

Suspending Police and Fire Employees Without Pay Pending Termination – The Rules Change Dramatically Starting June 1, 2009

All police and fire administrators who may potentially become involved in disciplinary termination cases must be aware of radical changes on the horizon as a result of A3481/S1336. The bill was signed by Governor Corzine at this year's PBA Annual Convention in Atlantic City and takes effect June 1, 2009, applying thereafter to all disciplinary cases in which the underlying conduct occurs after that effective date.

The core provisions of the bill provide for a 180 day limitation on suspensions without pay of police and fire personnel pending the outcome of termination charges. The new law also changes the appeal route available to non-civil service police and fire employees and the time for appeal by these employees who utilize the new alternate route.

The Basic 180 Day Rule

The 180 day period is measured in calendar days and begins to run from the day a police or fire employee is suspended without pay. Where the 180 day rule applies, the employee does not have to be reinstated on the 181st day, but the employee generally has to have his pay continued pending the outcome of the case starting from the 181st day.

Perhaps one would logically think that the 180 day time rule would limit the time for the final decision to be made following a hearing at the municipal or departmental level. However, the statutes created and amended under the bill which apply this 180 day rule require the employee to be paid if the decision by the Administrative Law Judge, in most civil service cases, is not made by the 181st calendar day after the start of the suspension without pay. In civil service cases, if the ALJ recommends that the termination be sustained, the suspension without pay can then continue through the time of the final decision of the Civil Service Commission. If the ALJ recommends some penalty short of removal, however, the 180 day rule still applies and the employee has to be paid come the 181st day. If there is no recommended decision by the ALJ within 180 days from the date of the suspension without pay, however, the employee must start getting paid suspension status starting on the 181st day.

Change in Appeal Route Options

For non-civil service police and fire agencies, the law previously had been that the terminated employee has a right of appeal to the Superior Court, Law Division, or for minor discipline in some cases the appeal process is through the grievance arbitration provisions of a Collective Bargaining Agreement. Now, however, the Legislature has provided that a *terminated*¹ police or fire employee may appeal through Superior Court or may instead choose a new alternate appeal route through PERC arbitration. Whereas employees previously had 10 days to perfect an appeal through the Superior Court route,

¹ It would appear that the new PERC appeal procedure alternative is only available to terminated employees and not available to those employees with disciplinary charges seeking suspensions short of termination.

if the employee chooses the PERC route for appeal then the time limitation is 20 days to appeal. The same basic 180 day rule governs the suspensions without pay, and the 180 day period is measured through the time of the PERC arbitrator decision. An appeal from that decision would then go to the Appellate Division of Superior Court, but as to the pay status of the employee, it would be governed by the arbitrator's decision.

Good News for Employers – Employee's Adjournments Toll the 180 Day Time Limit

Where the employee requests an adjournment of a hearing, the period of time during which the hearing is adjourned is not counted against the 180 day limitation on unpaid suspensions. Where the employee agrees to an adjournment or postponement, or even "causes by his actions" an adjournment or postponement, the adjournment or postponement period is not counted against the 180 day limit on unpaid suspensions. If an ALJ "for good cause" postpones or delays a hearing before the 181st day, the days of postponement or delay are not counted against the 180 day limit on unpaid suspensions.

180 Day Rule Does Not Apply to Charges Alleging or Relating to Criminal Behavior

The news for the employer which provides help to the employer in probably the lion's share of termination cases, is that the 180 day unpaid suspension limit does not apply to cases relating to criminal charges or allegations, ***nor does the 180 day unpaid suspension limit apply to purely administrative charges where the conduct alleged also constitutes a violation of the criminal law of New Jersey or any other jurisdiction.***

For example, an employee who has untruthfulness charges may only be charged administratively, not criminally, and the employer may seek to terminate the untruthful employee. In many if not most such cases, while the conduct might not actually be handled by the County Prosecutor and charged criminally, the conduct alleged nonetheless may constitute perjury as defined by the criminal statute at N.J.S.A. 2C:28-1, false swearing under 2C:28-2, or even official misconduct under 2C:30-2. Considering this example raises an interesting, but likely unanswerable question of interpretation of the new statute, which is whether alleged conduct which forms the basis of a termination charge administratively but only meets the definition of a disorderly persons or petty disorderly persons offense is excepted from the 180 day unpaid suspension limitation. Using our example, if for some reason the untruthfulness only meets the definition of the disorderly persons offense of Unsworn Falsification under 2C:28-3, then it is unclear whether the 180 day limitation applies².

² The language of the exception applies to "conduct that also would constitute a violation of the criminal laws of this State or any other jurisdiction." In the most technical legal sense, disorderly persons offenses and petty disorderly persons offenses in New Jersey are not "crimes." However, such offenses are included within the set of statutes known as the New Jersey Criminal Code. There is a very strong argument that such offenses, while technically not "crimes," are nonetheless "violations of the criminal laws." The Courts, ALJs, Civil Service Commission and PERC arbitrators will ultimately need to define some of these issues under this new law. This is but one example.

Practical Application

Now more than ever, careful attention to drafting charges is essential for police and fire termination cases. Many termination cases can be taken out of this 180 day unpaid suspension limitation depending upon how the charges are drafted. Another task which now has heightened importance in such cases is accounting and specifically documenting every calendar day of delay of the final decision in termination cases. There is a difficult balance between striving to meet this 180 day time limitation and providing sufficient discovery to employees and opportunity to mount the defense to meet with statutory, common law and constitutional due process requirements. Even with the most careful attention and the best legal advice, there are many questions which are not quite clear from reading this new law which will need to be addressed through individual cases. An easy solution to all of these issues is simply to continue the pay of an employee who is suspended pending a final decision on his or her termination. However, the reason this bill was passed was to address the fact that hearings are often dragged out and take a long time to work their way through final decision. Many municipalities and agency heads may not like the idea of employees who are being terminated receiving what is perceived as a paid vacation for several months while the final decision on termination remains pending.

Payback Provision

Such considerations lead to a final point worth noting from the new law. An employee who has his pay continued after the 181st day because of this new law, who ultimately has the termination sustained, must pay back the salary received after the 181st day. If the employee fails to reimburse the employer, the employer may have a lien on all property and income of the employee, to include money contributed by the employee to PFRS or any other retirement system and against any other terminal pay such as accumulated sick and vacation leave if the terminated officer remains contractually entitled to any such leave.