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STATE OF NEW JERSEY

DECISION OF THE CIVIL SERVICE COMMISSION

In the Matter of Tia Smith

CSC Docket No. 2016-1492

Request for Interim Relief

ISSUED NOV 20 2015 (JET)

Tia Smith, a County Correction Officer with the Camden County Correctional Facility, represented by Jeffrey S. Ziegelheim, Esq., petitions the Civil Service Commission (Commission) for interim relief of her 180 day suspension.

The record indicates that on December 8, 2014, the appointing authority issued a Preliminary Notice of Disciplinary Action (PNDA) to the petitioner seeking a 180 day suspension on charges of neglect of duty, conduct unbecoming an employee, and other sufficient cause. Specifically, the appointing authority alleged that on October 30, 2013, while working in the Admissions unit, the petitioner refused to remove handcuffs on a prisoner which resulted in her defecating on the cell floor. During a subsequent strip search conducted on the prisoner in the shower area, the appointing authority alleged that another Correction Officer punched the inmate in the ribs two or three times, which the petitioner witnessed, and she failed to report the incident. In addition, the appointing authority alleged that the petitioner impeded an Internal Affairs investigation when she provided misleading information stating that she did not move the inmate or see her get punched. A departmental hearing was held on August 26, 2015 and the hearing officer recommended a 120 day suspension. However, on September 14, 2015, the appointing authority served the petitioner with a Final Notice of Disciplinary Action (FNDA) which imposed a 180 day suspension beginning on September 14, 2015 and ending on March 11, 2016. It is noted that the petitioner has appealed her suspension to the Commission and that the matter has been transmitted to the Office of Administrative Law (OAL) for a hearing.

In her request for interim relief, the petitioner argues that the hearing officer initially recommended a 120 day suspension and the appointing authority improperly imposed a 180 day suspension. The petitioner contends that her suspension of 180 days was unwarranted. Specifically, the petitioner explains that the 180 day suspension has irreparably harmed her reputation and her standard of living has been jeopardized.¹ She maintains that such harm is irreparable and cannot be satisfied in equity by monetary damages. Additionally, the petitioner argues that she has shown a clear likelihood of success on the merits of the case. In this regard, she explains that the appointing authority failed to bring disciplinary charges against her within 45 days of the incident pursuant to *N.J.S.A. 30:8-18.2*. The petitioner adds that she had difficulty remembering the details of the incident since the appointing authority waited over 13 months to issue the PNDA. Therefore, the petitioner requests the 180 day suspension be summarily dismissed.

In response, the appointing authority, represented by Antonieta Paiva Rinaldi, Esq., maintains that the hearing officer's decision is only a recommendation of a penalty which the appointing authority is free to adopt or reject at its discretion and is not bound by the recommendation. Moreover, the appointing authority argues that the petitioner filed an appeal of her disciplinary matter with the Commission and a hearing of that matter is pending at OAL. As such, any disputed facts and errors that may have occurred at the departmental level will be cured through the appeals process.

In response, the petitioner asserts that the appointing authority failed to issue the disciplinary charges within the proper timeframe in violation of the 45-day rule. Further, the petitioner states that the issue pertaining to the 45-day rule is purely a matter of law and does not require a hearing. In addition, the petitioner states that the only material fact that exists in this matter pertains to the length of time that elapsed prior to when the disciplinary charges were issued. As such, the petitioner reiterates that she has shown a likelihood of success on the merits and the appointing authority has not disputed that she has been harmed as a result of the suspension.

In response, the appointing authority asserts that appellant's inappropriate actions toward the inmate on October 30, 2013 constituted neglect of duty and went against the public interest. In addition, the appointing authority avers that the appellant's arguments pertaining to the 45-day rule are not applicable. In this regard, the appointing authority states that the 45-day rule does not commence until it has been determined that disciplinary charges are warranted. The appointing authority explains that the incident occurred on October 30, 2013 and the disciplinary charges could not immediately be brought against the appellant because the prosecutor's office was conducting a separate criminal investigation

¹ The petitioner notes that she is not receiving an income as a result of the suspension, and she cannot afford living expenses, healthcare, and basic essentials such as food.

which began on December 5, 2013.² As such, the appointing authority could not move forward with the charges until the prosecutor's investigation concluded. Further, the appointing authority avers that the prosecutor's investigation had concluded on October 6, 2014, and as a result, it was able to interview the appellant on October 29, 2014. The appointing authority adds that, based on the petitioner's responses, it determined on November 12, 2014 that disciplinary action was warranted. Thus, the PNDA was timely issued on December 8, 2014. Moreover, the appointing authority asserts that the facts of the petitioner's disciplinary matter are in dispute and, therefore, a hearing at OAL is required. As such, the request for relief in the instant matter should be denied.

CONCLUSION

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

1. Clear likelihood of success on the merits by the petitioner;
2. Danger of immediate or irreparable harm;
3. Absence of substantial injury to other parties; and
4. The public interest.

