

CIVIL MOTION STATEMENT OF REASONS

Return Date:	April 25, 2014
Motion 40 & 41:	Saul v. Township of Manchester L-2381-12
Relief Sought:	40. Motion for Attorneys' Fees and Costs 41. Motion to Amend Order of Judgment
Moving Party Counsel:	40. Peter Paris of Mets Schiro & McGovern, LLP 41. Stephen Trimboli of Trimboli & Pusinowski, LLC
Opposition:	Yes
Opponent:	40. Township of Manchester, Defendant 41. Ryan Saul, Plaintiff
Opposition Counsel:	40. Stephen Trimboli of Trimboli & Pusinowski, LLC 41. Peter Paris of Mets Schiro & McGovern, LLP
Oral Argument:	Yes

BACKGROUND

Manchester Township Police Officer Ryan Saul ("Ptl. Saul" or "Plaintiff") was charged with twenty (20) counts of discipline, including multiple acts of dishonesty and filing inaccurate reports. After a six day hearing on these counts, Hearing Officer John Mercun, Esq. stated that he was "clearly convinced by a preponderance of credible evidence presented that Saul demonstrated untruthfulness and dishonesty..." among other things. Mr. Mercun found that the overall misconduct and lack of integrity of Ptl. Saul were "so serious and egregious" that dismissal was warranted. As such, Mr. Mercun recommended that

EXHIBIT 5

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Ptl. Saul be terminated. The Township ("Defendant"), following Mr. Mercun's recommendation, terminated Ptl. Saul on June 29, 2012.

Thereafter, on July 31, 2012, Ptl. Saul notified the Township in writing that he was seeking review of his termination. On August 2, 2012, Ptl. Saul filed a complaint with the Superior Court alleging wrongful termination. Ptl. Saul's Complaint further alleges that his financial and professional interests have been adversely affected and manifest injustice created by his termination. Ptl. Saul elected to have a hearing *de novo* in the Superior Court pursuant to N.J.S.A. 40A:14-150.

A non-jury trial was held on January 2, 2014. Thereafter, on March 11, 2014, the Court entered an Order stating:

- (1) the Court sustains the findings of the hearing Officer below with regard to Charge 8 relating to Officer Saul's failure to report an on-duty injury, and his record shall reflect a reprimand as to that violation of the Township's Code of Conduct;
- (2) that as for each of the remaining nineteen (19) charges, the Court finds that the Township did not meet its burden of proving by a preponderance of the evidence the alleged violations, and the findings of the Hearing Officer as to these alleged violations are reversed and vacated;
- (3) that Officer Ryan Saul shall within twenty (20) days from the date of this Order be reinstated as a Manchester Township Police Officer at his former grade and at current pay;
- (4) that his credited service time will be adjusted to include the period of time from his termination on February 10, 2011 to his reinstatement;
- (5) within forty-five (45) days from the date of this Order, the Township shall reimburse Officer Saul for all back pay and provide all other

benefits which would have accrued from the date of his termination to his reinstatement pursuant to the applicable collective bargaining agreements which have been in effect;

- (6) a detailed explanation of the Defendants' calculations of Plaintiff's back pay will be provided to Plaintiff's counsel within forty-five (45) days from the date of this Order;
- (7) Defendant will reinstate (or reimburse the cash value of) all sick time, personal time, vacation time, and any other contractual benefits and emoluments that have accrued since February 10, 2011, such that Plaintiff shall be made whole as if Plaintiff had never been suspended or terminated;
- (8) Plaintiff's personnel file will reflect that the sole penalty for the allegations giving rise to this action will be a "written reprimand" that indicates Patrolman Saul failed to immediately report his knee injury to his superiors;
- (9) all official, publicly accessible Department records will excise any mention of Plaintiff's suspension or termination and will be corrected to reflect a "written reprimand" as the sole penalty related to the charges in this matter.

