

*In the Matter of Joseph Richardson*

DOP Docket No. 2006-1684

**(Merit System Board, decided December 21, 2005)**

Joseph Richardson, a Police Captain with the City of Camden (City), represented by Clifford L. Van Syoc, Esq., petitions the Merit System Board (Board) for a stay and interim relief of his demotion to the title of Police Lieutenant.

The record indicates that in August 2003 the City began an investigation into Principal Payroll Clerk, Typing Sonya Bell's allegations of an ongoing hostile work environment caused by the petitioner and other members of the police department. Based on the outcome of this investigation, the City issued the petitioner a Preliminary Notice of Disciplinary Action (PNDA) dated July 1, 2004, charging him with violating the Police Department rules and regulations for failure to comply with the Chief's orders, being untruthful and conduct unbecoming an employee in the public service. Specifically, the City alleged that the petitioner failed to follow former Police Chief Robert Allenbach's<sup>1</sup> order to stop the move of Bell's desk to another office, and that he denied receiving such an order from former Captain Joseph Wysocki.<sup>2</sup> In addition, the City alleged that the petitioner had referred to Bell as a "bitch," shouted at Bell in a hallway, lied about the situation to Wysocki, and reported to the Risk Manager that he had conducted an investigation into the matter and had handled the matter. The petitioner was also responsible for the situation with Bell because he was ultimately responsible for the outcome of any situation under his command. A departmental hearing was held in which only the charges of failure to comply with the Chief's orders and the petitioner's alleged untruthfulness to Wysocki were upheld. The Final Notice of Disciplinary Action (FNDA) upholding the two charges was issued October 11, 2005, and indicated a penalty of demotion to Police Lieutenant effective October 12, 2005.

On October 11, 2005 the petitioner filed a complaint in the Superior Court, Law Division, seeking to enjoin the City from imposing any discipline against him. The Court issued a temporary injunction preventing the petitioner from being demoted. On October 26, 2005, the Court determined that it was not the appropriate forum for the relief the petitioner was seeking, but granted a stay and left the temporary restraint in place for an additional ten days. Subsequently, the petitioner appealed his demotion to the Board and that matter is currently pending transmittal to the Office of Administrative Law (OAL) for a hearing. Further, the petitioner has indicated that he is seeking relief from the Appellate Division from the Superior Court's order.

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<sup>1</sup> Allenbach retired as Police Chief effective June 30, 2004.

<sup>2</sup> Wysocki retired from his position effective August 1, 2004.

In his request for a stay and interim relief, the petitioner initially describes the office moving incident. The petitioner claims that prior to June 18, 2002, he had been ordered to move Bell's desk from one office to another. Bell was not aware of the impending move. On June 18, 2002, while the move was taking place, Bell acted up before disappearing for a substantial period of time. As result of Bell's reaction, Police Officer Lydia Perez contacted Allenbach on his cell phone and informed him of the situation. Allenbach told Perez to have Police Lieutenant Joseph Galiuzzi<sup>3</sup> inform the petitioner that the move should be stopped until he returned. Galiuzzi informed the petitioner of Allenbach's order but the petitioner was concerned over the validity of the order. While the petitioner attempted to contact Allenbach to confirm the order, the move of Bell's desk continued. The petitioner asserts that after he was unable to contact Allenbach, he halted the move. Meanwhile, Bell had complained to Wysocki that the petitioner had talked down to her and had cursed at her. The petitioner met with Wysocki. He argues that he did not lie to Wysocki about speaking directly to Allenbach as he did not speak with Allenbach while he was away from the police station. Further, the petitioner contends that when Allenbach returned to the station, he spoke at length with Wysocki, the petitioner, Bell, Galiuzzi, Perez and all others concerned, such that he knew all the facts and circumstances surrounding the event. On July 22, 2002, Allenbach held a meeting with the petitioner, Bell, and her labor representative, in which the petitioner claims that all issues concerning the June 18, 2002 incident were resolved to the satisfaction of everyone involved.

