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<p>IN THE MATTER OF IDESHA HOWARD, ESSEX COUNTY</p> <p>Appellant,</p>	<p>SUPERIOR COURT NEW JERSEY APPELLATE DIVISION</p> <p>DOCKET NO.: A-003889-22T4</p> <p>Civil Action</p> <p>APPELLATE BRIEF</p> <p>SAT BELOW: CIVIL SERVICE COMMISSION CSC DOCKET NO. 2023-552</p>
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LURETHA M. STRIBLING, ESQ.
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TABLE OF CONTENTS

	PAGES
TABLE OF AUTHORITIES	4
STATEMENT OF FACTS	6
PROCEDURAL HISTORY	10
TABLE OF JUDGMENTS	10
LEGAL ARGUMENT	
POINT I	
<u>THE CIVIL SERVICE COMMISSION ISSUED A</u>	
<u>DECISION WHICH WAS ARBITRARY, CAPRICIOUS,</u>	
<u>UNREASONABLE AND DID NOT COMPORT WITH</u>	
<u>THE RECORD BECAUSE THE PROVISIONS OF</u>	
<u>N.J.S.A. 30:8-18.2 WERE DISREGARDED AND THE</u>	
<u>APPELLANT WAS NOT RETURNED TO WORK</u>	
<u>AS A COUNTY CORRECTIONAL POLICE OFFICER</u>	11
POINT II	
<u>THE CIVIL SERVICE COMMISSION FAILED TO</u>	
<u>FOLLOW THE TENETS OF THE NEW JERSEY</u>	
<u>ADMINISTRATIVE CODE WHICH REQUIRED</u>	
<u>THAT WITH THE DISMISSAL OF THE</u>	
<u>CRIMINAL CHARGES, OFFICER HOWARD</u>	
<u>SHOULD HAVE BEEN RETURNED TO WORK</u>	
<u>WITH PROVISION OF BACK PAY AND BENEFITS.</u>	
<u>OFFICER HOWARD WAS NOT RETURNED TO WORK</u>	
<u>AND WAS GIVEN LIMITED BACK PAY</u>	19

TABLE OF CONTENTS

	PAGES
<u>POINT III</u>	
<u>THE SUBJECTIVE INTERPRETATION BY THE</u>	
<u>CIVIL SERVICE COMMISSION REGARDING THE</u>	
<u>START DATE FOR APPLICATION OF THE 45 DAY</u>	
<u>RULE WHEN THERE IS A CRIMINAL MATTER IS</u>	
<u>INCONSISTENT WITH THE STATUTORY</u>	
<u>REQUIREMENTS, AND THE LEGISLATIVE INTENT.</u>	
<u>THE INTERPRETATION BY THE CIVIL SERVICE</u>	
<u>COMMISSION SHOULD BE REJECTED WITH</u>	
<u>OFFICER HOWARD BEING RETURNED TO WORK</u>	22
<u>POINT IV</u>	
<u>THE CIVIL SERVICE COMMISSION FAILED TO ISSUE</u>	
<u>A RULING CONSISTENT WITH N.J.S.A 40A:14-201(2)a</u>	
<u>WHICH REQUIRED THAT OFFICER HOWARD BE</u>	
<u>RETURNED TO THE PAYROLL BECAUSE THERE WAS A</u>	
<u>FAILURE TO RENDER A DECISION WITHIN 180 DAYS</u>	
<u>OF BEING CHARGED FOR DEPARTMENTAL</u>	
<u>VIOLATIONS</u>	31
CONCLUSION	34

TABLE OF AUTHORITIES

CASES	PAGES
<u>Board of Educ. of Neptune v. Neptune Township Educ. Ass’n</u> , 144 N.J. 16 (1996)	26
<u>Campbell v. Dept. of Civil Service</u> , 39 N.J. 556 (1963)	11,12
<u>Grubb v. Borough of Hightstown</u> , 331 N.J. Super. 398 (Decided February 23, 2000)	23-27,30
<u>In Re Adoption of Amends. To Ne. Upper Raritan, Sussex Cnty. And Upper Del. Water Quality Mgmnt. Plans</u> , 435 N.J. Super. 440 (App. Div. 2006)	11-12
<u>In Re Carter</u> , 191 N.J. 474 (2007)	11
<u>In Re Tonner</u> , Docket No. A-2071-18T2 (Decided December 30, 2019)	13,14
<u>In the Matter of Clifton Gauthier, Rockaway Township</u> , CSC Docket No. 2017-2766(April 2, 2018)	30
<u>Mastrobattista v. Essex County Park Commission</u> , 46 N.J. 138 (1965)	20
<u>Mazza v. Bd. of Trs. Police and Firemen’s Retirement System</u> , 143 N.J. 22 (1995)	11
<u>Miele v. McGuire</u> , 31 N.J. 339 (2008)	19
<u>Shusted v. Traenker</u> , 155 N.J. Super. 23 (Law Div. 1977)	26
<u>State v. McGuire</u> , 84 N.J. 508 (1980)	26

TABLE OF AUTHORITIES

NEW JERSEY STATUTES	PAGES
<u>N.J.S.A.</u> 2C:24-7.1(A)(3)	7
<u>N.J.S.A.</u> 2C:28-7A(1)	7
<u>N.J.S.A.</u> 30:8-18.2	Passim
<u>N.J.S.A.</u> 40A:14-20(2)a	8,31
<u>N.J.S.A.</u> 40A:14-20(2)	32
<u>N.J.S.A.</u> 2C:51-2	13
<u>N.J.S.A.</u> 40A:14-149.2	20
<u>N.J.S.A.</u> 40A:14-147	23,25,28
<u>N.J.S.A.</u> 40A:14-201(2)(a)	
NEW JERSEY ADMINISTRATIVE CODE	
N.J.A.C. 4A:2-2.7(b)(1)	12,13
N.J.A.C. 4A:2-2.5	13
N.J.A.C. 4A:2-2.10(c)(1)	19
N.J.A.C. 4A:2-2.3(a)(1)	7
N.J.A.C. 4A:2-2.3(a)(6)	7
N.J.A.C. 4A:2-2.3(a)(7)	7
N.J.A.C. 4A:2-2.3(a)(12)	7
N.J.A.C. 2-2.5	7
N.J.A.C. 2-2.6	7

STATEMENT OF FACTS

Idesha Howard (Officer Howard or Appellant) was hired as a Correctional Police Officer on May 12, 2014 and worked at the Essex County Correctional Facility. On August 28, 2018, Officer Howard was directed by her supervisor to report to housing unit, 2D3 and did so. Officer Howard relieved Correctional Police Officer S. Williams for one hour and upon that officer's return from meal break, Officer Howard covered Correctional Police Officer Charles Lawson for one hour. During the one hour period, Officer Howard conducted tours every thirty minutes. Officer Howard monitored inmates in cells with cameras at three points within the hour. When Officer Lawson returned to the unit, Officer Howard left the unit and had no further responsibility to perform work on 2D3. An investigation was conducted because of an inmate death near the end of the shift on August 28, 2018.

On March 3, 2022, Officer Howard reported to work for her shift which was the 2:00 P.M. to 10:00 P.M. shift. Officer Howard was approached by personnel from the Essex County Prosecutor's Office who served her with papers which included a Complaint and the allegations documented were for August 28, 2018. **(Pa1, Complaint)** The charges noted on this Complaint were that Officer Howard "knowingly engaged in conduct which created a substantial risk of death to another person, specifically by knowingly failing to conduct cell checks on L.V., an inmate of the Essex County Correctional Facility on suicide-watch; in violation of N.J.S.A.

2C:24-7.1A(3) a crime of the third degree; and Knowingly making false entries with a purpose to defraud, in an Essex County Department of Corrections Close Custody Submission Report-Constant Close Observation Sheet, specifically by reporting (3) cell checks on L.V. an inmate in the Essex County Correctional Facility on suicide watch, that did not occur in violation of N.J.S.A. 2C:28-7A(1), a crime of the third degree. **(Pa1, Complaint)** Officer Howard was served with a Preliminary Notice of Disciplinary Action and other documents from the Essex County Correctional Facility on that same date immediately suspending her from the job based on having been served with the criminal charges and for violation of departmental policies. The other noted charges were N.J.A.C. 4A:2-2.3(a)(1) Incompetent, inefficient or failure to perform duties, N.J.A.C. 4A:2-2.3(a)(6) Conduct unbecoming; N.J.A.C. 4A:2-2.3(a)(7) Neglect of duty; and N.J.A.C. 4A:2-2.3(a)(12) Other sufficient cause; Criminal charge 2C:24-7.1A(3)//2C:28-7A(1)=3rd degree. **(Pa2, Preliminary Notice of Disciplinary Action, March 3, 2022)**

Officer Howard was represented by Counsel to address the criminal charges and on July 12, 2022, the criminal charges were dismissed. **(Pa7, Dismissal of Criminal Charges)** Gregory Bartelloni of the Essex County Correctional Facility, Internal Affairs was provided with notice that the criminal charges were dismissed with notice having been provided to him on July 13, 2022. **(Pa7, Dismissal, Pa28 Bartelloni Notice)** In the time period after this dismissal of the criminal charges,

there was no further communication from personnel at the Essex County Correctional Facility. Given the fact that the County of Essex, Essex County Correctional Facility did not serve Officer Howard with departmental charges within the set time frame for doing so per N.J.S.A. 30:8-18.2, Officer Howard should have been returned to her position and provided with back pay and per the statute, the Essex County Correctional Facility was foreclosed from bringing any charges against Officer Howard after the statutory time period per N.J.S.A. 30:8-18.2. In addition, Officer Howard should have been provided with back pay after dismissal of the criminal charges from the first date that she was not paid after being served with the criminal charges and going forward per N.J.S.A. 40A:14-201(2)a. On September 9, 2022, a letter was written to the Director at the Essex County Correctional Facility requesting that he return Officer Howard to the payroll and return her to her job. **(Pa8, Letter to Director Charles)** Thereafter, an Appeal for Interim Relief was filed with the Civil Service Commission (CSC) **(Pa11, Appeal for Interim Relief)**, **(Pa19, Supplement to Appeal for Interim Relief)** County or Essex filed a Brief. **(Pa28, County of Essex Brief)** In December of 2022, a decision was received from the Civil Service Commission. **(Pa31, CSC Decision 12/7/ 2022)**

Officer Howard was given limited back pay and was served with internal charges well after the 45-day time period to be adhered to after the criminal charges were dismissed. Officer Howard's due process rights were violated. The

determination made by the Civil Service Commission when this matter was submitted to the Written Appeals Unit resulted in determinations that are inconsistent with the controlling statutes. A Request for Reconsideration was submitted on December 11, 2022. **(Pa37, Request for Reconsideration)**. A Supplemental writing was submitted in support of the Request for Reconsideration on February 21, 2023. **(Pa61, Supplement to Request for Reconsideration)** On February 22, 2023, Counsel for the County of Essex submitted a brief. **(Pa79, Brief)**. A decision was rendered by the Civil Service Commission on July 19, 2023. **(Pa82, CSC Decision)**

It is requested that the Appellate Court require that the County of Essex return Officer Howard to her position as County Correctional Police Officer. It is further requested that Officer Howard be provided with back pay, benefits and that her seniority status be addressed.

