



Counsel fees are denied pursuant to *N.J.A.C. 4A:2-2.12* as the primary issue of this appeal was Guzman's removal from employment which was rendered moot. As such, he was not successful on the primary issue of the appeal.

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 15<sup>TH</sup> DAY OF JANUARY, 2020



Deirdre L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Christopher S. Myers  
Director  
Division of Appeals and Regulatory Affairs  
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P. O. Box 312  
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Attachment



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SUMMARY DECISION**

OAL DKT.NO. CSR 10413-19

AGENCY DKT. NO. N/A

**IN THE MATTER OF WILFREDO GUZMAN,  
ROCKAWAY TOWNSHIP,**

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**Paul W. Tyshchenko, Esq.** for appellant (Caruso Smith Picini, attorneys)

**Thomas N. Ryan, Esq.,** for Respondent, (Laddey, Clark & Ryan, LLP,  
attorneys)

Record Closed: November 7, 2019

Decided: December 3, 2019

**BEFORE Nanci G. Stokes, ALJ:**

**STATEMENT OF THE CASE**

Rockaway Township (Rockaway) police officer Wilfredo Guzman (Guzman) was suspended without pay on April 24, 2017, after a criminal complaint issued, and pled guilty to official misconduct, resulting in his forfeiture of public employment. Is Rockaway permitted to fine Guzman for accrued time off earned before his suspension? No. Under N.J.S.A. 11A:2-20 and N.J.A.C. 4A:2-2.4, a disciplinary fine can only be imposed as a form of restitution, instead of a suspension, or when an employee has agreed to a fine.

## PROCEDURAL HISTORY

On April 23, 2017, a criminal complaint was filed against Guzman, a police officer with Rockaway, charging him with inappropriate conduct and contact with children under the age of 18 in violation of N.J.S.A. 2C:14-2c(4) (second-degree crime), engaging in inappropriate sexual conduct in violation of N.J.S.A. 2C:24-4a(1) (third-degree crime), and endangering the welfare of children in violation of N.J.S.A. 2C:24-4a(2) (third-degree crime).

On April 26, 2017, Guzman was personally served with a Preliminary Notice of Disciplinary Action suspending him without pay effective April 24, 2017, charging Guzman with incompetency, inefficiency or failure to perform duties in violation of N.J.A.C. 4A:2-2.3(a)(1); insubordination in violation of N.J.A.C. 4A:2-2.3(a)(2); conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7); and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12). The Preliminary Notice also informed Guzman that he could be subject to penalties of removal under N.J.S.A. 2C:51-2.

On October 12 and October 24, 2017, State of New Jersey indictments were issued against Guzman including multiple counts of official misconduct, endangering the welfare of a child, and sexual assault in Rockaway between September 1, 2014 and June 11, 2015.

On May 31, 2018, Guzman pled guilty to two counts of official misconduct and the Superior Court of New Jersey ordered forfeiture of his public employment.

On July 19, 2018, an Amended Preliminary Notice of Disciplinary Action was issued advising Guzman that Rockaway sought removal for cause effective May 31, 2018, and a fine of all accrued and unused paid time off, except for "compensatory time off," totaling 2,620.34 hours or 218.36 twelve-hour shifts.

On October 12, 2018, Guzman was sentenced to concurrent six-year-prison-terms for each count.

On November 20, 2018, as requested by Guzman, Rockaway conducted a disciplinary hearing.

On January 30, 2019, Rockaway issued a Second Amended Preliminary Notice of Disciplinary Action, reflecting the corrected removal date of April 24, 2017.

On May 9, 2019, following the November 20, 2018, hearing and submission of written briefs, the hearing officer rendered a determination.

On June 10, 2019, a Final Notice of Disciplinary Action was presented, sustaining the charges against Guzman, including the removal as of April 24, 2017, and assessed a fine of 1,040 hours for "accrued time off."

Rockaway did not disburse the remaining portion of accrued time, or 1,580.34 hours.

On June 28, 2019, Guzman simultaneously appealed the determination to the Civil Service Commission and to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6. On July 8, 2019, the OAL received Guzman's appeal, but it was defective, which Guzman perfected on July 22, 2019.

