

In the Matter of Kelly McKenith et al.

DOP Docket Nos. 2004-4425, 2005-3, 2005-4, and 2005-5

(Merit System Board, decided February 9, 2005)

Kelly McKenith and Francisco Torres, represented by William D. Sayers, Esq., and Khalid Nash and Shawn Heyward, represented by Ciro Spina III, Esq., appeal their termination from employment as County Correction Officers with the County of Essex. Since the matters address similar issues, they have been consolidated herein.

By way of background, McKenith, Torres, and Heyward were laid off from their permanent positions as County Correction Officers with the County of Essex, effective March 29, 2004. It is noted that the Fraternal Order of Police and the Police Benevolent Association on behalf of affected County Correction Officers filed appeals regarding the good faith of the March 29, 2004 layoff and the matters are pending. McKenith and Heyward were subsequently rehired on April 6, 2004. Torres was rehired on April 7, 2004. However, they were terminated on June 8, 2004. With regard to Nash, he was not laid off. Rather, he accepted an intergovernmental transfer as a Correction Officer Recruit with the New Jersey Department of Corrections, effective March 30, 2004. Nash resigned from his position on April 12, 2004 and was rehired as a County Correction Officer by the County of Essex. He was subsequently terminated on June 8, 2004. The appointing authority advised the appellants that their services were no longer needed and terminated their employment without affording them a hearing. The appointing authority maintained that the appellants were provisionally appointed and it was not obligated to afford them with notice and a hearing pursuant to *N.J.A.C. 4A:2-2.1 et seq.* It is noted that the Division of Human Resource Management was not advised of the provisional appointments at the time.

Due to the layoff from their permanent positions, McKenith, Torres, and Heyward were placed on a special reemployment list for County Correction Officer, County of Essex. The special reemployment list was certified on June 21, 2004 and McKenith, Torres, and Heyward ranked seventh, twenty-fourth, and twenty-seventh, respectively, and would have been reachable for appointment. In disposing of the certification, the appointing authority appointed 23 eligibles, effective June 21, 2004,¹ including five eligibles who ranked lower than Heyward. The appointing authority requested that McKenith, Torres, and Heyward be removed due to an unsatisfactory employment record. In this regard, it indicated that on the weekend of March 27, 2004, the County of Essex closed the existing correctional facilities in Newark and Caldwell and opened a new facility in Newark. On June 4 and June 5, 2004, the appellants allegedly participated in a "blue flu" where approximately 200 County Correction Officers called out sick. This resulted in staff shortages, overtime payments, and redeployment of staff. The appointing authority contended that it could not allow the abuse to continue and terminated the services of McKenith, Nash, Torres, and Heyward. It stated that the appellants abused their sick time during this critical transition period. It is noted that the appointing authority's request to remove the names of McKenith, Torres, and Heyward

¹ It is noted that the 16th ranked eligible was appointed effective August 9, 2004.

from the special reemployment list was not approved by the Division of Human Resource Information Services as the instant matter was pending. Rather, the certification reflected that they were bypassed due to an unsatisfactory employment record. Regarding Nash, since he was not laid off, he was not afforded special reemployment rights or certified on June 21, 2004.

On appeal to the Merit System Board (Board), McKenith, Torres, and Heyward assert that since their names were on a special reemployment list, the appointing authority was prohibited from rehiring them as provisional employees. Nash argues that he cannot be considered a provisional employee since he held permanent status as a County Correction Officer at the time of the layoff. Therefore, the appellants claim that when they were rehired they maintained their permanent status and the appointing authority was prohibited from terminating them without following the proper notice procedures. *See N.J.A.C. 4A:2-2.1 et seq.* Additionally, they contend that they were not advised upon rehire that their positions were provisional. The appellants note that if disciplinary action is warranted, the appointing authority should proceed in accordance with Merit System law upon their reinstatement.

In response, the appointing authority, represented by Steeve J. Augustin, Assistant County Counsel, maintains that the appellants were hired on a provisional basis to fill a requisite need and accepted their status as provisional employees. Further, it contends that McKenith, Torres, and Heyward would have regained their permanent status on June 21, 2004. However, the appointing authority indicates that upon notice of the layoff, the appellants along with other employees began using all their sick days and were left with no days by the time of the layoff. If the appellants did not use all of their sick leave prior to the layoff or participate in the “blue flu,” they would not have been terminated. It notes that the appellants were the only provisional officers who had previously exhausted all their sick days. Other employees who allegedly participated in the “blue flu,” which included permanent and provisional employees, had not exhausted their sick leave and were therefore not terminated. They were only disciplined.