The petitioner argues that the charges brought forth against him on July 1, 2004 were not timely and violate the "45-day rule" as set forth in *N.J.S.A. 40A:14-147*. The petitioner contends that no valid reason exists which excuses the City from complying with this statute. Additionally, the petitioner asserts that the investigation into this matter was unduly delayed inasmuch as the City had all the information it needed by July 22, 2002, but did not begin an investigation until August 2003. In this regard, the petitioner claims that only the Chief of Police has the power to bring charges against police officers, and Allenbach had all the information necessary on July 22, 2002. The petitioner relies on *Aristizibal v. City of Atlantic City*, 380 *N.J. Super.* 405 (Law Div. 2005), in which the Court issued a permanent injunction against a municipal employer barring it from disciplining police officers where it did not begin an investigation resulting in disciplinary charges until 72 days after the incident occurred. In this respect, the petitioner notes that the investigation into his incident did not occur until several hundred days after the event. Further, the petitioner argues that the City's position that its policy required all hostile work environment complaints to be investigated by an independent investigator does not preempt a State statute and the City was required to comply with the "45-day" requirement. The petitioner also contends that the City does not send all hostile work environment complaints to an independent investigator. In support of this contention, he submits a certified

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<sup>3</sup> Galiuzzi was serving as a Police Sergeant on June 18, 2002.

statement from City Police Officer Rolan Carter which indicates that Carter has filed numerous complaints of discrimination and hostile work environment, and the City has not hired an independent investigator to investigate any of his allegations. Furthermore, the petitioner argues that the City's assertion concerning the sexual harassment policy and the alleged ongoing hostile work environment is a red herring as the sustained charges did not involve the City sexual harassment policy, did not require an independent investigation, and could be initiated by the Chief of Police.

In addition, the petitioner asserts that there is no evidence in the record that he disobeyed Allenbach's order or lied to Wysocki. In this regard, the petitioner claims that Allenbach testified at the departmental hearing that his order was that the move stop, and from everything he observed, the move was halted. Additionally, the petitioner states that Allenbach testified that he did not recall anyone telling him that the petitioner continued with the move after receiving his order. With regard to the petitioner's lying to Wysocki, the petitioner claims that Wysocki testified that he forgot how the matter had transpired three years earlier. Further, while Wysocki indicated that he had a feeling that the petitioner had lied about whether or not he had spoken with Allenbach on June 18, 2002, he chose not to pursue any discipline of the petitioner.

The petitioner claims that his stature with his co-workers and within the law enforcement community will be irreparably harmed if his petition is not granted. Additionally, the petitioner contends that he will be prejudiced if the demotion is allowed to stand and the public interest is in not allowing the demotion, as he will ultimately prevail and cost the taxpayers money. Further, the petitioner argues that the City violated the collective bargaining agreement concerning employees being interviewed for possible disciplinary action and access to tape recorded interviews.

In response, the City, represented by Joseph A. D'Aversa, Esq., argues that the City did not violate the "45-day Rule" in bringing charges against the petitioner on July 1, 2004. It argues that the instant matter concerned allegations of hostile work environment made by Bell against the petitioner and other members of the City's Police Department, and as such, required an independent investigation per the City's sexual harassment policy. In this regard, the City asserts that it hired Phyllis Krichev to perform an investigation which began in August 2003 and was completed in May 2004. City Police Chief Edwin Figueroa received the investigative report on May 24, 2004, and the petitioner was served the PNDA on July 1, 2004, well within the 45-day requirement. The City claims that the petitioner's argument that Allenbach could have brought forth charges against him in June or July of 2002 are false as an independent investigation was required. In fact, it argues, there is no evidence that Allenbach conducted an investigation and an internal affairs file was not opened regarding this incident until March 2003.

Additionally, the City contends that the June 18, 2002 incident was only part of the hostile work environment complaint filed by Bell. Further, the City contends that Krichev's investigation was complex, required her to interview 30 people and resulted in an 81 page report.

