



STATE OF NEW JERSEY

In the Matters of Brian Roach, *et al.*,
Jersey City

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

CSC Docket Nos. 2023-507, *et al.*

Requests for Interim Relief

ISSUED: September 20, 2023 (HS)

Brian Roach, Dubanes Bello, and Ruben Morales, Fire Fighters with Jersey City, represented by Michael A. Bukosky, Esq., petition the Civil Service Commission (Commission) for interim relief regarding their immediate suspensions. These matters have been consolidated due to similar issues presented.

As background, in a July 26, 2022 Preliminary Notice of Disciplinary Action (PNDA), Roach was charged with “[v]iolation of any criminal law” and “[v]iolation of any rule, regulation or General or Special Departmental order.” The PNDA specified that Roach was issued summonses for driving while intoxicated (DWI) and reckless driving while off duty on June 12, 2022; called in sick and was placed on sick leave on June 13, 2022; and failed to notify the Office of the Chief via a written report in violation of General Order #18-30. Roach was also issued a Notice of Immediate Suspension that immediately suspended him without pay, effective July 26, 2022, on the basis that an immediate suspension was necessary to maintain safety, health, order, or effective direction of public service based on the summonses and failure to notify. Per the Notice of Immediate Suspension, Roach could “respond orally or in writing.”

In an August 11, 2022 PNDA, Bello was charged with “[v]iolation of any [c]riminal [l]aw” and “[c]onduct not becoming a [p]ublic [e]mployee.” The PNDA specified that Bello had been arrested and transferred to the Hudson County Correctional Facility on August 10, 2022 for contempt, false swearing, and harassment. Bello was also issued a Notice of Immediate Suspension that

immediately suspended him without pay, effective August 11, 2022, on the basis that he had been 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. Per the Notice of Immediate Suspension, Bello could “respond orally or in writing.”

In a March 13, 2023 PNDA, Morales was charged with “[v]iolation of any [c]riminal [l]aw” and “[c]onduct not becoming a Firefighter.” The PNDA specified that Morales had been arrested on March 10, 2023 and charged with simple assault, criminal mischief, and burglary. Morales was also issued a Notice of Immediate Suspension that immediately suspended him without pay, effective March 13, 2023, on the bases that an immediate suspension was necessary to maintain safety, health, order, or effective direction of public service and that he had been 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. Per the Notice of Immediate Suspension, Morales could “respond orally or in writing.”

In their requests, the petitioners acknowledge that criminal or “quasi-criminal” charges were filed against them. However, they note that all such charges have been dismissed and that the prosecutions have been terminated. Thus, they contend that the appointing authority must issue Final Notices of Disciplinary Action (FNDAs) dismissing disciplinary charges and provide them with make-whole remedies to include back pay, benefits, seniority, and counsel fees for the 30-day period of immediate suspension without pay each faced, in accordance with *N.J.A.C. 4A:2-2.10*.

In response, the appointing authority, represented by Kyle J. Trent, Esq., maintains that the disciplinary charges were not filed pending and based solely on the fact that the petitioners faced criminal or quasi-criminal charges. Instead, each PNDA filed against the petitioners alleges unbecoming conduct or failure to report misconduct as required by Fire Department General Order. Per the appointing authority, although the criminal or quasi-criminal charges arose from the same incidents subject to the disciplinary charges at issue, each set of disciplinary charges is broader than the criminal or quasi-criminal charges and a departmental hearing on those issues is required before any FNDA can be issued. The appointing authority notes that it is well-settled that conduct unbecoming charges may be brought for the same conduct that resulted in criminal or quasi-criminal charges even if the public employee is acquitted of the criminal or quasi-criminal charges. As such, none of the disciplinary charges are subject to dismissal pursuant to *N.J.A.C. 4A:2-2.10*. Summary dismissal of the charges would deprive it of its right to hold its employees accountable for unbecoming conduct that may warrant a major disciplinary suspension or even removal. It would also detrimentally impact the public interest in ensuring appropriate conduct by those employees in the public trust. Instead, the appointing authority contends, a departmental hearing and factfinding on the charges are necessary before a determination as to the appropriate penalty, if any,

can be made and FNDA's can be issued. The appointing authority maintains that it has made efforts to schedule such departmental hearings that have been ignored by the petitioners as they apparently believe the charges should be dismissed summarily in light of the criminal or quasi-criminal charges' outcomes. The appointing authority insists that the petitioners' requests are meritless and must be rejected. Instead, the appointing authority urges the Commission to order the petitioners to participate in departmental hearings on the charges or be deemed to have waived their right to such hearings.