In response, McKenith and Torres² indicate that by the time the special reemployment list promulgated and a certification issued, most, if not all of, the laid off County Correction Officers were rehired in order of their ranking on the special reemployment list. Further, the appellants argue that it was not their fault that the appointing authority acted improperly in not appointing them off the special reemployment list. Thus, they contend that fundamental fairness dictates that the Board find that they were permanent employees who should have been afforded Merit System protection. Further, McKenith and Torres claim that the County Correction Officers who had “permanent status” and participated in the “alleged blue flu” only received minor discipline. Additionally, McKenith claims that she did not participate in the “blue flu” and has a documented medical condition. Between April 7, 2004 and June 6, 2004, she states that she called out sick for seven days and was hospitalized four of the days.

² It is noted that Heyward and Nash did not file responses.

In response, the appointing authority maintains that McKenith and Torres were aware of their provisional status. It submits personnel action forms indicating that McKenith and Torres received a “provisional appointment pending special reemployment list,” effective April 6, 2004 and April 7, 2004, respectively. However, it states that Torres and McKenith failed to report to the personnel office to sign the forms. The forms were nevertheless processed without their signatures in order for McKenith and Torres to be paid.

It is noted that the Division of Merit System Practices and Labor Relations requested a list of provisional employees who were rehired prior to the June 21, 2004 certification and the dates of their appointment. In response, the appointing authority submitted a list of 34 County Correction Officers. These employees were hired on various dates between April 5, 2004 and May 3, 2004. Further, those employees appearing on the special reemployment list who were provisionally hired were not appointed in order of the certification. For example, the fourth ranked eligible on the special reemployment list was rehired on April 6, 2004 and several eligibles below her were appointed on April 5, 2004. The 12th ranked eligible was rehired on April 12, 2004 and several eligibles below him were rehired on April 5 and April 7, 2004.

CONCLUSION

N.J.A.C. 4A:2-2.1 provides that the right to appeal major discipline, which includes the termination of an employee, applies only to permanent employees in the career service or a person serving a working test period. *See also N.J.S.A.* 11A:2-6.

The record shows that on March 29, 2004, a layoff occurred in the County of Essex due to the closing of two jail facilities. Individuals who were laid off received special reemployment rights. In the case of Nash, he was not laid off, but rather, he accepted an intergovernmental transfer to the New Jersey Department of Corrections, effective March 30, 2004. As such, Nash was not entitled to special reemployment rights, *i.e.*, placement on a special reemployment list. Nash subsequently resigned from his position on April 12, 2004 and was rehired by the County of Essex on June 8, 2004. Pursuant to *N.J.A.C.* 4A:1-1.3, a provisional appointment means employment in the competitive division of the career service pending the appointment of a person from an eligible list. Thus, it is clear that Nash received a provisional appointment. Additionally, his appointment was in violation of the special reemployment rights of the laid off County Correction Officers. *See N.J.A.C.* 4A:4-3.7. Therefore, since the Board finds that Nash held a provisional appointment at the time of his termination (in fact, an improperly made provisional appointment), he does not have the right to appeal his termination to the Board. Accordingly, his appeal is dismissed pursuant to *N.J.A.C.* 4A:2-2.1 and *N.J.S.A.* 11A:2-6.

With regard to the employment status of McKenith, Torres, and Heyward, since they were laid off, they were entitled to be placed on a special reemployment list. The only proper way the laid off County Correction Officers could be rehired was through this special reemployment list. The designation of “provisional appointment pending

special reemployment list” does not exist, nor is it permitted, under Merit System law and rules. The appointing authority was well aware of the existence of the special reemployment list, especially in light of the fact that the layoff occurred approximately one week prior to the rehiring of most of the laid off County Correction Officers. The Board is cognizant of the appointing authority’s need for the employees to be back at work. Nevertheless, the appointing authority should have first requested a certification from the Department of Personnel prior to the rehiring. The failure to appoint these appellants from a list, however, does not render the appointments prior to the issuance of the certification as provisional. In the present case, McKenith, Torres, and Heyward were in fact reachable for appointment on the certification. Thus, their appointments in early April 2004 must be considered permanent appointments. Accordingly, McKenith, Torres, and Heyward must be reinstated, as further explained below since they ranked higher than several individuals who were appointed from the special reemployment list and unless three positions are available for them, lower ranked individuals must be displaced.