Moreover, the City argues that the charges brought against the petitioner concerned both actions on and subsequent to the June 18, 2002 incident. The City also contends that the petitioner was the cause for the delay in obtaining an independent investigation as he indicated to the former Business Administrator and to Police Captain Patrick Hall of internal affairs that he had conducted an investigation into the June 18, 2002 incident and the subsequent problems with Bell and Police Department members. In this regard, the City claims that the petitioner presented the former Business Administrator with a memorandum dated October 21, 2002 containing several documents concerning the ongoing problems with Bell and certain Police Officers, including himself. Furthermore, the City contends that it was not until March 2003 that the petitioner informed Hall of Bell's allegation of a hostile work environment and the necessity for an independent investigation. With regard to the petitioner's reliance on *Aristizibal, supra*, the City contends that this case is not binding on the Board and that, nonetheless, it is distinguishable from the instant matter. In this regard, it contends that Allenbach should have forwarded concerns from the June 18, 2002 incidents for an independent investigation but rather chose to resolve the matter himself. Therefore, those who should have been apprised of the situation were not. The City also contends that the petitioner mischaracterized the testimony of its witnesses in claiming that they indicated that all allegations of hostile work environment are to be referred to an independent investigator. It asserts that Figueroa clarified his testimony in this regard and stated that not all allegations of hostile work environment are referred for an independent investigation as the Chief of Police has certain discretion in these matters.

Additionally, the City contends that the petitioner's reliance on Allenbach's testimony that his order to stop the move had been followed because it was not complete when he returned to the station is misplaced. The City argues that Allenbach simply assumed the move stopped when he issued his order because it was not complete when he returned. In this regard, the City asserts that the petitioner himself acknowledged that the move continued after he received Allenbach's order. Further, the City claims that after hearing all the testimony, the hearing officer determined that the petitioner initially denied knowledge of Allenbach's order to stop the move to Wysocki, but later acknowledged that he had received Allenbach's order after Wysocki had contacted Allenbach and learned about the order.

Further, the City claims that the petitioner will not suffer any irreparable harm if his petition is not granted because he would be returned to his Police

Captain position and entitled to differential back pay should he prevail on appeal after a hearing. The City also contends that the petitioner's contention that he will suffer irreparable harm as his reputation and stature will be tarnished is without merit as all employees being disciplined could make similar arguments. Moreover, the City argues that it will be irreparably harmed if the petitioner's stay is granted as this would have a devastating effect on its ability to impose discipline on its employees. Finally, the City claims that the petitioner's claim that the public interest requires that his petition be granted because it will cost the taxpayers money is irrelevant as the City will have to prepare and argue the petitioner's appeal regardless of whether his stay request is granted.

## CONCLUSION

Initially, the Board notes that it will not review the petitioner's claims regarding violations of the collective bargaining agreement. The Board does not have jurisdiction to enforce or interpret specific provisions or procedures which are contained in a collective bargaining agreement negotiated between the employer and a majority representative. See *In the Matter of Jeffrey Sienkiewicz, Bobby Jenkins and Frank Jackson*, Docket No. A-1980-99T1 (App. Div. May 8, 2001).

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

In reviewing this matter, the information provided in support of the instant petition demonstrates a clear likelihood of success on the merits. While it is unclear from the record whether the petitioner violated Allenbach's order to stop the move of Bell's desk or whether the petitioner lied to Wysocki about receiving Allenbach's order to stop (and the Board makes no finding on the substance of these charges), the record indicates that the City violated the "45-day rule" as set forth in *N.J.S.A.* 40A:14-147. The relevant portions of *N.J.S.A.* 40A:14-147, the "45-day rule," provide that "a complaint charging a violation of the [police department's] 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." This statute is designed to protect police officers from an appointing authority unduly and prejudicially delaying the imposition of

disciplinary action. However, the statute does not prohibit an appointing authority from doing a proper investigation into a matter to determine whether disciplinary charges are necessary and appropriate.<sup>4</sup> The fact that such normal and necessary investigation may span a period of time, which may exceed 45 days, does not automatically call for the dismissal of such charges. Rather, for the purposes of *N.J.S.A.* 40A:14-147, the charges must be brought within 45 days of the “person filing the complaint” obtaining sufficient information to bring such charges. The “person filing the complaint” is generally acknowledged to be the Chief of Police. *See N.J.S.A.* 40A:14-118. Therefore, the 45 days start when the Chief of Police has sufficient knowledge to bring the charges against an officer. *See Joseph McCormick v. Lawrence Township*, Docket No. A-2811-01T3 (App. Div., April 23, 2003); *See also, In the Matter of Christopher Silva* (MSB, decided January 30, 2001). However, this provision does not allow an appointing authority to unnecessarily delay the bringing of charges by not promptly attempting to obtain sufficient information to bring charges and promptly forwarding such information to the person responsible for filing the complaint.<sup>5</sup> Under such circumstances, it would be appropriate to dismiss charges against a police officer based on the 45-day rule. Conversely, the statute is undoubtedly not designed to force an appointing authority to bring disciplinary charges without properly investigating the matter to ensure that sufficient information to bring such charges is obtained.

