



STATE OF NEW JERSEY

In the Matter of Omar Diaz, City of Newark

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

CSC Docket No. 2023-299

Request for Interim Relief

ISSUED: September 21, 2022 (SLK)

Omar Diaz, a Police Captain with the City of Newark (Newark), represented by John J. Chrystal, III, President of the Superior Officers’ Association, petitions the Civil Service Commission (Commission) for interim relief regarding his immediate suspension.

By way of background, on June 25, 2022, Newark issued a Diaz a Preliminary Notice of Disciplinary Action (PNDA) immediately suspending him without pay effective that same day. The Immediate Suspension Notice indicated that Diaz was charged with Driving While Intoxicated, *see N.J.S.A. 39:4-50*, and he violated various departmental rules and regulations. It specified that on June 25, 2022, Diaz was working outside employment when a Police Sergeant noticed that Diaz appeared intoxicated. Thereafter, Newark presents that Diaz failed a field sobriety test. Additionally, Newark held a limited purpose hearing on July 18, 2022, where a determination was made to continue his immediate suspension without pay. Subsequently, Newark issued a “Final Notice of Disciplinary Action¹” (FNDA) continuing Diaz’s suspension without pay. Additionally, Newark indicates that the Essex County Prosecutor’s Officer (ECPO) initiated a criminal investigation regarding the incident, which is still pending.

¹ As the continuation of Diaz’s suspension was not a final disciplinary action, Newark’s notice was not a FNDA, despite this notice being issued on a FNDA form.

In his request, Diaz states that he would have a substantial likelihood of succeeding on the merits. He presents that although the charges are serious, he was only charged with a motor vehicle offense and not a crime. Diaz asserts that there is no evidence that there is any pending criminal charges and a criminal investigation is insufficient to impose an “indefinite” suspension. He indicates that a full departmental hearing on the merits has not been held. Therefore, he presents that under these circumstances, he could only be suspended for the maximum allowable time to hold a departmental hearing from the inception of the incident. *See In the Matter of Erik Blount* (CSC, decided June 17, 2020). He argues that since he was not charged with a violation of criminal law, it was not appropriate to indefinitely suspending him without pay in violation of *N.J.S.A. 11A:2-20*. Diaz presents that under *Herzog v. Township of Fairfield*, 349 *N.J. Super* (602) (App. Div. 2002), the Court held that under *N.J.S.A. 40A:14-149.1*, suspensions without pay are precluded for officers charged solely with violations of departmental rules or regulations, except where conduct is equivalent to the most serious of crimes involving moral turpitude or dishonesty is supportably alleged. Therefore, he argues that while Newark had a valid basis to immediately suspend him, his indefinite suspension was inappropriate. Diaz cites several cases to support his position that his suspension without pay was not warranted. Further, he contends that Newark has not alleged how his conduct made him unfit for duty, a hazard to any person if allowed to remain on pay status, or a threat to the safety, health, order or effective direction of public services. Therefore, Diaz argues that his suspension for solely violating departmental rules and regulations and a motor vehicle violation violates statutes, case law, and prior Civil Service Commission (Commission) decisions.

Additionally, Diaz states that he will suffer irreparable harm if his request is not granted because his immediate suspension without pay, prior to a disciplinary hearing, is a clear violation of law and Newark is obligated to obey the law and follow due process before it suspends its members. He presents that he is suffering financial hardship and irreparable harm by having his due process rights violated. Diaz contends that Newark’s failure to follow due process rights not only impacts him directly, but all Police Officers within the Department who will be in fear that they can be inappropriately suspended without pay without due process, prior to a disciplinary hearing. Similarly, he argues that the public interest is best served by sending a message to Newark that the law must be followed. Therefore, Diaz requests back pay, seniority and benefits retroactive to June 25, 2022, and reasonable attorney fees, administrative fees, and costs for his defense. He also requests that Newark be ordered to have a departmental hearing on the merits and he be reinstated, or the suspension be with pay. Diaz indicates that he had not waived his right to a hearing or agreed to extend the time limits for a hearing. He also requests any other remedy that the Commission deems just.

In response, Newark, represented by France Casseus, Assistant Corporation Counsel, asserts that Diaz cannot establish a clear likelihood of success on the merits.

It presents that on June 25, 2022, he was working outside employment and officers working outside employment are working in an official capacity of a Police Officer, which means that he was required to be in full uniform with necessary equipment. Newark states that while he was working his assigned outside employment post, without authorization or request, he went to another location where officers were investigating a separate, unrelated matter. Then, the field supervisor on the scene observed that Diaz was under the influence, which led to a field sobriety test to be given to Diaz, which he failed. It also indicates that a criminal investigation ensued. Therefore, Newark contends that these circumstances warranted his suspension as he was unfit for duty, a hazard, and necessary to ensure the safety, order and effective direction of public services. It presents that Diaz's seeking treatment on June 27, 2022, is further evidence that he was unable to effectively perform the duties of a Police Officer. Newark states that if the pending investigation results in criminal charges, this will further add to it position that he cannot succeed on the merits.