PROCEDURAL HISTORY

An Appeal for Interim Relief was filed with the Civil Service Commission on the date of September 11, 2022. (Pa11) As the result of notice from the Civil Service Commission, a Supplemental Brief was submitted on behalf of Officer Howard on the date of October 1, 2022. (Pa19) The County Counsel for Essex County submitted a Brief on October 6, 2022. (Pa28) On December 7, 2022, a decision was rendered by the Civil Service Commission. (Pa31, Decision CSC) On December 11, 2022, a Request for Reconsideration was submitted on behalf of Officer Howard. (Pa37) A supplemental Brief was issued on February 21, 2023 per the request of the CSC. (Pa61) County Counsel for Essex County submitted a Brief on February 22, 2023 (Pa79) On the date of July 19, 2023, the Civil Service Commission issued the decision on the Request for Reconsideration. (Pa82)

TABLE OF JUDGMENTS

Decision from Civil Service Commission for the

Appeal for Interim Relief December 7, 2022 Pa31

Decision from Civil Service Commission for the

Request for Reconsideration July 19, 2023 Pa82

LEGAL ARGUMENT

POINT I

THE CIVIL SERVICE COMMISSION ISSUED A DECISION WHICH WAS ARBITRARY, CAPRICIOUS, UNREASONABLE AND DID NOT COMPORT WITH THE RECORD BECAUSE THE PROVISIONS OF N.J.S.A. 30:8-18.2 WERE DISREGARDED AND THE APPELLANT WAS NOT RETURNED TO WORK AS A COUNTY CORRECTIONAL POLICE OFFICER

The standard of arbitrary, capricious or unreasonable is applicable to agency determinations and an agency determination can and will be overturned if it is found that the determination was arbitrary, capricious, unreasonable or lacked fair support in the record. In re Carter, 191 N.J. 474, 482 (2007). “The role of an appellate court is generally restricted to three inquiries: (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.” Mazza v. Bd. of Trs. Police & Firemen's Ret. Sys., 143 N.J. 22, 25 (1995) (citing Campbell v. Dept. of Civil Service, 39 N.J. 556, 562 (1963) "The burden of demonstrating that the agency's action was arbitrary, capricious or unreasonable is required of the party challenging

the administrative decision. In Re Adoption of Amends. To Ne. Upper Raritan, Sussex Cnty. And Upper Del. Water Quality Mgmt. Plans, 435 N.J. Super. 440, 443-444 (App. Div. 2006) The determination made by the Civil Service Commission which requires examination is the application of N.J.S.A. 30:8-18.2 and companion law set forth in the New Jersey Administrative Code to the facts of this case.

According to N.J.S.A. 30:8-18.2 Applicability of 45-day rule for violation of internal rules to county corrections officers.

1.A person shall not be removed from employment or a position as a county corrections officer, or suspended, fined or reduced in rank for a violation of the internal rules and regulations established for the conduct of employees of the county corrections department, unless a complaint charging a violation of those rules and regulations is filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based. A failure to comply with this section shall require a dismissal of the complaint. The 45-day time limit shall not apply if an investigation of a county corrections officer for a violation of the internal rules and regulations of the county corrections department is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of this State; **the 45-day limit shall begin on the day after the disposition of the criminal investigation.** N.J.S.A. 30:8-18.2. Finally, at N.J.A.C. 4A:2-2.7(b)(1) the following

language appears which is consistent with N.J.S.A. 30:8-18.2: If the criminal action does not result in an order of forfeiture issued by the court pursuant to 2C:51-2, the appointing authority shall issue a second Preliminary Notice of Disciplinary Action specifying any remaining charges against the employee **upon final disposition of the criminal complaint** or indictment. The appointing authority shall then proceed under 4A:2-2.5 and 2.6. Thus, per N.J.A.C. 4A:2-2.7(b)(1), the Appointing Authority must issue another PNDA upon dismissal of the criminal complaint. The application of the forty-five day rule in cases where there has been a criminal matter that was dismissed is noted in In re Tonner, Docket Number: A-2071-18T2 (Decided December 30, 2019). Tonner was a Senior Investigator at the New Jersey Department of Corrections and worked in the Special Investigations Division. Id. at 1. He was subjected to disciplinary action and in the period after he was served with a sixty day suspension and demotion to sergeant he stated to another employee, Adrian Ellison that he believed that his supervisor Jerome Scott had fabricated charges against him and he stated that he would shoot Scott. Id. at 2. Ellison reported the statement made by Tonner regarding shooting Scott to Chief Investigator Manual Alfonso and Alfonso then notified the Deputy Chief Investigator Edwin Soltys of the statement made by Tonner. Id. at 2. Scott was notified of what Tonner had stated and Scott wanted this threat to shoot him prosecuted, so, the matter was reported to the Hunterdon County Prosecutor's Office by Soltys. Id. at 2. After an investigation

was conducted by the Hunterdon County Prosecutor's Office, a determination was made to not pursue criminal charges against Tonner. Id. at 2 The Hunterdon County Prosecutor declined to bring charges on June 12, 2017 and the Department of Corrections management were notified of this. Id. at 2 Subsequently, on July 11, 2017, Tonner was served with a Preliminary Notice of Disciplinary Action which documented the violations he was being charged with. Id. at 2. A departmental hearing took place and then when the decision was appealed, it was sent to the Office of Administrative Law. Id. at 2. Tonner argued that the service of the Preliminary Notice of Disciplinary Action was served beyond 45 days and was out of time, but, this argument was rejected by the Court. Id. at 2. The Court rejected the argument of Tonner because the 45 day rule did not start until the day after there was rejection of this case by the Hunterdon County Prosecutor's Office. Id. at 2 Tonner appealed the decision of the Administrative Law Judge to the Appellate Court. Id. at 3. The Appellate Court agreed with the analysis of the 45-day rule issued by the Administrative Law Judge. The Appellate Court ruled that when there is a criminal matter included with the departmental charges, the 45 day limit shall begin on the day after the disposition of the criminal charges. Id. at 3.

In application of the 45 day rule to Officer Howard's charges, she had internal charges included with the criminal charges assessed against her on March 3, 2022. The criminal charges were dismissed on July 12, 2022. Per the application and

reading of the applicable component of N.J.S.A. 30:8-18.2, the forty-five days would be counted from July 13, 2022. The 45th day was August 26, 2022. The County of Essex was required to serve a Preliminary Notice of Disciplinary Action on Officer Howard within 45 days of the dismissal of the criminal charges and failed to do so. Of note, the New Jersey Administrative Code requires that the Preliminary Notice of Disciplinary Action is to be served on the employee upon dismissal of the criminal charges. This is consistent with N.J.S.A. 30:8-18.2. There was a failure to comply with this requirement. Therefore, having not been served with the Preliminary Notice of Disciplinary Action by the date of August 26, 2022 meant that the County of Essex could not serve Officer Howard with a Preliminary Notice of Disciplinary Action. Under these circumstances, Officer Howard should have been returned to work. Officer Howard received a Preliminary Notice of Disciplinary Action on the date of September 10, 2022 which was well beyond the forty-five days allowed. **(Pa56,58)** This is because in the instant matter there were criminal charges so the statutory language which references criminal charges is applicable to this matter. For the persons who do not have criminal charges the application of the 45 day rule is based on the first part of the statute which references when there was sufficient information by the investigator to know that there were violations of the internal rules and regulations. That component of the statute does not apply to this case because there were criminal charges. Based on the County of Essex being out of

time, Officer Howard should have been returned to work. This would mean that the subsequent internal hearing that took place must be disregarded as well as further action in the Office of Administrative Law. From a procedural perspective, there was no authority or basis to pursue further charges because there was a lack of compliance with the statute which references the application of the 45 days when there are criminal charges.

The record shows that in 2018, an investigation had been done based on an inmate death in 2018 which was completed, that there was some parts of the investigation performed with the personnel from the Prosecutor's Office and then the matter was turned over to the Essex County Prosecutor's Office. When Officer Howard was served with criminal charges on March 3, 2022 based on the date of August 28, 2018 and the criminal charges were dismissed, there was no further investigation undertaken. The record shows that Gregory Bartelloni from the Internal Affairs Department at the Essex County Correctional Facility was notified on the date of July 13, 2022 that the criminal charges had been dismissed on the date of July 12, 2022. **(Pa29, Notice to Bartelloni of Dismissal)** Per the laws cited above, the 45 day time period started on July 13, 2022. The service of the Preliminary Notice of Disciplinary Action had to be served within 45 days starting from July 13, 2022 if there were going to be internal charges assessed. It was not until the date of September 10, 2022 that Officer Howard received a Preliminary Notice of

Disciplinary Action by certified mail. **(Pa56, 58, Envelope and Preliminary Notice of Disciplinary Action)** This was well beyond the 45 day time period and by the admission of Vincent Conti who was the assigned investigator, no further investigation was conducted after the criminal charges were dismissed. Furthermore, the prong relied upon by the County of Essex where there is discussion of sufficient information is inapplicable here because only that section of the statute that references having criminal charges is applicable here.

The determination made by the Civil Service Commission regarding the 45 day rule is not consistent with the clear language of this statute. The Civil Service Commission wrote the following in their decision regarding the 45 day rule: The 45 day rule for county correctional police officers as provided for in N.J.S.A. 30:8-18.2 states that the complaint must be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based. There is no indication in the statute that the passage “the 45 day limit shall begin on the day after the disposition of the criminal investigation” was meant to subvert an appointing authority’s ability to conduct a proper investigation after the disposition of the criminal charges and deprive the person filing the complaint from obtaining sufficient information to file the matter.” In this case, the time frame provided for completion of investigation after a criminal matter is dismissed would be limited to 45 days after the dismissal

of the criminal charges. The Civil Service Commission analysis is incorrect because the fact that Officer Howard had been charged criminally requires application of that segment of the statute which applies to persons who have had criminal charges. The actions of the Civil Service Commission in issuance of its decision was arbitrary, capricious and unreasonable based on the record. The Civil Service Commission application of N.J.S.A. 30:8-18.2 is in error. There was a failure to follow the law.

It is requested that the decision reached by the Civil Service Commission be determined to be inconsistent with the law as set forth in N.J.S.A. 30:8-18.2 and that this determination reached by the Civil Service Commission be reversed with Officer Howard being returned to her job with the provision of back pay, benefits and seniority.

