

2. In lieu of a suspension, when the appointing authority establishes that a suspension of the employee would be detrimental to the public health, safety or welfare; or

3. Where an employee has agreed to a fine as a disciplinary option.

(d) An employee may pay a fine of more than five days salary in a lump sum or through installments. Unless otherwise agreed to by the employee, an installment may not be more than five percent of the gross salary per pay for a fine under \$500.00; 10 percent of gross salary per pay period for a fine between \$500.00 and \$1,000; or 15 percent of gross salary per pay period for a fine over \$1,000.

(e) An appointing authority may impose a suspension on the record when the appointing authority and the employee, or, where the employee is covered by a collective negotiations agreement, the employee's majority representative, agree in writing that, for purposes of progressive discipline, the employee will receive a suspension on the record and that it will have the same force and effect for purposes of future disciplinary actions as a suspension actually served by the employee.

Petition for Rulemaking.

See: 30 N.J.R. 3103(a), 30 N.J.R. 3552(a).

Petition for Rulemaking: Notice of Receipt; General Rules and Department Organization Appeals, Discipline and Separations Suspensions on the Record.

See: 38 N.J.R. 1085(a).

Amended by R.2006 d.386, effective November 6, 2006.

See: 38 N.J.R. 2773(a), 38 N.J.R. 4690(a).

In (b), inserted the last sentence; and added (e).

Case Notes

Dismissal of police officer was supported by officer's intentional avoidance of communication with police chief prior to taking unauthorized vacation; officer's conduct was so egregious as to warrant suspension of greater than six months, and civil service rules require dismissal of employee whose offense dictates such suspension. *Cosme v. Borough of East Newark Tp. Committee*, 304 N.J.Super. 191, 698 A.2d 1287 (A.D. 1997).

Correction officer was properly fined in lieu of suspension because his attendance was so critical to the operation of the correction center that a disciplinary suspension could not have been imposed without creating a risk to public health, safety, or welfare; absenteeism had already caused reduction of staff, involuntary overtime, and morale problems and the officer's suspension would have caused further disruption of the operations of the center, which would have been detrimental to public safety (adopting 2008 N.J. AGEN LEXIS 840). In re *Di Memmo*, OAL Dkt. No. CSV 920-08, 2008 N.J. AGEN LEXIS 1068, Final Decision (November 6, 2008).

Cottage training technician's failure to drive a state vehicle safely supported a charge of neglect of duty; since the technician's neglect caused property damage (in the amount of \$1,700), the appropriate form of penalty should have been a fine, providing partial restitution for her actions. However, while the technician's actions caused significant property damage, they were not so egregious as to warrant a fine equivalent to either a 15-day suspension or \$1,700; instead, the proper penalty was a fine equivalent to three days' pay. In re *McCrary*, OAL Dkt. No. CSV 4540-07, 2008 N.J. AGEN LEXIS 1223, Final Decision (October 8, 2008).

When an employee paid a fine in lieu of suspension, the employee was not separated from employment; a fine in lieu of suspension under

N.J.A.C. 4A:2-2.4 was recorded in the employee's personnel record as "x number of days' pay fined in lieu of x number of days suspended." Consequently, the number of days' pay fined was the number to be considered for progressive disciplinary purposes since that was the actual disciplinary penalty imposed (adopting in part and rejecting in part 2005 N.J. AGEN LEXIS 406). In re *Sims*, OAL Dkt. No. CSV 4103-04, 2005 N.J. AGEN LEXIS 1258, Final Decision (September 7, 2005), aff'd per curiam, Docket No. A-4396-05T3, 2007 N.J. Super. Unpub. LEXIS 1514 (App.Div. November 27, 2007).

Traffic signal repairer removed for falsifying application for employment with regard to criminal convictions. *Florenzo v. Bergen County Department of Public Works*, 96 N.J.A.R.2d (CSV) 22.

Police officer who lost police radio through carelessness was appropriately fined. *Przybyszewski v. Gloucester Township Police Department*, 95 N.J.A.R.2d (CSV) 623.

4A:2-2.5 Opportunity for hearing before the appointing authority

(a) An employee must be served with a Preliminary Notice of Disciplinary Action setting forth the charges and statement of facts supporting the charges (specifications), and afforded the opportunity for a hearing prior to imposition of major discipline, except:

1. An employee may be suspended immediately and prior to a hearing where it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services. However, a Preliminary Notice of Disciplinary Action with opportunity for a hearing must be served in person or by certified mail within five days following the immediate suspension.

2. An employee may be suspended immediately when the employee is formally charged with a crime of the first, second or third degree, or a crime of the fourth degree on the job or directly related to the job. See N.J.A.C. 4A:2-2.7.

(b) Where suspension is immediate under (a)1 and (a)2 above, and is without pay, the employee must first be apprised either orally or in writing, of why an immediate suspension is sought, the charges and general evidence in support of the charges and provided with sufficient opportunity to review the charges and the evidence in order to respond to the charges before a representative of the appointing authority. The response may be oral or in writing, at the discretion of the appointing authority.

(c) The employee may request a departmental hearing within five days of receipt of the Preliminary Notice. If no request is made within this time or such additional time as agreed to by the appointing authority or as provided in a negotiated agreement, the departmental hearing may be considered to have been waived and the appointing authority may issue a Final Notice of Disciplinary Action.

(d) A departmental hearing, if requested, shall be held within 30 days of the Preliminary Notice of Disciplinary

Action unless waived by the employee or a later date as agreed to by the parties. See N.J.A.C. 4A:2-2.13 for hearings regarding removal appeals by certain law enforcement officers and firefighters.

(e) Appeals concerning violations of this section may be presented to the Civil Service Commission through a petition for interim relief. See N.J.A.C. 4A:2-1.2.

Amended by R.1989 d.569, effective November 6, 1989.

See: 21 N.J.R. 1766(a), 21 N.J.R. 3448(b).

Added new (e).

Amended by R.1992 d.414, effective October 19, 1992.

See: 24 N.J.R. 2491(a), 24 N.J.R. 3716(a).

Revised (a).

Special amendment, R.2009 d.221, effective June 10, 2009 (to expire July 1, 2010).

See: 41 N.J.R. 2720(a).

In (d), inserted the last sentence; and in (e), substituted "Civil Service Commission" for "Commissioner".

In accordance with N.J.S.A. 52:14B-5.1c, special amendment R.2009 d.221 expires on December 28, 2010.

See: 42 N.J.R. 693(a).

Law Review and Journal Commentaries

Discrimination—Collateral Estoppel—Police Officers. Judith Nallin, 138 N.J.L.J. No. 1, 49 (1994).

Case Notes

Former city police officer's claim that the city and two officials violated the officer's procedural due process rights in disciplining the officer survived summary judgment in part given fact issues as to whether the final disciplinary decision was made by the person authorized to do so for purposes of N.J.A.C. 4A:2-2.5 and 4A:2-2.6; it was unclear whether the decision was made by the "appointing authority" under N.J.A.C. 4A:1-1.3. *Reilly v. City of Atl. City*, 427 F.Supp.2d 507, 2006 U.S. Dist. LEXIS 17208 (D.N.J. 2006).

The requirement of holding departmental hearing within 30 days of service of preliminary notice of disciplinary action against career service public employee was not jurisdictional, and thus, an appointing authority may proceed with disciplinary charges even if it fails to conduct a departmental hearing within the statutorily mandated period. *Goodman v. Department of Corrections*, 367 N.J.Super. 591, 844 A.2d 543.

Ordinarily, permanent civil service employees can be discharged or demoted only for cause, and they have pre-termination appeal and hearing rights; however, provisional employees can be terminated at any time at the discretion of the employer. *Melani v. County of Passaic*, 345 A.2d 579.

Adequate consideration given provisions of Law Against Discrimination. *Ensslin v. Township of North Bergen*, 275 N.J.Super. 352, 646 A.2d 452 (A.D.1994), certification denied 142 N.J. 446, 663 A.2d 1354.

Procedural irregularities at departmental level; cured by hearing at agency level. *Ensslin v. Township of North Bergen*, 275 N.J.Super. 352, 646 A.2d 452 (A.D.1994), certification denied 142 N.J. 446, 663 A.2d 1354.

Waiver of hearing. *Ensslin v. Township of North Bergen*, 275 N.J.Super. 352, 646 A.2d 452 (A.D.1994), certification denied 142 N.J. 446, 663 A.2d 1354.

Departmental hearing required within thirty days of preliminary notice of disciplinary action. *Ensslin v. Township of North Bergen*, 275 N.J.Super. 352, 646 A.2d 452 (A.D.1994), certification denied 142 N.J. 446, 663 A.2d 1354.

Due process rights of corrections officers who were dismissed for failure to comply with mandatory drug test order were violated. *Caldwell v. New Jersey Dept. of Corrections*, 250 N.J.Super. 592, 595 A.2d 1118 (A.D.1991), certification denied 127 N.J. 555, 606 A.2d 367.

Lack of entitlement to post termination hearing. *Grexa v. State*, 168 N.J.Super. 202, 402 A.2d 938 (App.Div.1978).

Due process: right to post termination hearing (statutory). *Nicoletta v. No. Jersey District Water Supply Commission*, 77 N.J. 145, 390 A.2d 90 (1978). Concurring and dissenting opinions.

Right to hearing. *Cunningham v. Dept. of Civil Service*, 69 N.J. 13, 350 A.2d 58 (1975).

