



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Anthony Graves,
Newark

CSC Docket No. 2019-3361

Request for Enforcement

ISSUED: SEPTEMBER 12, 2019 (SLK)

Anthony Graves, a Fire Captain with Newark, represented by Tisha N. Adams, Esq., requests that the Civil Service Commission (Commission) enforce its prior decision, *In the Matter of Anthony Graves* (CSC, decided April 17, 2019).

By way of background, on April 6, 2016, Graves was indefinitely suspended without pay due to pending criminal charges. On January 17, 2019, Graves was found not guilty and on January 22 and 23, 2019, Graves sent the appointing authority letters advising that his criminal matter had been resolved and requesting that he be reinstated and be awarded back pay, benefits and seniority. Thereafter, Graves requested interim relief to the Commission indicating that the appointing authority refused to reinstate him and award him back pay despite being notified that the criminal charges against him were adjudicated in his favor. In *Graves, supra*, the Commission ordered that Graves receive back pay from January 22, 2019 until he was either reinstated or issued a new Preliminary Notice of Disciplinary Action (PNDA). Further, it ordered that should he be reinstated or not ultimately removed from employment, he would be entitled to back pay, benefits and seniority pursuant to *N.J.A.C. 4A:2-2.10(c)2*. His request for counsel fees was denied.

In his request for enforcement, Graves submits an April 25, 2019 letter to the appointing authority's counsel asking if the appointing authority was going to reinstate him. Additionally, the letter requested an itemized accounting of the back pay due Graves from January 22, 2019, and when payment would be made, as well

as an itemized accounting of back pay, benefits and seniority from April 6, 2016 to the present and when his health benefits were going to be reinstated. Graves indicated that he did not receive a response to the letter and he has not received back pay nor was he reinstated or served a new PNDA.

In response, the appointing authority, represented by John J. Zidziunas, Esq., indicates that Graves received back pay from January 22, 2019 through the present and is continuing to receive back pay while it finalizes its PNDA against him. Specifically, it indicates that Graves received \$16,327.78 in back pay to date, which it asserts should be considered sufficient to forestall any fines or penalties.

In reply, Graves presents that he remains indefinitely suspended as his employment status was changed to a suspension with pay. He emphasizes that the appointing authority was ordered to either immediately reinstate him or issue a new PNDA and neither was done. Therefore, he argues that he should receive interest and counsel fees as he asserts that the appointing authority has acted in bad faith. Additionally, Graves indicates that the appointing authority has failed to articulate how the lump sum back pay payment of \$42,816.04 was calculated nor has it calculated across the board adjustments, provided vacation benefits, sick leave credits, seniority benefits, pension benefits or healthcare benefits. Additionally, he represents that he and his children remain without health insurance. Further, Graves argues that deductions for union dues, in the amount of \$605.79, were taken without authorization and in violation of law. He reiterates the Commission's prior decision states that the record indicated that the appointing authority had enough information to issue a new PNDA. Instead, Graves received a May 24, 2019 letter from internal affairs indicating that he was under investigation. However, the letter was vague and did not provide a basis for his suspension. Graves asserts that the appointing authority's actions have been taken in bad faith and invidious motivation due to a civil suit that he filed against it. Therefore, he requests an order enforcing the Commission's prior decision awarding benefits and seniority from January 22, 2019 to the present as well as requiring specific calculation regarding the appointing authority's award of back pay, benefits, and seniority. Additionally, Graves requests an order to immediately reinstate him with back pay, benefits and seniority from April 6, 2016 to January 21, 2019, or a full plenary hearing at the Office of Administrative Law regarding the administrative charges issued on April 6, 2016.

In further response, the appointing authority argues that Graves' request demanding a PNDA be rushed is against the procedures of the appointing authority and the safety of Newark's residents. Additionally, the Commission already denied his request for interest and counsel fees and he acknowledged that he has received back pay. The appointing authority argues that it is in compliance with the Commission's prior order.

CONCLUSION

N.J.A.C. 4A:2-2.4(a) provides that no suspension or fine shall exceed six months except for suspensions pending criminal complaint or indictment.

N.J.A.C. 4A:2-2.4(b) provides in local service, the appointing authority may provide that a suspension be with or without pay.

N.J.A.C. 4A:2-2.5(a) provides, in pertinent part, that an employee must be served with a PNDA setting forth the charges and statement of facts supporting the charges (specifications), and afforded the opportunity for a hearing prior to imposition of major discipline.

N.J.A.C. 4A:2-2.7(a)2 provides, in pertinent part, that an appointing authority may impose an indefinite suspension to extend beyond six months where an employee is subject to criminal charges, but not beyond the disposition of the criminal complaint or indictment.