During a telephone conference on September 12, 2019, the parties agreed that the material facts were undisputed, and no hearing was necessary to resolve the legal issue presented.

On October 11, 2019, Rockaway filed its motion for summary decision, and on November 4, 2019, Guzman filed his opposition. Rockaway filed a reply to the opposition on November 7, 2019.<sup>1</sup>

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<sup>1</sup> On November 11, 2019, Guzman filed a reply to Rockaway's submission of November 7, 2019. On November 14, 2019, Rockaway objected, asserting that the OAL rule for summary decision, N.J.A.C. 1:1-12.5, does not provide for additional replies. On November 18, 2019, Guzman responded to the objection

## FINDINGS OF FACT

Based on the documents submitted in support of an in opposition to the motion for summary decision, and when viewed in the light most favorable to the non-moving party, I **FIND** the following as **FACT** for purposes of this motion only:

On April 23, 2017, a criminal complaint was filed against Guzman, a police officer with Rockaway, charging him with inappropriate conduct and contact with children under the age of 18 in violation of N.J.S.A. 2C:14-2c(4) (second-degree crime), engaging in inappropriate sexual conduct in violation of N.J.S.A. 2C:24-4a(1) (third-degree crime), and endangering the welfare of children in violation of N.J.S.A. 2C:24-4a(2) (third-degree crime).

Before his suspension without pay on April 24, 2017, Guzman accrued "paid time off," more specifically, sick and vacation leave, totaling 2,620.34 hours or 218.36 twelve-hour shifts. Guzman was paid salary, sick time, vacation time, overtime, and Garcia time<sup>2</sup> for approximately 41 weeks from September 1, 2014, through June 11, 2015, during which time Guzman purportedly committed the acts described in the criminal complaint.

On May 31, 2018, Guzman pled guilty to two counts of official misconduct (counts eight and thirteen of indictment 17-10-867) and the Superior Court of New Jersey ordered forfeiture of his public employment. Regarding the plea, Guzman admitted that on June 11, 2015, while on duty, he had sexual relations with a girl at the Rockaway police substation, and during that same month, he had sexual relations with another girl at a private residence, also while on duty.

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urging consideration of its November 11, 2019, response. Because the November 11, 2019, submission is outside the timeframes of N.J.A.C. 1:1-12.5, is presented without court permission, and Rockaway objects, I will not consider either the November 11, 2019, submission, Rockaway's reply of November 14, 2019, or Guzman's reply of November 18, 2019.

<sup>2</sup> Garcia time is overtime paid to a police officer working overtime during one of the two workweeks in a pay cycle but has not used any vacation or sick time during one of the two work weeks of that pay cycle.

On July 19, 2018, an Amended Preliminary Notice of Disciplinary Action was served that removed Guzman, effective May 31, 2018, and imposed a fine of \$2,620.34 hours of accrued, unused paid time off.

A Second Amended Preliminary Notice of Disciplinary Action corrected the removal date to April 24, 2017.

The Final Notice of Disciplinary Action confirmed removal effective April 24, 2017, and imposed a fine of six months or 1,040 hours of "accrued time off."

### **DISCUSSION AND CONCLUSIONS OF LAW**

#### **I.**

A party may move for summary decision upon any or all substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). The motion for summary decision shall be served with briefs and may be served with supporting affidavits. Ibid. "The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b).

Even where a statute calls for a "hearing," where a motion for summary decision is made and supported by documentary evidence and where the objector submits no evidence to demonstrate a genuine issue of material fact, the motion procedure constitutes the hearing and no trial-type hearing is necessary. Contini v. Newark Bd. of Educ., 286 N.J. Super. 106, 120-21 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

To determine whether there exists a "genuine issue" of material fact that precludes summary judgment, the motion judge must consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-

moving party, are sufficient to demonstrate that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins., 142 N.J. 520, 540 (1995).

