



9 N.Y.2d 447, 174 N.E.2d 526, 214 N.Y.S.2d 444

Carl N. Brenner et al., Appellants,

v.

City of New York, Respondent.

Richard J. O'Neill, Appellant,

v.

City of New York, Respondent.

Court of Appeals of New York

Argued January 5, 1961;

Decided March 30, 1961.

CITE TITLE AS: Brenner v City of New York

HEADNOTES

[Municipal corporations](#) [police](#)

disciplinary proceedings--members of New York City Police Department, who were acquitted of criminal charges and found guilty of charges at departmental trial, not entitled to full pay during suspension pending trial (Administrative Code of City of New York, § 434a-20.0).

(1) Plaintiffs, members of the New York City Police Department, were charged with violations of the Penal Law and acquitted following trial. They were not paid for the time of their suspension pending trial on the criminal charges. At a departmental trial they were found guilty of certain charges against them, and as a result they were directed to forfeit 30 days' pay and were placed on probation for one year. Section 434a-20.0 of the Administrative Code of the City of New York authorizes suspension of members of the police force "without pay, pending the trial of charges" and provides that in the event "any member so suspended shall not be convicted by the commissioner of the charges so preferred, he shall be entitled to full pay from the date of suspension". Plaintiffs, having been convicted following a hearing on departmental charges, do not bring themselves within the provision entitling them "to full pay from the date of suspension".

(2) The provisions of section 434a-14.0 of the Administrative Code, relating to discipline, are not applicable to plaintiffs who were suspended on charges.

[Brenner v. City of New York, 9 A D 2d 729](#), affirmed.

[O'Neill v. City of New York, 9 A D 2d 729](#), affirmed.

SUMMARY

Appeal, in the first above-entitled action, from a judgment, entered January 14, 1960, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department which modified, on the law, an order of the Supreme Court at Special Term (Matthew M. Levy, J.; opinion [12 Misc 2d 311](#)), entered in New York County, (a) granting a motion by plaintiffs Carl N. Brenner, Joseph O. Johnson, Stanley L. Lewandoski, James W. Nitecki and Rudolfo F. Vargas for summary judgment and denying a cross motion of defendant for summary judgment with respect to those plaintiffs, and (b) denying a motion by plaintiffs John Blessinger, James F. Cusack, Edwin M. Leahy, Michael J. Quigley and Theodore C. Seibert for summary judgment, and granting a cross motion of defendant for summary judgment with respect to said plaintiffs. By ***448** the modification the Appellate Division denied the motion for summary judgment by plaintiffs Carl N. Brenner, Joseph O. Johnson, Thomas Keenan, Stanley L. Lewandoski, James W. Nitecki, and Rudolfo F. Vargas, and granted the motion by defendant City of New York for summary judgment dismissing the complaint as to those plaintiffs. Appeal, in the second above-entitled action, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from a judgment of said court, entered January 25, 1960, unanimously affirming an order of the Supreme Court at Special Term (Henry Epstein, J.; opinion [13 Misc 2d 1008](#)), entered in New York County, denying a motion by plaintiff for summary judgment and dismissing the complaint and directing that judgment be entered in favor of defendant.

POINTS OF COUNSEL

Victor J. Herwitz and Murray A. Gordon for appellants in the first above-entitled action.