Newark states that Diaz has not stated any facts supporting immediate or irreparable harm to him if his request is not granted as loss of income does not constitute immediate or irreparable harm since it can be remedied through back pay. It argues that Diaz's alleged violations of due process is unsubstantiated as he was rightfully suspended for cause. Newark notes that charges were issued against him and a limited purpose hearing was held on July 18, 2022, where Diaz was not present or unavailable during the hearing, but arguments on his behalf were made by his union, and the suspension was upheld. It reiterates that the matter is currently pending a criminal investigation and asserts that criminal investigations take precedent over administrative matters. Newark asserts that the ECPO presently has jurisdiction and that an administrative hearing cannot proceed until the conclusion of the criminal investigation. It argues that the public interest will suffer if the Commission grants him interim relief. Newark states that Diaz's actions impugned the integrity of the Police Department as he made a choice to leave his post, drink while on duty, and report to work intoxicated. It contends to keep him on the payroll based on the nature of the facts and pending criminal charges would be an insult to the hard-working police staff and Newark residents. Newark presents that Diaz's behavior indicates that he failed to meet the high standards of a Police Officer. See *Moorestown v. Armstrong*, 89 N.J. super 560, 566 (App. Div. 1965).

CONCLUSION

N.J.S.A.11A:2-13 provides, in pertinent part, that except as otherwise provided herein, before any disciplinary action in subsection a.(1), (2) and (3) of *N.J.S.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. The hearing shall be held within 30 days of the notice of

disciplinary action unless waived by the employee. Both parties may consent to an adjournment to a later date.

This section shall not prohibit the immediate suspension of an employee 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. In addition, where a suspension is based on a formal charge of a crime of the first, second or third degree, or a crime of the fourth degree if committed on the job or directly related to the job, the suspension may be immediate and continue until a disposition of the charge. The Commission shall establish, by rule, procedures for hearings and suspensions with or without pay.

N.J.S.A. 40A:14-147 provides, in pertinent part, that except as otherwise provided by law, no permanent member or officer of the police department or force shall be removed from his office, employment or position for political reasons or for any cause other than incapacity, misconduct, or disobedience of rules and regulations established for the government of the police department and force, nor shall such member or officer be suspended, removed, fined or reduced in rank from or in office, employment, or position therein, except for just cause as hereinbefore provided and then only upon a written complaint setting forth the charge or charges against such member or officer. The complaint shall be filed in the office of the body, officer or officers having charge of the department or force wherein the complaint is made and a copy shall be served upon the member or officer so charged, with notice of a designated hearing thereon by the proper authorities, which shall be not less than 10 nor more than 30 days from date of service of the complaint.

N.J.S.A. 40A:14-149.1 provides that notwithstanding any other law to the contrary, whenever any municipal police officer is charged under the law of this State, another state, or the United States, with an offense, said police officer may be suspended from performing his duties, with pay, until the case against said officer is disposed of at trial, until the complaint is dismissed, or until the prosecution is terminated; provided, however, that if a grand jury returns an indictment against said officer, or said officer is charged with an offense which is a high misdemeanor or which involves moral turpitude or dishonesty, said officer may be suspended from his duties, without pay, until the case against him is disposed of at trial, until the complaint is dismissed or until the prosecution is terminated.

N.J.A.C. 4A:2-2.4(b) provides that in local service, the appointing authority may provide that a suspension be with or without pay.

N.J.A.C. 4A:2-2.5(a) provides 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, except:

(1) An employee may be suspended immediately and prior to a hearing where it is determined that 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...However, a PNDA with opportunity for a hearing must be served in person or by certified mail within five days following the immediate suspension.

(2) An employee may be suspended immediately 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 N.J.A.C. 4A:2-2.7.*

N.J.A.C. 4A:2-2.5(b) provides that where suspension is immediate under (a)1 and 2 above, and is without pay, the employee must first be apprised either orally or in writing, of why an immediate suspension is sought, the charges and general evidence in support of the charges and provided with 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.

N.J.A.C. 4A:2-2.5(c) provides that the employee may request a departmental hearing within five days of receipt of the PNDA. If no request is made within this time or such additional time as agreed to by the appointing authority or as provided in a negotiated agreement, the departmental hearing may be considered to have been waived and the appointing authority may issue a FNDA.