Failure to hold a disciplinary hearing within 30 days, though a procedural irregularity, does not preclude an appointing authority from proceeding with the disciplinary process, since N.J.S.A. 11A:2-13 does not expressly indicate that the disciplinary charges are to be dismissed in the event that the appointing authority does not comply with the 30-day requirement. In re Leach, OAL Dkt. No. CSV 6373-07 and CSV 6745-07 (Consolidated), 2008 N.J. AGEN LEXIS 1230, Civil Service Comm'n Decision (October 8, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 228) adopted, which concluded that the appointing authority had the right to impose an indefinite suspension without pay under N.J.A.C. 4A:2-2.5(a)2 on a correction officer until June 26, the date when the officer pleaded guilty to downgraded charges, rather than only until March 7, the date when the County Prosecutor chose to downgrade the indictable offense, as the downgrade was specifically conditioned on a guilty plea. In re Paris, OAL Dkt. No. CSV 12208-06, 2008 N.J. AGEN LEXIS 708, Final Decision (June 11, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 51) adopted, which found that where the specifications in the appointing authority's complaint against a fire alarm operator included his absences, but not his failure to provide additional information regarding the pertinent doctor's notes, the latter could not be the basis of any discipline in light of the fact that it was not referenced in the specifications; an employee must be served with a Preliminary Notice setting forth the charges and a statement of facts supporting them and must be given an opportunity for hearing prior to imposition of major discipline. In re Bugg, OAL Dkt. No. CSV 3975-05, 2008 N.J. AGEN LEXIS 542, Final Decision (February 27, 2008).

Initial Decision (2006 N.J. AGEN LEXIS 963) adopted, which found that the appointing authority was authorized to suspend a senior correction officer indefinitely without pay pending the outcome of his criminal charges because it was alleged that the officer sold a cellular phone to an inmate for \$300; if permitted to remain on the job, the officer's presence would have been a hazard, requiring an immediate suspension to maintain order and effective public service. In re Mangual, OAL Dkt. No. CSV 4032-06, 2006 N.J. AGEN LEXIS 1110, Final Decision (December 6, 2006).

Youth worker's immediate and indefinite suspension was appropriate pursuant to N.J.A.C. 4A:2-2.5 and 4A:2-2.7 after he was charged with a third-degree crime; however, because the worker's subsequent removal was unrelated to the criminal charges, he was still entitled to a determination as to whether he was owed back wages for the time between his immediate suspension and the resolution of the criminal charges against him (adopting result in 2006 N.J. AGEN LEXIS 828 on other grounds). In re Smith, OAL Dkt. No. CSV 2147-05, 2006 N.J. AGEN LEXIS 1100, Final Decision (November 15, 2006).

Forty-five day rule of N.J.S.A. 40A:14-147 did not apply where the appointing authority sought a police officer's removal on the basis of his inability to perform his duties; the appointing authority did not charge the officer with a violation of the internal rules and regulations established for the conduct of a law enforcement unit. In re Del Valle, OAL Dkt. No. CSV 2878-04, 2006 N.J. AGEN LEXIS 533, Final Decision (February 8, 2006), aff'd per curiam, Docket No. A-3934-05T5, 2007 N.J. Super. Unpub. LEXIS 1121 (App.Div. February 8, 2007).

Appointing authority's failure to hold a police officer's departmental hearing within 30 days of service of the preliminary notice of disciplinary action (PNDA) did not require dismissal of the charge because the officer was not unduly prejudiced by having his departmental

hearing occur 39 days after service of the PNDA; the 30-day provision is not an absolute and inflexible requirement, nor is it a jurisdictional requirement that prohibits an appointing authority from proceeding with bringing the charges even though it fails to conduct the hearing within the statutorily mandated period. In re Del Valle, OAL Dkt. No. CSV 2878-04, 2006 N.J. AGEN LEXIS 533, Final Decision (February 8, 2006), aff'd per curiam, Docket No. A-3934-05T5, 2007 N.J. Super. Unpub. LEXIS 1121 (App.Div. February 8, 2007).

When a building maintenance employee was sent home upon arriving late to work, it constituted an immediate suspension for which he was entitled to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to review the charges and evidence and to respond; because the employer failed to comply with these requirements, the employee was entitled to back pay for the day he reported to work and was sent home. In re Wilson, OAL Dkt. No. CSV 2162-05, 2005 N.J. AGEN LEXIS 1046, Final Decision (December 7, 2005).

Initial Decision (2005 N.J. AGEN LEXIS 337) adopted, which found that immediate suspension of a county correction sergeant was proper upon a finding that his suspension was necessary to maintain the safety and effective direction of the prison; the officer's actions as a supervisor and prison official in directing his subordinates to violate rules and procedures, and causing posts to be unmanned resulting in mandated inmate checks not being conducted, were putting the facility, staff, and inmates at risk. In re Matza, OAL Dkt. No. CSV 1967-01, 2005 N.J. AGEN LEXIS 1045, Final Decision (November 22, 2005), aff'd per curiam, No. A-2481-05T1, 2007 N.J. Super. Unpub. LEXIS 907 (App.Div. June 19, 2007).

Hearing de novo on appeal to Merit System Board corrected alleged inadequate notice. Coley v. Rowan College, 94 N.J.A.R.2d (CSV) 4.

Absence of timely hearing required dismissal of disciplinary charges. Marjarum v. Hamilton Township Division of Police, 93 N.J.A.R.2d (CSV) 143.

Failure to comply with appropriate regulations in seeking to discipline employee. Hamilton v. Camden Housing Authority, 93 N.J.A.R.2d (CSV) 85.

Failure to provide employee with notice of dismissal; acts following meeting were not void pursuant to N.J.S.A. 10:4-15. McManus v. Housing Authority of the City of Englewood, 92 N.J.A.R.2d (CSV) 747.

Preliminary notice of disciplinary action met minimum discovery requirements. N.J.S.A. 40A:14-147, 11A:2-13. Gabbianelli v. Monroe Township Police Department, 91 N.J.A.R.2d (CSV) 79.

4A:2-2.6 Hearings before the appointing authority

(a) The hearing shall be held before the appointing authority or its designated representative.

(b) The employee may be represented by an attorney or authorized union representative.

(c) The parties shall have the opportunity to review the evidence supporting the charges and present and examine witnesses. The employee shall not be required to testify, but an employee who does testify will be subject to cross-examination.

(d) Within 20 days of the hearing, or such additional time as agreed to by the parties, the appointing authority shall make a decision on the charges and furnish the employee either by personal service or certified mail with a Final Notice of Disciplinary Action. See N.J.A.C. 4A:2-2.13 for the

issuance of a Final Notice in removal appeals by certain law enforcement officers and firefighters.

Special amendment, R.2009 d.221, effective June 10, 2009 (to expire July 1, 2010).

See: 41 N.J.R. 2720(a).

In (d), inserted the last sentence.

In accordance with N.J.S.A. 52:14B-5.1c, special amendment R.2009 d.221 expires on December 28, 2010.

See: 42 N.J.R. 693(a).

Case Notes

Due process. Carr v. Sharp, C.A., 454 F.2d 271 (1971).

Requirement of exhaustion of administrative remedies. City of New Brunswick v. Speights, 157 N.J. Super. 9, 384 A.2d 225 (Co.1978).

Res judicata: delay in hearing: limits on de novo hearing. In re Darcy, 114 N.J. Super. 454, 277 A.2d 226 (1971).

Receipt of second copy of final notice of disciplinary action did not extend time for filing appeal. Russ v. Human Services Department, 95 N.J.A.R.2d (CSV) 647.

Public employee voluntarily and deliberately planned his nonappearance at hearing and was not entitled to further hearing. Cue v. Camden County, 92 N.J.A.R.2d (CSV) 131.

4A:2-2.7 Actions involving criminal matters

(a) When an appointing authority suspends an employee based on a pending criminal complaint or indictment, the employee must be served with a Preliminary Notice of Disciplinary Action. The notice should include a statement that N.J.S.A. 2C:51-2 may apply to the employee, and that the employee may choose to consult with an attorney concerning the provisions of that statute.

1. The employee may request a departmental hearing within five days of receipt of the Notice. If no request is made within this time, or such additional time as agreed to by the appointing authority or as provided in a negotiated agreement, the appointing authority may then issue a Final Notice of Disciplinary Action under (a)3 below. A hearing shall be limited to the issue of whether the public interest would best be served by suspending the employee until disposition of the criminal complaint or indictment. The standard for determining that issue shall be whether the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services.

2. The appointing authority may impose an indefinite suspension to extend beyond six months where an employee is subject to criminal charges as set forth in N.J.A.C. 4A:2-2.5(a)2, but not beyond the disposition of the criminal complaint or indictment.

i. Where an employee who has been indefinitely suspended enters Pre-Trial Intervention (PTI) or has received a conditional discharge, the criminal complaint or indictment shall not be deemed disposed of until completion of PTI or until dismissal of the charges due

to the employee's satisfaction of the conditions in a conditional discharge, as the case may be.

ii. An appointing authority may continue an indefinite suspension until completion of PTI or until satisfaction of the conditions imposed in a conditional discharge. If an appointing authority chooses not to continue an indefinite suspension during the PTI period or during the period of conditional discharge, it may restore the employee to employment or initiate disciplinary action against the employee.

