



STATE OF NEW JERSEY

In the Matter of Gilberto Reyes,
Hudson County

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket No. 2017-521

Enforcement

ISSUED: JUL 17 2017 (JET)

Hudson County, represented by Daniel Sexton, Esq, appeals the attached decision rendered on December 16, 2015, granting Gilberto Reyes back pay.

By way of background, the appointing authority issued a Final Notice of Disciplinary Action dated November 28, 2013 that indefinitely suspended Reyes on charges effective November 7, 2013. Thereafter, Reyes filed a request for interim relief with this agency. Upon its review, the Civil Service Commission (Commission) granted Reyes' request for interim relief, reinstated him to employment, and ordered that he was entitled to back pay from May 13, 2015, to the date of commencement of the departmental hearing or on the date of his reinstatement. The Commission also ordered the appointing authority to issue a new Preliminary Notice of Disciplinary Action (PNDA) and expedite a departmental hearing. *See In the Matter of Gilberto Reyes* (CSC, decided December 16, 2015). It is noted that a new PNDA dated September 25, 2015 was issued, charging Reyes with insubordination, conduct unbecoming an employee, neglect of duty, and other sufficient cause. By letter dated February 10, 2016, the appointing authority's hearing officer issued a determination indicating that a disciplinary hearing was held for Reyes on December 2, 2015 and on January 26, 2016. The hearing officer recommended a 45 working day suspension for refusing to release information regarding the charges from New York. However, the matter of his suspension relating to the actual criminal matter in New York was rescinded.

In its request to the Commission, the appointing authority asserts, among other things, that back pay should be denied as Reyes failed to mitigate as required.

Specifically, the appointing authority contends that Reyes did not provide any explanation as to why he did not seek employment in response to his duty to mitigate. It adds that he did not apply for any positions, respond to classified advertisements, or attend a job fair, and it can be inferred that his lack of receipt of unemployment benefits shows that he failed to seek employment. In addition, the appointing authority states that Reyes reported in his certification that he received \$140 per month in welfare benefits from July 25, 2014 through March 1, 2016, and as such, admitted that he received welfare payments for February 2016, despite that he was employed at the time, and \$1,190 in welfare benefits and \$1,657.50 in food stamps. As such, Reyes conceded that his back pay should be reduced by \$2,847.50 and the Commission must impute income and offset the back pay award. Moreover, the appointing authority asserts that the Commission decision clearly indicated that only eight and half months are at issue, and the appellant may only receive back pay to the date the criminal charges were dismissed.

In response, Reyes, represented by Jeffrey S. Ziegelheim, Esq., asserts that the Commission's December 16, 2015 decision ordered he be reinstated with back pay from May 13, 2015 to the date of commencement of the departmental hearing or the date of his reinstatement. He contends that, since the appointing authority violated the 180 day provision pursuant to *N.J.A.C. 4A:2-2.13*, by delaying the local hearing which denied the appellant's salary, he is entitled to base pay rather than salary with mitigation for the period pursuant to *N.J.A.C. 4A:2-2.13(h)*. Reyes adds that he was reinstated with pay effective January 29, 2016, and the appointing authority failed to award back pay for the period of suspension to the date of reinstatement. Reyes explains that the December 16, 2015 decision does not require mitigation and the reduction of back pay. He also maintains that he has made a good faith effort to mitigate and find supplemental employment, as he was required to seek work while receiving welfare benefits. In support, Reyes provides a certification indicating, among other things, that he applied for jobs, and received welfare assistance and food stamps.

