

*In the Matter of Carlos Dominguez, et al.,
County of Passaic*

DOP Docket Nos. 2006-5054; 2006-5066; 2007-213; and 2007-691

(Merit System Board, decided January 17, 2007)

Carlos Dominguez, Vincent McDuffie, Yusef Williams, and Nicole Rapuano, represented by Anthony J. Fusco, Jr., Esq., appeal their terminations from employment as Juvenile Detention Officers with the County of Passaic. Since the matters involve similar issues, they have been consolidated.

By way of background, Department of Personnel (DOP) records indicate that Dominguez received a temporary appointment as a Juvenile Detention Officer, effective June 28, 2004. He then received an interim appointment, effective October 25, 2004, which was terminated on May 25, 2006. In that regard, in a letter dated May 25, 2006, John D. Givens, Director of the Passaic County Youth Reception and Rehabilitation Center, advised Dominguez that he was being terminated because of unsatisfactory performance. The letter also advised Dominguez that he had the right to request a hearing from the Merit System Board (Board). Dominguez's attorney contacted Givens for a hearing, but Givens replied that since Dominguez was released at the end of the working test period, his appeal was to be presented to the Board.

Regarding McDuffie, DOP records show that he received a temporary appointment as a Juvenile Detention Officer on July 3, 1995, which was terminated on May 2, 1997. On July 27, 1998, he received a regular appointment. He resigned in good standing from his permanent position¹ as a Juvenile Detention Officer on October 22, 2000. Subsequently, on February 3, 2003, McDuffie was rehired by the County of Passaic as a Juvenile Detention Officer on a temporary basis. He was then appointed provisionally pending open competitive examination procedures, effective February 3, 2004. It is noted that at the time of McDuffie's provisional appointment, there were two eligible lists for Juvenile Detention Officer, County of Passaic (C2065D and C2081E) in existence. The lists promulgated on May 15, 2003 and September 25, 2003 and expired on May 14, 2006 and September 24, 2006, respectively. Moreover, there is no record of a special reemployment list in existence at the time of McDuffie's temporary and provisional appointments. On June 7, 2006, McDuffie's provisional appointment was terminated. Prior to his termination, McDuffie was issued a Preliminary Notice of Disciplinary Action (PNDA), dated May 22, 2006, on the charge of pattern absenteeism. The proposed penalty was a 90 to 180 day suspension. On June 7, 2006, Givens wrote to McDuffie and advised him that he was being terminated since he was now at the end of his working test period and his performance, namely, his attendance and conduct, was

¹ It is noted that DOP records contain a Request for Personnel Action Form, dated October 25, 2000, indicating that the appellant resigned his permanent position as a Juvenile Detention Officer.

unsatisfactory. Givens also advised McDuffie that he had the right to request a hearing from the Board and no PNDA was issued since he was being released at the end of his working test period.

Regarding Williams, DOP records show that he received a temporary appointment as a Juvenile Detention Officer, effective July 14, 2003. Thereafter, he was appointed provisionally pending open competitive examination procedures, effective June 10, 2004. His provisional appointment was terminated effective June 20, 2006. Regarding Rapuano, DOP records show that she received a temporary appointment as a Juvenile Detention Officer, effective October 15, 2002. Her appointment was terminated effective June 20, 2006. Williams and Rapuano received letters, dated June 20, 2006, from Givens advising them that they were at the end of their working test periods and being terminated immediately. Givens also advised that they had the right to request a hearing from the Board and no PNDA was issued since they were being released at the end of their working test periods.

Thereafter, Dominguez, McDuffie, Williams, and Rapuano filed appeals with the Board. They indicated that they were terminated at the end of their working test periods and had career service rights, including a hearing regarding their termination. Additionally, they indicated that the appointing authority failed to provide them with a PNDA and a departmental hearing.

In Williams and Rapuano's case, the Division of Merit System Practices and Labor Relations advised them by letter that a review of DOP records did not indicate that they possessed permanent status in any title. In response, Williams indicated that he was first employed in July 2003 as a part-time Juvenile Detention Officer and then received a full-time position in May 2004. He stated that in 2004, he took the Juvenile Detention Officer (C2103F) examination, but failed. He also failed the examination (C2110G) in 2005. Regarding Rapuano, she stated that she was appointed as a part-time Juvenile Detention Officer in October 2002 and thereafter, in August 2003, she worked full time. She indicated that on June 5 and July 7, 2006, she received two PNDAs, dated June 5 and June 26, 2006. She requested a hearing on the PNDAs. Therefore, Williams and Rapuano argue that they were led to believe that they had civil service status.