3. Where the appointing authority determines that an indefinite suspension should be imposed, a Final Notice of Disciplinary Action shall be issued stating that the employee has been indefinitely suspended pending disposition of the criminal complaint or indictment.

(b) When a court has entered an order of forfeiture pursuant to N.J.S.A. 2C:51-2, the appointing authority shall notify the employee in writing of the forfeiture and record the forfeiture in the employee's personnel records. The appointing authority shall also forward a copy of this notification to the Department of Personnel.

1. If the criminal action does not result in an order of forfeiture issued by the court pursuant to N.J.S.A. 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 N.J.A.C. 4A:2-2.5 and 2.6.

(c) Where an employee has pled guilty or been convicted of a crime or offense which is cause for forfeiture of employment under N.J.S.A. 2C:51-2 but the court has not entered an order of forfeiture, the appointing authority may seek forfeiture by applying to the court for an order of forfeiture. The appointing authority shall not hold a departmental hearing regarding the issue of the applicability of N.J.S.A. 2C:51-2. If the court declines to enter an order of forfeiture in response to the appointing authority's application, the appointing authority may hold a departmental hearing regarding other disciplinary charges, if any, as provided in (b)1 above.

Amended by R.1989 d.569, effective November 6, 1989.
See: 21 N.J.R. 1766(a), 21 N.J.R. 3448(b).

In (a)1: added text, "The standard ... public services."
Amended by R.1992 d.414, effective October 19, 1992.
See: 24 N.J.R. 2491(a), 24 N.J.R. 3716(a).

Revised (a).
Public Notice: Notice of Receipt of a Petition for Rulemaking.
See: 29 N.J.R. 5333(a).

Amended by R.2000 d.433, effective October 16, 2000.
See: 32 N.J.R. 2275(a), 32 N.J.R. 3870(a).

Rewrote (b) and (c).
Amended by R.2006 d.271, effective July 17, 2006.
See: 37 N.J.R. 4345(a), 38 N.J.R. 3016(b).

Added (a)2i and (a)2ii.

Case Notes

Forfeiture of public office was not unconstitutional. *State v. Timoldi*, 277 N.J.Super. 297, 649 A.2d 872 (A.D.1994), certification denied 142 N.J. 449, 663 A.2d 1356.

Merit System Board of State Department of Personnel did not have exclusive jurisdiction for prosecution of forfeiture action against senior corrections officer. *State v. Lee*, 258 N.J.Super. 313, 609 A.2d 513 (A.D.1992).

Whether public employee's conviction involves or touches employment does not depend upon whether criminally proscribed acts took place within immediate confines of employment's daily routine. *Moore v. Youth Correctional Institute at Annandale*, 230 N.J.Super. 374, 553 A.2d 830 (A.D.1989), affirmed 119 N.J. 256, 574 A.2d 983.

Senior corrections officer's criminal conviction for harassing his immediate superior was one "involving or touching" his employment. *Moore v. Youth Correctional Institute at Annandale*, 230 N.J.Super. 374, 553 A.2d 830 (A.D.1989), affirmed 119 N.J. 256, 574 A.2d 983.

Initial Decision (2008 N.J. AGEN LEXIS 108) adopted, which concluded that a campus police officer was properly suspended upon allegations that he used university equipment to send numerous e-mails to a fellow employee whom he was pursuing romantically, e-mailed a confidential police report to her, and posted an offensive and menacing MySpace.com profile in her name after being rejected; the officer's misconduct involved, and directly touched upon, his employment. In re *Mandi*, OAL Dkt. No. CSV 4824-07, 2008 N.J. AGEN LEXIS 559, Final Decision (April 23, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 85) adopted, which concluded that a police officer was properly indefinitely suspended from his position pending the outcome of criminal charges against him after it was alleged that he was stealing items from impounded vehicles; the charges against him not only involved dishonesty but also a breach of the public trust by the very police officer whose duty it was to protect and preserve the property he allegedly appropriated for his own use. In re *Halpern*, OAL Dkt. No. CSV 7414-07, 2008 N.J. AGEN LEXIS 516, Final Decision (March 26, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 60) adopted, which dismissed a police officer's appeal from his indefinite suspension; the township appropriately suspended the officer indefinitely after he was charged with second-degree crimes and the case was inactive for years at the officer's request. In re *Nemes*, OAL Dkt. No. CSV 8464-00, 2008 N.J. AGEN LEXIS 522, Final Decision (February 27, 2008).

Employee's highly inappropriate comment advocating violence to a developmentally challenged student coupled with the employee's prior history of an alleged altercation with a fellow employee provided a sufficient basis for the appointing authority to order a fitness for duty psychological examination. However, the indefinite suspension of the employee for refusing to take the psychological examination was improper, as indefinite suspension is limited by N.J.A.C. 4A:2-2.7 to matters in which there is a pending criminal complaint or indictment (adopting in part and rejecting in part 2007 N.J. AGEN LEXIS 704). In re *Veronelli*, OAL Dkt. No. CSV 3881-07, 2007 N.J. AGEN LEXIS 1023, Merit System Board Decision (December 5, 2007).

Initial Decision (2006 N.J. AGEN LEXIS 963) adopted, which found that the appointing authority was authorized to suspend a senior correction officer indefinitely without pay pending the outcome of his criminal charges; it was alleged that the officer sold a cellular phone to an inmate for \$300 and the criminal charges were, therefore, directly related to his job. In re *Mangual*, OAL Dkt. No. CSV 4032-06, 2006 N.J. AGEN LEXIS 1110, Final Decision (December 6, 2006).

Youth worker's immediate and indefinite suspension was appropriate pursuant to N.J.A.C. 4A:2-2.5 and 4A:2-2.7 after he was charged with a third-degree crime; however, because the worker's subsequent removal was unrelated to the criminal charges, he was still entitled to a determination as to whether he was owed back wages for the time

between his immediate suspension and the resolution of the criminal charges against him (adopting result in 2006 N.J. AGEN LEXIS 828 on other grounds). In re Smith, OAL Dkt. No. CSV 2147-05, 2006 N.J. AGEN LEXIS 1100, Final Decision (November 15, 2006).

Initial Decision (2006 N.J. AGEN LEXIS 72) adopted, which found that deceased motor vehicle employee's appeal was moot, and employee's indefinite suspension under N.J.A.C. 4A:2-2.7 would have been upheld; the employee's access to records in her daily functions aided her ability to perpetuate the crime and subverted the normal system for obtaining licenses and undermined the public trust in the Motor Vehicle Commission's ability to serve the public. In re Love, OAL Dkt. No. CSV 2232-04, 2006 N.J. AGEN LEXIS 1102, Final Decision (March 22, 2006).

Automatic termination of correction sergeant based on conviction for crime of dishonesty affirmed. Christian v. Department of Corrections, Northern State Prison, 97 N.J.A.R.2d (CSV) 636.

Arrest for possession of illegal drugs provides grounds for blood test and removal. Pickett v. Department of Corrections, 97 N.J.A.R.2d (CSV) 546.

Corrections officer's illegal purchase of ammunition justifies removal. Nelsen v. East Jersey State Prison, 97 N.J.A.R.2d (CSV) 347.

Corrections officer with drugs in car suffers removal even though criminal action acquits. Reinhardt v. East Jersey State Prison, 97 N.J.A.R.2d (CSV) 166.

School district employee removed for arrest on charges of possessing illegal drugs. Hargrove v. State Operated School District of Newark, 97 N.J.A.R.2d (CSV) 112.

Corrections officer was not entitled to back pay for period of suspension pending resolution of criminal charges. Auberzinsky v. Cumberland County Sheriff's Department, 96 N.J.A.R.2d (CSV) 372.

Public works truck driver dismissed after conviction for offense involving minor child. Furde v. Hamilton Township Department of Public Works, 96 N.J.A.R.2d (CSV) 262.

No entitlement to continued employment in sensitive position for employee facing criminal and narcotics charges. Spellman v. Township of Parsippany-Troy Hills Police Department, 96 N.J.A.R.2d (CSV) 214.

Where corrections officer's off-duty simple assault on supervisor related to on-duty events, assault constituted insubordination and conduct unbecoming a public employee and warranted dismissal. Melillo v. Department of Corrections, East Jersey State Prison, 96 N.J.A.R.2d (CSV) 184.

Corrections officer's conviction for obstruction of justice and driving while under the influence justifies 78-day suspension. Scott v. Burlington County Jail, 96 N.J.A.R.2d (CSV) 171.

Criminal convictions result in summary forfeiture of school custodian's position. Turner v. State-Operated School District of the City of Newark, 96 N.J.A.R.2d (CSV) 146.

State corrections officer terminated for firing gun during off-duty argument. Dunns v. Department of Corrections, 96 N.J.A.R.2d (CSV) 108.

Park maintenance worker forfeits position due to conviction for disorderly persons offense involving dishonesty. Alsheimer v. County of Middlesex, 96 N.J.A.R.2d (CSV) 7.

Conviction on plea of guilty to drug offense warranted correction officer's termination. Ricks v. Department of Corrections, 95 N.J.A.R.2d (CSV) 441.

Filing of criminal charges directly relating to employment warranted indefinite suspension of safety specialist. Washington v. Division of Motor Vehicles, 95 N.J.A.R.2d (CSV) 336.

Indefinite suspension of police officer pending disposition of criminal indictment was not warranted absent evidence that public interest would be served. Nagy v. Borough of Carteret, 95 N.J.A.R.2d (CSV) 224.

