



STATE OF NEW JERSEY

CIVIL SERVICE COMMISSION

In the Matters of Norhan Mansour and
Omar Polanco, Jersey City

CSC Docket Nos. 2023-1592 &
2023-1594

Requests for Interim Relief

ISSUED: May 24, 2023 (EG)

Norhan Mansour and Omar Polanco, Police Officers with Jersey City, represented by Peter B. Paris, Esq., petition the Civil Service Commission (Commission) for interim relief of their immediate suspensions. Since these matters are substantially similar, they have been consolidated herein.

As background, the record indicates that Mansour was hired as a Police Officer in January 2019. Polanco was hired as a Police Officer in July 2018. Mansour was issued a Preliminary Notice of Disciplinary Action (PNDA) dated November 9, 2022, charging him with conduct unbecoming public employee for allegedly violating internal rules and regulations concerning the use of narcotics. Specifically, Mansour had tested positive for cannabinoids after a random drug test on September 22, 2022. Polanco was issued a PNDA on January 9, 2023, charging him with incapacity, insubordination, inability to perform duties, conduct unbecoming public employee, neglect of duty and other sufficient cause based on a similar positive random drug test result. The petitioners were each immediately suspended upon issuance of their respective PNDAs and a penalty of removal was indicated for both petitioners. Thereafter, the petitioners each received departmental hearings and Final Notices of Disciplinary Actions (FNDA) were issued on March 1, 2023, upholding the charges and their removals.¹

¹ Subsequently, the petitioners appealed to the Civil Service Commission and their matters are currently pending hearings at the Office of Administrative Law (OAL).

In the instant matter, the petitioners argue that their suspensions without pay and subsequent removals for the presence of cannabinoid metabolites in their urine samples taken during a random drug test violate the New Jersey Constitution, Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA), guidance from the Cannabis Regulatory Commission (CRC), and guidance from the New Jersey Attorney General's Office (AG). The petitioners contend that CREAMMA expressly prohibits any adverse action against any employees for using cannabis off-duty. They assert that there is nothing in the amendments to the New Jersey Constitution or in CREAMMA that treat law enforcement officers different than any other employees with regard to off-duty cannabis use. Additionally, the petitioners argue that the AG's Office issued an April 13, 2022, letter to all New Jersey law enforcement executives which stated, "I write to remind law enforcement of the provisions of the CREAMMA that set the parameters for departments issuing policies pertaining to cannabis use...The CREAMMA further provides that law enforcement agencies may not take any adverse action against any officers because they do or do not use cannabis off-duty." The AG's letter further indicated that an employee shall not be subject to any adverse action by an employer solely due to the presence of cannabinoid metabolites in the employee's bodily fluid from engaging in conduct permitted under CREAMMA. Further, the petitioners assert that the CRC issued guidance on September 9, 2022, reiterating the prohibition against adverse employment actions against adult employees who use cannabis off-duty.

The petitioners argue that their requests satisfy the standards for interim relief as outlined in *N.J.A.C. 4A:2-1.2(c)*. They claim a clear likelihood of success as the New Jersey Constitution, CREAMMA, guidance from the CRC, and guidance from the AG make it clear that no employer may lawfully impose any adverse action against any employee for using cannabis off-duty or for having cannabinoid metabolites in his or her bodily fluids. In this regard, they argue that there was no allegation that either of the petitioners exhibited on-duty impairment nor any allegation that they consumed any illegal marijuana. In addition, they state that the drug test took place five months after it became legal to purchase marijuana in New Jersey. Further, the petitioners contend that any appointing authority argument that under federal law the petitioners will not be able to obtain permits to carry firearms is not persuasive as New Jersey law enforcement officers are not required to have permits to carry a firearm and that the appointing authority is bound by the laws of this State regarding the use of marijuana by its employees.

The petitioner also contends that a likelihood of immediate of irreparable harm exists as the appointing authority will continue to violate the law by depriving employees their right to use off-duty marijuana. Further, they claim that there is an absence of substantial harm to others if their request is granted because no harm can come from following the provisions of the State Constitution and CREAMMA. Moreover, the petitioners contend that it is in the public interest in preventing the

appointing authority from suspending or removing employees who did nothing less than exercise their rights under the State's Constitution. Accordingly, the petitioners request that they be reinstated to their positions. They also request that the Civil Service Commission (Commission) issue guidance to avoid the appointing authority's making similar violations in the future.

