



STATE OF NEW JERSEY

In the Matter of Christopher Ferro,
Bergen County Sheriff's Office

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

CSC Docket No. 2022-1300

Request for Stay

ISSUED: JANUARY 21, 2022 (SLK)

The Bergen County Sheriff's Office (BCSO), represented by Brian M. Hak, Esq., requests a stay of the award of back pay and counsel fees in the Civil Service Commission's (Commission) decision in *In the Matter of Christopher Ferro* (CSC, decided October 27, 2021), pending its appeal to the Appellate Division.

By way of background, Ferro, a County Correctional Police Officer, on or around November 7, 2018, was subject to a random drug test. On December 28, 2018, the State Laboratory's (State Lab) Toxicology Report indicated that Ferro's urine tested positive for 11-Carboxy-THC, a controlled substance. The Toxicology Report contained a note indicating that Ferro claimed to have used CBD oil, but such use "should not be expected to produce a positive result for THC." Ferro was afforded the opportunity to have the second urine test independently, but he did not accept that opportunity. Ferro's THC level was found to be 18.9 ng/ml and the cutoff for THC is 15.0 ng/ml. Ferro was removed, and he appealed to the Commission, which transmitted the matter to the Office of Administrative Law (OAL). At the time of the initial toxicology screening, the State Lab did not have the capability to test for CBD and CBD metabolite, and only after Ferro's appeal was transmitted to the OAL did the State Lab possess such technology. On or about February 17, 2020, the State Lab tested Ferro's urine specimen for CBD and CBD metabolite, and CBD was not detected above the cutoff level of 5.0 ng/ml, which corroborated the initial report that the purported use of CBD "should not be expected to produce a positive result for THC." The Administrative Law Judge (ALJ) found that Ferro did not use CBD. However, the ALJ concluded that the initial test, which rendered THC above the cutoff, and the CBD test, which indicated THC under the cutoff, presented equivocal evidence. Therefore, the ALJ found that the BCSO did not meet its burden of proof.

On July 21, 2021, the Commission issued a decision remanding the matter back to the ALJ, and the ALJ again concluded that the BCSO did not meet its burden of proof. On October 27, 2021, two Commission members voted for Ferro's removal and two members voted to adopt the ALJ's decision. Therefore, since there was a tie, the ALJ's recommended decision was deemed adopted as the Commission's final decision. See *N.J.S.A. 52:14B-10(c)*. On November 9, 2021, this agency informed the parties of the Commission's decision. On December 5, 2021, the BCSO filed an appeal of the Commission's decision with the Superior Court of New Jersey, Appellate Division. On December 9, 2021, Ferro was reinstated and returned to BCSO's payroll.¹ The BCSO filed the subject request to stay the Commission's decision awarding back pay and counsel fees pending its appeal to the Appellate Division.²

In its request for a stay, the BCSO presents that the ALJ found that the AG's Drug Testing Policy required that a law enforcement officer who tests positive for an illegal drug must be terminated. Further, the ALJ found that the proper testing procedures were followed for the initial testing, which showed a level in Ferro's system of THC that was above the cutoff. Additionally, the ALJ found that this test result alone would require Ferro's removal. Also, the ALJ found that the CBD test conclusively demonstrated that CBD was not in his system. Therefore, its purported use by Ferro could not be the reason for the positive result determined by the initial test. However, the ALJ did not recommend to uphold Ferro's termination, even though the CBD test was near one and one-half years after the initial test and done solely for the purpose of determining whether CBD existed in his system, because the THC level in the CBD test was below the cutoff. The BCSO argues that it is illogical to conclude that the CBD test be considered more accurate for the purposes of determining the THC level than the initial test. It states that it is certain that the THC in the sample would degrade over time, which is why the CBD test only showed a level of THC 10.2 ng/ml, while the initial test showed a level of 18.9 ng/ml of THC, which is above the 15.0 ng/ml cutoff. The BCSO contends that the ALJ made a serious error, which requires a reversal of the decision. It emphasizes that there is no evidence that the initial test was invalid, and therefore, it has a strong likelihood of success on the merits. Additionally, the BCSO presents that two Commission members voted for Ferro's removal and it asserts that the Appellant Division must decide before back pay and counsel fees are finalized. It argues that it will be immediately and irreparably harmed if it is required to pay back pay now as Ferro has been out of work for nearly three years. Therefore, it is anticipated that the back pay award shall be substantial and it is unlikely that he will be able to repay it if the BCSO wins its appeal. Similarly, it contends that since Ferro has been reinstated and placed back on the payroll, and he will receive his back pay if the BCSO loses its appeal, there is no substantial injury to Ferro if BCSO's request is granted. Finally, it argues it is in the public's best interest that a law enforcement agency be able to