I. Appellants were not convicted of the charges for which they were suspended and are, therefore, entitled to full pay

from the date of suspension pursuant to section 434a-20.0 of the Administrative Code of the City of New York. II. Appellants were suspended, not dismissed, and therefore retained title to their offices and the salaries incidental thereto, thereby entitling appellants to back pay for the period of their suspensions. (*People ex rel. Flynn v. Woods*, 218 N. Y. 124; *People ex rel. Ryan v. French*, 91 N. Y. 265; *Fitzsimmons v. City of Brooklyn*, 102 N. Y. 536; *People ex rel. Nugent v. Board of Police Comrs.*, 114 N. Y. 245; *Wardlaw v. Mayor of City of N. Y.*, 137 N. Y. 194; *O'Neil v. State of New York*, 223 N. Y. 40; *Lehmann v. City of New York*, 153 Misc. 834, 244 App. Div. 712.) III. The denial of back pay to appellants for the period of their suspensions constitutes, in effect, punishment and, therefore, violates section 434a-14.0 of the Administrative Code of the City of New York which limits punishment short of dismissal to the forfeiture of 30 days' pay. IV. The suspensions of all appellants were invalid as violative of section 75 of the Civil Service Law in that said suspensions were without pay for periods in excess of 30 days. (*Matter of Cugell v. Monaghan*, 201 Misc. 607; *Matter of Kelly v. Board of Educ.*, 234 App. Div. 239.) V. Appellants Brenner, Johnson, Keenan, Lewandoski, Nitecki and Vargas were improperly suspended in that no departmental charges were pending at the time of their suspensions. *449

Murray A. Gordon and *Victor J. Herwitz* for appellant in the second above-entitled action. Appellant was not convicted of the matter which was the cause for his suspension and, pursuant to the express terms of section 434a-20.0 of the Administrative Code, he is entitled to back pay for the period of his suspension without pay.

Charles H. Tenney, Corporation Counsel (*Edward A. Doberman* and *Seymour B. Quel* of counsel), for respondent. I. Having been convicted of charges made against them, plaintiffs may not recover salary for the period of their suspensions. It is immaterial that their punishment was less than dismissal. Section 884-1.0 of the Administrative Code does not apply to members of the police force of the City of New York. (*People ex rel. Flynn v. Woods*, 218 N. Y. 124; *Lehmann v. City of New York*, 153 Misc. 834, 244 App. Div. 712; *Halpin v. City of New York*, 54 Misc. 128, 146 App. Div. 881; *Matter of Baker v. Kennedy*, 6 Misc 2d 589; *Matter of Flood v. Monaghan*, 201 Misc. 560; *Matter of Loos v. New York City Tr. Auth.*, 4 A D 2d 751; *Paris v. City of New York*, 189 Misc. 445; *Matter of Whalen v. Corsi*, 201 Misc. 39, 279 App. Div. 1113, 305 N. Y. 933; *Meade v. City of New York*, 193 Misc. 82; *Matter of Webber v. Tunney*, 186 Misc. 270; *Matter of Cugell v. Monaghan*, 201 Misc. 607; *Matter of Hering v. Clement*, 196 N. Y. 218; *People v. Grawunder*, 2 Misc 2d 126; *Matter of Emerson v.*

Buck, 230 N. Y. 380.) II. Regardless of whether plaintiffs were suspended pending the disposition of criminal charges or of departmental charges, or both, they were convicted of part of the "charges so preferred" and were not in any sense acquitted as they claim. III. Denial of pay during suspension pending trial, pursuant to section 434a-20.0 of the Administrative Code, is not suspension as a form of punishment after conviction within section 434a-14.0. Even if it were, the latter section does not limit suspension, as distinct from a fine, to a maximum of 30 days. (*Lehmann v. City of New York*, 153 Misc. 834, 244 App. Div. 712; *Halpin v. City of New York*, 54 Misc. 128; *Matter of Yannantuono v. Silverstein*, 8 A D 2d 725.) IV. The time limit upon a suspension pending determination of charges, contained in subdivision 3 of section 75 of the Civil Service Law, has no application to New York City policemen. (*Matter of McElroy v. Trojak*, 21 Misc 2d 145.) V. The prior or contemporaneous *450 filing of written charges is not required in order to suspend New York City policemen, although such charges are necessary for departmental trial and conviction. Even if written charges were necessary for suspension, the suspension of the Brenner group on February 16, 1955 would have been validated by the filing of written charges on March 19, 1955. (*People ex rel. Brennan v. Bingham*, 57 Misc. 677; *People ex rel. Langan v. Hayden*, 80 Hun 397.)

OPINION OF THE COURT

Dye, J.