In reply, the appointing authority, represented by Arthur R. Thibault, Esq., and Boris Shapiro, Esq., maintain that the petitioners have not demonstrated a clear likelihood of success on the merits. It contends that it is not seeking to remove the petitioners solely for the presence of cannabinoid metabolites in their system but rather because they are unfit to perform the essential functions of their positions given that their possession of firearms is illegal pursuant to federal firearms laws, 18 *U.S.C.* 921, *et. seq.* The appointing authority asserts that under the supremacy clause in the United States Constitution, federal law preempts CREAMMA regarding the ability of law enforcement officers carrying firearms and ammunition if they have used unlawful drugs. In this regard, it states that under 21 *U.S.C.* 812, marijuana remains a Schedule I substance at all times relevant to these charges and unlawful to consume by an individual. Thus, it contends that federal law prohibits it from issuing a firearm and ammunition to marijuana users and conflicts with any State law requiring employers to continue to employ marijuana users where said employees are required to carry a firearm as part of their work duties. Additionally, it argues that CREAMMA does not specifically address the rights of cannabis users to possess firearms. Thus, it asserts that the petitioners, admitted regular users of cannabis, cannot continue as police officers since they cannot be issued firearms and ammunition. Further, the appointing authority contends that the petitioners have not shown any evidence of irreparable harm. In this regard, it asserts that there is no evidence the petitioners cannot continue to use marijuana as they had admitted that they used it before and after their drug tests. Furthermore, the petitioners have not demonstrated that the public interest favors that their request be granted. Finally, it contends that since FNDAs have been issued, the petitioners' requests for interim relief are moot.

In response, the petitioners argue that the appointing authority has no authority to ignore State law in favor of its interpretation of federal law. Additionally, it asserts that under federal law, technically everything in CREAMMA is unlawful, and states could not legalize marijuana use for any reason. Further, they contend that the New Jersey legislature expressly prohibits law enforcement agencies from cooperating with or providing assistance to the government of the United States in enforcing the Controlled Substances Act solely for actions consistent with CREAMMA. In this regard, the petitioners argue CREAMMA does not require anyone to violate federal law but simply provides immunity from State prosecution and from adverse employment actions by municipalities that are solely based on cannabis manufacturing, distribution and use. The petitioners add that if the federal

government wants to prosecute cannabis users in New Jersey it can do so but the appointing authority cannot.

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, the Commission notes that the fact that petitioners have been issued FNDA's and have filed appeals which have been transmitted to OAL do not make the instant matter moot. The potential granting of this request could make the matters at OAL moot.

The information and arguments provided in support of the instant petition does not demonstrate a clear likelihood of success on the merits. There are arguments and evidentiary findings that need to be addressed during a full hearing before an Administrative Law Judge before a final determination can be made. As an example, the AG's April 13, 2022, guidance indicates that "there should be zero tolerance for *unregulated* marijuana consumption by officers at any time, on or off duty, while employed in this State" (emphasis added). As such, the usage of unregulated marijuana could still subject an employee to adverse employment consequences. In this matter, there was no evidence, such as receipts, *etc.*, conclusively establishing that the petitioners purchased their cannabis products legally. Further, a full record established at OAL which addresses all of the arguments set forth by the parties will enable the Commission to make a well-informed final determination.

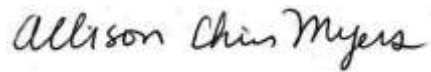
Furthermore, the petitioners have failed to show a danger of immediate or irreparable harm or how the public interest would be served by granting their requests. The argument that the petitioners cannot continue to use marijuana is not relevant and does not make sense. There does not appear to be any barrier to their continued use of regulated cannabis, absent an actual impairment on the job. Further, if after a full hearing the petitioners prevail, the appointing authority may have to change how it addresses any future marijuana cases. In this regard, in February 2023, the AG's Office issued a new Law Enforcement Drug Testing Policy which provides detailed guidance on what and how law enforcement agencies should address marijuana use in accordance with CREAMMA and CRC guidelines. Therefore, the risk of alleged continued violations of CREAMMA by the appointing authority would appear to have been minimized.

Accordingly, under these circumstances, the Commission denies the petitioners' requests for interim relief.

ORDER

Therefore, it is ordered that the petitioners' requests for interim relief be denied.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 24TH DAY OF MAY, 2023



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