
Forsythe v. Jersey City
Cite as 4 *N.J.A.R.* 479

ALEXANDER G. FORSYTHE,
Appellant,
v.
CITY OF JERSEY CITY,
Respondent.

Decided March 2, 1982

Initial Decision

SYNOPSIS

Appellant challenged a 15-day suspension from his duties as a police officer imposed by the City of Jersey City because the City believed that appellant had violated an internal police directive governing the use of sick leave by leaving home while out on sick leave without permission from the Medical Bureau.

The administrative law judge found that it was undisputed that while on sick leave the appellant had left home to see his attorney in order to consult with the attorney on a challenge to the Director of the Jersey City Medical Bureau's order prohibiting him from visiting his own doctor. This visit came after the appellant repeatedly attempted to contact the Medical Bureau without success. In addition, the judge found that the Medical Bureau had no clear-cut standards setting forth the circumstances under which it would grant or deny permission for an officer absent from work due to sickness to leave home.

While noting that such regulations have been found to be valid, the judge found that under the regulations the City had applied its sick leave policy in an arbitrary and unreasonable manner and, therefore, reversed the imposition of the 15-day suspension.

Patricia K. Costello, Esq., for appellant (McAlevy & Costello, attorneys)

Bernard Abrams, Asst. Corp. Counsel, for respondent

SPRINGER, ALJ:

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Procedural History

This is a civil service appeal brought by Alexander Forsythe challenging a 15-day suspension from his duties as police officer employed by the City of Jersey City. The suspension was imposed because the City had determined that Forsythe had violated an internal police directive governing use of sick leave. Petitioner contends that the City kept him confined at home and illegally interfered with his right to consult with counsel. In this appeal, he is seeking back pay for the period of suspension already entirely served and an award of counsel fees. As shall be seen, Forsythe was wrongfully suspended from his duties and is entitled to the relief requested.

By preliminary notice of disciplinary action dated December 18, 1980, the City accused Forsythe of violating General Order No. 4-79. More particularly, the notice alleged that on December 17, 1980, Forsythe was absent without leave from his home in violation of the written policy that officers out on sick leave must receive permission from the Medical Bureau before leaving home for any reason. A hearing below was conducted on March 2, 1981. On the same day, the City issued a final notice of disciplinary action which sustained the charge against Forsythe and ordered his suspension without pay for 15 days. Thereafter, on March 5, 1981, Forsythe filed a notice of appeal to the Civil Service Commission from the City's decision.

Subsequently, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A. 52:14F-1 et seq.* At this level, the case is handled as a hearing *de novo*, with the burden of proof upon respondent. A hearing before the Office of Administrative Law was held on November 10, 1981.

Undisputed Facts

Many of the background facts are uncontested. Since September 1976, Forsythe has been employed as a Jersey City police officer assigned to patrol duties. While on duty on January 26, 1980, Forsythe sustained serious injuries as the result of an automobile accident. He remained off active duty for ten months until November 28, 1980. During his absence, he was under the care of a neurologist at the Jersey City Medical Center. At the time of his return to work, he was given "light" duty consisting of part-time employment in the radio room. After approximately one week on the job, on December 9, 1980, Forsythe was told by the doctor in charge of the Medical Bureau to report back on sick leave for an indefinite period.

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It was during this second interval of involuntary sick leave that the offense allegedly occurred. Forsythe admitted that on December 17, 1980 he went to see his lawyer, after having tried unsuccessfully to contact the Medical Bureau to obtain the necessary authorization. Uncontested testimony established that on December 17, 1980, two Jersey City police sergeants were dispatched to the Forsythe home in Nutley, New Jersey. Their instructions were to verify Forsythe's presence at home and to deliver to him a written message from the Medical Bureau. When they arrived, at approximately 4:30 p.m., the sergeants were greeted at the door by Forsythe's wife. Originally Mrs. Forsythe informed the investigating officers that her husband was asleep and could not be disturbed. However, when the officers insisted on seeing Forsythe to check his whereabouts, the wife reluctantly acknowledged to them that her husband had gone to his attorney's office. Conflicting inferences were drawn by the respective parties as to the wife's motive for initially providing misleading information to the sergeants, but for purposes of this case her actual intention is irrelevant. With regard to the present case, the episode involving the wife has relevance only insofar as it confirms the fact of Forsythe's unauthorized absence from his home.

City records established that this incident was not the first time that Forsythe had been disciplined by the police department for violation of this particular regulation. Previously, in October 1980, Forsythe received a 24-day suspension from the force for having committed the same offense.