Initially, the information provided in support of the instant petition does not demonstrate a clear likelihood of success on the merits. A critical issue in any disciplinary appeal is whether or not the petitioner has actually committed the alleged infractions. In this matter, the petitioner argues that she is likely to succeed on the merits, the disciplinary penalty imposed was excessive, she has suffered irreparable harm, and that the appointing authority did not issue the disciplinary charges within the proper timeframe. However, the Commission will not attempt to determine the proper disciplinary penalty based on an incomplete written record. Such disciplinary appeals need a full plenary hearing before an Administrative Law Judge (ALJ) who will hear live testimony, assess the credibility of witnesses and weigh all the evidence in the record before making an initial decision. At that point, the Commission will be in a position to decide the propriety of the recommended penalty should the charges against the petitioner be sustained.

It is also noted that the Commission, after receiving the ALJ's initial decision will, in addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, utilize, where appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the

² The appointing authority notes that no criminal charges were filed as a result of the investigation.

employee's prior record. *George v. North Princeton Developmental Center*, 96 N.J.A.R. 2d (CSV) 463. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. See *Henry v. Rahway State Prison*, 81 N.J. 571 (1980). Moreover, the charges against the petitioner are serious, especially for a Correction Officer. However, without the benefit of a full hearing record before it, the Commission cannot determine if the penalty imposed is appropriate. Therefore, based on the foregoing, the petitioner has not shown a clear likelihood of success on the merits.

In regard to the petitioner's contention that the hearing officer recommended a 120 day suspension but she received a 180 day suspension, it is noted that the appointing authority is not bound by the hearing officer's recommendation. The appointing authority could have imposed any penalty based on its assessment of the nature and severity of the charges, and in this case, determined that the proper penalty was 180 days. Nevertheless, it cannot be ignored that the Commission will ultimately review the propriety of the penalty imposed in its *de novo* review of the matter after the Administrative Law Judge issues an initial decision.

Additionally, the petitioner has not shown that she is in danger of immediate or irreparable harm if this request is not granted. While the Commission sympathizes with her financial situation, the harm that she is experiencing while awaiting her hearing is purely financial in nature, and as such, can be remedied by the granting of back pay should she prevail in her appeal.

The petitioner has also argued that the appointing authority delayed issuing her PNDA by more than 45 days after the incident occurred. N.J.S.A. 30:8-18.2 states:

A person shall not be removed from employment or a position as a county corrections officer, or suspended, fined or reduced in rank for a violation of the internal rules and regulations established for the conduct of employees of the county corrections department, unless a complaint charging a violation of those rules and regulations is 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 this section shall require a dismissal of the complaint. The 45-day time limit shall not apply if an investigation of a county corrections officer for a violation of the internal rules and regulations of the county corrections department is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of this State; the 45-day limit shall begin on the day after the disposition of the criminal investigation. The 45-day requirement in this section for the filing of a

complaint against a county corrections officer shall not apply to a filing of a complaint by a private individual.

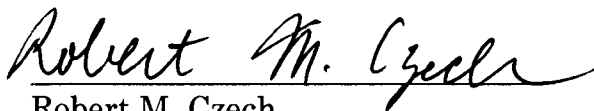
In this case, the appellant was charged with general causes for disciplinary action specified in *N.J.A.C.* 4A:2-2.3 and internal rules and regulations concerning employee conduct. The charges based on the violations of *N.J.A.C.* 4A:2-2.3 are not violations of internal rules and regulations. Therefore, *N.J.S.A.* 30:8-18.2 does not apply to those charges. The appointing authority explained that it could not issue the charges within the 45-day timeframe as there was a separate criminal investigation pending at the prosecutor's office. A review of the record reveals that the PNDA was issued after the prosecutor's investigation had ended and the person filing the complaint had sufficient information to file the matter on which the complaint is based. However, even if procedural violations occurred, there is no basis for a dismissal of the charges against the petitioner. Any procedural defects which may occur at the departmental or municipal level can be addressed and corrected during the *de novo* hearing at the OAL. See *Ensslin v. Township of North Bergen*, 275 *N.J. Super.* 352, 361 (App. Div. 1994), *cert. denied*, 142 *N.J.* 446 (1995); *In re Darcy*, 114 *N.J. Super.* 454 (App. Div. 1971).

Moreover, the petitioner contends that the appointing authority would not be adversely affected if the disciplinary charges were summarily dismissed and she were immediately returned to her position. However, the Commission does not find this argument persuasive. Based on the circumstances involved in the petitioner's alleged conduct, it would be harmful to the appointing authority, as well as the public at large, to allow an individual to be returned to employment after a departmental disciplinary sanction has been imposed without the benefit of a *de novo* hearing at OAL. In this regard, a law enforcement officer is held to a higher standard than a civilian public employee. See *Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied*, 47 *N.J.* 80 (1966), *In re Phillips*, 117 *N.J.* 567 (1990). Accordingly, the petitioner's request for interim relief is denied.

ORDER

Therefore, it is ordered that petitioner's request for interim relief be denied.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18th DAY OF NOVEMBER, 2015



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