Correction officer's termination justified; shooting of companion with stun gun. Curry v. Burlington County Jail, 95 N.J.A.R.2d (CSV) 92.

Conviction on plea of guilty to charge of conspiring to sell a false document of age was cause for forfeiture of correction officer's public employment. State Department of Corrections v. Gomez, 95 N.J.A.R.2d (CSV) 77.

Suspension; pendency of criminal charges. Abdunafi v. East Jersey State Prison, 94 N.J.A.R.2d (CSV) 653.

Suspension and removal of public employee convicted of a crime was justified. DeLeone v. Essex County, 94 N.J.A.R.2d (CSV) 544.

Automatic forfeiture of employment upon conviction. Hudson County v. Seinfeld, 94 N.J.A.R.2d (CSV) 516.

Suspension pending disposition of criminal complaint was in the public's interest. Lordi v. Woodbridge Township, 94 N.J.A.R.2d (CSV) 540.

Automatic forfeiture of employment upon conviction. City of Bayonne Department of Public Works v. Timoldi, 94 N.J.A.R.2d (CSV) 511.

Indefinite suspension was justified pending disposition of criminal charges. Gonzalez v. Essex County Welfare Board, 94 N.J.A.R.2d (CSV) 451.

Conviction on federal drug-related charges effected a forfeiture of positions. Roman v. Atlantic City Police Department, 94 N.J.A.R.2d (CSV) 250.

Automatic forfeiture of public employment upon criminal conviction of the third degree under N.J.S.A. 2C:51-2. Coxson v. Newark Board of Education, 94 N.J.A.R.2d (CSV) 129.

Pharmacist suspended indefinitely without pay pending disposition of criminal charges. Grillo v. Bergen Pines County Hospital, 94 N.J.A.R.2d (CSV) 81.

Guilty plea; however consideration of mitigating factors warranted the maximum suspension rather than permanent removal. Walcott v. City of Plainfield, 94 N.J.A.R.2d (CSV) 65.

Suspension pending resolution of criminal charges was appropriate; however, termination was not justified. Walcott v. City of Plainfield, 94 N.J.A.R.2d (CSV) 65.

Indictment justified suspension of welfare supervisor. Jersey City Welfare Board v. Miller, 94 N.J.A.R.2d (CSV) 55.

Forfeit of public employment; conviction of drug and alcohol-related offenses. Greystone Park Psychiatric Hospital, 94 N.J.A.R.2d (CSV) 14.

Termination; conduct unbecoming a public employee; physical attack by two employees on another employee. Bryson v. Division of Motor Vehicles, 94 N.J.A.R.2d (CSV) 1.

Hospital employee was entitled to back pay, seniority and benefits following dismissal of indictment. Gillard v. Trenton Psychiatric Hospital, 93 N.J.A.R.2d (CSV) 730.

Employee forfeited employment upon pleading guilty to criminal charges. Martin v. North Princeton Developmental Center, 93 N.J.A.R.2d (CSV) 675.

Police officer automatically forfeited position; criminal conviction. *Lehman v. Woodbridge Township Police Department*, 93 N.J.A.R.2d (CSV) 599.

Indefinite suspension pending disposition of sexual assault charges. *Vengenock v. Salem County*, 93 N.J.A.R.2d (CSV) 558.

Six-month suspension was warranted for conviction of a motor vehicle violation. *Turner v. Department of Higher Education*, 93 N.J.A.R.2d (CSV) 440.

Public employment; convictions of third-degree crimes. N.J.S.A. 2C:51-2. *Williams v. Marlboro Psychiatric Hosp., State Dept. of Human Services*, 93 N.J.A.R.2d (CSV) 421.

Convictions forfeited public employment. *Williams v. Marlboro Psychiatric Hospital*, 93 N.J.A.R.2d (CSV) 421.

Suspended employee did not resign by failure to report dismissal of criminal charges. *McCray v. Department of the Treasury*, 93 N.J.A.R.2d (CSV) 363.

Possession of controlled dangerous substance warranted removal. *Hickman v. Marlboro Psychiatric Hospital*, 93 N.J.A.R.2d (CSV) 356.

Indefinite suspension of employee pending disposition of criminal charges was proper. *Simeone v. Woodbridge Township Department of Public Works*, 93 N.J.A.R.2d (CSV) 340.

Continuation of suspension of correction officer until disposition of criminal charges ordered. *Rivera v. New Jersey Training School for Boys—Jamesburg*, 93 N.J.A.R.2d (CSV) 219.

Guilty plea constituted a forfeiture of position. *Watkins v. Bergen Pines County Hospital*, 92 N.J.A.R.2d (CSV) 768.

Issue of whether suspension was in the public interest was rendered moot by resignation. *Coleman v. Dept. of Public Works, Borough of Ringwood*, 92 N.J.A.R.2d (CSV) 510.

Guard was properly suspended pending outcome of charges. *Alton v. Newark Board of Education*, 92 N.J.A.R.2d (CSV) 478.

Suspension of youth worker was warranted pending disposition of criminal charge. *Moore v. Division of Youth and Family Services*, 92 N.J.A.R.2d (CSV) 433.

County employee forfeited her office as a result of conviction. *Starling v. Essex County Citizen Services, Division of Welfare*, 92 N.J.A.R.2d (CSV) 431.

Indefinite suspension of police officer was warranted. *Beck v. City of Trenton*, 92 N.J.A.R.2d (CSV) 411.

Forfeit of position; criminal conviction. *Rivera v. City of Bridgeton*, 92 N.J.A.R.2d (CSV) 311.

Indefinite suspension; criminal charges. *Smith v. Essex County Judiciary*, 92 N.J.A.R.2d (CSV) 271.

Indefinite suspension; disposition of charges. *Naro v. The Fire Division of the Department of Public Safety of the City of Trenton*, 92 N.J.A.R.2d (CSV) 211.

School bus driver disqualified from school employment due to drug offense. *Kovalak v. New Jersey State Department of Education*, 97 N.J.A.R.2d (EDU) 456.

School superintendent dismissed due to unbecoming conduct. In the Matter of the Tenure Hearing of Robert R. Vitacco, 97 N.J.A.R.2d (EDU) 449.

Acquitted school custodian was entitled to back pay but agreement with counsel for reimbursement of attorney fees was not binding on the

school board. *Griffin v. Board of Education of the City of Paterson*, 93 N.J.A.R.2d (EDU) 882.

4A:2-2.8 Appeals to Civil Service Commission

(a) An appeal from a Final Notice of Disciplinary Action must be filed within 20 days of receipt of the Notice by the employee. Receipt of the Notice on a different date by the employee's attorney or union representative shall not affect this appeal period.

(b) If the appointing authority fails to provide the employee with a Final Notice of Disciplinary Action, an appeal may be made directly to the Commission within a reasonable time.

(c) The appeal shall be substantially similar in format to the Major Disciplinary Appeal Form illustrated in the subchapter Appendix, incorporated herein by reference, and the employee shall provide a copy of the appeal to the appointing authority. The employee shall attach to the appeal a copy of the Preliminary Notice of Disciplinary Action and, unless (b) above is applicable, the Final Notice of Disciplinary Action. The appeal shall also include the following information:

1. The name, title, mailing address and telephone number of the appointing authority representative to whom the notices were provided;

2. The employee's name, mailing address and telephone number; and

3. The action that is being appealed.

(d) The employee should also include a statement of the reason(s) for the appeal and the requested relief.

(e) Failure of an employee to provide the information specified in (c) above shall not result in dismissal of the appeal, but shall delay processing of the appeal until the required information is provided, and may result in a reduced back pay award pursuant to N.J.A.C. 4A:2-2.10(d)4.

(f) See N.J.A.C. 4A:2-2.13 for removal appeals by certain law enforcement officers and firefighters.

Amended by R.1995 d.416, effective August 7, 1995.

See: 27 N.J.R. 1837(b), 27 N.J.R. 2884(b).

In (a), added the provision governing receipt of notice by the employee's attorney or union representative.

Amended by R.1998 d.518, effective November 2, 1998.

See: 30 N.J.R. 2325(a), 30 N.J.R. 3935(a).

Added (c) through (e).

Special amendment, R.2009 d.221, effective June 10, 2009 (to expire July 1, 2010).

See: 41 N.J.R. 2720(a).

Section was "Appeals to Merit System Board". In (b), substituted "Commission" for "Board"; and added (f).

In accordance with N.J.S.A. 52:14B-5.1c, special amendment R.2009 d.221 expires on December 28, 2010.

See: 42 N.J.R. 693(a).

Case Notes

Director of county board of social services possessed final authority regarding the board's personnel and discipline decisions, as required for

municipal liability under § 1983 based upon former county employee's First Amendment retaliation claims. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983; N.J.Admin. Code tit. 4A, §§ 2-2.8, 2-3.2. *Marrero v. Camden County Board of Social Services*, 164 F.Supp.2d 455 (D.N.J. 2001).

Administrative code section providing the receipt of Final Notice of Disciplinary Action on a different date by the employee's attorney or union representative shall not affect the appeal period did not conflict with the legislative intent of the Civil Service Act. *Mesghali v. Bayside State Prison*, 334 N.J.Super 617, 760 A.2d 805 (N.J.Super.A.D. 2000).

Remand to Commission for supplemental hearing. Dept. of Law and Public Safety v. Miller, 115 N.J.Super. 122, 278 A.2d 495 (App.Div. 1971).