POINT II

THE CIVIL SERVICE COMMISSION FAILED TO FOLLOW THE TENETS OF THE NEW JERSEY ADMINISTRATIVE CODE WHICH REQUIRED THAT WITH THE DISMISSAL OF THE CRIMINAL CHARGES, OFFICER HOWARD SHOULD HAVE BEEN RETURNED TO WORK WITH PROVISION OF BACK PAY AND BENEFITS. OFFICER HOWARD WAS NOT RETURNED TO WORK AND WAS GIVEN LIMITED BACK PAY

Per N.J.A.C. 4A:2-2.10(c)(1), Where an employee, other than a municipal police officer has been suspended based on a pending criminal complaint or indictment, following disposition of the charges, the employee shall receive back pay, benefits and seniority if the employee is found not guilty at trial, the complaint or indictment is dismissed or the prosecution is terminated. N.J.A.C. 4A:2-2.10(c)(1) In Miele v. McGuire, the Court found that employees in the classified civil service who have been suspended or dismissed, are entitled to back pay when the matter is disposed of. Miele v. McGuire, 31 N.J. 339 (2008). This is consistent with our statute, N.J.S.A. 40A:14-149.2 which provides that if a suspended police officer is found not guilty at trial, the charges are dismissed, or the prosecution is terminated, said officer shall be reinstated to his position and shall be entitled to recover all pay withheld during the period of suspension subject to any disciplinary proceedings or

administrative action. N.J.S.A. 40A:14-149.2 The New Jersey Administrative Code mirrors the provisions in the statute N.J.S.A. 30:8-18.2 with regard to employment. The view of fair play in employment relationships supports the position that persons that have been suspended or terminated and where the charges are determined to be unfounded should be entitled to restoration of their jobs. Mastrobattista v. Essex County Park Commission, 46 N.J. 138 (1965).

In application of the above noted statute to the instant matter, Officer Howard was suspended indefinitely on March 3, 2022 because she was served with criminal charges on that date. The criminal charges were dismissed on July 12, 2022. Per a clear reading of the statute, Officer Howard was entitled to receive back pay for the entire period of time that pay was withheld. This means that Officer Howard was entitled to back pay dating back to March 3, 2022 as that is the first date on which pay was withheld. Officer Howard was also supposed to be returned to her position. She was not returned to her position despite the fact that this Counsel gave notice to Director Ronald Charles that Officer Howard needed to be returned to her job and restored to the payroll. **(Pa8, Letter to Director Charles)**

The Civil Service Commission conceded that Officer Howard was entitled to back pay, however, the award of back pay granted by the Civil Service Commission was not consistent with the above noted statute. The Chairperson of the Civil Service Commission awarded back pay to Officer Howard from the date that the criminal

charges were dismissed which was July 12, 2022 through to August 31, 2022. This calculation of back pay was not consistent with the law. **(Pa31, Decision CSC 12/7/22)** Officer Howard was entitled to an award of back pay which should have gone back to the first date that she was without pay which was March 3, 2022. Based on this calculation, Officer Howard was owed back pay from March 3, 2022 forward. In addition, in light of the fact that there was a failure to comply with the 45 day rule, Officer Howard should have not been subjected to any further disciplinary action because she was not served with a Preliminary Notice of Disciplinary Action within the 45 day period after the criminal charges were dismissed. Officer Howard should have been reinstated to payroll and should have received retroactive back pay which should have covered the entire time that she was without pay. Officer Howard should have also been returned to work as noted above per application of our statute, N.J.S.A. 30:8-18.2

It is requested that the Appellate Court find that there was a failure on the part of the Civil Service Commission to adhere to and follow the noted laws including the statutes, administrative code and case law. Officer Howard was entitled to back pay, restoration to her job and receipt of benefits and seniority. It is requested that the determination reached by the Civil Service Commission be vacated and that Officer Howard receive back pay, benefits and that she be reinstated to her position.

POINT III

THE SUBJECTIVE INTERPRETATION BY THE CIVIL SERVICE COMMISSION REGARDING THE START DATE FOR APPLICATION OF THE 45 DAY RULE WHEN THERE IS A CRIMINAL MATTER IS INCONSISTENT WITH THE STATUTORY REQUIREMENTS, AND THE LEGISLATIVE INTENT. THE INTERPRETATION BY THE CIVIL SERVICE COMMISSION SHOULD BE REJECTED WITH OFFICER HOWARD BEING RETURNED TO WORK.

According to N.J.S.A. 30:8-18.2 Applicability of 45-day rule for violation of internal rules to county corrections officers.

1.A person shall not be removed from employment or a position as a county corrections officer, or suspended, fined or reduced in rank for a violation of the internal rules and regulations established for the conduct of employees of the county corrections department, unless a complaint charging a violation of those rules and regulations is filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based. A failure to comply with this section shall require a dismissal of the complaint. The 45-day time limit shall not apply if an investigation of a county corrections officer for a violation of the internal rules and regulations of the county corrections department is included directly or indirectly within a concurrent

investigation of that officer for a violation of the criminal laws of this State; **the 45-day limit shall begin on the day after the disposition of the criminal investigation.** N.J.S.A. 30:8-18.2.

The Appellate Court analyzed the sister statute, N.J.S.A. 40A:14-147 which is a statute specifically written for law enforcement units in the matter of Grubb v. Borough of Hightstown, 331 N.J. Super. 398 (Decided February 23, 2000) That statute is identical to the statute for County Correctional Police Officers except that it references law enforcement unit which also applies to County Correctional Police Officers and reads: “A complaint charging a violation of the internal rules and regulations established for the conduct of a law enforcement unit shall be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based. The 45-day limit shall not apply if an investigation of a law enforcement officer for a violation of the internal rules or regulations of the law enforcement unit is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of the state. The 45-day limit shall begin on the day after the disposition of the criminal investigation. The 45-day requirement of this paragraph for filing of a complaint against an officer shall not apply to the filing of a complaint by a private individual. N.J.S.A. 40A:14-147 Id. at 402. Bryan Grubb (Grubb) was employed as a police officer in the Borough of Hightstown and was arrested for

purchasing and selling anabolic steroids on March 28, 1995. Id. at 402. Grubb was charged with possession of a controlled dangerous substance, conspiracy to possess a controlled dangerous substance and official misconduct and when his case was submitted to the Grand Jury, he was indicted. Id. at 402. Grubb was suspended from his job pending disposition of the outstanding criminal charges. Id. at 402-43. A trial was held and on May 8, 1997, the jury rendered a verdict finding him guilty of all charges. Id. at 403. On May 9, 1997, the Hightstown Borough Council voted to terminate his employment. Id. at 403. Grubb was sentenced to a five-year prison term. Chief Kelvin Hopkins of the Hightstown Police Department prepared administrative charges but did not serve the charges because he understood that Grubb was going to file an appeal. Id. at 403. Grubb did file an appeal with the Appellate Court where he sought to overturn his conviction and on March 19, 1999, the Appellate Court vacated the judgment of conviction and entered a judgment of acquittal. Id. at 403. Thereafter, the State filed a petition for certification in a quest to reinstate the judgment of conviction which was denied by the Supreme Court on July 6, 1999. Id. at 403. On the date of August 17, 1999, Grubb's attorney sent a letter to the Chief of Police requesting that Grubb be reinstated to his position. Id. at 403. On the date of August 19, 1999, the Borough of Hightstown filed disciplinary charges against Grubb and the disciplinary charges were served on day 44 after the denial of the petition for certification. Id. at 404. A disciplinary hearing took place

on September 21 and September 22, 1999. Id. at 404. When the hearing concluded, Grubb's attorney moved for dismissal of the charges because it was claimed that there was a failure to timely file the charges per N.J.S.A. 40A:14-147. Id. at 404. Subsequently on September 30, 1999, the borough denied the motion to dismiss the charges. Id. at 404. The disciplinary hearing was stayed pending filing an appeal by way of complaint in lieu of prerogative writ by Grubb's counsel. Id. at 404. The matter was venued at the Superior Court in Mercer County and Chief of Police Kelvin Hopkins filed an Answer on November 19, 1999. Id. at 404. The Answer sought to affirm the denial of Plaintiff, Grubb's motion to dismiss and to order the continuation of the disciplinary hearing. Id. at 404. The matter was set down for litigation with focus on the application of N.J.S.A. 40A:14-147.

The Plaintiff argued that there was no evidence that the Borough of Hightstown was engaged in a concurrent criminal investigation, therefore per the noted statute, the Borough of Hightstown was required to file the charges no later than the 45th day on which the person filing the charges had obtained sufficient information to file the charges and that Chief Hopkins had sufficient information on March 28, 1997 which was the date that the Plaintiff was arrested to file the administrative charges. Id. at 505. The Chief of Police Kelvin took the position that there was engagement in a concurrent investigation by the Borough of Hightstown during the time of Plaintiff's arrest and that a member of the Hightstown Police

Department was assigned to accompany the Prosecutor's Office and act as an observer when the members of the Prosecutors Office went to Plaintiff's home to conduct a search and that on that date, Plaintiff was suspended from his job. Id. at 406. Further, Chief Kelvin noted that he testified at Plaintiff's criminal trial and thereafter, the Council for the Borough of Hightstown terminated Plaintiff's employment when he was found to be guilty by the jury. Id. at 406.

In analysis of this case, the court noted that it is important to look at the construction of the statute and that this begins with analysis and consideration of the plain language of the statute. Id. at 406 citing to Board of Educ. of Neptune v. Neptune Township Educ. Ass'n, 144 N.J. 16, 25 (1996). When the language of the statute is clear and unambiguous, the statute must be given its plain meaning. Id. at 25. The court has the responsibility to interpret the statute based on the legislative intent per the language used and the objective that the legislators sought to achieve. State v. McGuire, 84 N.J. 508, 514 (1980). The court noted that the legislative intent was circumvented in a case where an officer is first indicted for alleged crimes and then subjected to an action by his job for his removal prior to the adjudication of the criminal matter. Shusted v. Traenkner, 155 N.J. Super. 23, 30 (Law Div. 1977). The court noted that where there is pending criminal prosecution or investigation of a police officer, the statute tolls the time in which the administrative charges can be served on the police officer. Grubb supra at 407. Essentially, the criminal trial or

investigation requires completion before service of administrative charges because if a person charged was appearing in both a criminal and administrative proceeding, the person charged would decline to testify in the administrative proceeding and plead the 5th amendment or seek a stay of the administrative proceedings. Id. at 407. The court went on to note that the clear intent of the drafters of the noted statute was that the time for filing administrative charges was when the criminal matter had concluded which in the case of Grubb included the grand jury action, court trial and appeals. Id. at 409. The court further noted that in Grubb, the governing body could defer filing administrative charges until 45 days after the disposition of the criminal matter. Id. at 409. The court ruled in Grubb that when the Supreme Court of New Jersey denied the Petition for Certification, this represented the conclusion of the criminal matter. Id. at 413. It was found that the Chief of Police filed the administrative charges within 45 days of the conclusion of the criminal matter counting from the date that the Supreme Court denied the Petition for Certification. Id. at 413

In application of the conclusion reached in Grubb to the instant matter, there was a requirement to apply that section of N.J.S.A. 30:8-18.2 per the plain meaning of the statute. This required that the section of the statute that referenced criminal charges had to be applied. The language is clear and reads: The 45-day time limit shall not apply if an investigation of a county corrections officer for a violation of

the internal rules and regulations of the county corrections department is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of this State; **the 45-day limit shall begin on the day after the disposition of the criminal investigation.** N.J.S.A. 30:8-18.2. Per N.J.S.A. 40A:14-147, the language is similarly clear and reads: The 45-day limit shall not apply if an investigation of a law enforcement officer for a violation of the internal rules or regulations of the law enforcement unit is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of the state. The 45-day limit shall begin on the day after the disposition of the criminal investigation. N.J.S.A. 40A:14-147. The noted statutes are lacking in ambiguity and are clear and concise.