N.J.A.C. 4A:2-2.10(c) provides that where an employee, other than a municipal police officer, has been suspended based on a pending criminal complaint or indictment, following disposition of the charges the employee shall receive back pay, benefits and seniority if the employee is found not guilty at trial, the complaint or indictment is dismissed, or the prosecution is terminated. *N.J.A.C.* 4A:2-2.10(c)2 states, in pertinent part, that where disciplinary action is taken following the disposition of the complaint or indictment, such items shall not be awarded in the case of removal.

N.J.A.C. 4A:2-2.11(a) provides, in pertinent part, that when the Commission awards back pay, it may also award interest when an appointing authority has unreasonably delayed compliance with an order of the Commission or where the Commission finds sufficient cause based on the particular case.

N.J.A.C. 4A:2-1.5(b) provides, in pertinent part, that back pay, benefits and counsel fees may be granted where the appointing authority has unreasonably failed or delayed to carry out an order of the Commission or where the Commission finds sufficient cause based on the particular case. A finding of sufficient cause may be made where the employee demonstrates that the appointing authority took adverse action against the employee in bad faith or with invidious motivation.

N.J.A.C. 4A:10-2.1, states, in pertinent part, that where there is evidence of a violation of or noncompliance with Title 11A, New Jersey Statutes, or Title 4A, *N.J.A.C.*, the Commission may assess costs, charges and fines not to exceed \$10,000.

In this matter, the Commission finds that the appointing authority is in non-compliance with the Commission's prior decision and Civil Service rules. Specifically, under *N.J.A.C. 4A:2-2.4(a)* and *4A:2-2.7(a)2*, no suspension can exceed six months except for suspensions pending criminal complaint or indictment. Accordingly, in *In the Matter of Anthony Graves* (CSC, decided April 17, 2019), as Graves had been suspended over six months and his pending criminal matter was adjudicated in his favor, the Commission ordered that he receive back pay from January 22, 2019 until he was either reinstated or issued a new PNDA. However, instead of either reinstating him or issuing a new PNDA as ordered, the appointing authority converted his suspension without pay to a suspension with pay. While a suspension with pay is allowed in local service, a suspension with pay is still a suspension. As such, Graves' continued suspension over six months without pending criminal charges, even with pay, is in violation of Civil Service rules. As indicated in the prior decision, to determine otherwise would be contrary to *N.J.A.C. 4A:2-2.7(a)2*, which purpose is to keep public employees from being held in limbo indefinitely even after being exonerated in a criminal proceeding. Specifically, Graves is being kept in limbo without forthcoming administrative charges.

Therefore, the Commission orders that within 20 days of the issuance date of this decision, the appointing authority shall either issue a new PNDA setting forth administrative charges against Graves or reinstate him. Additionally, the Commission warns the appointing authority that if it fails to issue a new PNDA or reinstate him within this time, upon the Commission finding that the appointing authority has not complied with this order upon receipt of another request for enforcement, the Commission shall order his reinstatement and award mitigated back pay to the date of his initial indefinite suspension without pay. Moreover, the Commission will fine the appointing authority up to \$10,000 and order interest and counsel fees¹ upon a further finding of non-compliance. Finally, the Commission orders that the appointing authority provide a detailed accounting to Graves explaining how it calculated any payments awarded, seniority, and benefits.

ORDER

Therefore, it is ordered that Anthony Graves' request for enforcement is granted in part. Within 20 days of the issuance of this decision, the appointing authority shall either issue a new PNDA setting forth the administrative charges against him or reinstate him. Upon a finding that the appointing authority has not complied with this order, the Commission will order his reinstatement with back

¹ There does not appear to be a basis to award counsel fees at this juncture. While the appointing authority is in non-compliance, it has indicated that it is still investigating this matter. While the Commission is unclear as to why such investigation has taken such a lengthy amount of time, it will not award counsel fees absent a clear showing of bad faith or invidious motivation. In this regard, the appointing authority has at least attempted to comply with some portions of the Commission's prior order. However, should it not comply with the current order, counsel fees will be awarded.

pay to the date of his initial indefinite suspension without pay. Additionally, the appointing authority shall be subject to fines of up to \$10,000, interest and counsel fees. Further, the Commission orders the appointing authority provide a detailed accounting to Graves explaining how it calculated any payments awarded, seniority, and benefits.

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 10th DAY OF SEPTEMBER, 2019



Deirdre L. Webster Cobb
Chairperson
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and
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Attachment

c: Anthony Graves
Tisha N. Adams, Esq.
Eric Pennington, Esq.
John J. Zidziunas, Esq.
Records Center



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Anthony Graves,
Newark

CSC Docket No. 2019-1974

Request for Interim Relief

ISSUED: APRIL 22, 2019

(SLK)

Anthony Graves, a Fire Captain with Newark, represented by Tisha N. Adams, Esq., petitions the Civil Service Commission (Commission) for interim relief regarding his indefinite suspension.