Summary of Disputed Testimony

Since Forsythe did not deny that he left his home without permission, the primary factual dispute involves whether any legally-recognized justification existed for his conduct. Events leading up to the present charge took place during the week preceding December 17, 1980. On December 9, 1980, Forsythe attended a meeting at which he was ordered by Dr. Frances Cardiello, Director of the Medical Bureau, to return to sick leave. Both Forsythe and his wife, who was also present at the meeting, testified that Dr. Cardiello refused Forsythe's request to see his own doctor. Forsythe complained that Dr. Cardiello reached his determination without conducting any review of Forsythe's medical records. When informed that he must go back on sick leave, Forsythe asked Dr. Cardiello for permission to travel to his lawyer's office in order to challenge the Medical Bureau's ruling.

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Husband and wife agreed that Dr. Cardiello's response to this request was also negative. Moreover, Forsythe stated that Dr. Cardiello instructed him not to leave the house "for any reason whatsoever." Although Dr. Cardiello was not called as a witness, Officer Frank Vella of the Medical Bureau did testify on behalf of respondent. Contrary to appellant's testimony, Vella indicated that on December 9, 1980 Forsythe had received official permission to visit his doctor. He could not remember, however, whether or not Forsythe made any request on that day to see his attorney. Another officer supposedly also present at the meeting, Sgt. Gillespie, was not offered to corroborate Vella's version.

Within the next few days, according to Forsythe, he made repeated efforts to obtain authorization to leave his home. On December 11, 1980, Forsythe contacted Officer Vella and was denied permission to see his own doctor. No mention was made at that time of also wanting to see an attorney. On December 15 and again on December 16, 1980, Forsythe telephoned Sgt. Gillespie of the Medical Bureau for permission to see a doctor or lawyer. During his conversation with Sgt. Gillespie, Forsythe explained that his purpose for seeking legal counsel was to discuss the possibility of instituting suit against the City. Once more, the Medical Bureau representative denied him permission to leave his house.

By this time, Forsythe felt like a prisoner in his own home. Christmas was approaching, and the Forsythe family feared that he might be denied permission even to attend the holiday dinner at his parents' house. His wife had to drive their young children wherever they needed to go. Meanwhile, Forsythe remained under strict orders not to leave the premises. Forsythe's father, a retired Jersey City police officer, confirmed that during this period his son made "almost daily" attempts to get permission to see his attorney.

Finally, on December 17, 1980, Forsythe made arrangements for his attorney to draft the papers necessary to apply to the courts for an order to show cause why the City should not let him out of his house. Counsel advised that Forsythe must personally sign the papers so that they could be presented to a chancery judge early the next morning. Although Forsythe's attorney was still in court, he left a message that Forsythe should come to his office at 4:30 p.m. Between 3:30 and 3:50 p.m., Forsythe tried "about eight or nine times" to reach the Medical Bureau by telephone for permission to see his attorney. Each time there was no answer at the Medical Bureau. After trying for 20 minutes to get through, Forsythe left his home to keep his appointment at his lawyer's office.

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Significantly, much of Officer Vella's testimony tended to substantiate Forsythe's account. Thus, Vella admitted receiving "a few calls" in which Forsythe requested permission to leave home, although Vella could not pinpoint the exact dates of these telephone conversations. He did not always keep a written record of such requests, either because he forgot to do so or because he was too busy to write the information down. In at least one of the calls which Vella handled, Forsythe had requested permission to visit his attorney's office. Vella acknowledged that he denied this request. Because he took a vacation sometime around December 15, 1980, Vella had no knowledge about Forsythe's attempts to contact the Medical Bureau on December 17, 1980. Nobody else from the Medical Bureau was called to testify about what occurred on that crucial date.

When asked what criteria the Medical Bureau used in determining whether to grant a sick officer permission to leave home, Vella replied that he followed "unwritten policy" handed down from his superior officers. Generally, it was understood that permission would be routinely granted for an officer to see a doctor, obtain food or medicine, or deal with a genuine emergency. Likewise, an officer would automatically be granted permission to make a court appearance. But only under extraordinary circumstances would an officer be given permission to leave home to consult with an attorney. Before considering such a request, Vella said he would want to know the reason why the officer sought legal assistance. Similar restrictions on access to counsel were discussed in the testimony of Jersey City Police Director Michael Borseso at the prior departmental hearing. A transcript of that testimony reveals that Director Borseso told Forsythe's attorney "... if he wanted to talk to his client, he should go to his client's house."