In the instant matter, despite the clearly written statute, N.J.S.A. 30:8-18.2, the Civil Service Commission Chairperson wrote: “There is no indication in the statute that the passage “the 45 day time limit shall begin on the day after the disposition of the criminal investigation” was meant to subvert an appointing authority’s ability to conduct a proper investigation and deprive the person filing the complaint from obtaining sufficient information to file the matter.” **(Pa82, Decision of CSC 7/19/23)** The Civil Service Commission Chairperson failed to consider the legislative intent for the noted statute in rendering this decision which appears to be solely the opinion of the Chairperson. This analysis ignores the very clear

provisions in the above noted statute. The part of the statute which discusses criminal charges sets forth the required application under the circumstances where there are criminal charges and there is a timeframe set for service which is within 45 days of the disposition of the criminal charges. Officer Howard was served by the Prosecutor's Office with criminal charges on March 3, 2022. On that same date, Officer Howard was served with a Preliminary Notice of Disciplinary Action and cited were violation of departmental rules and regulations and Officer Howard was suspended. The matter proceeded in Criminal Court and the charges against Officer Howard were dismissed on July 12, 2022. In strict application of the second prong of the noted statute, the date of July 13, 2022 was the first day of the 45-day period allowed to serve a Preliminary Notice of Disciplinary Action. The County of Essex and Gregory Bartelloni of the Internal Affairs Division were notified by Prosecutor Perez on July 13, 2022 that the criminal charges which had been filed against the Plaintiff were dismissed on July 12, 2022. **(Pa29, Notice)** Counting from the date of July 13, 2022, the 45-day time period for service of the Preliminary Notice of Disciplinary Action ended on August 26, 2022. This resulted in an inability to charge Officer Howard after this time. Thus, the service of a Preliminary Notice of Disciplinary Action on Officer Howard on September 10, 2022 via certified mail **(Pa58, Preliminary Notice of Disciplinary Action dated 8/31/22)** required that the administrative charges against Officer Howard be dismissed. Service of those

charges was beyond the 45-day time period. The application of the 45-day rule when there are criminal charges was highlighted in the matter of In re Tonner. It is also clear in application in Grubb. In Gauthier, the 45-day rule was discussed, however, because Gauthier's dismissal of charges was via Pre-Trial Intervention, it was determined that Pre-Trial Intervention could not be interpreted as a dismissal of criminal charges. In the Matter of Clifton Gauthier, Rockaway Township, CSC Docket No. 2017-2766 (April 2, 2018)

It is requested that the Appellate Court reverse the decision of the Civil Service Commission in application of the 45 day rule. It is requested that the charges against Officer Howard be dismissed and that she be returned to work with back pay, benefits and seniority.

POINT 1V

**THE CIVIL SERVICE COMMISSION FAILED TO ISSUE A RULING
CONSISTENT WITH N.J.S.A 40A:14-201(2)a WHICH REQUIRED THAT
OFFICER HOWARD BE RETURNED TO THE PAYROLL WHEN THERE
WAS A FAILURE TO RENDER A DECISION WITHIN 180 DAYS OF
BEING CHARGED FOR DEPARTMENTAL VIOLATIONS**

Statutory law noted at N.J.S.A. 40A:14-201(2)a provides in pertinent part that “a final determination on a law enforcement officer’s suspension and termination shall be rendered within 180 calendar days from the date that the officer is suspended without pay. If a final determination is not rendered within those 180 days, as hereinafter calculated, the officer shall, commencing on the 181st calendar day, begin again to receive the base salary he was being paid at the time of his suspension and shall continue to do so until a final determination on the officer’s termination is rendered. N.J.S.A. 40A:14-201(2)a

In application of the above noted statute to the date that Officer Howard was indefinitely suspended which was March 3, 2022, the 181st day was August 31, 2022. Per the statutory requirements, Officer Howard should have been returned to payroll from the date of August 31, 2022. A letter was forwarded to Director Ronald Charles requesting that he alert the Payroll Department to restore Officer Howard to the payroll with provision of base pay from the date of August 31, 2022 forward, and

there was no response to this request. **(Pa8, Letter to Charles)** Officer Howard was never restored to the payroll consistent with this statute. Certainly, if the tenets of N.J.S.A. 30:8-18.2 had been followed, not only would Officer Howard have been returned to the payroll, but, she would have also been returned to her job.

The Civil Service Commission addressed this noted violation and ruled as follows: “The Commission notes that the petitioner’s reliance on the 180 day rule is misplaced. The 180 day rule for law enforcement officers and firefighters as provided for in N.J.S.A. 40A:14-201(2) clearly states that, when the law enforcement officer or fire fighter “is suspended from performing his official duties without pay for a complaint or charges, other than (1) a complaint or charges relating to the subject matter of a pending criminal investigation, inquiry, complaint or charge whether pre-indictment or post indictment” then a final determination on the officer’s or firefighter’s suspension and termination shall be rendered within 180 calendar days from the date that the officer or firefighter is suspended without pay. In this matter there was clearly a criminal investigation and criminal charges. Accordingly, the 180 day rule is not implicated in the instant case as to the petitioner’s indefinite suspension on March 3, 2022.” In this case, Officer Howard had been charged criminally on March 3, 2022, however, those criminal charges were dismissed on July 12, 2022. Therefore, there was after dismissal of the criminal charges a reasonable reliance on the above noted statute. It was expected that

Officer Howard would be returned to payroll by the date of August 31, 2022 and this did not happen and there had been no final determination regarding Officer Howard's indefinite suspension by the 180 day point. This required that Officer Howard be returned to payroll.

It is requested that the Appellate Court reverse the decision of the Civil Service Commission in application of the 45 day rule as well as the 180 day rule. It is requested that the charges against Officer Howard be dismissed and that she be returned to work with back pay, benefits and seniority.

CONCLUSION

For all of the reasons set forth in this Appellate Brief, Appendix, case law and court rules, it is requested that the Appellate Court reverse the decision reached by the Civil Service Commission. It is requested that the Appellant, Officer Howard be returned to her position as Correctional Police Officer, that she be provided with retroactive pay to the date that she was indefinitely suspended which was the date of March 3, 2022 through to the present time with no pay required from July 13, 2022 through to August 31, 2022 as some payment was provided by the County of Essex per the decision entered by the Civil Service Commission. Appellant should also be provided with benefits of employment that she was entitled to during this period of indefinite suspension as well as benefits and seniority.

Luretha M. Stribling
Luretha M. Stribling
Attorney for Appellant

DATED: January 31, 2024

Superior Court of New Jersey

Appellate Division

Docket No. A-003889-22T4

In the Matter of
IDESHA HOWARD, ESSEX
COUNTY.

: CIVIL ACTION
:
: ON APPEAL FROM
: THE FINAL AGENCY DECISION
: OF THE NEW JERSEY CIVIL
: SERVICE COMMISSION
:
: CSC DOCKET NO. 2023-552
:
:
:
:
:

BRIEF ON BEHALF OF RESPONDENT COUNTY OF ESSEX

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
APPENDIX TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT.....	1
COMBINED STATEMENT OF FACTS & PROCEDURAL HISTORY	2
LEGAL ARGUMENT.....	5
I. THE COMMISSION PROPERLY APPLIED THE 45-DAY RULE WHEN IT FOUND THAT THE AUGUST 31, 2022 PNDA WAS TIMELY ISSUED.	7
II. THE COMMISSION PROPERLY FOUND THAT THE 180- DAY RULE WAS INAPPLICABLE TO APPELLANT	12
CONCLUSION.....	14

APPENDIX TABLE OF CONTENTS

	Page
Letter from Essex County Prosecutor’s Office to Essex County Correctional Facility, dated September 24, 2018	Ra1
Email correspondence between Essex County Prosecutor’s Office and Essex County Counsel, dated July 13, 2022.....	Ra2
Email dated August 22, 2022 from Investigator Vincent Conti to Essex County Counsel attaching Investigation Report	Ra5
Essex County Department of Corrections Investigation Report, dated August 20, 2022	Ra6

TABLE OF AUTHORITIES

	Page(s)
 Cases	
<u>In re Arenas,</u> 385 N.J. Super. 440 (App. Div. 2006)	6
<u>Matter of Connors,</u> No. A-2779-18, 2021 WL 2821133 (N.J. Super. Ct. App. Div. July 7, 2021).....	10
<u>Dennery v. Bd. of Educ. of Passaic Cnty. Reg'l High Sch. Dist. No. 1,</u> <u>Passaic Cnty.,</u> 131 N.J. 626, 622 A.2d 858 (1993)	5
<u>Matter of Farlow</u> No. A-5617-15T1, 2019 WL 302616 (N.J. Super. Ct. App. Div. Jan. 24, 2019).....	10
<u>Karins v. City of Atl. City,</u> 152 N.J. 532, 706 A.2d 706 (1998)	5
<u>Lavezzi v. State,</u> 219 N.J. 163, 97 A.3d 681 (2014)	6
<u>Mesghali v. Bayside State Prison,</u> 334 N.J. Super. 617, 760 A.2d 805 (App. Div. 2000).....	6
<u>Roberts v. State, Div. of State Police</u> 191 <u>N.J.</u> 516 (2007)	9
<u>In re Stallworth,</u> 208 N.J. 182 (2011)	6, 7
<u>In re Virtua-W. Jersey Hosp. Voorhees for a Certificate of Need,</u> 194 N.J. 413, 945 A.2d 692 (2008)	6
 Statutes	
<u>N.J.S.A. 2C:24-7.1A(3)</u>	3
<u>N.J.S.A. 2C:28-7A(1)</u>	3

N.J.S.A. 30:8-18.2*passim*

N.J.S.A. 40A:14-20113

N.J.S.A. 40A:14-201(a)4, 12

N.J.S.A. 40A:14-201(2) 1

Other Authorities

N.J.A.C. 4a:2-2.3(a)(1), (6), (7), and (12) 3, 4

PRELIMINARY STATEMENT

Appellant Idesha Howard (“Appellant”), a corrections officer employed by the Essex County Correctional Facility (“ECCF”), is appealing the New Jersey Civil Service Commission’s (the “Commission”) July 19, 2023 final agency decision (the “Final Decision”) denying Appellant’s petition for reconsideration of its December 7, 2022 decision denying Appellant’s request for interim relief from her immediate and indefinite suspension. The Commission’s Final Decision was based upon a finding that Appellant failed to show the Commission erred in its December 7th decision when it determined that Appellant’s August 31, 2022 Preliminary Notice of Disciplinary Action did not violate the “45-Day Rule” imposed by N.J.S.A. 30:8-18.2, nor did her suspension implicate the “180-day rule” pursuant to N.J.S.A. 40A:14-201(2).