By way of background, on March 29, 2016, the Union County Prosecutor's Office charged Graves with impersonating a law enforcement officer, a fourth-degree offense. Thereafter, on April 6, 2016, the appointing authority issued a Preliminary Notice of Disciplinary Action (PNDA) immediately and indefinitely suspending him. Subsequently, a predetermination hearing was held on May 2, 2016 and a Final Notice of Disciplinary Action (FNDA) was issued on May 11, 2016, indicating that he was indefinitely suspended without pay until the criminal charges were adjudicated.¹ On July 22, 2016, Graves was indicted for official misconduct, pattern of official misconduct and unlawful possession of a weapon, which are second-degree offenses, and two counts of impersonating a law enforcement officer, a fourth-degree offense. Prior to trial, the unlawful possession of a weapon, official misconduct and pattern of official misconduct offenses were dismissed. On January 17, 2019, Graves was found not guilty of two counts of wrongful impersonation of a law enforcement officer. Thereafter, on January 22 and 23, 2019, Graves sent the appointing authority letters advising that his criminal matter had been resolved and requesting that he be reinstated and be awarded back pay, benefits and seniority.

¹ Graves submission indicates that he did not receive the FNDA at the time the appointing authority issued it.

In his request for interim relief, Graves states that the appointing authority has refused to reinstate him and award him back pay despite being notified that the criminal charges against him were adjudicated in his favor. Instead, on January 29, 2019, the appointing authority indicated that Graves' suspension would continue until it conducts and completes an internal investigation. He argues that pursuant to *N.J.A.C.* 4A:2-2.10(c), as he was found not guilty, he is to be immediately reinstated with back pay. Graves cites *In the Matter of James Shanks* (MSB, decided May 7, 2003) and *In the Matter of Jose A. Robles* (CSC, decided September 8, 2017) in support of his position. Additionally, he argues that he should receive counsel fees under *N.J.A.C.* 4A:2-2.12(a) as he believes that since he was found not guilty, he prevailed on the primary issues in this matter. Finally, concerning the standards for interim relief, he indicates that he is likely to succeed on the merits of this matter since he was found not guilty, he is in danger of suffering irreparable harm if he is not immediately reinstated since he needs to support his family, that no other party shall be injured by his reinstatement since he was found not guilty and therefore neither the public trust nor the appointing authority's integrity would be eroded by such action, and it is in the public interest to reinstate him since public employees should not be allowed to remain indefinitely suspended after they are found not guilty on criminal charges.

In response, the appointing authority, represented by John J. Zidziunas, Esq., presents that it intends to issue new disciplinary charges against Graves after it completes its investigation. It highlights that although Graves was not proven to be guilty beyond a reasonable doubt in the criminal proceeding, the standard for sustaining administrative charges is lower as it will only need to prove that the preponderance of the credible evidence supports the charges. Therefore, it argues that it is not likely Graves will succeed on the merits of this matter. Additionally, it indicates that *N.J.A.C.* 4A:2-2.10(c)2, as well as *Walcott v. City of Plainfield*, 282 *N.J. Super.* 121 (1995) and *In the Matter of Rafael Galan* (CSC, decided March 27, 2018) support its position that it be allowed to perform an internal investigation before it reinstates Graves as it believes its investigation will lead to a basis to issue a new PNDA. Further, it asserts that Graves is not suffering irreparable harm as he will have an opportunity to have an administrative hearing, and if he prevails, he will be able to seek back pay. Additionally, the appointing authority states that the charges against Graves are very serious and it would negatively impact Newark and be against the public interest to reinstate him without conducting an internal investigation. Finally, it argues that counsel fees are premature as the appointing authority needs time to conduct a proper internal investigation and the appellant's acquittal on criminal charges does not mean that he will prevail in the administrative matter.

In reply, Graves presents that appointing authority's reliance on *N.J.A.C.* 4A:2-2.10(c)2 to continue to indefinitely suspend him is misplaced as this section refers to a removal and Graves has not been terminated. Similarly, he argues that

this matter is distinguishable from *Walcott, supra*, as Walcott pleaded guilty to a criminal offense while Graves was found not guilty. Regardless, Graves believes that *Walcott* supports his position that he cannot continue to be suspended indefinitely after being found not guilty in a criminal proceeding. Additionally, Graves argues that *Galan, supra*, is not applicable as that matter involved a law enforcement officer. Further, in *Galan*, the prosecutor was conducting an investigation regarding a second indictment, which is not the case here. Therefore, he asserts that he should be reinstated immediately.

