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STATE OF NEW JERSEY

DECISION OF THE CIVIL SERVICE COMMISSION

In the Matter of Richard McGowan,
City of East Orange

Request for a Stay and Interim Relief

CSC Docket No. 2015-3274

ISSUED: **AUG 03 2015** (SLK)

Richard McGowan, a Police Captain with the City of East Orange (EOPD), represented by Wolodymyr P. Tyshchenko, Esq., petitions the Civil Service Commission (Commission) for a stay of his removal, effective June 10, 2015, pending the outcome of his hearing at the Office of Administrative Law (OAL).

By way of background, the petitioner was charged with incompetency, inefficiency or failure to perform duties, other sufficient cause, and violations of the EOPD's rules and regulations regarding insubordination, conduct toward superior and subordinate officers and associates, and authority and responsibility for commanding officers. Specifically, the appointing authority indicated that, on November 27, 2013, a COMPSTAT meeting was held where the petitioner was disrespectful, insolent and insubordinate to Inspector Tony Cook. Further, the appointing authority alleged that the petitioner failed to take any corrective action for an officer who reported to duty late on four consecutive days, failed to monitor the progress of an officer for five days following counseling by her immediate supervisor regarding her poor work performance and take corrective action for this officer as directed by Cook, and failed to review information and prepare for the weekly COMPSTAT meeting.

In his request for interim relief, the petitioner asserts that a substantial portion of the charges sustained against him were solely violations of Department Rules and Regulations which were brought in contravention of the 45 day rule. The petitioner argues that the charge that he was insubordinate is contradicted by Cook's own admission at the departmental hearing that COMPSTAT meetings involve a "degree of heated exchange." The petitioner claims that Cook admitted

under oath the he disparaged him at the COMPSTAT meeting in the presence of his peers and subordinate officers. The petitioner maintains that Cook permitted a lower ranking officer to cross-examine and raise his voice to the petitioner; yet that officer was not charged with insubordination or disciplined. The petitioner presents that Cook testified that officers are permitted to raise their voice, scream and, on occasion, even use profanity at COMPSTAT meetings and that no officer had ever previously been disciplined based on behavior at a COMPSTAT meeting. The petitioner argues that a reasonable person could not find his behavior to be insubordinate as he is alleged to have uttered two statements, "I'm insulted. I feel like I'm being attacked" and "I don't talk to my children like that" without even raising his voice. The petitioner asserts that due to the vindictive nature of the appointing authority and Chief of Police, the penalty of removal was far too severe especially since no one previously had ever been disciplined for behavior at a COMPSTAT meeting. Regarding the other charges, the petitioner asserts that they are trivial as he was accused of failing to supervise and take corrective action against subordinate officers while he was off-duty on approved vacation leave.

Additionally, the petitioner asserts that the appointing authority has a history of selective discipline and prosecution and therefore the Commission should order that he be reinstated to full duty, including back pay, pending disposition of this matter or, in the alternative, that he remain on the payroll pending disposition of this matter. The petitioner presents that he is a highly decorated officer and is respected by his peers. The petitioner argues that he will suffer irreparable harm if his removal is not stayed as his salary with the appointing authority is his sole source of income, and as a result of his loss of income, he will soon be unable to pay for his health insurance and may lose his home. Furthermore, the petitioner contends that there is no harm to the appointing authority in continuing to pay him, just as it has done for the past 20 years, as his salary constitutes a miniscule portion of the EOPD's budget. Finally, the petitioner argues that the public interest is served by reinstating him since he has demonstrated the likelihood of success on the merits and irreparable harm to himself.

