



**STATE OF NEW JERSEY
DECISION OF THE
CIVIL SERVICE COMMISSION**

In the Matter of Frederick Bender
City of Trenton Police Department

CSC DKT. NO. 2013-2228
OAL DKT. NO. CSV 02992-13

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ISSUED: JUNE 22, 2018 BW

The appeal of Frederick Bender, Police Officer, City of Trenton Police Department, 90 working day suspension, on charges, was heard by Administrative Law Judge Kathleen M. Calemmo, who rendered her initial decision on May 9, 2018 reversing the 90 working day suspension. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on June 20, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the penalty has been reversed, the appellant is entitled to 90 days of back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10. Further, since the appellant has prevailed, he is entitled to counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay and counsel fees are finally resolved.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Frederick Bender. The Commission further orders that appellant be granted 90 days 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*. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C. 4A:2-2.12*. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2-2.10* and *N.J.A.C. 4A:2.12*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay or counsel fees.

The parties must inform the Commission, in writing, if there is any dispute as to back pay or counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R. 2:2-3(a)(2)*. After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF JUNE, 2018

Deirdre' L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 02992-13

AGENCY REF. NO. 2013-2228

**IN THE MATTER OF
FREDERICK BENDER,
CITY OF TRENTON POLICE
DEPARTMENT.**

Stuart J. Alterman, Esq., for appellant (Alterman & Associates, LLC, attorneys)

George R. Saponaro, Esq., for respondent (Saponaro Law Group, attorneys)

Record closed: March 22, 2018

Decided: May 9, 2018

BEFORE KATHLEEN M. CALEMMO, ALJ:

STATEMENT OF THE CASE

Appellant, Frederick Bender (Bender), a Police Officer with the City of Trenton, Police Department (Trenton), appealed a 90-day suspension he received as major discipline for allegedly engaging with four other officers while off duty in a street fight on January 17, 2011. Trenton sustained the following charges: conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); other sufficient cause, N.J.A.C. 4A:2-2.3(a)(11); and misconduct, N.J.S.A. 40A:14-147. Trenton also determined that Bender

violated the following Trenton Police Department Rules and Regulations: 2:2.38, 3:1.3, 3:1.1, and 4:8.3. Bender denied the allegations as baseless and unjustly harsh.

PROCEDURAL HISTORY

On September 15, 2011, Trenton issued a Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and specifications against Bender. Following a departmental hearing held on October 5, 2012, Trenton issued a Final Notice of Disciplinary Action (FNDA) on February 19, 2013 sustaining the charges in the PNDA and suspending Bender from employment for ninety working days. Appellant appealed on February 21, 2013. The matter was transmitted by the Civil Service Commission Division of Appeals and Regulatory Affairs to the Office of Administrative Law (OAL) where it was filed on March 1, 2013 for hearing as a contested case. N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52: 14F-1 to 13.

The case was originally assigned to a different Administrative Law Judge (ALJ). Three adjournments were granted for the following dates: February 20, 2014; July 23, 2014; and January 5, 2015. The matter was reassigned to me on February 10, 2017. On March 10, 2017, respondent filed a Substitution of Counsel reassigning the case to Mr. Saponaro. After a telephone conference with the parties on February 28, 2017, I scheduled the hearing for May 17, 2017. The parties mutually requested an adjournment so I conducted a telephone conference on May 16, 2017, granted the request, and scheduled a status conference for August 17, 2017. During the telephone conference on August 17, 2017, Mr. Saponaro informed me that of the four police officers who had been charged regarding the same incident, two were still waiting for their final hearings at the local level. Mr. Saponaro requested additional time to resolve the issues with the other two officers. His intent was to reach a global settlement involving all three officers or a consolidation of the three matters. With Mr. Alterman's consent, I scheduled another status conference for September 27, 2017. At the September 27 conference, Mr. Saponaro reported that he had made no progress with the companion cases. Because

Mr. Alterman objected to any further adjournments, as unduly prejudicial to appellant, I scheduled the hearing dates for October 31, 2017 and November 9, 2017.

On the morning of the hearing, appellant was present and prepared to go forward. Mr. Saponaro appeared for respondent but did not bring any witnesses and represented that respondent was not prepared to go forward. He requested an adjournment of the October 31, 2017 hearing date and represented that respondent would be able to proceed on November 9, 2017. Mr. Alterman objected to this last-minute request. I allowed the parties to state their positions on the record. As Mr. Saponaro was not able to proceed with the hearing on behalf of respondent on the date scheduled for the hearing, I adjourned the hearing dates to allow appellant leave to file a motion to dismiss.

On February 28, 2018, appellant, through counsel, filed a motion to dismiss the disciplinary action due to respondent's failure to proceed. Respondent did not file any opposition to the motion. Respondent has not taken any action in this matter since October 31, 2017 and respondent's counsel has remained attorney of record.

LEGAL ANALYSIS AND CONCLUSION

Appellant moved to dismiss the disciplinary action with prejudice for respondent's failure to proceed at the time of the scheduled hearing date of October 31, 2017 in accordance with N.J.A.C. 1:1-14.14 seeking a sanction of dismissal of the charges with prejudice.

Appellant was present and prepared to go forward on the date of the hearing, October 31, 2017. Respondent's counsel appeared but represented that he was unable to proceed with the hearing because respondent was in the process of changing law firms. To date, there has been no substitution of counsel, and significantly, no opposition to appellant's motion. Despite the filing of appellant's motion to dismiss on February 28, 2018, respondent has yet to provide any explanation for its failure to proceed in this matter.

In an appeal concerning major disciplinary action, the burden of proof is on the appointing authority to show that the action taken was justified. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). The County bears the burden of establishing the truth of the allegations by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Bender filed his appeal on February 21, 2013 for an incident that occurred on January 17, 2011. Respondent has had more than ample time to show that the action taken against Bender was justified.

Based on the foregoing, I **CONCLUDE** that, because respondent failed to proceed on the date of the hearing, October 31, 2017; failed to offer any explanation for its failure to proceed; and failed to oppose appellant's motion to dismiss, the sanction of dismissal under N.J.A.C. 1:1-14.14(a) is warranted. I further **CONCLUDE** that without participating in the due process hearing, the disciplinary charges against appellant, Frederick Bender, cannot be sustained by respondent, City of Trenton Police Department, and must be **DISMISSED** with prejudice.

I hereby **ORDER** that the disciplinary action imposed by respondent against appellant set forth in the FNDA dated February 19, 2013 is hereby dismissed with prejudice.

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, PO 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.

May 9, 2018
DATE

Kathleen M. Calemmo
KATHLEEN M. CALEMMO, ALJ

Date Received at Agency:

May 9, 2018

Date Mailed to Parties:

May 9, 2018

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