It is noted that Rapuano filed for the examination for Juvenile Detention Officer (C2103F). However, she was not admitted to the examination because she filed her application late. Moreover, both Williams and Rapuano filed for the Juvenile Detention Officer (C2139H) examination, which had a closing date of August 21, 2006. An examination has not yet been administered. As to Dominguez, he filed for the Juvenile Detention Officer (C2103F) examination and appeared on the resulting eligible list, which promulgated on December 9, 2004 and expired on December 8, 2006. His name was certified on May 15, 2006, but his name was

removed from the eligible list (C2103F) due to an unsatisfactory employment record. He did not file an appeal concerning his removal. Regarding McDuffie, he filed for the Juvenile Detention Officer (C2110G) examination and appeared on the resulting eligible list, which promulgated on August 11, 2005 and expires on August 10, 2007. On October 23, 2006, McDuffie's name was certified. The certification is not due to be disposed of until April 23, 2007.

In response to the appeals, the appointing authority advised that the appellants were separated from employment due to an unsatisfactory rating during the "working test period and provisional status due to poor attendance and performance required of the job per standard policies." Further, it stated that in the termination letters, the appeal rights referred to the right given to union members to come before a designee and submit a grievance for reversal.

CONCLUSION

N.J.A.C. 4A:2-2.1 provides that the right to appeal major discipline, which includes the termination of an employee, applies only to permanent employees in the career service or a person serving a working test period. *See also N.J.S.A.* 11A:2-6. Pursuant to *N.J.A.C.* 4A:1-1.3, a permanent employee means an employee in the career service who has acquired the tenure and rights resulting from regular appointment and successful completion of the working test period. A provisional appointment means employment in the competitive division of the career service pending the appointment of a person from an eligible list. Additionally, *N.J.A.C.* 4A:4-5.2(d)1 provides that persons appointed to juvenile detention officer titles shall serve a 12-month working test period, which begins following regular appointment. Moreover, pursuant to *N.J.A.C.* 4A:4-1.6 and *N.J.A.C.* 4A:4-1.7, interim and temporary appointments may be made when certain conditions exist. *See also N.J.S.A.* 11A:4-13. Temporary appointments may be made for an aggregate period of not more than six months in a 12-month period. A temporary appointment for a maximum of 12 months may be approved by the Commissioner to a position established as a result of a short-term grant. *See N.J.S.A.* 11A:4-13c and *N.J.A.C.* 4A:4-1.7.

Furthermore, *N.J.A.C.* 4A:4-7.10(a) provides that a permanent employee who has resigned in good standing, retired or voluntarily demoted, may request consideration for reemployment by indicating availability to his or her appointing authority. *N.J.A.C.* 4A:4-7.10(b) states that upon recommendation of the appointing authority that such reemployment is in the best interest of the service, the Department of Personnel shall place the employee's name on a reemployment list. Regular reemployment lists for titles other than Police and Fire titles shall have durations of three years from the date of resignation, retirement or voluntary demotion, unless the list is extended pursuant to *N.J.A.C.* 4A:4-3.3(a)1. *See N.J.A.C.* 4A:4-7.10(c). *See also N.J.S.A.* 11A:4-9c.

In the instant matter, the critical issue before the Board is the appellants' status at the time of their terminations. With regard to McDuffie, he resigned in good standing from his permanent position as a Juvenile Detention Officer on October 22, 2000. However, he was rehired by the County of Passaic on February 3, 2003, which is within three years of his resignation. McDuffie received a temporary appointment and then was appointed provisionally pending open competitive procedures effective February 3, 2004. However, McDuffie should have been placed on a regular reemployment list and his appointment made from that list. It is clear that the appointing authority found his reemployment in the best interest of the service since it rehired him within three years of his resignation. See *N.J.S.A. 11A:4-9c* and *N.J.A.C. 4A:4-7.10(b)*. Moreover, there is no record of a special reemployment list in existence at the time of McDuffie's appointment, and thus, it would be appropriate to appoint him from a regular reemployment list. See *N.J.S.A. 11A:4-12* and *N.J.A.C. 4A:4-3.7*. Additionally, even if there was a basis to temporarily appoint McDuffie, the appointing authority has not presented a legitimate reason why McDuffie's temporary appointment lasted for more than six months. In order for McDuffie to continue to be employed after the six months, his appointment should have been made from a regular reemployment list which would have still existed had he been properly placed on the list. Further, it was inappropriate to characterize McDuffie's appointment on February 3, 2004 as provisional in light of his eligibility for reemployment and the existence of open competitive lists for Juvenile Detention Officer, County of Passaic. See e.g., *In the Matter of Kelly McKenith, et al.* (MSB, decided February 9, 2005) (Permanent laid off County Correction Officers who were returned to duty prior to issuance of a special reemployment list and then terminated were found to have permanent status at the time of termination by virtue of their special reemployment rights). Based on the foregoing, the Board finds that by virtue of his regular reemployment entitlement, McDuffie held permanent status at the time of his termination.² Therefore, his termination on June 7, 2006 constitutes a *de facto* immediate suspension from his duties without pay. See e.g., *In the Matter of Abnathy Mason* (MSB, decided July 7, 1999); *In the Matter of James Campbell* (MSB, decided April 18, 2000).