In response, the appointing authority, represented by Marlin Townes III, Esq., Assistant Corporation Counsel, argues that the petitioner's request should be denied as he has failed to establish a reasonable probability of success on the merits. The appointing authority maintains that the petitioner was insubordinate by making several insolent remarks to Inspector Cook during the November 27, 2013 COMPSTAT meeting. The appointing authority asserts that the petitioner failed to fulfill his duty to ensure improved performance and timeliness of officers on his tour who were found to be chronically late. The appointing authority provides that the 45-day time limit does not apply to charges under Civil Service regulations. Further, the appointing authority presents that the charges under its internal rules and regulations were within 45 days after the Chief of Police had sufficient knowledge to charge the petitioner, as its Professional Standard Unit

(PSU) furnished its findings from two investigations to the Chief of Police on December 20, 2013 and December 27, 2013 and the Preliminary Notices of Disciplinary Action (PDNAs) were served to the petitioner on December 26, 2013 and December 27, 2013. The appointing authority argues that the petitioner cannot demonstrate irreparable harm as his loss of income can be redressed through a monetary remedy such as an award of back pay if his removal ultimately is deemed improper. The appointing authority asserts that it is in the public interest to deny the petitioner's request as his reinstatement would negatively impact morale within the department by allowing an officer who did not follow agency rules to face no repercussion, it would interfere with how it maintains order and its operations, and would damage its positive image with the public.

CONCLUSION

N.J.A.C. 4A:2-1.2(c) provides the following factors for consideration in evaluating a petition for a stay and 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's actions constituted wrongful conduct warranting discipline. The Commission will not attempt to determine such a disciplinary appeal on the written record without 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. Likewise, the Commission cannot make a determination on whether the petitioner's penalty of removal was inappropriate without the benefit of a full hearing record before it. Since the petitioner has not conclusively demonstrated that he will succeed in having the underlying charges dismissed as there are material issues of fact present in the case, he has not shown a clear likelihood of success on the merits. Furthermore, while the Commission is cognizant of his financial situation, the harm that he is suffering while awaiting his OAL hearing is financial in nature, and as such, can be remedied by the granting of back pay should he prevail in his appeal. Moreover, the petitioner contends that there is no hardship to the appointing authority to continue to pay him just as it has done for the past 20 years. However, the public interest would not be served by allowing the petitioner to be placed back on the job given the serious nature and scope of the charges pending against him. Clearly, such allegations against a high ranking law enforcement officer cannot be casually regarded by the Commission. In this regard, the Commission notes that 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). See also, *In re Phillips*, 117 N.J. 567 (1990).

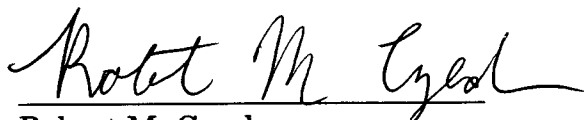
The petitioner also argues that a substantial portion of the charges sustained against him were solely violations of Departmental Rules and Regulations which were brought in contravention of the 45-day rule. The 45 day time period for filing disciplinary charges found in N.J.S.A. 40A:14-147 commences on the date on which the person filing the complaint has sufficient notice of the conduct underlying the disciplinary charges. In this matter, the appointing authority presents that the findings from two PSU investigations were not furnished to the Chief of Police until December 20, 2013 and December 27, 2013 and the PNDAs were served to the petitioner on December 26, 2013 and December 27, 2013. Therefore, it appears that the internal rules and regulation charges were served to the petitioner within 45 days after the Police Chief had sufficient information to file the matter upon which the complaint was based. Further, the 45 day rule does not apply to the charges filed under Civil Service 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 e.g., *McElwee V. Borough of Fieldsboro*, 400 N.J. Super. 388 (App. Div. 2008). See also, *In the Matter of Christopher Mercardo* (CSC, decided April 18, 2012); *In the Matter of Claudy Augustin* (MSB, decided April 23, 2008). See also, *In the Matter of James Cassidy* (MSB, decided August 12, 2003); *In the Matter of Steven Palamara* (MSB, decided April 10, 2002)

Accordingly, the petitioner has failed to show that he is entitled to a stay of his removal in this matter.

ORDER

Therefore, it is ordered that this request for a stay be denied.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE DAY 29th OF JULY, 2015



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