In reply, the petitioners argue that the appointing authority has never brought forth any evidence that they were unfit for duty or that there was some disability that prevented them from performing their regular Fire Fighter duties. The petitioners also contend that they enjoy certain statutory protections. Specifically, *N.J.S.A. 40A:14-21* provides:

If any member or officer of the paid or part-paid fire department or force shall be suspended pending a hearing as a result of charges made against him such hearing, except as otherwise provided by law, shall be commenced within 30 days from the date of the service of the copy of the complaint upon him; in default of which the charges shall be dismissed and said member or officer may be returned to duty.

N.J.S.A. 11A:2-13 provides:

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. 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.

The petitioners further state:

In each case the [appointing authority] suspended [petitioner] without pay prior to the *Loudermill*¹ hearing mandated by *N.J.A.C. 4A:2-2.5(b)*. They suspended each [petitioner] without pay for a period of 30 days and this suspension without pay was directly linked and caused by the arrests and charges.

...

¹ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

The [petitioners] are seeking back pay for these 30 day periods of suspension without pay and dismissal of those aspects of their disciplinary charges which relate to their arrests and charges.

CONCLUSION

N.J.A.C. 4A:2-1.2(c) provides the following factors for consideration in evaluating a petition 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.

N.J.A.C. 4A:2-2.5(a)1 provides that 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. *N.J.A.C.* 4A:2-2.5(a)2 provides that 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 and 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.

Initially, the appointing authority had valid bases to immediately suspend the petitioners. The petitioners hold extremely visible positions of trust. The Commission has long recognized that Fire Fighters hold very unique positions, and any disregard for the law is unacceptable in a Fire Fighter who operates in the context of a paramilitary organization in which the ability to follow orders is crucial to saving lives. See *In the Matter of Bart Giaconia* (MSB, decided February 22, 2006); *In the Matter of James Alessio* (MSB, decided March 9, 1999). Fire Fighters “are not only entrusted with the duty to fight fires, they must also be able to work with the general public and other municipal employees, especially police officers.” *Karins v. City of Atlantic City*, 152 *N.J.* 532, 552 (1998). The motor vehicles summonses, which included one for DWI, and criminal charges that had been filed against the petitioners—individuals employed to protect and serve the public—rendered the immediate suspensions appropriate to maintain public safety, order, and the effective

direction of firefighting services. The immediate suspensions were also procedurally valid per *N.J.A.C.* 4A:2-2.5(b). Specifically, the petitioners received Notices of Immediate Suspension that set forth why the immediate suspensions were sought and the general evidence in support, and the notices provided them with the opportunity to “respond orally or in writing.”

In addition, the petitioners contend that because all criminal or quasi-criminal charges that were filed against them have been dismissed with the prosecutions terminated, the appointing authority must proceed to issue FNDAs dismissing disciplinary charges and now provide them with back pay, benefits, seniority, and counsel fees for the periods of immediate suspension. The Commission disagrees. While it is true that each PNDA contained a “violation of any criminal law” disciplinary charge, it is clear that no PNDA was limited to such charge. Specifically, Roach’s PNDA includes a charge for violation of any rule, regulation, or departmental order, and the respective PNDAs of Bello and Morales include a conduct unbecoming charge. A critical issue in any disciplinary appeal is whether the petitioner’s actions constituted wrongful conduct warranting discipline. The Commission will not attempt to determine such disciplinary appeals on the written record here. Therefore, these matters must proceed to departmental hearings on the PNDAs to be scheduled within 30 days of receipt of this decision.² After the hearings, the appointing authority shall issue FNDAs, which if the charges are upheld, would include a disciplinary penalty which includes the initial period of immediate suspension. If the charges are dismissed, the petitioners would then be entitled to back pay and other benefits for the period of their immediate suspensions. Resolution of the issue of back pay, benefits, seniority, and counsel fees for any periods of suspension already served is premature while the disciplinary proceedings continue.

N.J.S.A. 40A:14-21 and *N.J.S.A.* 11A:2-13, cited by the petitioners, are not to the contrary. In that regard, *N.J.S.A.* 40A:14-21 references situations where the employee has been suspended pending a hearing. However, in the petitioners’ cases, their immediate suspensions ended. As for *N.J.S.A.* 11A:2-13, the 30-day time period noted therein for the holding of the departmental hearing has been deemed non-jurisdictional. *Goodman v. Department of Corrections*, 367 *N.J. Super.* 591 (App. Div. 2004). Accordingly, the petitioners have presented no basis to grant their requests for interim relief.

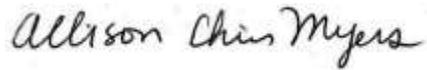
ORDER

Therefore, it is ordered that these requests be denied and the matters proceed as set forth above.

² The Commission notes that should the appellants not appear for such hearings, the appointing authority may proceed with issuing the FNDAs.

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 20TH DAY OF SEPTEMBER, 2023



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