Rather than provide any evidence or argument to show that the Commission’s Final Decision was arbitrary, capricious, unreasonable or unsupported by substantial credible evidence, Appellant recycles the same incorrect interpretation of statutes raised in her Interim Relief and Request for Reconsideration applications, hoping to get a different result. Despite two separate agency determinations that the relevant PNDA was timely filed, and that Appellant was properly suspended indefinitely due to pending criminal charges, Appellant continues to make the same arguments while ignoring and

minimizing the relevant facts. Appellant cannot show—because the record does not support it—that the Commission’s Final Decision was arbitrary or capricious. The Commission followed the Supreme Court’s statutory interpretation as applied to probation officers when it determined that the 45-Day Rule was not violated. The Commission also appropriately disregarded the 180-Day Rule as inapplicable based on a plain reading of the statute. As such, there is no basis for a finding that the Commission’s Final Decision was arbitrary, capricious, or unreasonable. Rather, the Commission’s Final Decision was proper as a matter of law and should now be affirmed.

COMBINED STATEMENT OF FACTS & PROCEDURAL HISTORY¹

On August 28, 2018, Appellant failed to conduct cell checks on an inmate of the ECCF who was on suicide-watch. After failing to perform her duties as a corrections officer, Appellant then falsely reported that such checks in fact occurred. Pa047-053. Tragically, the inmate committed suicide later that morning. *Id.* Following the incident, on September 24, 2018 the Essex County Prosecutor’s Office (“ECPO”) notified ECCF Director Alfaro Ortiz that the ECPO was conducting an investigation of the incident. The ECPO directed

¹ The procedural history and factual background overlap and are combined to avoid repetition for the Court’s convenience.

Director Ortiz to cease any administrative investigation and stated that “[t]he (45) forty-five-day rule is tolled.” Ra01.

After conducting its own investigation of the incident, on March 3, 2022, the ECPO criminally charged Appellant with two crimes in the third degree: knowingly engaging in conduct which creates a substantial risk of serious bodily injury to another person in violation of N.J.S.A. 2C:24-7.1A(3); and knowingly creating a false record in violation of N.J.S.A. 2C:28-7A(1). Pa047-053. As a result of the criminal charges, the Essex County Department of Corrections issued a Preliminary Notice of Disciplinary Action on March 3, 2022 (the “March 3, 2022 PNDA”) to Appellant, charging her with failure to perform duties, conduct unbecoming a public employee, neglect of duty, and “other sufficient cause” pursuant to N.J.A.C. 4A:2-2.3(a)(1), (6), (7), and (12). Pa002-004. Per the March 3, 2022 PNDA’s recommendation, Appellant was immediately suspended without pay from her employment, pending disposition of the criminal charges. Pa075.

The ECPO ultimately dismissed the criminal charges against Appellant on July 12, 2022. Pa018. The following day, the ECPO notified the Internal Affairs Department at the ECCF (“IA”) that the criminal charges against Appellant had been dismissed. Ra02. Upon dismissal of the criminal charges, IA was permitted to then begin its own investigation. IA immediately commenced its

administrative investigation which it concluded on August 20, 2022. Ra05 – 17. On August 22, 2022, IA forwarded its findings to the Office of the Director and the Disciplinary Unit “for any action deemed necessary.” Ra17.

After receiving the IA investigation report and based on the report’s findings, the Director issued a second PNDA dated August 31, 2022 (the “August 31, 2022 PNDA”), charging Appellant with failure to perform duties, conduct unbecoming of a public employee, neglect of duty, and “other sufficient cause” pursuant to N.J.A.C. 4a:2-2.3(a)(1), (6), (7), and (12). Pa58-60. Per the recommendation of the August 31, 2022 PNDA, Appellant’s suspension was continued.

Following the August 31, 2022 PNDA, on September 11, 2022, Appellant appealed to the Commission for interim relief. Appellant’s appeal was based on the erroneous argument that: (1) the August 31, 2022 PNDA was issued out of time based on the “45-Day Rule” found in N.J.S.A. 30:8-18.2; and (2) that because more than 180 days had passed since her suspension with no final decision, Appellant was entitled to a final determination of her employment status pursuant to N.J.S.A. 40A:14-201(a). Pa011. See also Appellant’s Supplemental Appeal for Interim Relief, dated October 1, 2022, Pa019-027. Respondent opposed Appellant’s appeal on October 6, 2022. Pa028. The Commission issued a decision on December 7, 2022, which granted the issuance

of back pay for the period of July 13, 2022 through August 31, 2022. Pa031-036. The Commission denied all other interim relief on the basis that the 45-Day Rule had not been violated, and that the 180-Day Rule was inapplicable. Id.

Following the Commission's December 7, 2022 decision, Appellant moved for reconsideration of the Commission's decision on December 11, 2022. Pa037. See also Appellant's Supplemental Request for Reconsideration, dated February 21, 2023. Pa061-70. On February 22, 2023, Respondent opposed Appellant's Request for Reconsideration. Pa079-081. The Commission issued its Final Decision denying Appellant's Request for Reconsideration on July 19, 2023, noting that Appellant did not present any new evidence or persuasive argument showing the Commission erred in its December 7th decision. Appellant now appeals the Commission's July 19th Final Decision denying Appellant's Request for Reconsideration.

LEGAL ARGUMENT

To prevail on her appeal, Appellant must demonstrate that the Commission's determinations were arbitrary, capricious, or unreasonable. Karins v. City of Atl. City, 152 N.J. 532, 540, 706 A.2d 706 (1998); Denney v. Bd. of Educ. of Passaic Cnty. Reg'l High Sch. Dist. No. 1, Passaic Cnty., 131 N.J. 626, 641, 622 A.2d 858 (1993). To determine whether an agency's decision is arbitrary, capricious or unreasonable, courts examine: "(1) whether the

agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors." In re Stallworth, 208 N.J. 182, 194 (2011) (internal citations and quotations omitted).

The Court's review of an agency action is extremely limited. Mesghali v. Bayside State Prison, 334 N.J. Super. 617, 622, 760 A.2d 805 (App. Div. 2000) (quoting Matter of Musick, 143 N.J. 206, 216, 670 A.2d 11 (1996)). The Court defers to the specialized or technical expertise of the agency and affords a strong presumption of reasonableness to the administrative agency's exercise of its statutorily delegated responsibilities. In re Virtua-W. Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422, 945 A.2d 692 (2008); Lavezzi v. State, 219 N.J. 163, 171, 97 A.3d 681 (2014). "The burden of demonstrating that the agency's action was arbitrary, capricious or unreasonable rests upon the person challenging the administrative action." In re Arenas, 385 N.J. Super. 440, 443-44 (App. Div. 2006) (citing McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002)). In reviewing the agency's decision, "the reviewing court may not substitute its own judgment for the agency's even though it may

have reached a different result.” In re Stallworth, 208 N.J. 182, 194 (2011) (internal citations and quotations omitted).

Here, Appellant fails to put forth any compelling reason or evidence that the Commission erred in its July 13 decision. Rather, Appellant again argues that the Commission erroneously found that Respondent complied with the 45-Day Rule when it issued the August 31, 2022 PNDA. Appellant additionally argues that pursuant to the 180-Day Rule, Appellant is entitled to reinstatement and back pay beginning from March 3, 2022 and not from July 13, 2022 as the Commission awarded. Appellant bases these arguments on her misinterpretation, and in some cases blatant disregard, for the language of the applicable statutes. She fails to demonstrate that the Commission’s determination that the 45-Day Rule was not violated, and the 180-Day Rule was not implicated was in any way unreasonable based on the facts and case law. Her arguments were properly dismissed by the Commission and should again be rejected here.

I. THE COMMISSION PROPERLY APPLIED THE 45-DAY RULE WHEN IT FOUND THAT THE AUGUST 31, 2022 PNDA WAS TIMELY ISSUED.

The 45-Day Rule sets a time limit by which an entity must file a complaint charging any violations of rules or regulations where an employee has been removed or suspended from their position. See e.g., N.J.S.A. 30:8-18.2. N.J.S.A.

30:8-18.2 applies the 45-Day Rule to correctional police officers, and states in pertinent part that:

A person shall not be removed from employment or a position as a county correctional police officer, or suspended, fined or reduced in rank for a violation of the internal rules and regulations established for the conduct of employees of the county corrections department, **unless a complaint charging a violation of those rules and regulations is filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based.** A failure to comply with this section shall require a dismissal of the complaint. The 45-day time limit shall not apply if an investigation of a county correctional police officer for a violation of the internal rules and regulations of the county corrections department is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of this State; the 45-day limit shall begin on the day after the disposition of the criminal investigation.

(emphasis added).

Appellant routinely misapplies the 45-Day Rule under N.J.S.A. 30:8-18.2 and incorrectly argues that the 45-day timeline starts after the disposition of the criminal investigation, thus requiring any subsequent PNDA to have been filed no later than August 26, 2022. Pb15. However, as the Commission noted in both of its decisions, this interpretation ignores the majority of the proceeding language and the accepted judicial interpretation of the statute. Indeed, the Supreme Court directly rejected Appellant's interpretation when analyzing a

similarly worded statute in Roberts v. State, Div. of State Police, and found that the 45-Day Rule begins to run when “the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based.” 191 N.J. 516, 525 (2007). Put another way, until the person with authority to issue a complaint has sufficient information to file said complaint, the 45-Day Rule does not begin to run.

As the Supreme Court noted in Roberts, to require the 45-Day Rule to run beginning on the day after the disposition of the criminal investigation “would potentially prevent the [investigating agency] from conducting as thorough an internal investigation in circumstances giving rise to criminal investigations as in those with no criminal investigations.” Roberts v. State, Div. of State Police 191 N.J. 516, 525 (2007). The Supreme Court correctly recognized that “it would be illogical for the Legislature to have provided the necessary investigative period to determine whether disciplinary charges should issue when no criminal conduct has been alleged, but to have shortened that period when potential criminal conduct is under investigation.” Id. (internal citations removed).

Despite this accepted interpretation of the statutory language, Appellant asked the Commission, and now this Court, to ignore the Supreme Court’s decision in Roberts and instead find Appellant’s interpretation compelling. This

is in direct contradiction to the courts in this jurisdiction which applied the Roberts statutory interpretation to N.J.S.A. 30:8-18.2. See e.g., Matter of Connors, No. A-2779-18, 2021 WL 2821133, at *5 (N.J. Super. Ct. App. Div. July 7, 2021) (adopting the statutory interpretation set forth by the court in Roberts as applied to N.J.S.A. 30:8-18.2 and finding the “sufficient information” provision of N.J.S.A. starts the forty-five-day clock) (internal citations omitted); see also Matter of Farlow No. A-5617-15T1, 2019 WL 302616, at *3 (N.J. Super. Ct. App. Div. Jan. 24, 2019) (finding that the 45-Day time limit under N.J.S.A. 30:8-18.2 started when the warden received the internal investigation report).

As these cases make clear, the 45-Day clock did not begin in the instant matter until the director received IA’s findings on August 22, 2022. As noted in the record, IA was instructed to cease any administrative investigation until the criminal investigation was complete. Ra01. Thus, IA did not begin its investigation until July 13, 2022 when it was notified by the ECPO that the criminal charges were dismissed. Ra02. Thereafter, IA’s investigation concluded on August 20, 2022. IA’s findings were forwarded to the Director two days later so that the Director could take “any action deemed necessary and appropriate.” Ra05-17. The Director (and not IA) is the person with the authority to issue any complaint. Therefore, the 45-day time limit was triggered on August 22, 2022, which was the day that the Director “obtained sufficient information to file the

matter upon which the complaint is based.” As such, Respondent was well within the 45-Day Rule time limit, having filed the August 31, 2022 PNDA a mere eleven days after IA concluded its investigation and nine days after IA presented its findings.