Human Services Assistant's working test period appeal was moot because the assistant's separate appeal of her removal on disciplinary charges was untimely filed and therefore dismissed; the denial of a hearing due to the late filing was not subject to an appeal before the OAL but had to be appealed to the Superior Court, Appellate Division. *In re Black*, OAL Dkt. No. CSV 8953-06, 2007 N.J. AGEN LEXIS 1176, Final Decision (June 20, 2007).

Where an employee appealed from the appointing authority's decision to remove her from her position, but failed to appeal other disciplinary actions taken against her within 20 days, the Merit System Board had jurisdiction over the issue of whether the employee was properly removed, but did not have jurisdiction to render a decision on the other disciplinary actions (adopting in part and rejecting in part 2006 N.J. AGEN LEXIS 734). *In re Small*, OAL Dkt. No. CSV 3331-03, 2007 N.J. AGEN LEXIS 1106, Final Decision (January 17, 2007).

Administrative Law Judge may only review an employee's discipline if the matter is transmitted by the Merit System Board; an ALJ does not have the authority to determine whether an appeal has been filed (adopting in part and rejecting in part 2006 N.J. AGEN LEXIS 734). *In re Small*, OAL Dkt. No. CSV 3331-03, 2007 N.J. AGEN LEXIS 1106, Final Decision (January 17, 2007).

Initial Decision (2006 N.J. AGEN LEXIS 991) adopted, which found that a cottage training technician's appeal from a disciplinary action in which he was removed from his employment was moot where the technician failed to timely appeal from a second disciplinary action that also resulted in his removal. *In re Clarke*, OAL Dkt. No. CSV 2040-06, 2006 N.J. AGEN LEXIS 1098, Final Decision (December 20, 2006).

Initial Decision (2005 N.J. AGEN LEXIS 528) adopted, which concluded that a judiciary clerk's appeal from her removal was dismissed as untimely where neither the Merit System Board, the appointing authority, or the Office of Administrative Law received any notice of appeal. *In re Keels*, OAL Dkt. No. CSV 9883-03, 2005 N.J. AGEN LEXIS 1226, Final Decision (October 19, 2005).

Where an employee received pertinent disciplinary notices in which he was specifically advised of the applicable 20-day time period for appealing, but failed to do so, the appeal was dismissed; the applicable time limit is jurisdictional and mandatory. *In re Floyd*, OAL Dkt. No. CSV 5660-03, 2005 N.J. AGEN LEXIS 427, Initial Decision (August 19, 2005), adopted (Merit System Board September 21, 2005).

Receipt of second copy of final notice of disciplinary action did not extend time for filing appeal. *Russ v. Human Services Department*, 95 N.J.A.R.2d (CSV) 647.

Terminated employee did not file an objection to the employer's action in terminating her employment within reasonable period of time. *Gibbons v. Vineland Developmental Center*, 92 N.J.A.R.2d (CSV) 491.

Charges against psychiatric hospital worker would be dismissed where alleged victim left the state and could not be located. *Godwin v. Marlboro Psychiatric Hosp.*, 92 N.J.A.R.2d (CSV) 96.

4A:2-2.9 Commission hearings

(a) Requests for a Commission hearing will be reviewed and determined by the Chairperson or the Chairperson's designee.

(b) Major discipline hearings will be heard by the Commission or referred to the Office of Administrative Law for hearing before an administrative law judge, except that an appeal by certain law enforcement officers or firefighters of a removal shall be heard as provided in N.J.A.C. 4A:2-2.13. Minor discipline matters will be heard by the Commission or referred to the Office of Administrative Law for a hearing before an administrative law judge for an employee's last suspension or fine for five working days or less where the aggregate number of days the employee has been suspended or fined in a calendar year, including the last suspension or fine, is 15 working days or more, or for an employee's last suspension or fine where the employee receives more than three suspensions or fines of five working days or less in a calendar year. See N.J.A.C. 1:1 for OAL hearing procedures.

1. Where an employee has pled guilty to or been convicted of a crime or offense which is cause for forfeiture of employment under N.J.S.A. 2C:51-2, but the court has not issued an order of forfeiture, the Commission shall not refer the employee's appeal for a hearing regarding the applicability of N.J.S.A. 2C:51-2 nor make a determination on that issue. See N.J.A.C. 4A:2-2.7.

2. Where a court has entered an order of forfeiture, and the appointing authority has so notified the employee, but the employee disputes whether an order of forfeiture was actually entered, the Commission may make a determination on the issue of whether the order was actually entered. See N.J.A.C. 4A:2-2.7.

3. Notwithstanding (b)1 and 2 above, the Commission may determine whether an individual must be discharged from a State or local government position due to a permanent disqualification from public employment based upon the prior conviction of a crime or offense involving or touching on a previously held public office or employment, provided, however, that the Attorney General or county prosecutor has not sought or received a court order waiving the disqualification provision. See N.J.S.A. 2C:51-2(d) and (e).

(c) The Commission may adopt, reject or modify the recommended report and decision of an administrative law judge. Copies of all Commission decisions shall be served personally or by regular mail upon the parties.

(d) The Commission may reverse or modify the action of the appointing authority, except that removal shall not be substituted for a lesser penalty.

Amended by R.1995 d.417, effective August 7, 1995. See: 27 N.J.R. 1838(a), 27 N.J.R. 2885(a).

In (a), substituted the Commissioner or the Commissioner's designee for the Board as the party that does the review.

Amended by R.2000 d.433, effective October 16, 2000.

See: 32 N.J.R. 2275(a), 32 N.J.R. 3870(a).

In (b), amended the N.J.A.C. reference in the introductory paragraph, and added 1 through 3.

Amended by R.2006 d.271, effective July 17, 2006.

See: 37 N.J.R. 4345(a), 38 N.J.R. 3016(b).

In (b), added the second sentence.

Special amendment, R.2009 d.221, effective June 10, 2009 (to expire July 1, 2010).

See: 41 N.J.R. 2720(a).

Section was "Board hearings". Substituted "Commission" for "Board" throughout; in (a), substituted "Chairperson or the Chairperson's" for "Commissioner or Commissioner's"; and in the introductory paragraph of (b), inserted "except that an appeal by certain law enforcement officers or firefighters of a removal shall be heard as provided in N.J.A.C. 4A:2-2.13".

In accordance with N.J.S.A. 52:14B-5.1c, special amendment R.2009 d.221 expires on December 28, 2010.

See: 42 N.J.R. 693(a).

Case Notes

Civil Service Commission's duty to review findings of administrative law judge prior to acceptance or rejection of judge's recommendations (citing former rule N.J.A.C. 4:1-5.4). In the Matter of Morrison, 216 N.J.Super. 143, 523 A.2d 238 (App.Div.1987).

Removal hearing—employee service record must be in evidence (citing former N.J.A.C. 4:1-16.9). In the Matter of Parlow, 192 N.J.Super. 247, 469 A.2d 940 (App.Div.1983).

Entitlement to hearing as matter of fundamental fairness. Cunningham v. Dept. of Civil Service, 69 N.J. 13, 350 A.2d 58 (1975).

Deputy fire chief was entitled to appeal seven-day suspension as "major disciplinary action," notwithstanding appointing authority's argument that since deputy's normal work schedule was to work one 24-hour shift and then have three 24-hour tours off duty, with the 24-hour tour of duty being divided into two 12-hour shifts, therefore the deputy was effectively suspended for only two 24-hour tours of duty or a four-day suspension during the seven calendar day suspension. The five-day standard for major disciplinary action refers to five working days of not more than 40 hours of pay and since the deputy was suspended for 48 hours, his suspension was considered a major disciplinary action equal to six days and entitled him to a hearing on the discipline. In re Crowder, OAL Dkt. No. CSV 2998-08, 2008 N.J. AGEN LEXIS 1053, Final Decision (October 22, 2008).

Based on a library assistant's disciplinary record, including a recent 10-day suspension, and the nature of the incident, in which the assistant was argumentative and loud to the public information officer, resulting in the officer asking the assistant to leave her office five times before he finally left, a 30-day suspension, rather than 15 days as recommended by the ALJ, was the appropriate penalty. In re Daughtry, OAL Dkt. No. CSV 10171-06, 2008 N.J. AGEN LEXIS 586, Final Decision (May 7, 2008).

Although a prison cooking instructor had valid, substantiated excuses as to why she was absent from work one day and why she did not call her supervisor in a timely manner on another, she failed to present a convincing reason for failing to abide by the appointing authority's call-on and call-off policy for a third absence, even in light of the accommodations the instructor received under the FMLA; however, removal was not consistent with the principles of progressive discipline, considering that the instructor's prior record consisted of only minor discipline and her medical condition mitigated the offense. In re Debias, OAL Dkt. No. CSV 6114-07, 2008 N.J. AGEN LEXIS 508, Merit System Board Decision (May 7, 2008).

Removal of a high school security guard for chronic or excessive absenteeism and violation of Consent Order was modified to a resignation in good standing, where the employee's absences were due to her disability, domestic violence incidents, and/or child care concerns; although the employee may not have provided timely documentation for

her absences, she did eventually present documentation. In re Sanders, OAL Dkt. No. CSV 11115-07, 2008 N.J. AGEN LEXIS 591, Final Decision (April 23, 2008).

