

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matter of Malikah Spencer,  
Essex County

CSC Docket No. 2020-2548

Requests for Interim Relief

ISSUED: JUNE 19, 2020 (SLK)

Malikah Spencer, a County Correctional Police Officer with Essex County, represented by Luretha Stribling, Esq., petitions the Civil Service Commission (Commission) for interim relief regarding her pending disciplinary action.

By way of background, Spencer was served with a Preliminary Notice of Disciplinary Action (PNDA) on December 19, 2019, charging her with conduct unbecoming a public employee and other sufficient cause as well as violating certain departmental rules and regulations. The charges specified that on August 17, 2019, Spencer was involved in a domestic dispute which she failed to report to the shift commander, which prompted an internal investigation. In response to the investigation, Spencer called the investigator on August 19, 2019 stating that she would be out of the country and would not be back until August 25, 2019. Later, on August 22, 2019, she was absent without leave and when she was called and asked why she was not at work, she stated that she was in Mexico and forgot to call out. Then, Spencer called out on August 23, 2019 through August 26, 2019 stating that she was taking Family and Medical Leave Act (FMLA) time. The appointing authority indicated that her use of FMLA was fraudulent as she had indicated that she was out of the country until August 25, 2019.

In her request, Spencer indicates that she was the victim of a domestic violence incident on August 17, 2019, which resulted in Police Officers reporting to her residence. She explains that as a County Correctional Police Officer, the protocol is that she informs her employer that she was involved in an incident where law enforcement was called. However, as she was so upset by this incident, the Police Officers at the scene said that they would inform her employer, which they did. There

was also a second domestic violence incident on August 19, 2019, and Spencer called out from work.

On August 19, 2019, Spencer's family members were traveling to Mexico and she decided to travel with them as she believed it was safer to go with her family than remain at home and be subjected to another incident. She took a day off on August 21, 2019, and used a day without pay on August 22, 2019, which she called in. This call was made after the shift started and beyond the scheduled call out time. Spencer returned from Mexico on August 23, 2019, as her child was sick and needed emergency care. She took her child to the hospital and used a FMLA day. Spencer had already been approved for FMLA months earlier. The treating physician provided her a note excusing her from work and the note was provided to her supervisory staff. However, the appointing authority accused her of misusing FMLA time and not calling out from work on August 22, 2019. Supervisory staff claimed that she used FMLA on August 23, 2019 for vacation. She was ordered to provide travel documentation concerning her trip, which she provided.

Spencer states that after the investigation initiated on August 22, 2019, there was no further communication from the investigator. Thereafter, on December 19, 2020, she was served with a PNDA. Spencer presents that under *N.J.S.A. 40A:14-147*, police officers, which includes County Correctional Police Officers, are to have a departmental hearing no less than 10 days from the complaint and no more than 30 days from the date of service of the complaint. Further, a complaint charging a violation of internal rules and regulations shall be filed no longer than the 45<sup>th</sup> day on which the person filing the complaint obtained sufficient information to file such a complaint. However, the 45-day limit does not apply if the investigation into violations of internal rules and regulations includes a concurrent criminal investigation. Instead, the 45-day time limit starts after the disposition of the criminal investigation. Moreover, a failure to comply with this statute requires that the complaint be dismissed.

Spencer asserts that since the investigation started on August 22, 2019, under *N.J.S.A. 40A:14-147*, she needed to be served the PNDA within 45 days, which was October 5, 2019 and the departmental hearing needed to be held within 30 days of October 5, 2019, which was November 5, 2019. Further, she states that there was no concurrent criminal investigation. Therefore, Spencer argues that since the PNDA was served 75 days after October 5, 2019, and the departmental hearing was not held within the required 30 day time frame, the complaint needs to be dismissed.

In response, the appointing authority, represented by Jill Caffrey, Assistant County Counsel, asserts that Spencer does not have a clear likelihood of success on the merits. It presents that under *N.J.S.A. 30:8-18.2*, the 45-day rule does not apply if the investigation concurrently involves a criminal investigation. As the matter was not referred back to it from the County Prosecutor's Office until December 10, 2019,

the PNDA that was served on December 19, 2019 was served well within the 45-day time period. Further, the 45-day rule only applies to violations of internal rules and regulations and not administrative charges. Therefore, even if the internal charges were dismissed, the administrative charge of conduct unbecoming a public employee remained. Moreover, it was Spencer's attorney who requested two hearing adjournments and the appointing authority allowed an adjournment of her third hearing date when she terminated her previous attorney's representation. Additionally, she will not suffer irreparable harm if her request is denied as she is entitled to a departmental hearing and, subsequently, a hearing at the Office of Administrative Law. Moreover, it is the appointing authority, and not Spencer, who will suffer substantial injury if her request is granted, as her alleged FMLA fraud is a clear liability to the appointing authority. Finally, the public would be harmed if a County Correctional Police Officer, who is alleged to have engaged in FMLA fraud, would go undisciplined.

### CONCLUSION

Pursuant to *N.J.A.C. 4A:2-1.2(c)*, the standards to be considered regarding a petition for interim relief are:

1. Clear likelihood of success on the merits by the petitioner;
2. Danger of immediate or irreparable harm if the request is not granted;
3. Absence of substantial injury to other parties if the request is granted;
- and
4. The public interest.

Initially, Spencer cites *N.J.S.A. 40A:14-147*, which provides provides, in pertinent part, that a departmental hearing for Police Officer who has been issued disciplinary charges shall have a departmental hearing not less than 10 nor more than 30 days from date of service of the complaint. 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. The 45-day time limit shall not apply if an investigation of a law enforcement officer for a violation of the internal rules or regulations of the law enforcement unit 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. 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. However, this statute only applies to **municipal** Police Officers.

Nevertheless, *N.J.S.A. 30:8-18.2* provides, in pertinent part, that a County Correctional Police Officer shall not be disciplined for a violation of the internal rules

and regulations, unless a complaint 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 there is a concurrent criminal investigation, and if there is; the 45-day limit shall begin on the day after the disposition of the criminal investigation.

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 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 Spencer's ultimate is appropriate without the benefit of a full hearing record before it. Since she has not conclusively demonstrated that she will succeed in having the underlying charges dismissed as there are material issues of fact present in the case, she has not shown a clear likelihood of success on the merits. Further, Spencer is not in danger of suffering immediate or irreparable harm or substantial injury if her request is not granted as she will be entitled to a departmental hearing and, subsequently, a hearing at the Office of Administrative Law, if necessary.

Concerning the alleged procedural violations by the appointing authority, the record indicates that there was a concurrent criminal investigation as the matter was referred to the Essex County's Prosecutor's Officer. Thereafter, the Prosecutor's Office indicated that it was not going to pursue criminal charges and referred the matter back to the appointing authority on December 10, 2019. As such, the appointing authority's issuing of the PNDA on December 19, 2019 was well within 45 days after the disposition of the criminal charges. Further, the 45-day rule does not apply to the charges filed under Civil Service regulations. *See e.g., Hendricks v. Venetone*, 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). Moreover, the appointing authority has provided documentation that indicates that the delay in holding the departmental hearing was due to Spencer's former counsel's requests for adjournments as well as her switching counsel.

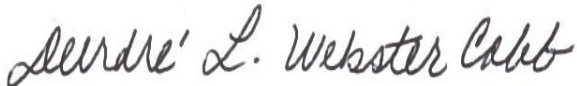
Accordingly, the Spencer has failed to show that she is entitled to interim relief.

**ORDER**

Therefore, it is ordered that this petition be denied.

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  
17<sup>TH</sup> DAY OF JUNE, 2020



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