



STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of Donald Brad
Wiltshire, City of Ocean City

CSC Docket No. 2018-722

Request for Interim Relief

ISSUED: OCT 06 2017 (JET)

Donald Brad Wiltshire, a Fire Fighter with the City of Ocean City, represented by Louis M. Barbone, Esq., petitions the Civil Service Commission (Commission) for interim relief of his removal effective August 15, 2017.

By way of background, the appointing authority issued the petitioner a Preliminary Notice of Disciplinary Action (PNDA) dated October 19, 2015, and an amended PNDA dated November 12, 2015 seeking his removal, on charges of Conduct Unbecoming a Public Employee, Neglect of Duty, Other Sufficient Cause, and violations of the appointing authority's rules, regulations, and policies. Specifically, the appointing authority asserted that the petitioner notified Fire Chief Christopher Breunig and Fire Captain John Murphy that he had regularly taken up to two milligrams of Klonopin for a period of two years while actively performing the duties of a Fire Fighter, including driving city vehicles and fire trucks. The appointing authority also alleged that the petitioner did not previously report such information to his superiors, the Human Resources Director and Assistant Human Resources Director, and administration. The appointing authority further alleged that, on October 9, 2015, the petitioner notified the Fire Chief that he used medical marijuana over a period of two years without reporting such to his superiors, the Human Resources Director and Assistant Human Resources Director, or administration. It also alleged that he was actively working as a Fire Fighter and

performing such duties while using medical marijuana.¹ A departmental hearing was conducted,² the petitioner's removal was sustained, and the appointing authority issued a Final Notice of Disciplinary Action (FNDA) dated August 10, 2017 removing him from employment.

It is noted that the petitioner initially filed a complaint in Superior Court, Cape May County, alleging violations of the Conscientious Employee Protection Act (CEPA) and the New Jersey Law Against Discrimination, which was dismissed.

In his request, the petitioner asserts that he has a clear likelihood of success on the merits of this case, as his medical condition in no way impairs his ability to perform his duties. The petitioner states that there is no evidence to show that he was intoxicated while serving in his position and impaired from performing his duties. The petitioner argues that, prior to the departmental hearing, he was required to undergo a medical evaluation which he passed. The petitioner adds that the appointing authority issued the charges against him despite that it conceded that none of the charges alleged that the performance of his duties were deficient. Further, the petitioner maintains that the evidence shows that his superiors knew that he was prescribed medications for years prior to when the charges were filed against him. He claims that they were notified on two separate occasions per the appointing authority's rules that he was diagnosed with dystonia and undergoing medical treatment that included a prescription drug regimen. The petitioner explains that, although the rules in effect at the time indicated that he was required to advise his superiors, the Fire Chief did not ask for any further clarification from him. In addition, the petitioner argues that there is a danger of immediate and irreparable harm, as his health benefits will cease and medical treatment will be disrupted as a result of his removal from employment. In this regard, the petitioner asserts that his removal will have a disastrous effect on his health. The petitioner contends that a stay of the removal is appropriate under the circumstances, as the appointing authority will not experience any detrimental effects from maintaining the status quo. Moreover, the petitioner states that the public interest will be served for allowing a Fire Fighter with nearly 22 years of service to maintain health insurance and granting back pay to him while he is out from work. The petitioner adds that the Fire Chief did not serve the August 10, 2017 FNDA until August 15, 2017.

In response, the appointing authority, represented by Littie E. Rau, Esq., asserts that the petitioner does not have a clear likelihood of success in this matter, as he clearly violated the appointing authority's rules pertaining to reporting his drug regimen. The appointing authority explains that the petitioner does not

¹ The record reflects that the Fire Chief required the petitioner to undergo a Fitness for Duty evaluation and, on November 5, 2015, the appointing authority received the results the petitioner's drug test administered on October 28, 2015, which showed the presence of marijuana (1754 mg/ml).

² The record reflects that a departmental hearing was conducted in February 2017.

dispute that he was smoking marijuana for several years while employed in his position, nor does he dispute the November 5, 2015 positive drug test evidencing marijuana use. In this regard, it argues that the November 5, 2015 drug test indisputably violated the appointing authority's drug and alcohol policies. Further, the appointing authority contends that petitioner did not inform the Fire Chief that he had been smoking marijuana until October 9, 2015, which is after the appointing authority issued the its September 1, 2015 drug testing policy. In addition, the appointing authority asserts that, although the appellant claims that he reported the marijuana use to various superiors, and states his marijuana use does not interfere with the performance of his duties, such assertions were not substantiated at the departmental hearing.