Under Appellant’s interpretation of the 45-Day Rule, IA would have been required to conduct a thorough investigation and present its finding, and the director would have to decide to and file charges all within 45 days of the issuance of the August 31, 2022 PNDA. As the Supreme Court correctly recognized in Roberts, this interpretation essentially hampers any administrative investigation where the conduct also warrants a criminal investigation. It is illogical that actions which are serious enough to warrant a criminal investigation somehow also warrant an accelerated or contemporaneous administrative investigation. In fact, ECCF was precluded from conducting its investigation until after the conclusion of the ECPO investigation.

Appellant has failed to show that the Commission’s decision did not follow the law as interpreted by the courts, or that there was insufficient evidence for the Commission to come to its conclusion. The Commission, therefore, appropriately and correctly found that the August 31, 2022 PNDA complied with the 45-Day Rule. Accordingly, Appellant has not met her burden

of showing that the Commission's decision was arbitrary, capricious or unreasonable.

II. THE COMMISSION PROPERLY FOUND THAT THE 180-DAY RULE WAS INAPPLICABLE TO APPELLANT

The Commission also properly applied the plain meaning of the statute when it found that the 180-Day Rule did not apply to Appellant due to the pending criminal charges against her. Appellant's argument that she should be returned to payroll under the 180-Day Rule ignores the plain wording of the statute. N.J.S.A. 40A:14-201(a) states in pertinent part:

When a law enforcement officer employed by a law enforcement agency or a firefighter employed by a public fire department that is subject to the provisions of Title 11A of the New Jersey Statutes is suspended from performing his official duties without pay for a complaint or charges, **other than (1) a complaint or charges relating to the subject matter of a pending criminal investigation, inquiry, complaint, or charge whether pre-indictment or post indictment**, or (2) when the complaint or charges allege conduct that also would constitute a violation of the criminal laws of this State or any other jurisdiction, and the law enforcement agency employing the officer or the public fire department employing the firefighter seeks to terminate that officer's or firefighter's employment for the conduct that was the basis for the officer's or firefighter's suspension without pay, a final determination on the officer's or firefighter's suspension and termination shall be rendered within 180 calendar days from the date the officer or firefighter is suspended without pay.

(emphasis added).

A plain reading of the statute shows that the 180-Day Rule is inapplicable where, as is the case here, there were charges relating to a criminal complaint. Appellant was indefinitely suspended on March 3, 2022 due to the criminal complaint filed against her. Therefore, at the time of the suspension, these pending criminal charges tolled the 180-day requirement imposed by N.J.S.A. 40A:14-201.

Appellant offers no case law to show the dismissal of a criminal investigation somehow restarts the 180-Day Rule or otherwise changes the plain meaning of the statute. Rather, Appellant couches her misapplication of the rule as the standard and ignores the plain language of the statute. Appellant has failed to meet her burden to show the Commission's decision that the 180-Day Rule was inapplicable to Appellant due to the criminal charges pending against her was inconsistent with the applicable law. Therefore, the Commission was not arbitrary or capricious in finding that the 180-Day Rule was inapplicable to Appellant at the time she was indefinitely suspended and that her suspension was proper.

CONCLUSION

For these reasons, Respondent respectfully submits that the Court should affirm the Commission's Final Decision denying Appellant's Request for Reconsideration.

Respectfully submitted,

s/ Courtney Gaccione

By:

Dated: April 16, 2024

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3889-22T4

IN THE MATTER OF
IDESHA HOWARD, ESSEX
COUNTY

)
)
) Civil Action
)
) On Appeal from a Final
) Agency Decision of the
) Civil Service Commission
)
) CSC Dkt. No. 2023-552

STATEMENT IN LIEU OF BRIEF ON BEHALF OF
THE NEW JERSEY CIVIL SERVICE COMMISSION
Date Submitted: May 20, 2024

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On the Statement

This Statement in Lieu of Brief is filed on behalf of the Civil Service
Commission pursuant to Rule 2:6-4(c). Appellant, Idesha Howard, challenges

the Commission’s December 7, 2022, final administrative determination denying her request for interim relief. (Pa30).¹ Howard seeks to appeal her suspension from her position as a Corrections Police Officer with the Essex County Correctional Facility (“Essex”). Ibid.

On March 3, 2022, Essex issued Howard a Preliminary Notification of Disciplinary Action (“PNDA”), charging Howard with failure to perform duties, conduct unbecoming a public employee, neglect of duty, and “other sufficient cause” pursuant to N.J.A.C. 4A:2-2.3(a)(2), (6), (9), and (12) and recommending an immediate suspension without pay. (Pa2). Howard was immediately suspended without pay. (Pa75).

The charges resulted from criminal charges made against Howard on the same day by the Essex County Prosecutors Office for knowingly engaging in conduct that creates a substantial risk of serious bodily injury to another person in violation of N.J.S.A. 2C:24-7.1A(3) and knowingly creating a false record in violation of N.J.S.A. 2C:28-7A(1). (Pa47-53). Following a dismissal of the criminal charges on July 12, 2022, Essex began its investigation and issued a

¹ “Pa” refers to the Appellant’s appendix.

second PNDA on August 31, 2022. (Pa58-60). The second PNDA charged Howard with failure to perform duties, conduct unbecoming of a public employee, neglect of duty, and “other sufficient cause” pursuant to N.J.A.C. 4a:2-2.3(a)(1), (6), (7), and (12) and recommended continuing her suspension. Ibid.

On September 11, 2022, Howard appealed to the Commission for interim relief. (Pa11). Howard argued that the August 31, 2022, PNDA was out of time pursuant to N.J.S.A. 30:8-18.2 (the “45-Day Rule”) because the 45 day period for charging her began on the day of the disposition of the criminal charges and expired on August 26, 2022. Ibid. Further, she argued that pursuant to N.J.S.A. 40A:14-201(a) (the “180-Day Rule”), she was entitled to a final decision because more than 180 days had passed since her suspension. Ibid.

On December 7, 2022, the Commission issued a decision denying Howard’s interim appeal of her suspension but granting her backpay for July 13, 2022, through August 31, 2022. (Pa31-36). The Commission concluded that Howard’s reliance on the 45-day rule was misplaced. That rule requires the appointing authority to file its complaint no later than the forty-fifth day after “obtain[ing] sufficient information to file the matter upon which the complaint

is based.” (Pa34). Essex properly filed its August 31, 2022, PNDA eleven days after the criminal charges were disposed of, and Howard’s interpretation of the statute was counter to the holding in Roberts v. State, Div. of State Police 191 N.J. 516 (2007) (“[i]t would be illogical for the Legislature to have provided the necessary investigative period to determine whether disciplinary charges should issue when no criminal conduct has been alleged, but to have shortened that period when potential criminal conduct is under investigation. We decline to infer an intent to achieve such an unreasonable result.”). Ibid.

Further, the Commission found Howard improperly relied on the 180-Day Rule. (Pa35). The Commission concluded that the rule does not apply to charges “relating to the subject matter of a pending criminal investigation, inquiry, complaint, or charge.” N.J.S.A. 40A:14-201(a)(1). Ibid. The Commission reasoned Howard was due backpay between the criminal charges being dismissed in July 2022 and the issuance of the second PNDA in August. Ibid.

On December 11, 2022, Howard requested a reconsideration of the Commission’s denial of interim relief. (Pa37). The Commission issued a Final Decision denying Howard’s request on July 19, 2023. (Pa82-86). Howard

argued that the Commission improperly relied on Roberts and argued that the 180-Day Rule applied to her suspension because Essex had all of the information it needed for its March 2, 2022 PNDA following the incident in September of 2018. Ibid. Essex countered, arguing that Howard had failed to make any new arguments or present new evidence. (Pa84). Further, Essex argued that the investigations by law enforcement into the criminal matter and the agency's internal investigation are separate and distinct investigations. Ibid.

The Commission found that Howard's arguments about the investigation being completed in September of 2018 were not presented in her initial petition for relief. Ibid. Howard failed to explain why she did not make these arguments then. Ibid. Further, the Commission found that the 180-Day Rule would not have applied to criminal charges if she had presented that argument. (Pa85). Further, the Commission found Howard failed to present new evidence and failed to support her arguments beyond making unsupported allegations. (Pa86).

Having reviewed the merits briefs filed by the primary parties, the Commission has determined that the factual and legal issues involved in this appeal do not warrant filing a separate brief. The primary issue raised in the appeal is whether the Commission's decision rejecting Howard's appeal as

untimely and denying her subsequent request for reconsideration was arbitrary, capricious, or unreasonable. The primary parties to the appeal have adequately addressed the relevant issues, and a separate brief on the merits is unnecessary. Furthermore, the Commission's participation is not required in the public interest.

Nevertheless, the Commission's decision should be affirmed. It is well-established that an agency's determination will not be upset unless it is affirmatively shown that it is arbitrary, capricious, or unreasonable or that it lacks fair support in the record. Karins v. City of Atl. City, 152 N.J. 532, 540 (1998). A strong presumption of reasonableness attaches to the Commission's decision. In re Carroll, 339 N.J. Super. 429, 437 (App. Div. 2001). Thus, a court must affirm the decision if the evidence supports it, even if the Court would have reached a different result. Campbell v. N.J. Racing Comm'n, 169 N.J. 579, 587 (2001).

The record provides ample support for the Commission's finding that Howard's reliance on the 45-Day Rule and 180-Day Rule was misplaced and its denial of her interim appeal and motion for reconsideration. (Pa31-36). For

these reasons, the Commission's decision denying Howard's petition for reconsideration relief should be affirmed.