In this case, the parties stipulate that there is no genuine issue as to the material facts, and that the only issue presented is Rockaway's disciplinary authority to withhold payment of Guzman's accrued time off prior to his suspension on April 24, 2017. More pointedly, no genuine issue exists that Guzman held a public position as a police officer when he was indicted for crimes of the second and third degree committed while on duty; that he pled guilty to two counts of official misconduct, a second-degree crime, resulting in his forfeiture of public employment; that Guzman was suspended without pay and removed from public employment, and that Guzman did not agree to a fine as discipline for his actions. In addition, no genuine issue exists that from September 1, 2014 through June 11, 2015, Guzman was charged with committing criminal acts and worked or was paid by Rockaway for approximately 41 weeks; that during the plea hearing, Guzman admitted to two instances of inappropriate sexual relations with girls while on duty in June 2015; and that before his suspension on April 24, 2017, Guzman had accrued 2,620.34 hours of sick and vacation leave. Since these facts are clear and undisputed, I **CONCLUDE** that this case is ripe for summary decision.

II.

In appeals from disciplinary actions, the appointing authority bears the burden of proof by a preponderance of the credible evidence. N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

Under N.J.S.A. 2C:51-2, a person holding any public position who is convicted of a crime of the third degree or above must forfeit his or her position. Consequently, N.J.A.C. 4A:2-2.7(a)(2) permits immediate suspension of an employee formally charged with a crime of the first degree, second degree, or third degree, or a crime in the fourth degree on the job or directly related to the job. N.J.S.A 40A:14-149.1 mandates a suspension with pay even where a criminal or quasi-criminal offense is charged as the basis for the disciplinary proceeding, unless the offense charged is especially grave or an indictment has been returned. In Herzog v. Twp. of Fairfield, 349 N.J. Super. 602,



607 (App. Div. 2002), the court noted that the legislative intent of N.J.S.A. 40A:149.1 "was to protect a police officer from the loss of income and other benefits while the charges pended unless they were of special gravity."

If an indictment is returned, however, suspension without pay is permitted until the case disposition. N.J.S.A 40A:14-149.1. Reimbursement for an unpaid suspension is required only if the suspended police officer obtains a favorable disposition of the criminal charges, subject to disciplinary proceedings. N.J.S.A 40A:14-149.2. Indeed, in disciplinary cases resulting in removal following the disposition of the criminal charges, back pay and benefits are not awarded. N.J.A.C. 4A:2-2.10(c)(2). See also IMO Nemes v. Hamilton Township, Department of Public Safety, 2008 N.J. AGEN LEXIS 60 (Jan. 23, 2008) (suspension without pay proper even though exceeding 6 months because appellant was charged and convicted of crimes incompatible with his employment as a police officer). "Back pay" includes unpaid salary and other wages, while "benefits" include vacation and sick leave credits, and additional amounts expended to maintain health insurance coverage during the period of suspension or removal. N.J.A.C. 4A:2-2.10(d).

Given this discussion, I **CONCLUDE** that Guzman is not entitled to vacation or sick leave time accrued during his suspension.

### III.

Guzman, however, does not challenge the suspension without pay, including leave time accrued following his suspension on April 24, 2017, or his removal from public employment; instead, Guzman seeks payment for vacation and sick leave time accrued before, not during, his suspension.

### A.

Guzman asserts that the suspension without pay and subsequent removal from employment are discipline, and that an additional disciplinary fine is not authorized.

On the other hand, Rockaway asserts that accrued vacation and sick leave time pre-suspension should not be paid to Guzman, maintaining it can impose a fine in the form of restitution for time Guzman was paid as a police officer from September 1, 2014, through June 11, 2015, during which charges for criminal acts issued. Toward this end, Rockaway highlights that police officers are held to a high standard of conduct both on and off the job. In re Carter, 191 N.J. 474, 486 (2007). Indeed, Rockaway asserts the gravity of the crimes committed during this period not only preclude back pay and benefits following his suspension, but also vacation and sick leave time accrued by Guzman while serving as a police officer.

Rockaway further asserts that Guzman breached his duty as a police officer in failing to identify his victims as sexual crime victims or provide them with legal and medical advice in violation of the Crime Victim's Bill of Rights and the "Attorney General Standards for Providing Services to Victims of Sexual Assault," but Rockaway cites to no section of these standards that allows for the discipline it seeks.