Plaintiff is now moving for attorneys' fees and costs pursuant to N.J.S.A. 40A:14-155. Defendant opposes this motion on the basis that in order for a police officer to be entitled to his expenses for legal fees, he must have been exonerated of all charges. Defendant argues that in this case, the Court sustained the charge of "failure to report an on-the-job injury." Plaintiff replies to Defendant's Opposition arguing that the disciplinary proceeding was "finally determined in favor of the member or officer" thus, attorney fee reimbursement is appropriate.

Also at this time, Defendant is moving to amend the Order pursuant to R. 4:49-2. Defendant argues that the portion of the Order concerning reimbursing the Plaintiff for back pay and benefits within forty-five (45) days must be amended to reflect the statutory requirements of N.J.S.A. 40A:14-151. In order to recover salary from the date of dismissal, the statute requires an application to be filed with the municipal clerk within thirty (30) days after the judicial termination. Plaintiff opposes this motion arguing that there is no statute or case law to limit this Court's authority to order back pay in this case. Defendant replies to Plaintiff's Opposition arguing that it cited statute and case law regarding the back pay and that because the Court was sitting as a statutory tribunal, its jurisdiction was strictly limited to the subject matter set forth in the statute.

ANALYSIS

POINT ONE

PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS MUST BE DENIED BECAUSE PLAINTIFF WAS NOT CLEARED OF ALL CHARGES.

As a result of the January 2, 2014 trial, Plaintiff is now seeking reimbursement of attorneys' fees and costs. Plaintiff moves pursuant to N.J.S.A. 40A:14-155 on the basis that the Court reversed Plaintiff's termination and that the disciplinary proceeding was finally determined in favor of the officer. Defendant opposes Plaintiff's motion relying upon Kerwick v. Trenton, 184 N.J. Super. 235 (App. Div. 1982) and Township of Waterford v. Babli, 158 N.J. Super. 569, 386 A.2d 906 (Law Div. 1978), *aff'd o.b.*, 168 N.J. Super. 18, 401 A.2d 697 (App. Div. 1979). Defendant argues that these cases stand for the proposition that Plaintiff must have been "exonerated" of all charges in order to be awarded attorneys' fees. Plaintiff replies to Defendant's Opposition arguing that the term "exonerate" does not appear in the statute and is misleading. Plaintiff argues that the cases relied upon by Defendant were decided before the Legislature amended N.J.S.A. §40A:14-155 in 1986. Plaintiff further argues that Kerwick and Waterford are distinguishable from the instant matter because the officers in those cases were convicted of crimes or other serious misconduct.

To begin with, N.J.S.A. 40A:14-155 provides:

Whenever a member or officer of a municipal police department or force is a defendant in any action or legal proceeding arising out of and directly related to the lawful exercise of police powers in the furtherance of his official duties, the governing body of the municipality

shall provide said member or officer with necessary means for the defense of such action or proceeding, but not for his defense in a disciplinary proceeding instituted against him by the municipality or in criminal proceeding instituted as a result of a complaint on behalf of the municipality. **If any such disciplinary or criminal proceeding instituted by or on complaint of the municipality shall be dismissed or finally determined in favor of the member or officer, he shall be reimbursed for the expense of his defense.** (Emphasis added).

Plaintiff argues that because the termination was ultimately reversed by this Court, there was a "final determination" in favor of Plaintiff entitling him to reimbursement of attorneys' fees and costs in the amount of \$35,984.78 plus fees and costs related to the instant motion.