In this regard, *N.J.S.A. 11A:2-13* provides that an employee may be suspended immediately and prior to a hearing where it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services. See also *N.J.A.C. 4A:2-2.5(a)1*. If the employer elects to bar an employee from working involuntarily and without pay, the regulatory scheme in this State requires that prior to withholding of wages, the employee must be afforded oral or written notice of the charges, an explanation of

² It is noted that an individual appointed from a regular reemployment list is not subject to a new working test period. See *N.J.A.C. 4A:4-5.1(b)1*.

the employer's evidence and an opportunity to review the charges and evidence and to respond. See *N.J.S.A.* 11A:2-13; *N.J.A.C.* 4A:2-2.5(b); *In the Matter of Anthony Recine* (MSB, decided March 10, 1998) (The Board found that the Township of Hamilton did not provide a proper pretermination hearing since Recine was not made aware of the charges and the general evidence supporting the charges prior to being suspended without pay).

In this case, it is clear that the appointing authority did not comply with the procedures as it failed to provide McDuffie with a proper pretermination hearing. Additionally, the appointing authority has not shown that there was a basis to immediately suspend McDuffie. Givens advised McDuffie that he was being terminated due to his performance, namely, his attendance and conduct, was unsatisfactory. The record does not indicate that McDuffie was unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services. Accordingly, McDuffie was improperly immediately suspended without pay and is, therefore, entitled to reinstatement and back pay.

Additionally, McDuffie is entitled to reasonable counsel fees pursuant to *N.J.S.A.* 11A:2-22, which provides that the Board 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 Board is not reviewing the merits of charges or any penalty imposed, it is clear that the effect of McDuffie'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 McDuffie. Therefore, under these particular circumstances, the Board finds that this matter is substantially equivalent to an appeal of major disciplinary action and since McDuffie has prevailed on the primary issue of his appeal, he is entitled to an award of reasonable counsel fees in respect to the instant matter. See *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 *Campbell and Mason, supra*. It is noted that upon McDuffie's reinstatement, if the appointing authority chooses to do so, it may proceed with disciplinary action against him pursuant to *N.J.A.C.* 4A:2-2.1, *et seq.*

As to the remaining appellants, based on a careful review of the record, the Board does not find that Dominguez, Rapuano, and Williams had permanent status nor were they serving in working test periods at the time of their terminations. Therefore, the Board does not have jurisdiction to review their terminations. See *N.J.S.A.* 11A:2-6 and *N.J.A.C.* 4A:2-2.1. In this regard, although Givens and the

appointing authority advised the appellants that they were being released at the end of their working test periods, Dominguez, Rapuano, and Williams were not appointed by way of examination and corresponding eligible list. Therefore, they could not have been serving in a working test period. Moreover, while the appellants were serving for quite some time on a temporary, interim, or provisional basis, nothing in Merit System law or rules authorizes the granting of permanent status to such employees. See e.g., *In the Matter of William Boes, et al.* (MSB, decided October 24, 2000). Furthermore, a provisional employee is not entitled to a vested property interest in the subject title. In this regard, in *O'Malley v. Department of Energy*, 109 N.J. 309 (1987), the New Jersey Supreme Court found that an employee who provisionally occupied a position for more than two years but was returned to his former position when a promotional examination was not given in a timely manner did not have a right to retain his provisional appointment until such time as an examination was given. Additionally, the Court stated that "the legislative goal of appointments based on merit and fitness is the paramount consideration. With respect to provisional employees, that goal is met by competitive examinations, not by holding a position beyond the time prescribed by the Legislature." *O'Malley, supra* at 316-317. Moreover, the only interest that results from placement on an eligible list is that the candidate will be considered for an applicable position so long as the eligible list remains in force. See *Nunan v. Department of Personnel*, 244 N.J. Super. 494 (App. Div. 1990).

Finally, while Dominguez, Rapuano, and Williams do not have any vested rights, the Board is concerned that they remained in interim, temporary, or provisional status for some time, and that they were incorrectly advised that they were serving in working test periods. Therefore, the Board directs the Division of Human Resource Management (HRM) to review and closely monitor the appointments of Juvenile Detention Officers with the County of Passaic. HRM should review the status of the current employees and implement action as necessary, pursuant to Title 4A of the New Jersey Administrative Code.

ORDER

Therefore, it is ordered that Vincent McDuffie be reinstated and granted back pay, benefits and seniority from June 7, 2006 to the date of actual reinstatement. The amount of back pay awarded is to be reduced and mitigated to the extent of any income earned or that could have been earned by McDuffie during this period. Proof of income earned shall be submitted to the appointing authority within 30 days of receipt of this decision. McDuffie is also entitled to 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. Additionally, McDuffie's record shall be corrected to reflect an appointment from a regular reemployment list, effective February 3, 2003.

It is further ordered that the appeals of Carlos Dominguez, Yusef Williams, and Nicole Rapuano of their terminations from employment as Juvenile Detention Officers with the County of Passaic be dismissed for the Merit System Board's lack of jurisdiction. Moreover, it is ordered that the matter be referred to the Division of Human Resource Management for further review consistent with this decision.

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