Guzman counters that he was neither convicted of nor pled guilty to crimes of sexual assault, and that he pled guilty to only two specific instances of official misconduct and, therefore, any fine, if imposed, should be limited to only two days of pay.

Regardless, Rockaway maintains that equitable principles should be applied to disgorge Guzman of his accrued leave benefits in restitution for time it paid Guzman from September 1, 2014, through June 11, 2015. Rockaway relies upon caselaw, such as Kaye v. Rosefielde, 223 N.J. 218 (2015), which recognizes that employees owe a duty of loyalty to their employer and that equitable remedies include disgorgement of compensation during the time when an employee was disloyal. In that case, the trial court concluded that Rosefielde engaged in egregious conduct constituting a breach of his duty of loyalty, breach of his fiduciary duty, legal malpractice, and civil fraud, but the trial court declined to order equitable disgorgement of Rosefielde's salary because the breach of duty did not result in damage or economic loss to his employer.

The Supreme Court disagreed, noting the "broad discretion afforded to courts fashioning equitable remedies," and permitted disgorgement of the employee's compensation as a remedy for breach of loyalty. Id. at 222. The remedy of disgorgement is "derived from principles of contract law recognizing that when an employee breaches the duty of loyalty at the heart of the employment relationship, he or she may be compelled to forego compensation earned during the period of disloyalty" and in effect, is unearned. Id. at 233.

Kaye, however, did not involve public employment with the protections afforded public employees, nor did it include an administrative proceeding.

Still, Rockaway argues that disgorgement is appropriate in administrative proceedings, citing Ivan Roach v. Department of Transportation, CSV 1044-02, initial decision, (March 4, 2003), [https://njlaw.rutgers.edu/collections/oal/html/initial/csv01044-02\\_1.html](https://njlaw.rutgers.edu/collections/oal/html/initial/csv01044-02_1.html). In that case, during working hours for which Roach was paid as a mechanic by the New Jersey Department of Transportation (NJDOT), Roach left his work location, worked, and was paid as a mechanic by another employer. In addition, when Roach was on sick leave from NJDOT receiving his full salary, Roach was working as a full-time mechanic for another employer. During these times, NJDOT maintained that Roach was not entitled to compensation, charged him with theft by deception, and sought his removal and a fine for restitution of Roach's salary. The ALJ found that the NJDOT sustained the charges of theft by deception, ordered Roach's removal from public employment, but did not order disgorgement of salary or imposition of a fine. Therefore, I **CONCLUDE** that these cases provide Rockaway with no authority for the proposed fine of Guzman's accrued sick and vacation leave as restitution for salary and other time paid during the alleged period of disloyalty.

## **B.**

Although court-fashioned doctrines may have utility and relevance in administrative proceedings, "their potential for achieving sound result must be tempered by a full appreciation of an administrative agency's statutory foundations, executive

nature, and its special jurisdictional and regulatory concerns.” Hackensack v. Winner, 82 N.J. 1, 29 (1980).

Under N.J.S.A 11A:2-20 and N.J.A.C. 4A:2-2.4(c), an appointing authority may only impose a fine as a form of restitution; instead of a suspension, when it is established that a suspension would be detrimental to the public health, safety or welfare; or when an employee has agreed to a fine as a disciplinary option. Even so, N.J.A.C. 4A:2-2.4(a) states that “no suspension or fine shall exceed six months except for suspensions pending criminal complaint or indictment.” Thus, the “situations in which fines are imposed are restricted and the appointing authority must make a specific showing to justify the imposition of a fine.” IMO Nicole Baldwin, Mercer County, 2009 NJ CSC LEXIS 405 (Sept. 17, 2009); see also IMO Bloomfield Maintenance Workers Association, (MSB), final decision, (January 12, 2005) (appointing authority’s practice of imposing a fine as a form of discipline was not appropriate as criteria for the imposition of a fine was not met).