Therefore, the Board orders that the June 21, 2004 certification be reissued with the date of April 5, 2004, the earliest date of reappointment in the record. Additionally, the Board finds that although the actual appointment dates vary between April 5, 2004 and May 3, 2004, for equitable considerations, all the County Correction Officers who were rehired during this time period and whose names appear on the special reemployment list should receive a retroactive appointment date of April 5, 2004, for record purposes only.

Since the Board has determined that McKenith, Torres, and Heyward’s appointments in April 2004 are permanent appointments, their termination on June 8, 2004 constitutes a *de facto* immediate suspension from their duties without pay. *See e.g., In the Matter of Abnathy Mason* (MSB, decided July 7, 1999); *In the Matter of James Campbell* (MSB, decided April 18, 2000).

In this regard, *N.J.S.A.* 11A:2-13 provides that an employee may be suspended immediately and prior to a hearing where it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services. *See also N.J.A.C.* 4A:2-2.5(a)1. If the employer elects to bar an employee from working involuntarily and without pay, the regulatory scheme in this State requires that prior to withholding of wages, the employee must be afforded oral or written notice of the charges, an explanation of the employer’s evidence and an opportunity to review the charges and evidence and to respond. *See N.J.S.A.* 11A:2-13; *N.J.A.C.* 4A:2-2.5(b); *In the Matter of Anthony Recine* (MSB, decided March 10, 1998) (The Board found that the Township of Hamilton did not provide a proper pretermination hearing since Recine was not made aware of the charges and the general evidence supporting the charges prior to being suspended without pay).

In this case, it is clear that the appointing authority did not comply with the procedures as it failed to provide the appellants with a proper pretermination hearing. Additionally, the appointing authority has not shown that there was a basis to

immediately suspend McKenith, Torres, and Heyward. The appointing authority maintains that McKenith, Torres, and Heyward participated in the “blue flu” and had previously exhausted all their sick days prior to the layoff. However, the Board does not find that these actions, even if proven true, are sufficient to immediately suspend these employees under the regulatory criteria. Moreover, although the Board is not reviewing the merits of the charges against the appellants, it notes that the appointing authority recognized that participating in the “blue flu,” in and of itself, would not warrant termination. It only disciplined the other employees who participated in the “blue flu.” The appointing authority also does not dispute the appellants’ contention that permanent employees only received minor discipline. Accordingly, the appellants were improperly immediately suspended without pay and are, therefore, entitled to back pay.

Additionally, McKenith, Torres, and Heyward are entitled to reasonable 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. While this matter is not specifically a disciplinary appeal, since the Board is not reviewing the merits of charges or any penalty imposed, it is clear that the effect of the appellants’ improperly imposed immediate suspension from duty was an involuntary separation from employment, which is the basis of all major disciplinary actions. Further, it is clear that the appointing authority misapplied the disciplinary rules in its treatment of the appellants. Therefore, under these particular circumstances, the Board finds that this matter is substantially equivalent to an appeal of major disciplinary action and since the appellants have prevailed on the primary issue of their appeal, they are entitled to an award of reasonable counsel fees in respect to the instant matter. *See In the Matter of Andrew Kullen* (MSB, decided September 26, 2000) (Back pay, benefits and counsel fees granted where the appointing authority did not have a sufficient basis for an immediate suspension). *See also Campbell and Mason, supra.*

It is noted that upon the appellants’ reinstatements, if the appointing authority chooses to do so, it may proceed with disciplinary action against the appellants for the alleged job action pursuant to *N.J.A.C. 4A:2-2.1 et seq.*

ORDER

Therefore, it is ordered that the appeal of Khalid Nash of his termination from employment as County Correction Officer with the County of Essex be dismissed for the Merit System Board’s lack of jurisdiction.

It is further ordered that the June 21, 2004 certification of the special reemployment list for County Correction Officer, Essex County, be reissued retroactively to April 5, 2004. Additionally, the appointing authority is ordered to dispose of the certification, providing those County Correction Officers who were rehired between April 5, 2004 and May 3, 2004 and whose names appear on the special reemployment list, a retroactive appointment date of April 5, 2004, for record purposes only.

It is further ordered that Kelly McKeith, Francisco Torres, and Shawn Heyward be reinstated and granted back pay, benefits and seniority from June 8, 2004 to the date of their actual reinstatement. The amount of back pay awarded is to be reduced and mitigated to the extent of any income earned or that could have been earned by the appellants during this period. Proof of income earned shall be submitted to the appointing authority within 30 days of receipt of this decision.

Kelly McKeith, Francisco Torres, and Shawn Heyward are also 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.