In the first of the above-entitled actions the plaintiffs, members of the New York City Police Department, sue to recover pay allegedly wrongfully withheld during periods of their suspension, pending trial in Special Sessions, on charges brought against them of alleged violation of section 580 of the Penal Law (conspiracy). Following trial in Special Sessions, the plaintiffs were acquitted. O'Neill, the plaintiff in the second action, was charged not with conspiracy but with felonious assault, and was tried (and acquitted) not in Special Sessions but in Kings County Court. At the departmental trial, on amended charges, the respective plaintiffs were found by the Commissioner not guilty of certain of the amended specifications, and guilty of certain others, "of unlawfully and wilfully extending an unwarranted and unnecessary privilege to [a motorist] and of failing to take necessary police action against him", and a disciplinary sentence "To forfeit thirty (30) days pay and placed on probation for a period of one year" was imposed on each. The plaintiffs were not paid for the period of their suspension pending trial in Special Sessions.

Section 434a-20.0 of the Administrative Code of the City of New York authorizes suspension of members of the police force “without pay, pending the trial of charges” and then provides that in the event “any member so suspended shall not be convicted by the commissioner of the charges so preferred, he shall be entitled to full pay from the date of suspension”. That language is clear and unequivocal and requires no construction. These petitioners, having been convicted following a hearing on departmental charges, do not bring themselves within the clear wording entitling them “to full pay from the date of suspension”. It is only when the member so suspended “shall not be convicted” that the right “to full pay” becomes operative. *451

Nothing in section 434a-14.0 requires a different result. As the titles indicate, the sections are separate and distinct. One relates to suspension of members, the other to discipline. In the latter category the Commissioner is given the power, among others, (1) to forfeit or withhold pay as a punishment for a specified time or (2) to suspend without pay. As to (1), the forfeiture or deduction of pay, punishment is limited to “no more than thirty days' salary” while, as to (2), suspension, there is no such limitation. The condition precedent entitling a member to pay during suspension is that he “shall not be convicted ... of the charges so preferred”. There is a sound basis for adopting a distinction. Forfeiture or withholding of pay implies that the member is not suspended and that he continues to perform his services on the force. The framers of the section apparently felt that the forfeiture of 30 days' pay was sufficient punishment for breach of discipline. However, we have a different situation when we deal with suspension upon charges, pursuant to section 434a-20.0. That implies that the official is relieved of duty during the interval. The Commissioner is accorded a broad discretionary power without limitations. The courts have consistently held that a member of the police force is not entitled to salary during suspension following a conviction on charges. That was the rule under the predecessor section 292 of the Greater New York Charter, which was re-enacted without substantial change as section 434a-20.0 (*People ex rel. Flynn v. Woods*, 218 N. Y. 124; *Halpin v. City of New York*, 54 Misc. 128, appeal dsmd. 146 App. Div. 881), and the rule has been continued as to section 434a-20.0 (*Matter of Baker v. Kennedy*, 6 Misc.2d 589; *Matter of Flood v. Monaghan*, 201 Misc. 560).

It seems clear that if the nature of the punishment rather than the fact of acquittal had been intended -- and we do not so read

the language used -- it would have been a simple matter for the Legislature to have provided that if a member “shall not be dismissed” he shall be entitled to full pay. Section 434a-20.0 is complete and self-contained. Any reference to sections relating to other city employees, using different language, such as section 884-1.0, may not be reconciled and should not be resorted to, as, quite obviously, the different enactments were designed to indicate a different legislative intent. *452

In the *Brenner* matter, we agree with the holding in the court below that the statute is satisfied so long as departmental charges are filed within a reasonable time after suspension and a trial is thereafter held.

The judgments appealed from should be affirmed, without costs.

Van Voorhis, J.

(Dissenting).

