



STATE OF NEW JERSEY

**DECISION OF THE
CIVIL SERVICE COMMISSION**

In the Matter of Ruth DiPalma,
City of Union City

CSC Docket No. 2019-1496

Request for Interim Relief

ISSUED: JANUARY 18, 2019 (JET)

Ruth DiPalma, a Cashier with the City of Union City, represented by Christopher P. Kelly, Esq., petitions the Civil Service Commission (Commission) for interim relief of her removal.

By way of background, the appointing authority issued the petitioner a Preliminary Notice of Disciplinary Action (PNDA) on August 10, 2018, immediately suspending her and removing her from employment on charges of incompetency, inefficiency or failure to perform duties, inability to perform duties, conduct unbecoming a public employee, neglect of duty, misuse of public property, and other sufficient cause. It alleged that, on or about May 9, 2018, the petitioner returned from the bank with the appointing authority's daily deposits and she purposely and knowingly deprived the appointing authority of its public property by placing some of the money in a concealed area of her body. In this regard, it alleged that, on May 8, 2018, the petitioner made two separate deposits. Specifically, the first deposit was for \$25,842.67, but she only deposited \$25,823.67, which was less than the required amount. The second deposit was made to a Trust Account, and the petitioner deposited \$20.00. The petitioner returned to the workplace with the unreconciled amount of money, took \$20.00 from the drawer, and put it into her bra. The remaining amount of \$19.00 was deposited the next day and marked "in transit." It added that the petitioner holds a position of trust, and her immediate suspension was necessary to maintain the safety, health, order and/or effective direction of public services.

In her request, the petitioner asserts that she has a clear likelihood of success on the merits. Specifically, the petitioner contends that it is undisputed that she was suspended without pay and has been denied a departmental hearing.¹ The petitioner states that she was denied due process and is entitled to review the evidence against her and to respond by way of a pretermination *Loudermill* hearing. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). The petitioner adds that an indefinite suspension may only be imposed when an individual has a criminal complaint or an indictment pending. As such, the appointing authority has improperly suspended her without pay. The petitioner adds that the appointing authority has not demonstrated that she is unfit for duty or is a hazard to anyone, and her suspension is not necessary to maintain the safety, health, order or effective direction of public services. The petitioner contends that the incident does not rise to the level that would jeopardize the safety, health, order and/or effective public services. Rather, the petitioner maintains that the video evidence demonstrates that the petitioner stole no money from the appointing authority and shows that she attempted to rectify a mistake. The petitioner adds that she should not have been suspended without an opportunity for a hearing. The petitioner asserts that it has been well over 30 days that is required for a departmental hearing to be conducted pursuant to *N.J.A.C. 4A:2-2.5(d)*, as 109 days has passed as of the date she filed this matter and no hearing has been held. The petitioner explains that she lives in an apartment and she runs the risk of being evicted from her apartment if she is not restored to employment. The petitioner adds that there is no substantial risk of harm if she is returned to her position, and the public interest will be served if the request in this matter is granted. As such, she requests to be reinstated with back pay, benefits, seniority and award of counsel fees.²

In support, the petitioner provides a copies of the deposit statements on the alleged date of the incident, and a copy of the video surveillance tape as evidence in support of her request in this matter.

In response, the appointing authority, represented by Michael Garcia, Esq., asserts that the petitioner unlawfully took public funds and as such, was immediately suspended from her position in order to maintain the effective direction of public services. Specifically, the appointing authority contends that the petitioner's request is moot as two of the petitioner's motions were decided on November 30, 2018 by the appointing authority's hearing officer. The appointing authority adds that additional discovery was provided to the petitioner on

¹ The petitioner states that, on May 10, 2018, the appointing authority's Director of Finance and two Police Officers confronted the petitioner and informed her that she was fired.

² The petitioner asserts that she filed a Superior Court action against the appointing authority, the appointing authority's Tax Collector, and the appointing authority's Mayor pursuant to the New Jersey Law Against Discrimination (LAD). The petitioner states that she continued working after filing the law suit and the matter remains pending.

December 14, 2018. Further, the appointing authority contends that it has satisfied the requirements set forth in *N.J.A.C.* 4A:2-2.5. In this regard, the appointing authority confirms that the petitioner was served with a PNDA and was provided a hearing. The appointing authority states that the PNDA narrative explained the evidence against her, and she was provided with a video tape of the alleged incident, deposit slip, bank receipt, and contents of her drawer. The appointing authority also indicated that a witness would testify about the alleged incident. Moreover, the appointing authority contends that the tentative hearing dates for the departmental hearing were on January 3, 2019 and January 4, 2019.

Additionally, the appointing authority argues that the appellant is unlikely to succeed in this matter as the evidence shows that she took public money. The appointing authority states that the petitioner is guilty of conduct unbecoming an employee and neglect of duty. In this regard, it explains that the petitioner received the appointing authority's policy pertaining to bank deposits and she was aware of her responsibilities. The appointing authority explains that, on May 8, 2018, the petitioner made two separate deposits, and she deposited less money than what was authorized. The appointing authority maintains that the petitioner deposited part of the money, returned part of the money, and placed some of the money in her bra. Further, the appointing authority asserts that, other than financial harm, the petitioner has failed to identify what harm she would experience that would require relief in this matter. In this regard, it contends that, if the petitioner prevails in this matter, there is no danger of immediate or irreparable harm, as she would be properly compensated. Moreover, it contends that the public interest is best served if the petitioner remains suspended and there is no evidence that the appointing authority should not be faced with reinstating an employee absent a departmental hearing.