CONCLUSION

Pursuant to *N.J.A.C. 4A:2-2.10(d)*, an award of back pay shall include unpaid salary, including regular wages, overlap shift time, increments and across-the-board adjustments. *N.J.A.C. 4A:2-2.10(d)3* provides that an award of back pay shall be reduced by the amount of money that was actually earned during the period of separation, including any unemployment insurance benefits received, subject to any applicable limitations set forth in (d)4. Further, *N.J.A.C. 4A:2-2.10(d)4* states that where a removal or a suspension for more than 30 working days has been reversed or modified and the employee has been unemployed or underemployed for all or a part of the period of separation, and the employee has failed to make reasonable efforts to find suitable employment during the period of separation, the employee shall not be eligible for back pay for any period during which the employee failed to

make such reasonable efforts. "Reasonable efforts" may include, but not be limited to, reviewing classified advertisements in newspapers or trade publications; reviewing Internet or on-line job listings or services; applying for suitable positions; attending job fairs; visiting employment agencies; networking with other people; and distributing resumes. The determination as to whether the employee has made reasonable efforts to find suitable employment shall be based upon the totality of the circumstances, including, but not limited to, the nature of the disciplinary action taken against the employee; the nature of the employee's public employment; the employee's skills, education, and experience; the job market; the existence of advertised, suitable employment opportunities; the manner in which the type of employment involved is commonly sought; and any other circumstances deemed relevant based upon the particular facts of the matter. The burden of proof shall be on the employer to establish that the employee has not made reasonable efforts to find suitable employment. *See N.J.A.C. 4A:2-2.10(d)4, et seq.*

Initially, the appointing authority argues that Reyes is not entitled to back pay since he failed to mitigate and seek employment, and in the alternative it argues that the back pay award should be reduced. The Commission disagrees. In the prior matter, the Commission ordered Reyes be *reinstated to duty and ordered that he was entitled to back pay from May 13, 2015, to the date of commencement of the departmental hearing or the date of his reinstatement*. Since the Commission did not reverse the disciplinary charges in the prior matter, the regulations cited by the appointing authority **requiring** mitigation do not apply in this matter. The appointing authority confirmed in this matter that Reyes was returned to duty on January 29, 2016. Although the February 10, 2016 determination from the hearing officer indicates that a new PNDA was issued and a departmental hearing was held on December 2, 2015, these events occurred *prior* to when the Commission issued the December 16, 2015 decision and involve a separate disciplinary matter. Therefore, given that the administrative charges against Reyes pertaining to the criminal charges from New York were dismissed, and Reyes was returned to duty on January 29, 2016, he is entitled to back pay from the date of his suspension, May 13, 2015, and ending on the date of his reinstatement, January 29, 2016. However, since Reyes received welfare benefits during the time of his suspension, those amounts should be deducted from his back pay award since the intent of back pay is to make an individual whole, not to provide a windfall. However, the food stamps received should not be deducted as such benefits cannot be considered income since they are only usable for certain specific purposes.

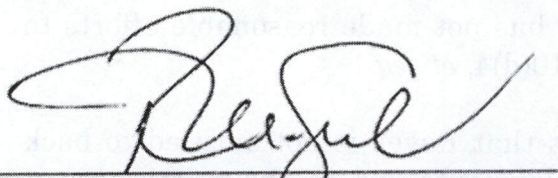
ORDER

Therefore, it is ordered that Reyes be awarded back pay, minus any amount of welfare benefits received, for the time frame noted above within 30 days of the issuance of this decision. In the event that the appointing authority fails to make a good faith effort to comply with this order within the prescribed timeframe, the

Commission orders that a fine be assessed against the appointing authority in the amount of \$100 per day, beginning on the 31st day from the issuance of this decision, and continuing for each day of continued violation, up to a maximum of \$10,000.

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 13th DAY OF JULY, 2017



Robert M. Czedh, Chairperson
Civil Service Commission

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and
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Attachment

c: Gilberto Reyes
Daniel Sexton, Esq.
Jeffrey S. Ziegelheim, Esq.
Records Center



STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of Gilberto Reyes

CSC Docket No. 2016-1535

Request for Interim Relief

ISSUED DEC 18 2015 (JET)

Gilberto Reyes, a County Correction Officer with Hudson County, represented by Jeffrey S. Ziegelheim, Esq., petitions the Civil Service Commission (Commission) for interim relief of his indefinite suspension.