Defendant argues that in interpreting N.J.S.A. 40A:14-155, New Jersey courts have held that the statute "intends that only an exoneration of the officer will entitle him to reimbursement of legal expenses" Kerwick v. Trenton, 184 N.J. Super. at 240 (App. Div. 1982) and that "the Legislature intended that police officer only be reimbursed for legal fees when they are acquitted of all charges against them." Township of Waterford v. Babli, 158 N.J. Super. at 572. In Waterford, the plaintiff police officer was found guilty of six disciplinary charges at a departmental hearing and dismissed from his position. Id. at 570. On appeal, the Superior Court acquitted the plaintiff of four of the charges, and returned him to his position of police officer after a six-month suspension. Id. The plaintiff sought reimbursement for his legal expenses pursuant to N.J.S.A. 40A:14-155. The Court rejected the plaintiff's request for legal expenses, holding that because the plaintiff "was not acquitted of all charges against him, it could not find that the matter was 'finally determined in his favor.'" Id. at 573. The Waterford Court

relied upon the Legislative history and intent of N.J.S.A. 40A:14-155 in reaching this determination. Id. at 572. In particular, the Court relied upon specific language in the bill enacting N.J.S.A. 40A:14-155, in which the Legislature stated that the statute would "provide for reimbursement of police and firemen cleared of disciplinary charges..." Id. The Court reasoned that "the use of the word 'cleared' indicates that the Legislature intended that police officers only be reimbursed when they are *acquitted of all charges against them.*" Id. (Emphasis added). The Court acknowledged that while the plaintiff's suspension was a more favorable result than his dismissal, "the fact that he was convicted on two of the charges precluded a finding that he was 'cleared' of the charges against him" Id. and the plaintiff was not entitled to reimbursement of attorneys' fees.

While Waterford was decided prior to the 1986 amendment to N.J.S.A. 40A:14-155 it has not been overturned and was recently relied upon by the Appellate Division for the proposition that a police officer must be cleared of all charges in order to receive any reimbursement for legal defenses under the statute. In Johnstone v. Kearny, 332 N.J. Super. 606, 607 (App. Div. 2000), a police officer appealed "from the grant of summary judgment dismissing his complaint seeking *pro rata* attorney's fees because of the disposition favorable to him on some charges embodied in a multi-count federal indictment." The Appellate Division, "adhering to Waterford," rejected plaintiff's argument that he was entitled to a *pro rata* share for attorneys' fees on the charges that had been dismissed in his favor. Id. at 608. The Appellate Division held that "so long as a defendant is convicted of one or more counts of a multi-count indictment simultaneously disposed by plea or trial, he or she is not entitled to reimbursement under N.J.S.A. 40A:14-155." Id.

Plaintiff argues that these cases are distinguishable because, in all of these cases, the police officers were found to be guilty of criminal offenses, misconduct that justified substantial loss in pay, or both. Plaintiff argues that because

Plaintiff's sole infraction was worthy only of a written reprimand, these cases do not apply to the instant matter. However, Plaintiff provides no case law to support its argument that any remaining charges must amount to criminal offenses or justify a substantial loss in pay in order for the plaintiff to be precluded from reimbursement of attorneys' fees and costs. The case law interpreting N.J.S.A. 40A:14-155 is rather clear that a "final determination in favor of the officer" amounts to complete reversal or acquittal of all charges against the officer. Because this Court sustained the findings of the hearing Officer below with regard to Charge 8, it must deny Plaintiff's application for attorneys' fees and costs pursuant to N.J.S.A. 40A:14-155.

POINT TWO

**DEFENDANT'S MOTION TO AMEND THE
ORDER OF JUDGMENT SHOULD BE
GRANTED BECAUSE N.J.S.A. 40A:14-151
REQUIRES PLAINTIFF TO FILE A
WRITTEN APPLICATION WITH THE
TOWNSHIP CLERK.**

Also at this time, Defendant is seeking to amend the Court's Order of March 11, 2014. Defendant moves pursuant to R. 4:49-2 on the basis that the Court's Order grants relief which was not within its jurisdiction. Defendant argues that under the statutory appeal scheme, back pay and benefits are addressed separately from the *de novo* review of Plaintiff's conviction under N.J.S.A. 40A:14-150. Defendant argues that under N.J.S.A. 40A:14-151, whenever a dismissal from office for a member of the municipal police department is found by the Court to be illegal, the member is entitled to recover his salary from the date of the separation, provided that a written application is filed with the municipal clerk within thirty (30) days after the judicial determination. Plaintiff opposes this motion arguing that N.J.S.A. 40A:14-151 includes an independent right to obtain back pay directly from the municipality, but not the exclusive means.