Findings of Fact

On the question of how much weight to give conflicting testimony, it must be noted that frequently Officer Vella's recollection of relevant events appeared hazy and uncertain. At other times, Vella seemed hesitant and indefinite in his responses, particularly when he was asked about the appropriate standards for exercise of the Medical Bureau's discretion. As previously mentioned, Vella was not even working on the date of the alleged offense. Apparently, no records were maintained of the disposition of requests by officers for permission to leave home while on sick leave. Such business records as did exist were incomplete and inaccurate. Personnel records regarding

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Forsythe's absences from work contained obviously overlapping or incorrect dates. To the extent that the parties' testimony may have differed, therefore, I have accepted the version of the facts described by Forsythe and his witnesses.

Accordingly, I **FIND**:

1. On December 9, 1980, the Director of the Medical Bureau commanded Forsythe to discontinue active police duty and report back on sick leave. In reaching this conclusion, the Director failed to consider Forsythe's medical records.
2. Despite Forsythe's objection, the Director of the Medical Bureau refused to grant him permission to visit his own doctor's office.
3. When Forsythe sought to consult with his lawyer in order to challenge this ruling, the Director of the Medical Bureau also rejected his request for permission to leave his home for that purpose.
4. During the following week, Forsythe tried unsuccessfully on numerous occasions to obtain permission from the Medical Bureau to get outside help.
5. Specifically, on December 11, 1980, a representative of the Medical Bureau denied Forsythe permission to visit his doctor. Again, on December 15 and 16, 1980, another representative of the Medical Bureau denied Forsythe permission to visit either his doctor or lawyer.
6. Then on December 17, 1980, Forsythe made an appointment to see his lawyer later that same afternoon. From 3:30 to 3:50 p.m., Forsythe tried to telephone the Medical Bureau to ask for permission to visit his lawyer.
7. Notwithstanding the fact that these calls were made during the hours provided in the applicable regulation, the Medical Bureau failed to answer its telephone.
8. There were no clear-cut standards adopted by the City setting forth the circumstances under which the Medical Bureau may grant or deny permission for an officer absent from work due to sickness to leave home. Rather, the decision was left largely to the whim of the individual member of the Medical Bureau who happened to be on duty.
9. Under the particular circumstances, the City applied its sick leave policy in an arbitrary and unreasonable manner.

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Conclusions of Law

Based on the factual findings and the applicable law, I **CONCLUDE** that Forsythe cannot be disciplined for consulting with legal counsel in order to challenge the very regulation he is accused of violating.

On appeals *de novo* from disciplinary actions, the law provides that the Civil Service Commission may redetermine guilt or modify a penalty originally imposed. *N.J.S.A.* 11:2A-1 and 11:15-6. Regardless of whether the appeal is taken from the decision of a law enforcement agency or of some other public entity, the Commission is empowered to substitute its own judgment for that of the local authority if the circumstances so warrant. *Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980).

Here the appellant is charged with violating a section of General Order 4-79 of the Jersey City police regulations which states:

Members who are injured or sick, and not hospitalized, must remain at home for the duration of their leave, unless given permission by the Police Medical Bureau to leave their home. If a member feels it necessary to leave home, he will call the Medical Bureau . . . between the hours of 0800 and 1600, Monday to Friday, and state his reason.

At the outset, it should be recognized that the City has a strong interest in maintaining proper discipline and decorum within the ranks of its uniformed police force, and that its regulations devoted toward that end are entitled to a presumption of validity. *Kelley v. Johnson*, 425 *U.S.* 238 (1976). Municipal regulations confining an officer on sick leave to his place of residence have been upheld in another jurisdiction as a valid measure to combat malingering and to protect fiscal integrity. *Loughran v. Codd*, 432 *F. Supp.* 259 (E.D.N.Y. 1976). Recognizing the legitimate governmental concern here involved, Forsythe does not attack the validity of the regulation on its face. Nor does he suggest that the City cannot regulate the conduct of its public employees who are on paid sick leave. Instead, he argues that the regulation as applied to him should be overturned as a totally arbitrary and unreasonable.

Assuming the validity of the regulation quoted above, it does not follow that permission to leave home may be unreasonably and capriciously withheld by the official in charge. Valid regulations cannot be applied in arbitrary ways so as to reach unjust results. In *Gissi*

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v. *Codd*, 391 *F. Supp.* 1333 (E.D.N.Y. 1974), a federal district court squarely held that to prevent a police officer on sick leave from visiting his attorney was an arbitrary restriction of his freedom of movement, absent adequate standards to guide the discretion of the reviewing police sergeant.