Fines may be properly assessed as restitution under N.J.A.C 4A:2-24(c)1, but only limited forms of restitution are recognized in administrative proceedings, such as for the cost of lost or damaged property, see, e.g., IMO Oswald Robetto, City of Newark Fire Department, 2017 N.J. AGEN LEXIS 812 (December 11, 2017) (cost of lost radio properly fined) or when additional costs are incurred because of the employee’s conduct, see, e.g., IMO Jennifer McCrary, final decision, (October 23, 2018), <https://njlaw.rutgers.edu/collections/oal/final/csv4540-07.pdf> (fine in lieu of suspension appropriate discipline where employee’s neglect caused property damage). The cases involving fines comport with the common understanding of restitution as being “an equitable remedy under which a person [or entity] is restored to his or her original position prior to loss or injury or placed in the position he or she would have been, had the breach [of contract or duty] not occurred.” Black’s Law Dictionary 910 (6<sup>th</sup> ed. 1993).

Contrary to Guzman’s position that his suspension without pay precludes Rockaway from assessing a fine, a disciplinary fine can also be imposed when an employee is suspended. In IMO Ramona Carter, 2017 N.J. CSC LEXIS 347 (May 5,

2017), on remand from the Appellate Division finding a charge of insubordination unsupported, the Civil Service Commission (Commission) addressed the proper penalty for the remaining charges of conduct unbecoming and falsification. Given the severity of the offenses, the Commission upheld the original fifteen working day suspension and the fine, noting that the appointing authority's expense of having to pay another officer overtime due to Carter's actions also warranted a fine of the overtime costs as restitution.

In this case, Rockaway suspended Guzman without pay, and Guzman did not agree to a fine. There is no restitution sought for damaged or lost public property or excess costs incurred by the appointing authority as a result of Guzman's actions. Notably, Rockaway has not proven that Guzman breached his duty of loyalty for the six-month period of Guzman's salary it seeks to disgorge; instead, Rockaway relies upon Guzman's plea of guilty to two counts of official misconduct occurring on only two days. Regardless, disgorgement of salary during a period where an employee has breached a duty of loyalty is not discipline authorized under the civil service statutes or regulations.

Since Rockaway has no disciplinary authority to withhold payment for vacation and sick leave accrued prior to a suspension or to impose a fine as restitution of paid time during a period of disloyalty, I **CONCLUDE** that Rockaway must pay Guzman for vacation and sick leave accrued prior to the suspension of April 24, 2017, and that Rockway is not entitled to prevail on its motion for summary decision as a matter of law.

### **ORDER**

Given my findings of fact and conclusions of law, I **ORDER** that the motion for summary decision is **DENIED**, and that Rockaway is to pay Guzman for 2,620.34 hours in accrued sick and vacation leave prior to his suspension on April 24, 2017.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 3, 2019  
DATE

  
NANCI G. STOKES, ALJ

Date Received at Agency:

December 3, 2019

Date Mailed to Parties:  
ljb

December 3, 2019

**APPENDIX**

**Exhibits**

**Appellant:**

P-1 Letter Brief in reply to Motion for Summary Decision

**Respondent:**

R-1 Complaint-Warrant No. 1435-W-2017-000142 dated April 23, 2017

R-2 Preliminary Notice of Disciplinary Action dated April 26, 2017

R-3 Indictments (17-10-00891-1 and 17-10-00867-1)

R-4 Correspondence from the Office of the Atty. Gen. to the Mayor of Rockaway Township dated June 27, 2018

R-5 Amended Preliminary Notice of Disciplinary Action dated July 19, 2018

R-6 Decision in IMO Nemes v. Hamilton Township, Department of Public Safety, 2008 N.J. AGEN LEXIS 60 (Jan. 23, 2008)

R-7 Decision in Ivan Roach v. Department of Transportation, CSV 1044-02, initial decision, (March 4, 2003),  
[https://njlaw.rutgers.edu/collections/oal/html/initial/csv01044-02\\_1.html](https://njlaw.rutgers.edu/collections/oal/html/initial/csv01044-02_1.html)

R-8 Attorney General Standards to Ensure the Rights of Crime Victims

R-9 Attorney General Standards for Providing Services to Victims of Sexual Assault

R-10 Notice of Motion for Summary Decision

R-11 Reply Brief to Opposition