To begin with, a court hearing a *de novo* appeal under N.J.S.A. 40A:14-150 "sits as a special statutory tribunal, and not by reason of any constitutional or inherited common law jurisdiction." Grasso v. Borough Council of the Borough of Glassboro, 205 N.J. Super. 18, 23 (App. Div. 1985), certif. den., 103 N.J. 453 (1986). In these instances, the Court sits as a statutory agent, not as a court of general jurisdiction. A court sitting as a "statutory tribunal" has "jurisdiction strictly limited to the subject matter set forth by statute, and jurisdiction cannot be

conferred by consent." State v. Bruneel, 14 N.J. 53, 58 (1953). The Court acts "merely as a legislative agent through whose instrumentality the special proceeding is administered," and the Court's "authority is channeled strictly within the bounds of the powers delegated." In re Janssen Dairy Corp., 2 N.J. Super. 580, 584 (App. Div. 1949).

N.J.S.A. 40A:14-151 provides as follows:

Whenever any member or officer of a municipal police department or force shall be suspended or dismissed from his office, employment or position and said suspension or dismissal shall be judicially determined to be illegal, said member or officer shall be entitled to recover his salary from the date of such suspension or dismissal, provided a written application therefor shall be filed with the municipal clerk within 30 days after such judicial determination.

(Emphasis added).

The statutory requirement of the judicial determination of the "illegality" of a dismissal is satisfied when the officer is acquitted of the disciplinary charges. Borough of Chester v. Roseberry, 202 N.J. Super. 428, 432 (App. Div. 1985).

Defendant sets forth an argument that Borough of Chester explains a bifurcated procedure by which back pay may be recovered. Defendant argues that the member of the police department is required to file a written application for back pay with the municipal clerk within thirty (30) days to recover his salary since the date of the dismissal. If the municipality refuses payment, then the member of the police department may institute action in the Law Division to recover the back pay. Thus, the member must first file the application with the municipal clerk to recover back pay and cannot bypass this statutory requirement to seek immediate redress in the Law Division for back pay.

In Borough of Chester, the plaintiff asserted that the Law Division lacked jurisdiction to decide the issue of back pay. The Court stated:

We recognize that defendant should have filed a written application for back pay with the municipal clerk within 30 days of his acquittal as required by N.J.S.A. 40A:14-151 and if payment was refused he could then have instituted an action in the Law Division.

See Graham v. Asbury Park, 69 N.J. Super. at 258; Manobianco v. City of Hoboken, 96 N.J. Super. 273, 279-83 (Law Div.1967). Cf. Fletcher v. Newark, 155 N.J. Super. 5 (App.Div.1978).

In that case, the plaintiff objection only to the merits of defendant's entitlement to back pay and not on jurisdictional grounds. The Court found that the parties agreed to a determination on the merits and that the Law Division judge had the authority to determine defendant's claim if it were brought under proper procedures.

Here, Plaintiff claimed for back pay in his Complaint and was granted such relief by this Court upon its finding that Plaintiff's termination was wrongful. However, pursuant to N.J.S.A. 40A:14-151, Plaintiff should have been required to file a back pay request with the Township clerk. Plaintiff has not provided the Court with support for its argument that the statute provides an independent right to obtain back pay from the municipality.

At oral argument on Friday April 25, 2014, the parties agreed to mediate with regard to the issue of the payment of back pay and benefits. The Court orders the parties to resolve these issues within sixty (60) days of the date herein. If the issues are not so resolved within that time period, Plaintiff must file a separate Law

Division action seeking compensation for the payment of back pay and benefits based on this Court's finding that Plaintiff was wrongfully terminated.

CONCLUSION

For the foregoing reasons, Plaintiff's motion is **DENIED**; Defendant's motion is **GRANTED**.