Removal modified to resignation in good standing for a nursing home Institutional Attendant whose medical condition rendered her incapable of performing the essential lifting functions of the position; in light of the fact that the employee's problems were not specifically performance related or based on misconduct, and were based instead on a documented medical condition, the disciplinary penalty of removal was unduly harsh. In re Clarke, OAL Dkt. No. CSV 4495-07, 2008 N.J. AGEN LEXIS 551, Final Decision (April 23, 2008).

Senior alcoholism counselor who failed to comply with repeated directives to complete the mandatory coursework required to obtain the proper license/certification for her position could not perform the essential functions of her job and separation from employment was required; however, in light of the fact that the counselor's problems were not specifically performance related or based on misconduct, but were based instead on a change in the qualifications needed to hold her title, the disciplinary penalty of removal was modified to a resignation in good standing. In re VanDerveer, OAL Dkt. No. CSV 6265-07, 2008 N.J. AGEN LEXIS 511, Final Decision (February 27, 2008).

Based on divergent testimony and a credibility determination regarding certain critical facts, Fire Alarm Operator (also known as a dispatcher) falsely represented himself as a firefighter to a police officer during a motor vehicle stop, constituting conduct unbecoming a public employee, and left his confinement during sick leave without first contacting his tour commander; Merit System Board increased 30-working day suspension to 120-working day suspension (adopting in part and rejecting in part 2008 N.J. AGEN LEXIS 3). In re McFadden, OAL Dkt. No. CSV 07267-07, 2008 N.J. AGEN LEXIS 579, Final Decision (February 13, 2008).

Penalty increased to a 45 working day suspension for a School Clerk who was found, on conflicting evidence, to have engaged in such conduct as leaving her post without authorization and making defiant and disrespectful comments to a supervisor. The employee's infractions were consistent with a prior pattern of similar misconduct and served as a significant disruption to the smooth functioning of the appointing authority, and the employee's apparent disrespectful attitude was especially a concern given the educational setting (adopting in part and rejecting in part 2007 N.J. AGEN LEXIS 735). In re Ramos, OAL Dkt. No. CSV 3883-07, 2008 N.J. AGEN LEXIS 541, Final Decision (February 13, 2008).

Where police officer was charged with violating order to attend a pistol range for weapons qualifications by failing to attend or notify his supervisor of his absence, ALJ's imposition of eight-day suspension (forfeiture of eight vacation days) was improper and penalty was increased to a 120 working day suspension. It was implausible that an experienced police officer could have mistakenly thought that the mandatory firearms training conducted twice per year under the guidelines of the State Attorney General would be optional for him, and in light of the officer's extensive disciplinary record, his actions were egregious and worthy of a severe sanction, placing him on notice that any future infraction might lead to his removal from employment. In re Martin, OAL Dkt. No. CSV 1303-06, 2008 N.J. AGEN LEXIS 528, Final Decision (January 16, 2008).

Eight-day suspension for unauthorized absences was not warranted where the evidence showed that supervisors condoned the practice of leaving work early upon completion of an inspection and the supervisors themselves received six and eight-day suspensions; nonetheless, the ALJ's recommendation of a one-day suspension was not sufficient, and a more appropriate penalty was a five-day suspension (adopting in part and rejecting in part 2007 N.J. AGEN LEXIS 732). In re Thompson, OAL Dkt. No. CSV 774-07, 2007 N.J. AGEN LEXIS 1017, Final Decision (December 19, 2007).

Removal of county correction officer, based on the charge of inability to perform duties, was unduly harsh where the officer's problems were the result of a medical condition, permanent uncontrolled glaucoma in the right eye, and it was undisputed that there was no history of

disciplinary actions against the officer; the circumstances provided a sufficient basis to modify the removal to a resignation in good standing, pursuant to N.J.A.C. 4A:2-2.9(d) (adopting in part and rejecting in part 2007 N.J. AGEN LEXIS 705). In re Gore-Bell, OAL Dkt. No. CSV 3975-06, 2007 N.J. AGEN LEXIS 1024, Final Decision (December 5, 2007).

Initial Decision (2007 N.J. AGEN LEXIS 701) adopted, which increased the penalty from a 35-day suspension to a 90-day suspension, where a food service employee called in sick because he was not granted vacation leave he thought he was entitled to and where he had a significant disciplinary history for similar conduct. In re Frederick, OAL Dkt. No. CSV 784-07, 2007 N.J. AGEN LEXIS 1158, Final Decision (December 5, 2007).

Where a police officer was untruthful in providing testimony during a deposition in a civil matter and changed his testimony at the trial more than a year later without notifying the city attorney, such conduct was egregious enough to warrant an increased penalty of a 60-working day suspension, notwithstanding his relatively unblemished disciplinary history. In re Hubbs, OAL Dkt. No. CSV 6528-06, 2007 N.J. AGEN LEXIS 1148, Final Decision (October 10, 2007).

Although a police officer had only a minor disciplinary history, he attempted to use his position as a police officer to intimidate fellow police officers and members of the public in order to secure advantages for himself to which he would not otherwise be entitled; such egregious conduct warranted an increased suspension of 120 working days, rather than a 60-working day suspension (adopting in part and rejecting in part 2007 N.J. AGEN LEXIS 615). In re Joyce, OAL Dkt. No. CSV 9145-06, 2007 N.J. AGEN LEXIS 1177, Final Decision (September 26, 2007), *aff'd per curiam*, No. A-1038-07T2, 2008 N.J. Super. Unpub. LEXIS 2882 (App.Div. December 4, 2008).

In light of the concept of progressive discipline, as well as consideration of the seriousness of the underlying incident in which the truck driver tested positive for alcohol and at a level above the legal limit for commercial driver license holders, removal was too harsh a remedy; considering the driver's disciplinary history and that the DOT policy clearly contemplated rehabilitation rather than automatic removal, the appropriate penalty was a 4-month suspension. For non-law enforcement officers, who are not held to the stricter standard of conduct expected of law enforcement officers, a "second chance" is generally provided by appointing authorities in similar situations (adopting in part and rejecting in part 2007 N.J. AGEN LEXIS 248). In re Steiger, OAL Dkt. No. CSV 5463-05, 2007 N.J. AGEN LEXIS 1054, Merit System Board Decision (July 11, 2007).

Where a senior correction officer was a passenger in a car that was stopped by a police officer for having a burnt headlight and the ALJ found that the correction officer committed falsification regarding the identity of the driver, the correction officer's actions violated her obligation to respond truthfully to a law enforcement officer and the penalty was increased from a 20-day suspension to a 30-day suspension (adopting in part and modifying in part 2007 N.J. AGEN LEXIS 277). In re Manay, OAL Dkt. No. CSV 8342-06, 2007 N.J. AGEN LEXIS 1162, Final Decision (June 20, 2007).

Determination that an electrician's failure to replace and properly dispose of multiple electrical light ballasts known to contain dangerous polychlorinated biphenyls was understandable due to his lack of supervision did not mandate a finding that his actions did not constitute a neglect of duty, but such a finding was relevant in determining the electrician's penalty; a four-month suspension, rather than removal, was appropriate in light of the circumstances of the case as well as the electrician's long record of service (adopting in part and rejecting in part 2007 N.J. AGEN LEXIS 276). In re Gatewood, OAL Dkt. No. CSV 7812-06, 2007 N.J. AGEN LEXIS 1169, Merit System Board Decision (June 20, 2007).

Six-month suspension rather than 20-day suspension was appropriate for a police sergeant found on conflicting testimony to have blamed a totally emotional and distraught woman for causing her son's death, used profanity towards her, and punched the woman, who was half his

size. In re Ricciardi, OAL Dkt. No. CSV 1851-06, 2007 N.J. AGEN LEXIS 1043, Final Decision (April 25, 2007).

Initial Decision (2006 N.J. AGEN LEXIS 795) adopted, which concluded that 10-day and 20-day suspensions were justified for a correction officer's two unexcused absences after the officer's sick leave was exhausted, despite the officer's family issues; furthermore, in the determination of the appropriate penalty, the Merit System Board is not bound by the provisions of a collective bargaining agreement. In re Bahm, OAL Dkt. No. CSV 00468-05, Final Decision (December 20, 2006).

Clerk's separation from employment was necessary where she had a history of unexcused absences and tardiness; although she was suffering from a legitimate psychological disorder, her medical problems did not excuse her failure to abide by the appointing authority's policies and procedures governing attendance, such as providing medical documentation to justify absences and submitting timely requests to extend leaves of absence. However, in light of the clerk's genuine psychological disorder, the disciplinary penalty of removal was unduly harsh and was modified to a resignation in good standing (adopting 2006 N.J. AGEN LEXIS 431). In re Martinez, OAL Dkt. No. CSV 6550-05, 2006 N.J. AGEN LEXIS 909, Final Decision (October 19, 2006).

Although an off-duty police officer may have been provoked during an altercation outside of a bar, the situation did not call for the officer to display his firearm unless he was going to effectuate an arrest, which the officer failed to do, instead leaving the man lying on the ground; however, the penalty of removal was excessive and was modified to a 60-day suspension. In re Salensky, OAL Dkt. No. CSV 7734-05, 2006 N.J. AGEN LEXIS 910, Merit System Board Decision (October 19, 2006).