N.J.A.C. 4A:2-2.5(d) provides that a departmental hearing, if requested, shall be held within 30 days of the PNDA unless waived by the employee or a later date as agreed to by the parties.

N.J.A.C. 4A:2-2.6(d) provides that within 20 days of the hearing, or such additional time as agreed to by the parties, the appointing authority shall make a decision on the charges and furnish the employee either by personal service or certified mail with a FNDA. *See N.J.A.C. 4A:2-2.13* for the issuance of a Final Notice in removal appeals by certain law enforcement officers and firefighters.

N.J.A.C. 4A:2-2.7 provides, in pertinent part, that an indefinite suspension can only be imposed where there is a "pending criminal complaint or indictment."

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

Initially, it is noted that Diaz's immediate suspension under *N.J.A.C.* 4A:2-2.5(a)1 was warranted. Clearly, the charges of driving while intoxicated while on duty establishes a hazard and his immediate suspension was necessary to maintain the health, order, and effective direction of the police department. In this regard, the Commission is mindful that Diaz, as law enforcement officer, is held to a higher standard than other public employees. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied*, 47 *N.J.* 80 (1966). *See also In re Phillips*, 117 *N.J.* 567 (1990). Further, under *N.J.A.C.* 4A:2-2.4(b), Newark had the option to suspend Diaz without pay. Regarding Diaz's argument that his suspension without pay was inappropriate under *Herzog, supra*, that matter involved a Police Officer reading a confidential internal affairs document and disseminating it to the newspaper which led to charges solely for violating departmental rules and regulations. The Court found Herzog's conduct did not rise to the level of "moral turpitude or dishonesty" as required under *N.J.S.A.* 40A:14-149.1 to support a Police Officer being suspended without pay. Therefore, it ordered back pay from the period of suspension. However, this matter is distinguishable as the allegation that a Police Officer driving while intoxicated, especially while on duty, is an offense that impugned the integrity of the Police Department and put lives at risk and, therefore, was an offense that involved "moral turpitude," warranting a suspension without pay. It is noted that other cases that Diaz references either involved cases where the Commission found that immediate suspensions were not warranted, or the issue involved whether an indefinite suspension was warranted and not whether an immediate suspension without pay was appropriate.

Concerning Diaz's "indefinite" suspension, he was indefinitely suspended without being charged with a crime. It is noted that the Diaz's violation of *N.J.S.A.* 39:4-50, a motor vehicle law, while serious, is not considered a violation of a criminal law. *See In the Matter of Louis Ricca* (CSC, decided December 4, 2013). In this regard, there is no evidence in the record that there is any pending **criminal** charges or indictment. A criminal investigation is insufficient to impose an indefinite suspension. *See Blount, supra*. Further, Newark's argument that the ECPO presently has jurisdiction and that an administrative hearing cannot proceed until the conclusion of the criminal investigation is not persuasive. *See In the Matter of Egberto Colon* (CSC, decided November 18, 2015); *In the Matter of Kenneth Poole* (MSB, decided May 18, 2005); *In the Matter of Francis Salensky* (MSB, decided April

6, 2005). Pursuant to *N.J.A.C.* 4A:2-2.5(a)1, *N.J.A.C.* 4A:2-2.5(d) and *N.J.A.C.* 4A:2-2.6(d), an immediate suspension can only generally span 55 days from its inception, allowing for the maximum time for the departmental hearing process to be completed. Accordingly, in this case, given the procedural due process violations committed by Newark, the Commission orders that Diaz's immediate suspension beginning on June 25, 2022, shall be considered without pay through August 19, 2022, and thereafter with pay until he is either reinstated or a departmental hearing on the merits is held and the disposition of a new FNDA sustaining the charges is issued. The Commission orders that any departmental hearing must be commenced no later than 20 days from the issuance of this decision. Further, Newark is to provide Diaz back pay from August 20, 2022, until his reinstatement or issuance of a new FNDA. Finally, the Commission warns Newark that if it fails to commence a departmental hearing and issue a new FNDA or reinstate Diaz within the specified time frame, upon the Commission finding that Newark has not complied with this order, the Commission will impose fines up to \$10,000 pursuant to *N.J.A.C.* 4A:10-2.1.

ORDER

Therefore, it is ordered that Omar Diaz's petition for interim relief is granted in part. Within 20 days of the issuance date of this decision, Diaz shall be reinstated or a departmental hearing on the merits of the charges must be commenced. Further, Diaz shall be awarded back pay from August 20, 2022, until his reinstatement or issuance of a new Final Notice of Disciplinary Action.

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 21ST DAY OF SEPTEMBER, 2022

Dolores Gorczyca

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Presiding Member
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