While the situation here might well be regarded as a violation of the due process or the privileges and immunities clause of the 14th Amendment, it is unnecessary to address these issues in order to resolve this controversy in Forsythe's favor. Apart from constitutional considerations, the City's action should be condemned as an exercise of extremely poor judgment. One of our most basic civil rights is the entitlement to be represented by counsel of one's choosing. *Dwyer v. Jung*, 133 *N.J. Super.* 343, 347 (Ch. Div. 1975), *aff'd* 137 *N.J. Super.* 135 (App. Div. 1975). Proofs presented by the City failed to elicit a single good reason why Forsythe should have been deprived of the opportunity to consult with his lawyer. Indeed, the inference is compelling that the police officials acted not in the best interests of the public, but rather to prevent appellant from bringing his treatment at the hands of the department to the attention of the judicial branch of government. Such misuse of power is obviously improper. It is insufficient to say, as does the City, that Forsythe's attorney is free to pay a house call on his client, or that Forsythe may still communicate with his lawyer through the mails. Unless an overriding governmental interest is clearly at stake, the State has absolutely no business interfering with the free flow of information between lawyer and client.

Lastly, the City questions the jurisdiction of the Civil Service Commission to decide this case, claiming that Forsythe's remedy should have been to bring a writ of mandamus challenging the constitutionality of the regulation or, alternatively, to pursue a grievance procedure available under the collective negotiating agreement. It should be kept in mind, however, that this case first arose not by any legal action taken by Forsythe, but because the City instituted a disciplinary proceeding against him. Ironically, the City now contends that Forsythe should have started suit to invalidate the regulation, while at the same time the City seeks to punish Forsythe for visiting his lawyer to discuss just such a possibility. In the present posture of the case, the applicability of the regulation was appropriately raised by Forsythe as a defense to the disciplinary charge, not as a general attack upon the validity of the regulation itself. *Cf. State v. Barcheski*, 181 *N.J. Super.* 34 (App. Div. 1981). Jurisdiction to consider appeals from

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disciplinary actions taken by public employers rests exclusively with the Civil Service Commission. Discipline of public employees is a matter of inherent managerial prerogative which cannot be made the subject of a binding agreement. The Civil Service Act has preempted the disciplinary determinations of public employees covered by its provisions, leaving no room for collective negotiations or binding arbitration. *State v. Local 195, IFPTE*, 179 *N.J. Super.* 146, 154 (App. Div. 1981).

Order

For the foregoing reasons, it is **ORDERED** that the City's finding that Forsythe committed a disciplinary violation and its imposition of a 15-day suspension are **REVERSED**.

It is further **ORDERED** that the City reimburse Forsythe for all back pay and other benefits lost as a result of the 15-day suspension. The amount of back pay shall be mitigated to the extent of any income earned by Forsythe during the period of suspension.

It is further **ORDERED** that pursuant to *N.J.S.A.* 40A:14-155 the City pay all reasonable counsel fees incurred by Forsythe in connection with this disciplinary proceeding.

And it is further **ORDERED** that within 30 days of the final decision in this matter, Forsythe shall submit to the City proof of income loss and an affidavit of services rendered by his counsel. If within 30 days after the City receives such documents the parties cannot reach agreement on the amount of income loss and counsel fees, either party may request that the Civil Service Commission re-transmit this matter to the Office of Administrative Law for further hearing limited to these issues.

**After reviewing this Initial Decision,
the Civil Service Commission, on
April 28, 1982, issued the following Final Decision:**

The appeal of Alexander G. Forsythe, Police Department, City of Jersey City, suspension for 15 days, beginning March 6, 1981 and ending March 24, 1981, on charges was brought on for hearing before Administrative Law Judge Ken R Springer, who rendered his recommended decision on March 2, 1982. No exceptions were filed. Having considered the record and the administrative law judge's recommended decision issued thereon, and based upon the record herein, and having made an independent evaluation of the

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same, the Civil Service Commission at its meeting on April 20, 1982, accepts and adopts the findings and conclusion as contained in the attached administrative law judge's recommended decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in its 15-day suspension of appellant was not justified. The Commission, therefore, reverses that action and orders that the action of the appointing authority be reversed and appellant's appeal be sustained.

The Commission further orders that appellant be granted back pay for the period of suspension. The amount of back pay awarded is to be reduced and mitigated to the extent of any income earned by the appellant during this period. Proof of income loss shall be submitted to the appointing authority within 30 days from the receipt of this Order. However, this time limit is directory, not mandatory. Additional time will be granted for good and sufficient reason upon request.

The Commission further orders that counsel fees in this case should be awarded to the attorney for appellant, without diminution, pursuant to *N.J.S.A.* 40A:14-155.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.