



STATE OF NEW JERSEY

In the Matter of Ferdinand
Fernandez, Passaic County Sheriff's
Office

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

CSC Docket No. 2024-1572

Request for Interim Relief

ISSUED: March 20, 2024 (SLK)

Ferdinand Fernandez, a Sheriff's Officer with the Passaic County Sheriff's Office (PCSO), represented by Lori A. Dvorak, Esq., petitions the Civil Service Commission (Commission) for interim relief regarding his immediate suspension.

By way of background, on or about June 15, 2023, it was alleged that Fernandez was heading to a funeral in a civilian vehicle. He activated his emergency lights and siren, crossed over the centerline, stopped at a red light and when the light turned green, he entered the intersection where his vehicle contacted another vehicle. Subsequently, Fernandez was charged with a disorderly persons offense and issued several motor vehicle tickets.¹ On or about June 26, 2023, Fernandez was placed on administrative leave. On July 24, 2023, a Preliminary Notice of Disciplinary Action (PNDA) was issued charging him with conduct unbecoming a public employee and violating departmental rules and regulations and suspending him with pay indefinitely pending criminal charges. In an August 3, 2023, letter, Fernandez informed the PCSO that he pled not guilty to the charges in the PNDA and requested a departmental hearing. There is nothing in the record that indicates that a departmental hearing has been scheduled or held or that Fernandez followed up on his request to have a departmental hearing. On or about January 1, 2024, the Police Training Commission (PTC) informed the PCSO that it was not awarding Fernandez

¹ The disorderly persons offense and motor vehicle tickets are still pending in municipal court. The PCSO states that since the matter is currently under review by the Passaic County Prosecutor's Office (Prosecutor's Office), it has not had the opportunity to investigate the matter.

a license based on the subject incident. On January 3, 2024, Fernandez received notice that the PCSO intended to suspend him without pay effective January 5, 2024, due to the pending criminal matter and the PTC's decision to deny him a license. The notice advised him that if he opposed the suspension without pay, he was to submit a statement by January 5, 2024. In a January 4, 2024, dated letter, Fernandez opposed his suspension without pay. On or about January 4, 2024, an amended PNDA was issued adding the charges inability to perform duties and other sufficient cause due to the PTC's denying him a license.² On January 5, 2024, the PCSO informed Fernandez that any issue he had with the PTC's denial of his license needed to be addressed to the PTC and it was moving forward with his suspension without pay. Also on January 5, 2024, the PCSO issued a second amended PNDA indicating that his suspension effective January 5, 2024, was without pay.³ On January 10, 2024, Fernandez was notified that the State Licensing Unit mistakenly did not issue him a license. Therefore, the PCSO advised Fernandez that it dismissed the charges related to inability to perform duties and other sufficient cause for failing to hold a license. However, it indicated that this did not change that his suspension would be continued without pay. On January 23, 2024, this agency received the subject request for interim relief arguing that the suspension be returned to with pay status.

In his request, Fernandez highlights that his suspension was initially with pay as the PCSO did not assert that an immediate suspension without pay was necessary when the charges were first issued. He notes that under *N.J.A.C. 4A:2-2.5(a)2*, an employee may be immediately suspended when charged with a crime, which is not the present case. Further, as there have been no changes in the facts, he argues that there is no justification to modify the suspension to be without pay. He presents *N.J.S.A. 40A:14-149.1* as being instructive to reiterate that since he has only been charged with a disorderly persons offense, which is not a crime, his suspension should be with pay. Therefore, Fernandez believes that he has a clear likelihood of success on the merits. Further, he contends that he is suffering irreparable harm because of the loss of health insurance for himself and his family cannot be remedied by back pay. Additionally, he asserts that there is no risk of substantial injury to the PCSO as it has the money and is choosing not to spend it. He emphasizes that nothing has changed while the charges are pending so he believes that the PCSO should be stopped from arbitrarily changing his suspension from paid to unpaid status.

In response, the PCSO, represented by Leslie S. Park, Deputy County Counsel, highlights that Fernandez's traveling with emergency lights and siren was not authorized and he was not responding to an emergency. Further, he was using a civilian vehicle which was not permitted to be equipped with such devices. It notes that the incident was referred to the Prosecutor's Office and remains under the Prosecutor's Office's review. The PCSO highlights that Fernandez was paid for the

² The amended PNDA indicated that Fernandez's suspension, effective January 4, 2024, was with pay, which is assumed to be an error.