By way of background, on November 7, 2013, the petitioner was involved in a domestic dispute and he was charged with Menacing with Weapon (2nd degree) in violation of New York P.L. 120.14, Unlawful Imprisonment (2nd degree) in violation of New York P.L. 135.05, and Criminal Possession of a Firearm/Weapon (4th degree) in violation of New York P.L. 265.01. On November 7, 2013, the petitioner was issued a Preliminary Notice of Disciplinary Action (PNDA), immediately suspending him without pay effective November 7, 2013 on charges of neglect of duty, conduct unbecoming an employee, and other sufficient cause. Specifically, the appointing authority alleged that the petitioner placed an unloaded firearm in his mouth during a verbal dispute. A *Loudermill* hearing was held on November 14, 2013 and the petitioner was indefinitely suspended pending criminal charges in a Final Notice of Disciplinary Action (FNDA) dated November 28, 2013 but effective November 7, 2013. It is noted that the FNDA sustained all the charges listed on the November 7, 2013 PNDA. It is also noted that the criminal charges against the petitioner were dismissed on October 22, 2014.

In his request for interim relief, the petitioner argues that the appointing failed to properly dispose of the administrative charges against him pursuant to *N.J.S.A. 40A:14-201(a)* and *N.J.A.C. 4A:2-2.5(a)2*. Specifically, the petitioner asserts that the appointing authority did not dispose of the administrative charges against him within 180 days after the criminal charges were dismissed or reinstate

him to employment. The petitioner contends that the 180 day period commenced on the date the criminal charges were dismissed and the appointing authority had sufficient evidence at that point to dispose of the administrative charges. See *N.J.A.C. 4A:2-2.5(a)2*. The petitioner explains that there was no finding of guilt when the criminal charges were dismissed. As such, the petitioner maintains that the appointing authority should have disposed of the administrative charges by April 21, 2015, which is 180 days after the criminal charges were dismissed. Additionally, the petitioner asserts that the appointing authority has not issued a new PNDA¹, returned him to pay status, nor provided a reason for the delay in disposing of the administrative charges.² Accordingly, the petitioner maintains that the appointing authority has exceeded the 180 day period to render a decision on the charges and he is entitled to receive his salary pursuant to *N.J.A.C. 4A:2-2.13*.

Additionally, the petitioner explains that the indefinite suspension has irreparably harmed his reputation and his standard of living has been jeopardized. He maintains that such harm is irreparable and cannot be satisfied in equity by monetary damages. Moreover, the petitioner argues that he has shown a clear likelihood of success on the merits of the case since the facts are uncontroverted. Therefore, the petitioner requests reinstatement to pay status until the disposition of the disciplinary matter is resolved. In the alternative, the petitioner requests that the charges be dismissed.

In response, the appointing authority, represented by Daniel W. Sexton, Esq., maintains that the petitioner's request should be denied. Specifically, the appointing authority asserts that it is required to consider the petitioner's criminal history in the context of discipline even though the criminal action has been dismissed. Further, the appointing authority explains that the petitioner has refused to release the sealed criminal records for its review. As such, the appointing authority contends that the petitioner's non-cooperation precludes any relief, as his actions caused the delay of the disposition of the administrative charges. In addition, the appointing authority explains that it filed a motion for the criminal records and obtained an order on October 22, 2015 to unseal the documents. In this regard, the appointing authority avers that it will proceed with the administrative charges as soon as it receives a copy of the criminal records.³ The appointing authority contends that the petitioner has acted in bad faith since he initially accepted a settlement offer in March 2015 agreeing to a six month suspension, but before the agreement was finalized, on April 9, 2015, the appellant

¹ The petitioner notes that, despite his repeated requests, the appointing authority has not scheduled a hearing after the criminal charges were dismissed.

² The petitioner notes that he has not requested an adjournment, and the matter has not reached a final disposition at the local level. As such, there is no decision to appeal to the Civil Service Commission.