The police officers in the *Brenner* action were acquitted of charges in the Court of Special Sessions of conspiracy under section 580 of the Penal Law in connection with their handling of persons charged with motor vehicle violations. The officer in the O'Neill action was acquitted of felonious assault charges in the Kings County Court. They were found guilty, however, after departmental trials in disciplinary proceedings conducted by the Police Department, fined 30 days' pay and placed on probation for one year. In addition to this loss of pay, however, they have been required to forfeit from \$4,330 to \$6,230 apiece in loss of pay accruing over much longer periods while awaiting their departmental trials. The fines which could not exceed 30 days' salary under section 434a-14.0 of the Administrative Code of the City of New York were thus trivial in comparison with their total losses. These actions are to recover plaintiffs' pay while under suspension awaiting departmental trials. It seems to us that they should recover. The Police Commissioner had undoubted power to suspend, without pay, any member of the police force pending the trial of charges (Administrative Code, § 434a-20.0). Plaintiffs might have been discharged from the force as a result of the departmental trials, in which event they could not have recovered salary accruing after suspension. Upon the other hand, however, “Suspension from the performance of the duties of an office does not itself work a forfeiture of the right to the salary attached to the office during the period of suspension. (*Wardlaw v. Mayor, etc., of N. Y.*, 137 N. Y. 194, 200.)” (*People ex rel. Flynn*

v. *Woods*, 218 N. Y. 124, 130.) And in *People ex rel. Ryan v. French* (91 N. Y. 265) it was held that the salary of a patrolman of the police force of the City of New York is incidental to his office and that he is entitled to his entire salary as long as he possesses the title to the office. On this principle, it would follow as matter of law that unless these officers were removed from the force they are entitled to their salaries during *453 their periods of suspension subject only to forfeiting the maximum of 30 days' salary permitted by section 434a-14.0 of the Administrative Code.

Section 884-1.0 of the Administrative Code directs that, except as otherwise provided by law, every head of an agency in New York City is empowered: "In his discretion, to suspend for not more than one month without pay, any subordinate pending the hearing and determination of charges against such subordinate, or the making of any explanation, as the case may be. If the subordinate so suspended be removed, he shall not be entitled to salary or compensation after suspension. If he be not so removed, he shall be entitled to full salary or compensation from the date of suspension to the date of reinstatement, less such deduction or fine as may be imposed." That section expressly entitles plaintiffs to the relief which they demand. No other or contrary disposition of their rights is made by section 434a-20.0 of the Administrative Code relating to suspension of members of the police force. That section states that "If any member so suspended shall not be convicted by the commissioner of the charges so preferred, he shall be entitled to full pay from the date of suspension, notwithstanding such charges and suspension." But this sentence neither adds to nor detracts from section 884-1.0 of the Administrative Code, which has been quoted, applicable to every head of an agency in New York City. Manifestly if the member of the police force is not convicted, he is entitled to full pay from the date of suspension. If he is convicted but is not removed from the force, he is not entitled to recover full pay from the date of

suspension since an amount equivalent to not more than 30 days' salary is deducted for the offense. Nothing in section 434a-20.0, or in any other provision of the Administrative Code, states that he shall not recover that much if he is not removed from the force. He cannot get full pay from the date of suspension in that event, since the amount of his fine must be deducted. He cannot recover any pay if he is removed. He is entitled to full pay from the date of suspension if he is acquitted. Nothing states, however, that, if he is fined but not removed, his maximum fine shall be multiplied many times for the reason that it has taken a long while for him to be reached for trial in the department. The direction that a member of the force shall receive full pay from the date of suspension *454 if he is not convicted of the departmental charges creates no inference that he is not to be paid anything for the period of suspension if he is convicted but not removed from the force. It may be inferred that, in such event, he is not entitled to full pay from the date of suspension, for the reason that the amount of his fine must be deducted. After deduction of the fine, however, the express language of the Administrative Code and the principles of law require that he be reimbursed during the period of suspension minus any fine which has been imposed.

The judgment appealed from should be reversed in each action, with costs in all courts, and judgment directed in favor of appellants for the relief demanded in the complaint after deducting the amounts of plaintiffs' fines.

Chief Judge Desmond and Judges Burke and Foster concur with Judge Dye; Judge Van Voorhis dissents in an opinion in which Judges Fuld and Froessel concur.

In each action: Judgment affirmed.

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