sufficient cause" under N.J.A.C. 4A:2-2.3(a)(11)[3] because the charges were very serious, the appointing authority had demonstrated a need for lengthy investigation of a complex matter, and, finally, the officer had not lost any pay. On the other hand, as noted in Clarke, "an appointing authority cannot resurrect a time-barred internal rule charge by using a Title 4A charge." Thus, charges of inappropriately engaging in outside conduct were dismissed, where the appointing authority had known about the conduct for a decade. In re Cheeks, CSV 12674-08, Initial Decision (June 2, 2009), affirmed in part, modified in part, remanded in part, CSC (September 17, 2009), <http://njlaw.rutgers.edu/collections/oal/>. Cheeks also relies in part on an earlier decision, In re Richardson, No. A-2740-05T5 (App. Div. August 27, 2007), dismissing misconduct charges against an officer where the police chief had sufficient knowledge of the misconduct in 2002, but disciplinary charges were not brought until 2004. Ibid. "The 45-day rule specifically states that if the time frame is violated, the complaint must be dismissed. Accordingly, once the complaint incorporating the underlying charges is dismissed, no disciplinary penalty of any kind may be imposed." In re McCormick, CSV 06319-00, CSC (December 27, 2001), <http://njlaw.rutgers.edu/collections/oal/>.

For purposes of N.J.S.A. 40A:14-147, the charges must be brought within forty-five days of the time the person filing the complaint had sufficient information to bring the charges. In general, the person filing the complaint is the police chief. Aristizabal v. City of Atl. City, 380 N.J. Super. 405 (App. Div. 2005). Appellant points out that the memo issued by Detective Charles Hinton of the Department's Professional Standards

[3] Effective March 5, 2012, former (a)(11) was recodified as (a)(12).

Unit to Chief Robinson was dated May 12, 2014. But the charges were not filed until January 2015, and, as appellant points out, no evidence supports any continuing investigation. This was not complex; the City had all the necessary information in May, and for whatever reason did not bring charges until the following year, well beyond the forty-five days. Moreover, at the hearing, the respondent did not offer any separate evidence concerning "other sufficient cause"; it focused solely on the departmental rules and regulations. Unfortunately, the lengthy gap between the May report and the January filing created a situation in which an administrative charge with no substance to it is being used to save a set of stale internal-rule charges. Thus, I **CONCLUDE** that the charges must be dismissed.

Progressive discipline is the general rule in civil service cases. W. New York v. Bock, 38 N.J. 500, 523 (1962). In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline and the employee's prior record. George v. N. Princeton Dev. Ctr., 96 N.J.A.R.2d (CSV) 463. For the sake of completeness, it is noted that Officer Hairston's disciplinary record across the past fifteen years shows a series of five disciplinary actions for sick-leave use, ranging from a written reprimand in December 2008 to one-day, ten-day and thirty-day suspensions in 2009, 2011, and 2012, respectively, and, finally, a forty-five-day suspension in December 2013, which would be about the time this infraction occurred. (R-3.)

However, as noted above, where charges must be dismissed for violation of the forty-five-day rule, no discipline may be imposed. Therefore, I **CONCLUDE** that the 100-day suspension must be lifted.

ORDER

For the reasons cited above, the 100-day suspension is hereby **REVERSED**.

I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 4, 2016
DATE

LAURA SANDERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency:

Date Mailed to Parties:

/caa

WITNESSES

For Appellant:

No witnesses

For Respondent:

Berkely Jest
Derrick Moses
Amena Wright
Lashawn Valerie Kearse
Gloria Corbett
Tommy Wright

EXHIBITS

For Appellant:

P-1 Preliminary Notice of Disciplinary Action dated January 8, 2015

P-2 East Orange Police Department General Order, Sick Leave—Procedures, effective January 1, 2010

For Respondent:

R-1 Memorandum to Captain Phyllis Bindi from Lt. Berkely E. Jest, dated January 16, 2014

R-2 Memorandum to Lt. Berkely Jest from Sgt. Derrick Moses, dated December 28, 2013

R-3 Report from Professional Standards Unit to Chief William C. Robinson, dated May 12, 2014

R-4 Final Notice of Disciplinary Action delivered on April 13, 2015