³ The appointing authority notes that the criminal charges were allegedly based upon an incident where the petitioner illegally utilized his service weapon which he carried pursuant to his status as a law enforcement officer. Therefore, the contents of the file are sought, *inter alia*, to see if there is any competent and admissible evidence of the crimes charged.

rejected the offer that he previously accepted and requested a hearing. Moreover, the appointing authority states that the petitioner fails to acknowledge the exceptions to the 180 day rule pursuant to *N.J.S.A. 40A:14-201(b)3*.

CONCLUSION

Initially, *N.J.S.A. 40A:14-201(a)* states:

When a law enforcement officer employed by a law enforcement agency or firefighter employed by a public fire department that is subject to the provisions of Title 11A of the New Jersey Statutes is suspended from performing his official duties without pay for a complaint or charges, *other than* (1) a complaint or charges relating to the subject matter of a pending criminal investigation, inquiry, complaint, or charge whether pre-indictment or post indictment, or (2) when the complaint or charges allege conduct that also would constitute a violation of the criminal laws of this State or any other jurisdiction, and the law enforcement agency employing the officer or the public fire department employment the firefighter seeks to terminate that officer's or firefighter's employment for the conduct that was the basis for the officer's or firefighter's suspension without pay, a final determination on the officer's or firefighter's suspension and termination shall be rendered within 180 calendar days from the date the officer or firefighter is suspended without pay. If a final determination is not rendered within those 180 days, as hereinafter calculated, the officer or firefighter shall, commencing on the 181st calendar day, being again to receive the base salary he was being paid at the time of his suspension and shall continue to do so until a final determination on the officer's or firefighter's termination is rendered [emphasis added].

Therefore, *N.J.S.A. 40A:14-201(a)* only applies when a law enforcement officer is suspended without pay in situations *other than* where the officer is the subject of a pending criminal investigation or the conduct would constitute a violation of the criminal laws of this state or any other jurisdiction. Thus, since the petitioner was criminally charged in New York, *N.J.S.A. 40A:14-201(a)* does not apply in this situation. *See also N.J.A.C. 4A:2-2.12(g)(i)*.

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.

In reviewing this matter, it is not necessary to address the merits of the underlying charges against the petitioner. Rather, the first issue to be determined is whether the nature and seriousness of the criminal charges support the necessity for an indefinite suspension. *N.J.A.C. 4A:2-2.5(a)2* provides that an employee may be suspended immediately and prior to a hearing 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. *See also, N.J.S.A. 11A:2-13. N.J.A.C. 4A:2-2.7(a)1* provides that, if requested, an employee who is indefinitely suspended is entitled to a departmental hearing that:

[S]hall be limited to the issue of whether the public interest would best be served by suspending the employee until disposition of the criminal complaint or indictment. The standard for determining that issue shall be whether 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.

Moreover, 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. *See N.J.A.C. 4A:2-2.7(a)2*. Where the appointing authority determines that an indefinite suspension should be imposed, a FNDA shall be issued stating that the employee has been indefinitely suspended pending disposition of the criminal complaint or indictment. *See N.J.A.C. 4A:2-2.7(a)3*. Additionally, it is settled that upon dismissal of a criminal complaint or indictment, 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. *See e.g., In the Matter of James Shanks* (MSB, decided May 7, 2003) (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).

In the instant matter, there is no dispute that the petitioner was charged with Menacing with Weapon (2nd degree, Unlawful Imprisonment (2nd degree), and criminal possession of a Firearm/Weapon (4th degree). The petitioner's indefinite suspension effective November 7, 2013 was clearly warranted based on these charges. The charges are serious and touch upon the petitioner's employment. It must be emphasized that the petitioner is a law enforcement officer

who is sworn to uphold and enforce the law. Thus, such criminal charges against an individual sworn to protect and serve the public rendered the petitioner's indefinite suspension necessary in order to maintain the safety of the public and the petitioner's fellow officers and to ensure effective direction of the law enforcement services the appointing authority provides.