Respectfully submitted,

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IN THE MATTER OF IDESHA HOWARD, ESSEX COUNTY Appellant,	SUPERIOR COURT NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003889-22T4 Civil Action APPELLANT'S REPLY BRIEF SAT BELOW: CIVIL SERVICE COMMISSION CSC DOCKET NO. 2023-552
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LURETHA M. STRIBLING, ESQ.
MAY 30, 2024

TABLE OF CONTENTS

	PAGES
TABLE OF AUTHORITIES	3
RESPONSE TO PRELIMINARY STATEMENT	4
RESPONSE TO STATEMENT OF FACTS	5
RESPONSE TO LEGAL ARGUMENT	8
<u>I.THE COMMISSION IMPROPERLY APPLIED</u>	
<u>THE 45 DAY RULE AS THE SERVICE OF THE</u>	
<u>PNDA ON SEPTEMBER 10, 2022 WAS BEYOND</u>	
<u>THE 45 DAY TIME PERIOD APPLICABLE AFTER</u>	
<u>CRIMINAL CHARGES ARE DISMISSED</u>	9
<u>II. THE 180 DAY RULE WAS CERTAINLY</u>	
<u>APPLICABLE TO THE APPELLANT AND</u>	
<u>THE CIVIL SERVICE COMMISSION ERRED</u>	
<u>AGAIN IN FAILING TO FOLLOW THE LAW</u>	
<u>RESPONSE TO THE STATEMENT IN LIEU OF</u>	
<u>BRIEF ON BEHALF OF THE NEW JERSEY</u>	
<u>CIVIL SERVICE COMMISSION</u>	15
RESPONSE TO STATEMENT IN LIEU	17
CONCLUSION	21

TABLE OF AUTHORITIES

CASES	PAGES
<u>Grubb v. Borough of Hightstown</u> , 331 N.J. Super. 398 (Decided February 23, 2000)	10
<u>Roberts v. State, Div. of State Police</u> , 191 N.J. 516 (2007)	11,12
<u>In Re Connors</u> , 2021 N.J. Super. Unpub. LEXIS 1397 (Decided July 7, 2021)	12,13
<u>In Re Farlow</u> , 2019 N.J. Super. Unpub. LEXIS 173 (Decided January 24, 2019)	14,15
<u>Mayflower Sec. Co. v. Bureau of Sec.</u> 64 N.J. 85 (1973)	9
NEW JERSEY STATUTES	
<u>N.J.S.A. 30:8-18.2</u>	Passim
<u>N.J.S.A. 40A:14-201(2)a</u>	7,16
N.J.S.A. 53:1-33	11,12

RESPONSE TO THE PRELIMINARY STATEMENT OF COUNTY OF
ESSEX

As noted in the Appellant Brief for Idesha Howard (Appellant), Appellant was suspended from employment on the date of March 3, 2022 after being served with criminal charges. **(Pa1)** In the minutes after being served with the criminal charges, Appellant was served with internal charges which suspended her from her job. **(Pa2)** As pled in the Amended Appellant Brief, the 45 day rule set forth in the statute N.J.S.A. 30:8-18.2 was violated. This is because the criminal charges were dismissed on July 12, 2022. **(Pa7)** Per that aspect of N.J.S.A. 30:8-18.2, the 45 day time frame for service of the Preliminary Notice of Disciplinary Action (PNDA) after the dismissal of criminal charges starts the day after dismissal of criminal charges. The claim made by the County of Essex that the 45 day rule was not violated is incorrect. The service of the PNDA was to be accomplished by August 26, 2022. There was no service of a PNDA by that date. The claim that the PNDA was served on Appellant on August 31, 2022 is incorrect, but, even that date is beyond the 45 day time period and as a result there was no ability to proceed. The date of service of the PNDA was September 10, 2022. **(Pa56)** The envelope that the PNDA was in notes the date of September 10, 2022. **(Pa57)** It was improper for the County of Essex to then pursue disciplinary action in this matter and the Appellant should have been returned to work.

The appeal of the decision of the Civil Service Commission was necessary because the decision of the Civil Service Commission was arbitrary, capricious and unreasonable. The decision disregarded the clear reading of the statute noted above and further disregarded the legislative intent. The decision rendered was based on the subjective belief by personnel and the Chairperson of the Civil Service Commission that the statute as written was not to be interpreted as written. Subjective beliefs are of no moment. Simply put, when there is uncertainty as to what was meant by the legislators, the legislative intent for the statute must be reviewed. There was a failure to examine the legislative intent and the decision reached was in error.

RESPONSE TO STATEMENT OF FACTS AND PROCEDURAL

HISTORY

The underlying details of August 28, 2018 are not at issue here. The Appeal for Interim Relief was about application of the statutes in this matter. What should be of concern in looking at the alleged incident is the fact the evidence makes it clear that the Appellant had nothing to do with the inmate death on August 28, 2018, four years ago. The act of bringing that incident up appears to be an attempt to discredit the Appellant and not address the issue before this Court. The Appellant was not assigned to the 2D3 Unit where the inmate was housed. Early in the shift, Appellant was directed to conduct meal breaks for the officers assigned to the 2D3 Unit who

were S. Williams and Charles Lawson. Appellant concluded meal break coverage for Charles Lawson at 1:00 A.M. and left the unit to take care of other assignments. The inmate died later in the shift at about 5:55 A.M. When Appellant was served with criminal charges and the criminal litigation began, the evidence did not support the charges and it was correctly determined that Appellant had nothing to do with the inmate death. The evidence did not support the charges that the Appellant had not performed her assignment during the time that she covered the officers for meal break on Unit 2D3. An investigation was done in 2018 by Vincent Conti in Internal Affairs which was concluded on about September 28, 2018. Vincent Conti subsequently testified that he did not conduct a further investigation after the criminal charges were dismissed, but, issued the same report that had been provided in September of 2018. The claim by Counsel that IA was permitted to perform their investigation after the criminal charges were dismissed is correct, however, per the second prong of N.J.S.A. 30:8-18.2, there was a set time frame in which to conclude the investigation after criminal charges were dismissed and there was a failure to adhere to that time frame. When the Essex County Prosecutor's Office reviewed the evidence after Appellant had been charged and was being prosecuted, the criminal charges against Appellant were dismissed. As noted, the dismissal of the charges was on July 12, 2022. **(Pa7)** The fact that criminal charges were assessed against Appellant four years after the alleged incident in 2018 should be of concern to

Counsel and administration at the County of Essex. Such action represents an abuse of process. This appeal is about the failure to abide by the statutes and administrative codes. The service of the PNDA on September 10, 2022 when the criminal charges were dismissed on July 12, 2022 was out of time and represented a violation of Appellant's due process rights and is not sustainable. The position taken in this matter by this Counsel with regard to the 45 day rule is consistent with the statute and is not erroneous. The position taken by the County of Essex and the Civil Service Commission in understanding and application of the 45 day rule is in error.

Similarly, the decision reached by the Civil Service Commission with regard to N.J.S.A. 40A:14-201(a) was in error. This Counsel did not write that Appellant was entitled to a final determination of her employment status. Clearly, what was written was that the suspension had lasted beyond 180 days with no decision and as a result of this, Appellant should have been returned to payroll. Per Civil Service Commission guidelines, there can be no suspension that lasts beyond 180 days. After the criminal charges were dismissed, the County of Essex was required to provide retroactive pay from the first date that Appellant did not receive pay. This meant that the retroactive pay should have started at the date of March 3, 2022 , the date that Appellant was suspended without pay. That pay should have continued because there were no further charges assessed against Appellant within 45 days of dismissal of the criminal charges.

RESPONSE TO THE LEGAL ARGUMENT

As established in the Amended Appellant Brief, the actions of the Civil Service Commission were arbitrary, capricious and unreasonable because there was a failure to follow the law and the clear tenets of the statutes. Clearly, the Civil Service Commission failed to adhere to the clear language of the noted statute, N.J.S.A. 30:8-18.2. The record did not support the determination reached as a review of the record in application of the law supported the position of Appellant and the decision reached could not have been reached per the record. There is no support in the record that Appellant was served with the PNDA after the dismissal of the criminal charges within 45 days. As noted above and in the Appellant's Brief, the criminal charges were dismissed on July 12, 2022. The 45 day time period started on July 13, 2022 which then required that the service of the PNDA had to be accomplished by August 26, 2022. By the very admission of the County of Essex it was served after that time. There is no support in the record that the PNDA was served on August 31, 2022 which was clearly beyond 45 days. The record does reflect that fact that the PNDA was served on September 10, 2022 via certified mail. **(Pa56, Pa57)** The County of Essex violated the 45 day rule and the Civil Service Commission failed to correct the violation. The Civil Service Commission in reading and understanding the clear language of the statute, N.J.S.A. 30:8-18.2 should have ordered that Appellant be returned to work. Because of the failure to adhere to the

law, the Civil Service Commission decision was indeed arbitrary, capricious and unreasonable as it failed to comport to the law. As a result, the Appellate Court is not required to follow the flawed interpretation and application by the Civil Service Commission. The Appellate Court is not bound by the interpretation of the statutes or the law by an administrative agency. Mayflower Sec. Co. v. Bureau of Sec. 64 N.J. 85, 93 (1973).

I.THE COMMISSION IMPROPERLY APPLIED THE 45 DAY RULE AS THE SERVICE OF THE PNDA ON SEPTEMBER 10, 2022 WAS BEYOND THE 45 DAY TIME PERIOD APPLICABLE AFTER CRIMINAL CHARGES ARE DISMISSED.

As noted in the Appellant's Brief, there are two prongs to N.J.S.A. 30:8-18.2 and depending on the facts of the case, a determination must be made regarding which prong is applicable. The first part of the statute refers to sufficient information being the basis for the time frame of service of the PNDA when there are no criminal charges. The second prong is applicable as here when there are criminal charges. The simplicity of the language should have been adhered to and if there was any question regarding what the language meant, the legislative intent should have been examined for clarity and better understanding. N.J.S.A. 30:8-18.2 provides: Applicability of 45-day rule for violation of internal rules to county corrections officers.

1.A person shall not be removed from employment or a position as a county corrections officer, or suspended, fined or reduced in rank for a violation of the internal rules and regulations established for the conduct of employees of the county corrections department, unless a complaint charging a violation of those rules and regulations is filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based. A failure to comply with this section shall require a dismissal of the complaint. The 45-day time limit shall not apply if an investigation of a county corrections officer for a violation of the internal rules and regulations of the county corrections department is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of this State; **the 45-day limit shall begin on the day after the disposition of the criminal investigation.** N.J.S.A. 30:8-18.2.

In this case, the investigation by the County was concluded in 2018. Appellant was not served with a PNDA. Vincent Conti testified in an internal hearing that he was told by Bartelloni that the criminal charges were dismissed and that he should complete his report. No investigation was done and he simply put the August 2022 date on the report from 2018. The statute is written as it is because the criminal investigation and prosecution of a case can take a long period of time as noted in Grubb v. Borough of Hightstown, 331 N.J. Super. 398 (Decided February 23, 2000).

When the criminal matter is dismissed, the time frame for serving the PNDA is 45 days after the charges are dismissed.

Roberts v. State, Div. of State Police, is distinguished from the instant matter. Roberts v. State, Div. of State Police, 191 N.J. 516 (2006). Roberts was a State Trooper and the statute that applied to him is different than the statute under discussion here which is N.J.S.A. 30:8-18.2. Id. at 2. The applicable statute for Roberts is N.J.S.A. 53:1-33. Id. at 2. According to the holding in Robert, “when a criminal investigation of a State Trooper has ended with a decision not to prosecute, the statutory “applicable time limit” within which disciplinary charges against the Trooper must be filed is forty-five days after the Superintendent of the State Police has obtained the report of the internal disciplinary action.” Id. at 2. The statute that applies to State Troopers does not mirror the statute that is applicable to county and municipal police. Id. at 5 and 6. Of note in Roberts is that when the case was sent to the Division of Criminal Justice, Office of Insurance Fraud Prosecutor to conduct a criminal investigation, the decision was made not to prosecute and the case was returned to the State Police. Id. at 1. Because there were no criminal charges, the statute N.J.S.A. 53:1-33 which governs the suspension and removal of State Troopers applied and provided that a complaint charging a violation of State Police Internal rules and regulations “shall be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the

matter upon which the complaint is based. Id. at 2. Roberts is distinguished from the instant matter because the applicable statutes for County Correction Officers and State Troopers are distinctly different. In Roberts, the case was sent to the Prosecutor who declined to prosecute, no charges were assessed against Roberts and the case was returned to the State Police. Id. at 1. In the instant matter, Appellant's information was sent to the Prosecutor's Office in 2022 and the Essex County Prosecutor's Office investigated and charged Appellant who then had criminal charges which were prosecuted in the criminal court. When there is a decision not to prosecute a State Trooper, the first section of N.J.S.A. 53:1-33 applies. The second part of N.J.S.A. 53:1-33 provides that when there is a concurrent criminal investigation, the applicable time limit shall begin on the day after the disposition of the criminal investigation. Id. at 2. In Roberts, the second prong was not applied. In the instant matter, because Appellant had criminal charges and was being prosecuted criminally, the second part of the statute N.J.S.A. 30:8-18.2 applied as noted in the body of this brief.