In this case, the record clearly shows that Allenbach had knowledge of the pertinent facts underlying the sustained disciplinary charges against the petitioner by July 22, 2002. Allenbach appears to have had discussions with all the individuals involved and even had a meeting about the incident. The City contends that Allenbach was not authorized to discipline the petitioner in this instance since an independent investigator was needed to review the matter and Allenbach had not conducted an investigation into the matter. The Board does not agree. The record reveals that Allenbach held a meeting on July 22, 2002 with the principals involved in an attempt to resolve the issues concerning the June 18, 2002 incident. After this meeting, Allenbach did not call for an independent investigation. Per the City’s contention, as provided by Figueroa, the Chief of Police has some discretion in determining whether incidents are referred for an independent investigation. In the instant matter, Allenbach must not have thought that the incident required an independent investigation as none was called for. Additionally, the Board agrees with the petitioner’s contention that the sustained charges are unrelated to a hostile work environment claim and did not require further investigation. Clearly,

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<sup>4</sup> In fact, the Internal Affairs Policies and Procedures promulgated by the Attorney General (AG Guidelines), under the section covering the investigation of internal complaints, requires that all allegations of officer misconduct *shall* be thoroughly and objectively investigated. AG Guidelines at 11-20.

<sup>5</sup> The AG Guidelines state that an agency would have a difficult time justifying an extensive bureaucratic delay once any member of that agency has established sufficient information. *Id.*

had the sustained charges actually dealt with the other alleged incidents regarding Bell, the Board's conclusion may have been different.<sup>6</sup> However, the Board emphasizes that the sustained charges and specifications on the FNDA **only** refer to the alleged misconduct regarding the June 2002 incident.

The City has also argued that the petitioner was the cause for the delay in properly investigating this matter. The Board is not persuaded by this argument. As indicated above, Allenbach had sufficient information to bring forth charges, if he chose to, on July 22, 2002. Additionally, even assuming, *arguendo*, that an independent investigation was required and that the petitioner did cause a delay by indicating to the Business Administrator and Internal Affairs that he had investigated the matter, the City still has no viable explanation for the delay in starting the investigation from March 2003 to August 2003, and for the length of the investigation.

Based on the foregoing, the Board finds that the City violated the 45-day provision of *N.J.S.A.* 40A:14-147. Accordingly, the appropriate remedy is to dismiss the charges against the petitioner, return him to his position as a Police Captain, and award him differential back pay from the date of his demotion to the actual date he is returned to a Police Captain position.

Further, the Board awards the petitioner 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. In this regard, the petitioner has prevailed in his petition, and is entitled to an award of reasonable counsel fees. *See In the Matter of James Campbell* (MSB, decided January 11, 2000); *In the Matter of Abnathy Mason* (MSB, decided July 7, 1999). However, it is noted that the petitioner is only entitled to counsel fees regarding his attorney's actions in respect to his petition to the Board and not for representation prior to this petition or representation in any other forum, such as Superior Court.

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<sup>6</sup> Further, the Board notes that both Figueroa and Internal Affairs had knowledge of Bell's claim of hostile work environment in March 2003; however, the investigation into her claims did not begin until August 2003. The City provides no explanation for this delay. Therefore, even if an independent investigation was necessary, the Board finds that the City unduly delayed in initiating such an investigation. Moreover, while the City claims that Krichev's investigation was complex and required interviewing 30 people, 10 months to complete the investigation appears excessive. As indicated above, while *N.J.S.A.* 40A:14-147 provides an appointing authority the opportunity to conduct an investigation to properly bring forth charges, it does not allow an appointing authority to unnecessarily delay the bringing of charges by not promptly attempting to obtain sufficient information to bring charges and promptly forwarding such information to the person responsible for filing the complaint.

## **ORDER**

Therefore, it is ordered that Joseph Richardson's request for interim relief be granted and all the charges against him be dismissed. Additionally, the Board orders that Richardson be returned to the title of Police Captain with differential back pay from the date of his demotion until his actual reinstatement as a Police Captain.

Further, the Richardson is 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.

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