³ The second amended PNDA was delivered on January 11, 2024.

six-month period from June 29, 2023, through January 4, 2024. The PCSO argues that Fernandez is unlikely to succeed on the merits. It presents that *N.J.S.A.* 4A:14-149.1 is not applicable as that statute refers to municipal Police Officers and Fernandez is a Sheriff's Officer whose position is established under different statutes. Further, under *N.J.A.C.* 4A:2-2.5(a)1, an employee may be immediately suspended prior to a hearing when it is necessary to maintain effective public services. The PCSO states that when assessing the totality of the circumstances it determined that an immediate suspension was warranted. It notes that Fernandez did not contest his immediate suspension. The PCSO asserts that it had always been its intention to change the suspension to unpaid status in the new year based on the current pending charges that had not been resolved within six months. Additionally, it indicates that it followed the requirements for a suspension without pay under *N.J.A.C.* 4A:2-2.5(b) by providing the proper notices and affording Fernandez the ability to respond. Further, the PCSO contends that Fernandez is not suffering irreparable harm since he can receive back pay if his suspension is ultimately determined to not have been warranted and he continues to receive employer sponsored health insurance coverage where he is only responsible for the employee contribution. Moreover, it argues that it is prejudicial to the PCSO to continue to pay him while the charges are pending as it would set a poor tone for the department. The PCSO asserts that even though it paid him for six months, this does negate its ability to change the suspension to unpaid status under Civil Service law and rules. Finally, the PCSO believes that the public interest is best served to not pay Fernandez while charges against him, a law enforcement officer, are pending.

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:14-149.1 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 Final Notice of Disciplinary Action (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 *N.J.S.A.* 40A:14-149.1 is not applicable as it refers to municipal Police Officers and Fernandez is a county Sheriff's Officer. Regardless, the Commission has the authority to permit immediate suspensions of Civil Service employees without pay even when no crime has been charged under Title 11A of the New Jersey Statutes. Further, Fernandez's immediate suspension under *N.J.A.C.* 4A:2-2.5(a)1 was warranted. Clearly, the charges of reckless driving, as well as other charges related to the above-referenced incident where the appellant is alleged to have engaged in the unauthorized use of emergency lights and siren in a non-emergency situation on a civilian vehicle that was not permitted to use such devices where he crossed the centerline and got into an accident establishes a hazard and his immediate suspension was necessary to maintain the health, order, and effective direction of the sheriff's department. In this regard, the Commission is mindful that Fernandez, 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). It is also noted that Fernandez has not contested his immediate suspension, but rather, his pay status during that suspension. Further, under *N.J.A.C.* 4A:2-2.4(b), the PCSO had the option to suspend Fernandez without pay. The mere fact that the PCSO chose to

initially suspend Fernandez with pay does not signify that the PCSO could not at some future date change that suspension to without pay as Fernandez has provided no legal authority that prohibits the change. Moreover, the record indicates that the PCSO complied with *N.J.S.A. 4A:2-2.5(b)* when changing his suspension to be without pay.

Concerning Fernandez's "indefinite" suspension, he was indefinitely suspended without being charged with a crime, although reckless driving and the other offenses related to the incident are serious, a disorderly persons offense is not a crime. In this regard, there is no evidence in the record that there is any pending **criminal** charges or indictment. The PCSO's decision to indefinitely suspend Fernandez pending the Prosecutor Office's review and/or the resolution of the matters in municipal court was invalid as there are no grounds under Civil Service regulations to suspend an employee indefinitely without a criminal charge pending. *See In the Matter of Rana Elsayed* (CSC, decided April 24, 2019). Further, it is noted that there is nothing in the record that indicates that a departmental hearing has been held or scheduled. Further, the PCSO's belief that it has not had the opportunity to investigate because the matter is being reviewed by the Prosecutor's Office is unpersuasive as that is not a valid reason for not holding the departmental hearing as required under *N.J.A.C. 4A:2-2.5(d)* where criminal charges are not pending. *See In the Matter of Equina Taylor* (CSC, decided March 27, 2018). *See also 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 the PCSO regarding the indefinite suspension, the Commission orders that Fernandez's immediate suspension from January 5, 2024, shall be considered without pay through February 29, 2024, and thereafter with pay until he is either reinstated or a departmental hearing on the merits is held and a FNDA is issued. The Commission orders that absent any agreed to adjournment, any departmental hearing must be commenced no later than 20 days from the issuance of this decision. Further, the PCSO is to provide Fernandez back pay from March 1, 2024, until his reinstatement or issuance of a FNDA.

ORDER

Therefore, it is ordered that Ferdinand Fernandez's petition for interim relief is granted in part. Absent any agreed to adjournment by the parties, within 20 days of the issuance date of this decision, Fernandez shall be reinstated or a departmental hearing on the merits of the charges must be commenced. Further, Fernandez shall be awarded back pay from March 1, 2024, until his reinstatement or issuance of a 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 20TH DAY OF MARCH, 2024



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