The County refers to In Re Connors as applicable to the instant matter and that case is distinguished from the instant matter. In Re Connors, 2021 N.J. Super. Unpub. LEXIS 1397 (Decided July 7, 2021), Connors was a Correctional Police Lieutenant who failed to properly investigate and document complaints by inmates that their photographs had been damaged by Corrections Officers. Id. at 1 and 2.

Connors was interviewed by Internal Affairs and admitted that he had not properly investigated or documented the information obtained from Corrections Officers. Id. at 2. Connors was brought up on disciplinary charges and received suspension time and when Connor appealed the matter went to the Office of Administrative Law, the Judge determined that Connors should be suspended. Id. at 3. In Connors, in his filing with the Appellate Court he complained that the 45 day rule as set forth in N.J.S.A. 30:8-18.2 had not been complied with. Id. at 4. The Appellate Court in citing to the statute N.J.S.A. 30:8-18.2 cited to the first part of the statute which was the relevant part for Connors and recited: A person shall not be removed from employment or a position as a county corrections officer, or suspended, fined or reduced in rank for a violation of the internal rules and regulations established for the conduct of employees of the county corrections department, unless a complaint charging a violation of those rules and regulations is filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based. A failure to comply with this section shall require a dismissal of the complaint. Id. at 5. The second part of this statute that references persons with a criminal charges did not apply to Connor. In the instant matter, the second part of the statute applied to Appellant because Appellant was charged criminally and prosecuted.

The County refers also to In Re Farlow which is a matter that involved sexual harassment charges against Farlow who was a Correctional Lieutenant at the Camden County Correctional Facility. In Re Farlow, 2019 N.J. Super. Unpub. LEXIS 173 (Decided January 24, 2019). Farlow over a period of time of two years made inappropriate and sexual comments to female Correctional Police Officers, referred to a male Correctional Police Officer as Gay and used abusive language in communications with other employees which were eventually reported to administration. Id. at 2 and 3. Farlow as a result of his behavior was given training in the sexual harassment policy and procedure, harassment, quid pro quo harassment, diversity, ethics and respecting the workplace. Id. at 3. Farlow was given charges and had a hearing at the Office of Administrative Law. Id. at 3. The penalty of suspension that had been given to Farlow by the administrator was upheld at the Office of Administrative Law. Id. at 3. Farlow filed an appeal and claimed among other things that the charges assessed against him were untimely per the statute, N.J.S.A. 30:8-18.2. Id. at 3. The Appellate Court found that the charges were not untimely and said that the statute “requires that charges be filed no later than forty-five days after the employer obtains sufficient information on which to base the complaint.” Id. at 3. In Farlow, the first aspect of the statute N.J.S.A. 30:8-18.2 was applied. This case is distinguished from the instant matter because Appellant was charged criminally by the Prosecutor, therefore, the second aspect of this statute

applied which set forth a different trigger for starting the running of the 45 day period. It should be noted that each aspect of the statute provides a period of 45 days to serve the PNDA, however, the triggers are different based on whether there are solely internal charges as in Connor and Farlow and here where Appellant had criminal charges.

In this matter, given that the PNDA issued on March 3, 2022 mirrored charges in the criminal complaint and the criminal complaint was dismissed, there was no basis to serve Appellant with a PNDA. Certainly after the 45 day time period, the service of a PNDA was out of time and served to violate Appellant's due process rights. The legislative intent was disregarded by the Civil Service Commission who applied a determination inconsistent with the law as the Civil Service Commission applied the first prong of the statute which was for persons without criminal charges.

II. THE 180 DAY RULE WAS CERTAINLY APPLICABLE TO THE APPELLANT AND THE CIVIL SERVICE COMMISSION ERRED AGAIN IN FAILING TO FOLLOW THE LAW

The Civil Service Commission failed to follow the law again when it was decided by that body that the 180 day rule did not apply to the Appellant. The Appellant was served with criminal charges on March 3, 2022 and those charges were dismissed on July 12, 2022. After the dismissal of the criminal charges, Appellant was not returned to work. The service of the criminal charges and the

PNDA on March 3, 2022 reached the 180 day time frame on August 31, 2022. Despite these facts, the County of Essex failed to return Appellant to the payroll.

Statutory law noted at N.J.S.A. 40A:14-201(2)a provides in pertinent part that “a final determination on a law enforcement officer’s suspension and termination shall be rendered within 180 calendar days from the date that the officer is suspended without pay. If a final determination is not rendered within those 180 days, as hereinafter calculated, the officer shall, commencing on the 181st calendar day, begin again to receive the base salary he was being paid at the time of his suspension and shall continue to do so until a final determination on the officer’s termination is rendered. N.J.S.A. 40A:14-201(2)a

In application of the above noted statute to the date that Officer Howard was indefinitely suspended which was March 3, 2022, the 181st day was August 31, 2022. Per the statutory requirements, Officer Howard should have been returned to payroll from the date of August 31, 2022. A letter was forwarded to Director Ronald Charles requesting that he alert the Payroll Department to restore Officer Howard to the payroll with provision of base pay from the date of August 31, 2022 forward, and there was no response to this request. **(Pa8, Letter to Charles)** Officer Howard was never restored to the payroll consistent with this statute. Certainly, if the tenets of N.J.S.A. 30:8-18.2 had been followed, not only would Officer Howard have been returned to the payroll, but, she would have also been returned to her job.

The position taken here is that Appellant was put out of work on the date of March 3, 2022 because of criminal charges and the PNDA received on that date. The clock began to run with regard to time out of work starting from March 3, 2022. The date of August 31, 2022 was not a restart of the clock for calculating time out of work but reflected the actual time Appellant had been out of work. The Civil Service Commission requires that after 180 days of being out of work that there has to be a return to payroll. There was a failure to adhere to the clear language of the noted statute, thus, the law was not followed by the County of Essex and the Civil Service Commission rendered a ruling which was arbitrary, capricious and unreasonable.

It is requested that the decision reached by the Civil Service Commission be reversed and that Appellant be returned to work with full back pay, benefits and seniority. The back pay should cover the period from March 3, 2022 to the present time with subtraction of the pay received by Appellant after dismissal of the criminal charges on July 12, 2022 through to August 31, 2022.

**RESPONSE TO THE STATEMENT IN LIEU OF BRIEF ON BEHALF OF
THE NEW JERSEY CIVIL SERVICE COMMISSION**

In response to this writing, this Counsel places reliance on the written response in this Brief to the County of Essex Brief as written by Courtney Gaccione. The procedural history of this matter is well documented in the Amended Appellant's Brief. As noted repeatedly, based on the fact that the criminal charges

were dismissed, Appellant should have been returned to work. Additionally, because there was no timely service of the PNDA by the County of Essex, there was no right to proceed in examination of internal charges. As noted above, prong one of the noted statute, N.J.S.A. 30:8-18.2 does not apply to Appellant. Per the legislative intent, the aspect of the statute, prong two which specifically references circumstances where there has been an investigation for violation of criminal laws of the state is applicable here. It is evident that the legislative intent was to apply that aspect of the statute based on the facts which involved investigation for violation of criminal laws. In instances where there are no criminal charges, the first prong or part of the statute applies where it is referenced sufficient facts having been obtained. The second prong or part of the statute applied where there is an investigation for violations of the criminal laws in the state. The criminal investigation and litigation of a matter can go on for years and it is common that after criminal charges are dismissed, there would be no basis to proceed internally on those same charges. The record in this case did not support Appellant being prosecuted criminally. As noted, Appellant was not assigned to the Unit 2D3, while she was on the unit she performed her job and the work that she performed while on the Unit 2D3 was documented in the Close Custody Observation Sheet and recorded on camera footage. The dismissal of the criminal charges was because the evidence did not support those charges.

Because the evidence did not support the criminal charges assessed against Appellant, the evidence then could not support the internal charges.

The persistence by the County of Essex in trying to charge Appellant internally was improper as there was a failure to adhere to the requirements set forth in N.J.S.A. 30:8-18.2. The required service was well beyond the 45 day time period and Appellant should have been returned to work with back pay, benefits and seniority retroactive to March 3, 2022. The evidence as to what the County of Essex was required to do is set forth in the record per the facts and dates identified which are supported and included in the Appellant's Appendix.

In clarification of the mis-statements in the record by the Civil Service Commission, the following information is provided. 1. The PNDA from the County of Essex was not issued on August 31, 2022 but was issued on September 10, 2022. In order for the PNDA to be viable, it had to be issued by August 26, 2022 and there clearly was a failure to issue it timely. 2. The Appellant did not claim that per the 180 day rule she was entitled to a final decision. A clear perusal of what was written in the Appellant's Brief and in this Brief is the fact that an employee cannot be off of the payroll for greater than 180 days and because of this, on the 181st day, Appellant should have been returned to the payroll. 3. The application of the statute, N.J.S.A. 30:8-18.2 that references criminal charges is applicable here and not that first prong or part of the statute which references sufficient information as was

explained above. 4. The Civil Service Commission did not reject the appeal by Appellant as untimely. The Civil Service Commission rendered a decision which is inconsistent with the clear tenets of the law and hence the decision was arbitrary, capricious and unreasonable and resulted in the instant appeal.

The Appellate Court is not bound by the interpretation of the law by the Civil Service Commission and will base the determination reached on the interpretation of the law by the Appellate Court. The Appellate Court will do so in this matter because the decision reached by the Civil Service Commission is inconsistent with the law as well as the legislative intent.

It is requested that the Appellate Court vacate the entire decision reached by the Civil Service Commission which is mirrored by the County of Essex. It is requested that the Appellate Court order that Appellant be returned to work, given all benefits and seniority and given all back pay retroactive to March 3, 2022 with subtraction of the pay received for the period of July 12, 2022 through to the date of August 31, 2022. Appellant received pay for that noted period of time. It is requested that the Appellate Court award to this writer Counsel Fees and costs.

CONCLUSION

For all of the reasons set forth in this Brief, the Amended Appellant's Brief, the Appendix submitted in this matter as well as the statutes and case law, that the Appellate Court vacate the entire decision reached by the Civil Service Commission and that Appellant be returned to work and given all benefits, seniority and back pay retroactive to March 3, 2022 with subtraction of the pay received for the period of July 12, 2022 through August 31, 2022. It is requested that the Appellate Court award to this writer Counsel Fees and costs.

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