In response, the petitioner reiterates many of the arguments that she presented above. In addition, she asserts, among other things, that she should not have been suspended without the opportunity for a pre-hearing to review the charges against her. The petitioner adds that the appointing authority submits an undated memorandum that indicates that the surveillance video was reviewed with the petitioner on May 10, 2018.

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, in reviewing this matter, it is not necessary to address the merits of the underlying charges against the petitioner. Rather, the issue before the Commission in this matter is to determine if the appointing authority presented a valid basis to immediately suspend the petitioner. With respect to her arguments pertaining to the alleged incident, the Commission does not, as of the issuance of this decision, have any control over the appointing authority's internal actions or any administrative charges it may issue.

N.J.S.A. 11A:2-13 and *N.J.A.C. 4A:2-2.5(a)*¹ provide that an employee may be suspended immediately without a hearing if the appointing authority determines that the employee is unfit for duty or is a hazard to any person if allowed to remain on the job or that an immediate suspension is necessary to maintain safety, health, order, or effective direction of public services. Further, *N.J.S.A. 11A:2-13* states in pertinent part that except as otherwise provided herein, before any disciplinary action in subsection a.(1), (2) and (3) of *N.J.S.A. 11A:2-6* is taken against a permanent employee in the career service or a person serving a working test period, the employee shall be notified in writing and shall have the opportunity for a hearing before the appointing authority or its designated representative. *N.J.A.C. 4A:2-2.5(a)* states 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. Additionally, where the suspension is immediate, the PNDA must be served within five days following the immediate suspension.

With regard to the requirements articulated in *Loudermill, supra*, *N.J.A.C. 4A:2-2.5(b)* provides, in pertinent part, that when an employee is suspended immediately and without pay, the employee must be apprised orally or in writing of why the suspension is sought, the charges and general evidence in support of the charges, and provided sufficient opportunity to review the charges and the evidence in order to respond to the charges before a representative of the appointing authority. The response may be oral or in writing, at the discretion of the appointing authority. In a prior case addressing this issue, *In the Matter of Anthony Recine* (MSB, decided March 10, 1998), it was 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. By contrast, as set forth below, the petitioner in the instant matter was well aware of the charges against her and the evidence in support of the charges at the time of her suspension.

The record reflects that the petitioner was apprised in writing that she was immediately suspended on August 10, 2018 and was provided the basis for her suspension. The petitioner was served with the August 10, 2018 PNDA, charging her with incompetency, inefficiency or failure to perform duties, inability to perform

duties, conduct unbecoming a public employee, neglect of duty, misuse of public property, and other sufficient cause. The specifications as indicated in the PNDA is considered the general evidence supporting the charges. The petitioner was provided with sufficient opportunity to respond. Moreover, the PNDA was served within five days after the petitioner was suspended and no procedural violations occurred. Thus, the requirements of *Loudermill* were met.

In this matter, 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 she is likely to succeed on the merits, the disciplinary penalty imposed was excessive, and she has suffered irreparable harm. The Commission notes that the charges against the petitioner are particularly serious, as they involved potential theft or misuse of public funds. 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 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. Regardless, given the serious nature of the charges, it is clear that the appointing authority met the standards for an immediate suspension enunciated in *N.J.A.C.* 4A:2-2.5(a)1. Moreover, the petitioner has not shown that she is in danger of immediate or irreparable harm if this request is not granted. While the Commission sympathizes with her financial situation, the harm that she is experiencing while awaiting her hearing is purely financial in nature, and as such, can be remedied by the granting of back pay should she prevail in her appeal. Moreover, the public is best served when a public employee facing such serious charges is kept out of the workplace pending adjudication of the charges.

Regarding the departmental hearing, the appointing authority issued the PNDA on August 10, 2018 and the record indicates that a departmental hearing has not yet been completed. The Commission notes that the imposition of the immediate suspension on August 10, 2018, without a pending criminal charge, could only generally be effected for up to 55 days and any period of suspension after 55 days, without actually sustaining a disciplinary charge, would be improper. In this regard, a PNDA is required to be issued within five days where an immediate suspension is sought and, thereafter, if a departmental hearing is requested, the full hearing should be held within 30 days of the date of the PNDA, and the FNDA should be issued by no later than 20 days from the date of the hearing. *See N.J.A.C.* 4A:2-2.5(a)1, 4A:2-2.5(d) and 4A:2-2.6(d). However, the record also indicates that some of the delay in the proceedings can be attributable to the petitioner's requests

for discovery and motion to dismiss.³ Thus, it cannot be conclusively determined that the time frames above have not been adhered to. *See N.J.A.C. 4A:2-2.5(d)*. As such, upon receipt of this decision, the appointing authority is directed to immediately recommence the hearing which shall be completed within 30 days of the issuance of this decision.

ORDER

The Civil Service Commission orders that the petitioner be denied and that a hearing, if still pending, be conducted and completed within 30 days of the issuance of this decision.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 16th DAY OF JANUARY, 2019



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

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c: Ruth DiPalma
Christopher P. Kelly, Esq.
Michael Garcia, Esq.
Maryury Martinetti
Kelly Glenn

³ While the “hearing” has apparently not yet been held, it is clear that proceedings have begun and such proceedings do constitute part of the departmental hearing process. As such, the petitioner’s requests/motion cannot be used to penalize the appointing authority for all of the delays in the proceedings.