Additionally, the appointing authority maintains that the petitioner did not demonstrate at the departmental hearing that his marijuana use would not interfere with his duties. In this regard, the appointing authority's forensic toxicologist provided a credible report which evidenced that petitioner's chronic marijuana usage, whether prescribed or not, cannot be reconciled with the responsibilities required of a Fire Fighter when weighed against public safety interests. As such, the appointing authority states that petitioner's belief that his prior years of good service as a Fire Fighter is of no moment as it is questionable if he can continue to safely perform his duties while smoking marijuana. The appointing authority adds that the petitioner has not shown any evidence of irreparable harm since he has the ability to obtain health insurance elsewhere. It asserts that the petitioner was paid for his accrued sick time and provided with health benefits through August 31, 2017 for the time he was suspended, and his request for back pay should be denied as he would be entitled to such a remedy if he is successful in his disciplinary appeal. Moreover, the appointing authority contends that he was well aware of his termination at the time he received the FNDA.

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.

Initially, the information and arguments 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 has actually

committed the alleged infractions. In this matter, the petitioner argues that he is likely to succeed on the merits, the disciplinary penalty imposed was excessive, he has suffered irreparable harm, and that the appointing authority did not issue the disciplinary charges within the proper timeframe. Initially, the Commission notes that the charges against the petitioner are particularly serious, especially for a Fire Fighter. However, the Commission will not attempt to determine the propriety of the charges or the proper disciplinary penalty based on an incomplete written record. Such matters need a full plenary hearing before an Administrative Law Judge (ALJ) who will hear live testimony, assess the credibility of witnesses and weigh all the evidence in the record before making an initial decision. At that point, the Commission will be in a position to decide the propriety of the recommended penalty should the charges against the petitioner be sustained.

Additionally, the petitioner has not shown that he is in danger of immediate or irreparable harm if this request is not granted. While the Commission sympathizes with his financial situation and that he does not have benefit of health insurance provided by the appointing authority, the harm that he is experiencing while awaiting his hearing is purely financial in nature, and as such, can be remedied by the granting of back pay should he prevail in her appeal. Moreover, the petitioner may seek health insurance independently or through other employment. Therefore, based on the foregoing, the petitioner has not shown a clear likelihood of success on the merits.

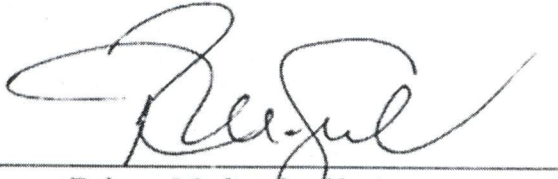
With respect to the petitioner's argument that he did not receive the FNDA until August 15, 2017, such a delay does not change the outcome of this matter. Even if procedural violations occurred, there is no basis for a dismissal of the charges against the petitioner. Any procedural defects which may occur at the departmental level are deemed cured by the granting of a *de novo* hearing at the OAL. See *Ensslin v. Township of North Bergen*, 275 N.J. Super. 352, 361 (App. Div. 1994), *cert. denied*, 142 N.J. 446 (1995); *In re Darcy*, 114 N.J. Super. 454 (App. Div. 1971).

Moreover, the petitioner contends that the appointing authority would not be adversely affected if the disciplinary charges were summarily dismissed. However, the Commission does not find this argument persuasive. Based on the circumstances involved in the petitioner's alleged conduct, it would potentially be harmful to the appointing authority, as well as the public at large, to allow an individual facing such serious disciplinary charges to be returned to employment without the benefit of a *de novo* hearing at OAL. Accordingly, the petitioner's request for interim relief is denied.

ORDER

Therefore, it is ordered that petitioner's request for interim relief be denied.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4th DAY OF OCTOBER, 2017



Robert M. Czedo, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher Myers
Director
Division of Appeals
& Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
PO Box 312
Trenton, New Jersey 08625-0312

c: Donald Brad Wiltshire
Louis M. Barbone, Esq.
Littie E. Rau, Esq.
Kelly Glenn