Forty-five day suspension, rather than removal or a 90-day suspension, was appropriate discipline where a psychiatric hospital employee was found to have used inappropriate physical contact in restraining a patient; a charge of abuse was not sustainable because the evidence demonstrated that the employee was only attempting to restrain the patient after the patient first made physical contact with the employee (adopting in part and rejecting in part 2006 N.J. AGEN LEXIS 400). In re Graves, OAL Dkt. No. CSV 226-06, 2006 N.J. AGEN LEXIS 770, Merit System Board Decision (August 9, 2006).

Reduced penalty of 60-day suspension was appropriate for a police officer who failed to remain available to department physicians and superiors during sick leave. ALJ had found that officer's testimony that it took him 20 minutes to dress after department officers had knocked on his door was not credible (adopting in part and rejecting in part 2006 N.J. AGEN LEXIS 405). In re Rosado, OAL Dkt. No. CSV 9431-04, 2006 N.J. AGEN LEXIS 778, Merit System Board Decision (July 19, 2006).

Police officer's separation from employment was justified after she failed to successfully complete training; however, in light of the fact that the officer's problems were, in large part, medically based, and the fact that she had not been found guilty of any willful misconduct, the disciplinary penalty of removal was modified to a resignation in good standing. In re Hidalgo, OAL Dkt. No. CSV 6327-00, 2006 N.J. AGEN LEXIS 542, Final Decision (April 26, 2006).

Initial Decision (2006 N.J. AGEN LEXIS 162) adopted, which found that resignation in good standing, rather than removal, was appropriate for a Sheriff's Officer who was dismissed from the county Firefighters and Police Training Academy for missing physical conditioning sessions. In re McGorty, OAL Dkt. No. CSV 9567-05, 2006 N.J. AGEN LEXIS 636, Final Decision (April 26, 2006).

Where a police officer disobeyed lawful orders, disregarded police department policies and procedures, and embarked on a high-speed vehicle pursuit without notifying police headquarters and without authorization, a 20-day suspension did not convey to the officer the seriousness of his infractions and was, therefore, increased to a 30-day suspension; the police chase could have had tragic consequences and the officer had received counseling for similar behavior in the past (adopting in part and modifying in part 2006 N.J. AGEN LEXIS 69). In re

McConnell, OAL Dkt. No. CSV 9430-04, 2006 N.J. AGEN LEXIS 547, Final Decision (April 5, 2006).

Increased suspension of 45 days was appropriate for a police officer who failed to immediately report to Internal Affairs as ordered in connection with an incident in which he lost his service weapon. The officer had contended that the delay was in part because he was awaiting legal counsel (adopting in part and rejecting in part 2006 N.J. AGEN LEXIS 71). In re Ortiz, OAL Dkt. No. CSV 12056-04, 2006 N.J. AGEN LEXIS 613, Final Decision (March 22, 2006).

Three-month suspension, rather than removal, was the appropriate discipline for a nurse's aide who was accused of neglecting a patient after she refused to care for a male patient on two occasions, assuming

other aides would see to his care; although the aide was pregnant and feared the often combative patient, she never made a formal request to be re-assigned, nor did she provide medical documentation for special accommodation. In re Snyder, OAL Dkt. No. CSV 554-05, 2006 N.J. AGEN LEXIS 623, Final Decision (March 8, 2006).

Six-month, rather than 15-day, suspension was warranted where the ALJ found, on conflicting evidence, that a township truck driver sexually harassed a fellow employee; it was of no consequence that the complaining employee did not request more discipline for the driver because such conduct could not be tolerated (adopting in part and rejecting in part 2005 N.J. AGEN LEXIS 952). In re Washington, OAL Dkt. No. CSV 6778-04, 2006 N.J. AGEN LEXIS 216, Final Decision (February 8, 2006).

In its de novo review of a disciplinary matter, the Merit System Board has exclusive jurisdiction to determine the proper penalty and is not bound by any provision contained in a collective bargaining agreement. *In re Hayes*, OAL Dkt. No. CSV 5089-05, 2006 N.J. AGEN LEXIS 210, Merit System Board Decision (January 25, 2006).

Initial Decision (2005 N.J. AGEN LEXIS 635) adopted, which found that where a plumber's driver's license was suspended for a period of 10 years, requiring the appointing authority to either change the plumber's duties or utilize additional personnel to drive him to specified locations, would have been an unreasonable burden to place on an employer for 10 years; because the plumber was unable to perform his duties the appointing authority had good cause to conclude that his return to work was not appropriate. Nevertheless, termination was modified to a resignation in good standing where the parties agreed that the plumber was a good plumber, had satisfactory evaluations, and never had a problem with his work or attendance, and termination would have precluded the plumber from seeking future public employment. *In re Seitz*, OAL Dkt. No. CSV 2889-05, 2005 N.J. AGEN LEXIS 1083, Final Decision (December 7, 2005).

Initial Decision (2005 N.J. AGEN LEXIS 338) adopted, which found that 30 working-day suspension, rather than 12 working-day suspension, was warranted where a correction officer failed to follow policies, procedures, and rules when he permitted an unauthorized transfer from a prisoner's assigned cell to permit him to share a cell with another prisoner. *In re Miller*, OAL Dkt. No. CSV 2033-04, 2005 N.J. AGEN LEXIS 1181, Final Decision (September 7, 2005), *aff'd per curiam*, No. A-0653-05T1, 2006 N.J. Super. Unpub. LEXIS 2123 (App.Div. Oct. 18, 2006).

Receipt of second copy of final notice of disciplinary action did not extend time for filing appeal. *Russ v. Human Services Department*, 95 N.J.A.R.2d (CSV) 647.

County sheriff's officer was required by settlement agreement to submit to psychiatric examinations. *Petescia v. County of Essex*, 92 N.J.A.R.2d (CSV) 388.

4A:2-2.10 Back pay, benefits and seniority

(a) Where a disciplinary penalty has been reversed, the Commission shall award back pay, benefits, seniority or restitution of a fine. Such items may be awarded when a disciplinary penalty is modified.

(b) Where a municipal police officer has been suspended based on a pending criminal complaint or indictment, following disposition of the charges the officer shall receive back pay, benefits and seniority pursuant to N.J.S.A. 40A:14-149.1 et seq.

(c) 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.

1. Such items shall not be awarded when the complaint or indictment is disposed of through Conditional Discharge, N.J.S.A. 2C:36A-1, or Pre-Trial Intervention (PTI), N.J.S.A. 2C:43-12 et seq.

2. Where disciplinary action has been taken following disposition of the complaint or indictment, such items shall not be awarded in case of removal. In case of suspension, where the employee has already been suspended for more than six months pending disposition of the complaint or

indictment, the disciplinary suspension shall be applied against the period of indefinite suspension. The employee shall receive back pay for the period of suspension beyond six months, but the appointing authority may for good cause deny back pay for the period beyond the disciplinary suspension up to a maximum of six months.

(d) Back pay shall include unpaid salary, including regular wages, overlap shift time, increments and across-the-board adjustments. Benefits shall include vacation and sick leave credits and additional amounts expended by the employee to maintain his or her health insurance coverage during the period of improper suspension or removal.

1. Back pay shall not include items such as overtime pay, holiday premium pay and retroactive clothing, uniform or equipment allowances for periods in which the employee was not working.

2. The award of back pay shall be reduced by the amount of taxes, social security payments, dues, pension payments, and any other sums normally withheld.

3. Where a removal or suspension has been reversed or modified, an indefinite suspension pending the disposition of criminal charges has been reversed, the award of back pay shall be reduced by the amount of money that was actually earned during the period of separation, including any unemployment insurance benefits received, subject to any applicable limitations set forth in (d)4 below.

4. Where a removal or a suspension for more than 30 working days has been reversed or modified or an indefinite suspension pending the disposition of criminal charges has been reversed, and the employee has been unemployed or underemployed for all or a part of the period of separation, and the employee has failed to make reasonable efforts to find suitable employment during the period of separation, the employee shall not be eligible for back pay for any period during which the employee failed to make such reasonable efforts.

i. "Underemployed" shall mean employment during a period of separation from the employee's public employment that does not constitute suitable employment.

ii. "Reasonable efforts" may include, but not be limited to, reviewing classified advertisements in newspapers or trade publications; reviewing Internet or on-line job listings or services; applying for suitable positions; attending job fairs; visiting employment agencies; networking with other people; and distributing resumes.

iii. "Suitable employment" or "suitable position" shall mean employment that is comparable to the employee's permanent career service position with respect to job duties, responsibilities, functions, location, and salary.

iv. The determination as to whether the employee has made reasonable efforts to find suitable employment shall be based upon the totality of the circumstances,

including, but not limited to, the nature of the disciplinary action taken against the employee; the nature of the employee's public employment; the employee's skills, education, and experience; the job market; the existence of advertised, suitable employment opportunities; the manner in which the type of employment involved is commonly sought; and any other circumstances deemed relevant based upon the particular facts of the matter.

v. The burden of proof shall be on the employer to establish that the employee has not made reasonable efforts to find suitable employment.

5. An employee shall not be required to mitigate back pay for any period between the issue date of a Civil Service Commission decision reversing or modifying a removal or reversing an indefinite suspension and the date of actual reinstatement. The award of back pay for this time period shall be reduced only by the amount of money that was actually earned during that period, including any unemployment insurance benefits received.

6. Should a Civil Service Commission decision reversing or modifying a removal or reversing an indefinite suspension subsequently be stayed, an individual shall be required to mitigate an award of back pay from the date of the stay through the date of actual reinstatement, in accordance with (d)4i through v above.