¹ This matter was originally filed by Ferro as a request for enforcement as Ferro had not been reinstated. However, the BCSO now indicates that Ferro was reinstated and returned to the payroll.

² The background was developed from the BCSO's submission for a request for a stay.

follow AG mandates without the fear that it will be exposed to monetary liability when such mandates are followed.

In response, Ferro, represented by David J. Altieri, Esq., asserts that the BCSO does not have a clear likelihood of success as the Appellate Division is deferential to the agency and only overturns a matter when it finds that a determination was arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence. Further, Ferro argues that the BCSO misinterprets the ALJ's findings as he did not claim that the second test was more accurate. Instead, he presents that the ALJ found that the results were equivocal based upon the record, which included tests with different findings for the THC level. Additionally, there was expert testimony that indicated that the result above the cutoff could easily fall below the cutoff level when accounting for an appropriate margin of error. Ferro emphasizes that the Commission reviewed the BCSO's arguments in its exceptions, and now it is presenting the same arguments. Moreover, Ferro states that early in the disciplinary process, he presented case law to the BCSO where an appointing authority claimed that a "zero tolerance" policy tied its hand in terminating the officer, but the Commission reinstated that officer after finding that low levels of THC in his test supported the fact that CBD caused the positive test, which was upheld in the Appellate Division. Regarding the second prong for a stay, Ferro argues that the BCSO, a major county agency in the most populous county in the State, will not be harmed if its request for a stay is denied, but as he has been out of work for nearly three years, he is the one who is harmed if the stay is granted. He presents that he has two children and was forced to switch to his wife's health insurance, which added significant expense. Additionally, Ferro states that he and his wife had to take on significant debt to cover expenses and the back pay is a lifeline for him and continuing the stay would only continue the harm against him.

CONCLUSION

Pursuant to *N.J.A.C.* 4A:2-1.2(c), the standards to be considered regarding a petition for a stay are:

1. Clear likelihood of success on the merits by the petitioner;
2. Danger of immediate or irreparable harm if the request is not granted;
3. Absence of substantial injury to other parties if the request is granted;
and
4. The public interest.

N.J.A.C. 4A:2-1.2(f) provides that following a final administrative decision by the Commission, and upon the filing of an appeal from that decision to the Appellate Division, a party to the appeal may petition the Commission for a stay or other relief pending a decision by the Court.

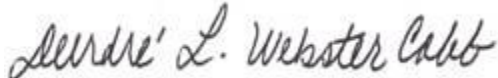
In this matter, after reviewing the evidence, the ALJ recommended that Ferro's removal be reversed. Further, after a review of the ALJ's decision, the evidence, and the exceptions, two of the four Commission voted to adopt the ALJ's recommendation, while two voted for Ferro's removal. Therefore, there is nothing in the record that indicates that the BCSO has a clear likelihood of success on the merits at the Appellate Division. Further, the BCSO asserts that it will suffer irreparable harm due to the financial hardship that it will be caused if it pays the back pay as ordered. However, while the Commission appreciates the financial hardship that the award of back pay presents the BCSO, it is Ferro who is suffering immediate or irreparable harm by not receiving the back pay that has been awarded to him. Also, there is nothing in the record about Ferro's inability to reimburse the BCSO should it prevail on appeal. Finally, it is in the public's interest that the Commission's orders be followed.

It is further noted that the record does not indicate that the parties have reached agreement on back pay and counsel fees as previously awarded. Therefore, in accordance with *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. February 26, 2003), this decision is not a final decision. The parties must inform the Commission, in writing, if there is any dispute to back pay and/or counsel fees within 60 days of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to R. 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

ORDER

Therefore, it is ordered that this request be denied.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 19TH DAY OF JANUARY, 2022



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