



STATE OF NEW JERSEY

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

In the Matter of Clifton Gauthier,
Rockaway Township

Request for Back Pay

CSC Docket No. 2017-2766

ISSUED: APRIL 2, 2018 (ABR)

Clifton Gauthier, a Police Officer with Rockaway Township, represented by Steven J. Kaflowitz, Esq., requests back pay for the period of his indefinite suspension.

By way of background, on January 14, 2014, the appointing authority served the petitioner with a Preliminary Notice of Disciplinary Action (PNDA), suspending him indefinitely, with pay, pending the disposition of criminal charges,¹ effective as of that date. In the January 14, 2014 PNDA, the appointing authority charged the petitioner with inability to perform duties, conduct unbecoming a public employee, and other sufficient cause. On September 11, 2014, the petitioner was indicted for witness tampering and official misconduct. On September 12, 2014, the appointing authority served the petitioner with a second PNDA, amending the indefinite suspension to without pay, pending the disposition of criminal charges, effective September 12, 2014. On June 6, 2016, the petitioner was admitted into the Pre-Trial Intervention Program (PTI). The indictment was dismissed on January 23, 2017 after the petitioner's successful completion of PTI. The petitioner was subsequently reinstated and received back pay for the period between his January 23, 2017 completion of PTI and the date of his reinstatement.

¹ The petitioner was charged with witness tampering, in violation of *N.J.S.A. 2C:28-5a(4)*, and official misconduct, in violation of *N.J.S.A. 2C:30-2a*, based upon an alleged incident involving the petitioner's attempt to get a relative's drunk driving ticket dismissed from municipal court.

In the instant matter, the petitioner requests back pay for the period from September 12, 2014 to January 23, 2017. In support, the petitioner cites *N.J.S.A. 40A:14-149.2*, which provides:

If a suspended police officer is found not guilty at trial, the charges are dismissed or the prosecution is terminated, said officer shall be reinstated to his position and shall be entitled to recover all pay withheld during the period of suspension subject to any disciplinary proceedings or administrative action.

The petitioner maintains that the phrase “charges are dismissed” in *N.J.S.A. 40A:14-149.2* includes dismissal following a defendant’s successful completion of PTI. He also notes the contrast between *N.J.A.C. 4A:2-2.10(c)(1)*, which expressly bars the award of back pay, benefits and seniority for public employees other than municipal police officers, when a complaint or indictment is disposed of through Conditional Discharge or PTI with *N.J.S.A. 40A:14-149.2*, which does not contain such a prohibition. In view of that distinction, he argues that he is entitled to back pay for the period at issue.

In response, the appointing authority, represented by Thomas N. Ryan, Esq., argues that the petitioner is not entitled to back pay from September 12, 2014 to January 23, 2017. It contends that the lack of a reference to PTI in *N.J.S.A. 40A:14-149.2* does not require it to pay the petitioner back pay for the subject period. Specifically, it argues that the statute’s reference to being “found not guilty at trial, the charges dismissed or the prosecution terminated” requires a favorable disposition of charges and that the dismissal of criminal charges following completion of PTI, a diversionary program, does not satisfy that mandate. In support of that contention, it cites the Appellate Division’s decision in *Grill and Walsh v. City of Newark Police Department*, Docket No. A-6224-98T3 (App. Div. January 30, 2001), which held that municipal police officers seeking back pay pursuant to *N.J.S.A. 40A:14-149.2* needed to have a favorable termination and that successful completion of PTI did not constitute such a favorable termination. The appointing authority also observes that the Appellate Division has held PTI not to be a favorable disposition in interpreting other statutes. In this regard, the appointing authority cites *Cressinger v. Bd. of Educ. of City of Newark*, 256 *N.J. Super* 155, 156 (App Div. 1992) (finding that a board of education employee, whose criminal charges were dismissed through PTI was not entitled to counsel fees under *N.J.S.A. 18A:16-6*) and *Rubin v. Nowak*, 248 *N.J. Super.* 80, 83 (App. Div. 1991) (noting that “[t]o determine whether a prosecution was terminated favorably, [t]he inquiry...focuses on whether the termination was...dispositive as to the accused’s innocence of the crime.”).

In reply, the petitioner argues that the case law cited by the appointing authority does not control the interpretation of *N.J.S.A. 40A:14-149.2*. In that

regard, the petitioner notes that *Grill and Walsh, supra* was an unpublished opinion and *R. 1:36-3* provides that an unpublished opinion does not constitute binding precedent. As to the other decisions cited by the appointing authority in support, the petitioner maintains that because the Appellate Division was construing other statutes in those matters, they are not relevant in interpreting *N.J.S.A. 40A:14-149.2*.