CONCLUSION

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

N.J.A.C. 4A:2-2.5(a)2 provides that an employee may be suspended immediately when the employee is formally charged with a crime of the first, second or third degree, or a crime of the fourth degree on the job or directly related to the job.

N.J.A.C. 4A:2-2.7(a)2 provides that the appointing authority may impose an indefinite suspension to extend beyond six months where an employee is subject to criminal charges as set forth in *N.J.A.C.* 4A:2-2.5(a)2, but not beyond the disposition of the criminal complaint or indictment.

N.J.A.C. 4A:2-2.10(c) provides that where an employee, other than a municipal police officer, has been suspended based on a pending criminal complaint or indictment, following disposition of the charges the employee shall receive back pay, benefits and seniority if the employee is found not guilty at trial, the complaint or indictment is dismissed, or the prosecution is terminated. *N.J.A.C.* 4A:2-2.10(c)2 states, in pertinent part, that where disciplinary action is taken following the disposition of the complaint or indictment, such items shall not be awarded in the case of removal.

N.J.A.C. 4A:2-2.12(a) provides that the Commission shall award partial or full reasonable counsel fees incurred in proceedings before it and incurred in major disciplinary proceedings at the departmental level where an employee has prevailed on all or substantially all of the primary issues before the Commission.

Initially, it is noted that it was appropriate for the appointing authority to immediately and indefinitely suspend Graves on April 6, 2016 pending the disposition of criminal charges. Further, 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 ALJ who will hear live testimony, assess the credibility of witnesses, and weigh all the evidence in the record before making an initial decision. In other words, the mere fact that Graves was found not guilty in a criminal proceeding does not mean that he has a clear likelihood of success on the merits concerning administrative disciplinary charges as the burden of proof is lower in an administrative proceeding. Therefore, since Graves has not conclusively demonstrated that he will succeed in having any new administrative charges dismissed, he has not shown a clear likelihood of success on the merits. Further, while the Commission is cognizant of his financial situation, the harm that he is suffering while awaiting the outcome of the administrative proceedings is financial in nature, and as such, can be remedied by the granting of back pay should he ultimately prevail. Additionally, given the serious nature of the disciplinary charges at issue, the public interest is best served by not having Graves on the job pending the outcome of any such charges.

However, the record indicates that on January 22, 2019, the appointing authority received notice that Graves was found not guilty of the criminal charges that were the basis for his indefinite suspension. Upon dismissal of the criminal charges, an employee is entitled to immediate reinstatement to employment following an indefinite suspension or prompt service of any remaining administrative charges upon which the appointing authority wishes to base disciplinary action. Even when an employee is ultimately removed on administrative disciplinary charges, he or she is entitled to an award of back pay for the period between dismissal of the criminal charges and service of a PNDA setting forth any remaining administrative charges. See *In the Matter of Stanford Harris* (CSC, decided December 17, 2008); *In the Matter of James Shanks* (MSB, decided May 7, 2003). To determine otherwise would be contrary to *N.J.A.C. 4A:2-2.7(a)2*, which purpose is to keep public employees from being held in limbo indefinitely even after being exonerated in a criminal proceeding.

Concerning the appointing authority's argument that it needs additional time to conduct an internal investigation before it issues a new PNDA, the record indicates that the appointing authority had enough information to issue a PNDA on April 6, 2016, where it listed administrative charges. Thus, while it is not prohibited from further investigation; it cannot keep Graves out of work without pay absent actually issuing new charges. While the appointing authority indicates

that it *intends* to issue such new administrative charges, it cannot unilaterally maintain an unpaid suspension without actually bringing forth charges.

With respect to counsel fees, the primary issue in the current matter is Graves' current status and whether he will ultimately be disciplined, not his now-completed indefinite suspension. In this regard, and as stated above, his not guilty verdict in a criminal proceeding does not mean he will ultimately prevail as there is a lower standard of proof in an administrative proceeding. Moreover, the Commission only grants counsel fees for departmental matters that reach it on appeal. *See N.J.A.C. 4A:2-2.12(f)*. Thus, any grant of counsel fees for the current matter or any potential future disciplinary action is premature. Further, as Graves' indefinite suspension was never initially appealed to the Commission, regardless of the outcome of that matter, he is not entitled to counsel fees for that suspension.

ORDER

Therefore, it is ordered that Graves' request for interim relief is granted in part. Graves shall receive back pay from January 22, 2019 until he is either reinstated or issued a new PNDA. Further, should he be reinstated or not ultimately removed from employment, he shall be entitled to back pay, benefits and seniority pursuant to *N.J.A.C. 4A:2-2.10(c)2*. His request for counsel fees is 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 17th DAY OF APRIL, 2019



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