Regarding the petitioner's request to dismiss the charges based on the appointing authority's delay in disposing of the administrative charges, as noted earlier, the November 23, 2013 FNDA sustained all four administrative charges on the November 7, 2013 PNDA. There is nothing in the record evidencing that the petitioner was served with a new PNDA and charged administratively after the criminal charges against him were dismissed. However, the parties agree that the administrative charges are still pending and the petitioner clearly requested a departmental hearing in an e-mail dated April 14, 2015 when he rejected the settlement offer. It is noted that an appointing authority's unilateral delay in holding a departmental hearing does not warrant a dismissal of the charges. See *Goodman v. Department of Corrections*, 367 N.J. Super. 591 (App. Div. 2004). Additionally, the Commission is not persuaded that the petitioner should be reinstated to his position based on the disposition of the criminal charges, as the charges would have impugned the integrity of the agency. Clearly, the serious allegations against the petitioner cannot be ignored. Moreover, given that the petitioner serves in the County Correction Officer title, the public interest is best served by not having the petitioner on the job pending the outcome of his departmental proceedings. In this regard, a law enforcement officer is held to a higher standard than a civilian public employee. See *Moorestown v. Armstrong*, 89 N.J. Super. 560 (App. Div. 1965), *cert. denied*, 47 N.J. 80 (1966), *In re Phillips*, 117 N.J. 567 (1990).

However, the petitioner is entitled to some form of relief for such a delay. See *In the Matter of Patrick Dunican*, Docket No. A-5937-99T1 (App. Div. November 9, 1999); *In the Matter of Edward Wise* (MSB, decided July 19, 1999); *In the Matter of Kenneth Hixenbaugh* (MSB, decided February 24, 1998). The record reflects that the criminal charges against the petitioner were dismissed on October 22, 2014. As noted above, 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. It is un rebutted by the petitioner that he was in settlement negotiations with the appointing authority and these negotiations appear to have caused some delay in the scheduling of the departmental hearing. Indeed, the only evidence in the record that the petitioner requested a departmental hearing is an e-mail dated April 14, 2015 to the appointing authority. The petitioner should not benefit from a delay in his departmental proceedings if he was in settlement negotiations to resolve the matter and there is no other proof that he requested an earlier hearing date. However, when the petitioner rejected the appointing authority's offer, he clearly requested a

hearing through his counsel on April 14, 2015. The appointing authority did not take action to schedule the requested hearing since it did not have access to the sealed criminal records from New York. Additionally, the parties agree that the administrative charges contained on the November 7, 2013 PNDA are the ones currently outstanding. Therefore, given that the record indicates he requested a hearing on April 14, 2015, his departmental hearing should have commenced within 30 days, *i.e.*, by May 13, 2015. Thus, the appointing authority shall issue a new PNDA containing the administrative charges and the petitioner is entitled to back pay from May 14, 2015, and ending on the date of commencement of the departmental hearing or the date of his reinstatement if the petitioner is returned to his position without the need for a departmental hearing.

Regarding the appointing authority's explanation that it has requested the appellant's sealed criminal records for review before it can proceed with the disposition of the administrative charges, the Commission is not persuaded. The appointing authority was under no legal obligation to postpone the administrative proceedings after the criminal charges were dismissed. In this case, a new PNDA was not issued after the criminal charges were dismissed, a departmental hearing has not been scheduled, and a new FNDA has not been issued. Although the appointing authority argues that the petitioner did not cooperate and provide the criminal records for its review, that information is of no moment. It is the appointing authority's burden to obtain such evidence in support of the administrative proceedings that it initially brought against the petitioner. The Commission does not condone the procedural violations by the appointing authority and cautions the appointing authority that it will not countenance such violations in the future and any such instances will subject it to fines or other actions under *N.J.A.C. 4A:10-1.1*.

ORDER

Therefore, it is ordered that the petitioner's request for relief be granted in part and that he be awarded back pay and benefits from May 13, 2015, and ending on the date of commencement of the departmental hearing or on the date of his reinstatement if the petitioner is returned to his position without the need for a departmental hearing. The appointing authority is also ordered to immediately issue a new PNDA regarding the remaining administrative charges and to expedite a departmental hearing.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 16th DAY OF DECEMBER, 2015



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