In response, the appointing authority acknowledges that *Grill and Walsh* is an unpublished decision and that *N.J.S.A. 40A:14-149.2* was not the statute at issue in the other decisions it cites to show PTI is not a requisite favorable dismissal of criminal charges. Nevertheless, the appointing authority submits that because the common law rule is “no work, no pay,” and that because statutes abrogating a common law rule must be strictly construed, back pay can only be awarded to municipal police officers in the limited circumstances where the officer’s suspension was precipitated by criminal charges and the officer was reinstated after he or she received a favorable dismissal of those charges. Thus, the appointing authority argues that providing back pay to a municipal police officer accused of committing a crime while that public employee willingly enters into PTI or another diversionary program and is not working for the public during the pendency of a suspension, would be inconsistent with the statute and common law principles. Thus, it contends that case law interpreting similar statutes in analogous contexts further supports its position.

CONCLUSION

N.J.A.C. 4A:2-2.10(b), in conjunction with *N.J.S.A. 40A:14-149.2* provides that when a municipal police officer has been suspended based on a pending criminal complaint or indictment and is subsequently “found not guilty at trial, the charges are dismissed or the prosecution is terminated,” he or she shall be reinstated to his or her position and he or she shall be entitled to recover all pay withheld during the period of suspension, subject to any disciplinary proceedings or administrative action.

At the outset, *R. 1:36-3* states that “[n]o unpublished opinion shall constitute precedent or be binding upon any court” and the rule sets forth limits on the ability of the courts and counsel to cite to unpublished opinions. However, *R. 1:36-3* permits unpublished opinions to be called to the attention of a tribunal as secondary research, provided that a party using an unpublished opinion furnishes all other parties and the tribunal with the full text thereof and all other relevant favorable and unfavorable unpublished opinions known to exist. *Falcon v. Am. Cyanamid*, 221 N.J. Super. 252, 261 n.2 (App. Div. 1987). Furthermore, *R. 1:36-3* does not “prevent the court[s] from acknowledging the persuasiveness of a reasoned decision on analogous facts.” *Sauter v. Colts Neck Volunteer Fire Co. No. 2*, __ N.J. Super. __ (App. Div. 2017) (slip op. at 28). In the instant matter, the appointing authority

provided copies of the *Grill and Walsh* decision. Therefore, although *Grill and Walsh* does not constitute binding precedent under *R. 1:36-3*, the rule does not preclude the Civil Service Commission (Commission) from considering the persuasiveness of the Appellate Division's reasoning in *Grill and Walsh* in its review of the instant matter.

As the parties note, in *Grill and Walsh*, the Appellate Division upheld a determination by the Merit System Board (Board), predecessor to the Commission, which denied a back pay award to two municipal police officers seeking back pay for a suspension period after criminal charges brought against them were dismissed following their completion of PTI. The Board found that the officers were not entitled to back pay under *N.J.S.A. 40A:14-149.2*, as it found that a disposition through PTI did not satisfy the requirement of a favorable dismissal of the charges against a municipal police officer. In affirming the Board's decision, the Appellate Division noted that under the common law, a public employee was not entitled to compensation when he or she did not perform work. *Grill and Walsh* (citing *DeMarco v. Board of Chosen Freeholders of Bergen County*, 21 *N.J.* 136, 143 (1956); *Kelty v. Dep't of Law and Public Safety*, 321 *N.J. Super.* 84, 92 (App. Div. 1999)). Moreover, since *N.J.S.A. 40A:14-149.2* was a statute that altered a common law rule, it was to be strictly construed. *Id.* (citing *DeMarco*, 21 *N.J.* at 143). The Appellate Division also found that the statute's enumerated categories of being found not guilty at trial, dismissal of the charges, and termination of the prosecution demonstrated an intent to require the accused municipal police officer to secure a favorable dismissal of the charges against him or her. *Id.* The Appellate Division noted that while PTI provided a channel to resolve a criminal charge without the risk of conviction, it had not been construed to constitute a favorable termination. *Id.* As such, it upheld the Board's denial of back pay for the period of the appellants' suspensions.

The instant matter presents similar circumstances to *Grill and Walsh*, as the petitioner, a municipal Police Officer, seeks back pay for the period of time he was indefinitely suspended to the dismissal of the charges through his participation in a PTI program. The Commission finds that the requirement in *N.J.S.A. 40A:14-149.2*, that a municipal Police Officer be "found not guilty at trial, [have] the charges...dismissed or [see] the prosecution is terminated," is a requirement that underlying criminal charges are resolved through a favorable disposition. Moreover, as noted above, the Commission is mindful that while participation in a PTI program is neither a conviction nor an acquittal, it has not been construed to constitute a favorable termination of criminal charges. *See N.J.S.A. 2C:43-13(d)*. *See also In the Matter of Christopher Ritoch* (MSB, decided July 27, 1993). Therefore, as the dismissal of criminal charges after completion of PTI is not considered a requisite favorable disposition of criminal charges required for entitlement to back pay under *N.J.S.A. 40A:14-149.2*, there does not appear to be a basis to grant the petitioner's request for back pay.

ORDER

Therefore, it is ordered that this request be denied.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 27TH DAY OF MARCH, 2018

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