7. If an employee also held other employment at the time of the adverse action, the back pay award shall not be reduced by earnings from such other employment. However, if the employee increased his or her work hours at the other employment during the back pay period, the back pay award shall be reduced by the earnings from such additional hours.

8. A back pay award is subject to reduction by any period of unreasonable delay of the appeal proceedings directly attributable to the employee. Delays caused by an employee's representative may not be considered in reducing the award of back pay.

9. A back pay award is subject to reduction for any period of time during which the employee was disabled from working.

10. Funds that must be repaid by the employee shall not be considered when calculating back pay.

(e) Unless otherwise ordered, an award of back pay, benefits and seniority shall be calculated from the effective date of the appointing authority's improper action to the date of the employee's actual reinstatement to the payroll.

(f) When the Commission awards back pay and benefits, determination of the actual amounts shall be settled by the parties whenever possible.

(g) If settlement on an amount cannot be reached, either party may request, in writing, Commission review of the outstanding issue. In a Commission review:

1. The appointing authority shall submit information on the salary the employee was earning at the time of the adverse action, plus increments and across-the-board adjustments that the employee would have received during the separation period; and

2. The employee shall submit an affidavit setting forth all income received during the separation.

(h) See N.J.A.C. 4A:2-2.13 for situations in which certain law enforcement officers or firefighters have appealed a removal that has been reversed or modified.

Amended by R.1992 d.414, effective October 19, 1992.

See: 24 N.J.R. 2491(a), 24 N.J.R. 3716(a).

Redesignated part of existing text in (a) to (d); added new (b)-(c); redesignated existing (b)-(d) to (e)-(g).

Amended by R.1997 d.435, effective October 20, 1997.

See: 29 N.J.R. 3102(a), 29 N.J.R. 4455(b).

Inserted new (d)4; and recodified existing (d)4 as (d)5.

Amended by R.2008 d.215, effective August 4, 2008.

See: 40 N.J.R. 1402(a), 40 N.J.R. 4520(a).

Rewrote (d)3 and (d)4; added new (d)5 through (d)9; and recodified former (d)5 as (d)10.

Special amendment, R.2009 d.221, effective June 10, 2009 (to expire July 1, 2010).

See: 41 N.J.R. 2720(a).

Substituted "Commission" for "Board" and "Civil Service Commission" for "Merit System Board" throughout; and added (h).

In accordance with N.J.S.A. 52:14B-5.1c, special amendment R.2009 d.221 expires on December 28, 2010.

See: 42 N.J.R. 693(a).

Amended by R.2010 d.068, effective May 17, 2010.

See: 42 N.J.R. 116(a), 42 N.J.R. 928(a).

In (d)1, substituted a comma for "and" following the second occurrence of "pay" and inserted "and retroactive clothing, uniform or equipment allowances for periods in which the employee was not working".

Case Notes

On a backpay claim where a State employee has been removed from employment due to his or her own misconduct but is later reinstated, the availability of substitute employment is relevant to the establishment of a failure-to-mitigate defense by the appointing agency, and the employee's failure to seek substitute employment during separation is not a sufficient basis to deny the claim without any consideration of the availability of such employment. *O'Lone v. Department of Human Services*, 357 N.J. Super. 170, 814 A.2d 665.

Regulation applies in those circumstances where employee has been completely exonerated of the criminal charges, yet there is basis for disciplinary suspension despite employee's exoneration. *Walcott v. City of Plainfield*, 282 N.J. Super. 121, 659 A.2d 532 (A.D.1995).

Merit System Board's adoption of rules regarding back pay for police officers during periods of nondisciplinary suspension requires public notice of anticipated action. *DelRossi v. Department of Human Services (Police)*, 256 N.J. Super. 286, 606 A.2d 1128 (A.D.1992).

Police officer was not entitled to back pay and benefits during period of nondisciplinary suspension resulting from criminal charges. *DelRossi v. Department of Human Services (Police)*, 256 N.J. Super. 286, 606 A.2d 1128 (A.D.1992).

Merit System Board must exercise power to award back pay for periods of nondisciplinary suspension through rule making. *DelRossi v. Department of Human Services (Police)*, 256 N.J. Super. 286, 606 A.2d 1128 (A.D.1992).

Corrections officers who were dismissed for violation of mandatory drug test order were not entitled to award of back pay as remedy for due process violations at pretermination hearings. *Caldwell v. New Jersey Dept. of Corrections*, 250 N.J.Super. 592, 595 A.2d 1118 (A.D.1991), certification denied 127 N.J. 555, 606 A.2d 367.

Where discharge of employee was in error, back pay could be awarded (citing former N.J.A.C. 4:1-5.5). In the Matter of Williams, 198 N.J.Super. 75, 486 A.2d 858 (App.Div.1984).

Determination of back pay—prior disciplinary record not a consideration (citing former N.J.A.C. 4:1-5.17). *Steinal v. City of Jersey City*, 193 N.J.Super. 629, 475 A.2d 640 (App.Div.1984) affirmed 99 N.J. 1, 489 A.2d 1145 (1985).

Since removal from position of supervising sheet metal worker with public school district was modified to a six-month suspension, employee was entitled to mitigated back pay, benefits, and seniority. In re Delli Santi, OAL Dkt. No. CSV 11901-07, 2008 N.J. AGEN LEXIS 1088, Civil Service Commission Decision (September 24, 2008).

Imputed mitigation subtracted from former city firefighter's back pay award. In re Abdul-Haqq, OAL Dkt. No. CSV 9385-03, 2008 N.J. AGEN LEXIS 720, Final Decision (June 11, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 228) adopted, which concluded that the appointing authority had the right to impose an indefinite suspension without pay under N.J.A.C. 4A:2-2.5(a)2 on a correction officer until June 26, the date when the officer pleaded guilty to downgraded charges, rather than only until March 7, the date when the County Prosecutor chose to downgrade the indictable offense, as the downgrade was specifically conditioned on a guilty plea. In re Paris, OAL Dkt. No. CSV 12208-06, 2008 N.J. AGEN LEXIS 708, Final Decision (June 11, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 228) adopted, which concluded that while the appointing authority had the right to impose an indefinite suspension without pay under N.J.A.C. 4A:2-2.5(a)2 from Dec. 14, 2005 until June 26, 2006, the date when the correction officer pleaded guilty in municipal court to downgraded charges, back pay was due the officer under N.J.A.C. 4A:2-2.10(c)2 for the period of the indefinite suspension that exceeded six months, i.e., from June 14, 2006 to July 30, 2006. In re Paris, OAL Dkt. No. CSV 12208-06, 2008 N.J. AGEN LEXIS 708, Final Decision (June 11, 2008).

Although a police officer was exonerated on criminal charges that he sexually assaulted three women, he was not entitled to reinstatement or back pay because he still remained subject to disciplinary proceedings, including conduct unbecoming a police officer. In re Cofone, OAL Dkt. No. CSV 6774-05 (CSV 2578-01 and CSV 6148-03 On Remand), 2006 N.J. AGEN LEXIS 776, Final Decision (July 19, 2006), aff'd per curiam, No. A-0306-06T5, 2008 N.J. Super. Unpub. LEXIS 1694 (App.Div. July 16, 2008).

Correction officer, who was unreasonably denied a leave of absence during her working test period, was entitled to back pay from the date she was medically cleared to return to work (August 5, 2005), rather than from the date of her removal (June 7, 2005); because it could not be assumed that the officer would have passed her working test period, she was entitled to back pay for 10 months (the part of the one-year working test she did not complete) or until her reinstatement, whichever was first. In re Mortimer, OAL Dkt. No. CSV 6378-05, 2006 N.J. AGEN LEXIS 543, Merit System Board Decision (April 26, 2006).

Initial Decision (2005 N.J. AGEN LEXIS 483) adopted, which found that city was required to pay back wages to police officer after criminal charges against him were dismissed, there was no administrative action against him, and he had mitigated his losses during his period of separation; after termination, the officer had increased his hours at his second job, which constituted sufficient mitigation of his back pay award. In re Russo, OAL Dkt. No. CSV 11729-03, 2005 N.J. AGEN LEXIS 1077, Final Decision (November 22, 2005).

Reinstated county correction officer was entitled to back pay for the period of time in which he sought substitute employment because the appointing authority did not provide any evidence that suitable substitute employment was available, nor did it overcome the officer's testimony that his search for substitute employment took place in the period right after he was terminated; however, the officer was not entitled to back pay for the period of time that he attended school on a full-time basis because he was not actively seeking substitute employment. In re Martin, OAL Dkt. No. CSV 6599-03 (CSV 8656-98 On Remand), 2005 N.J. AGEN LEXIS 1211, Final Decision (July 13, 2005).

Reinstated county correction officer was not entitled to recover his monthly expenses for medications not covered by his spouse's health insurance because he was only entitled to recover additional amounts expended to maintain health insurance coverage during the period of improper suspension or removal. In re Martin, OAL Dkt. No. CSV 6599-03 (CSV 8656-98 On Remand), 2005 N.J. AGEN LEXIS 1211, Final Decision (July 13, 2005).

Reinstated county correction officer was not entitled to recover unpaid accrued vacation time because, pursuant to N.J.A.C. 4A:6-1.2, vacation leave not taken in a given year could only be carried over to the following year; it could not be accrued and carried over from year to year. In re Martin, OAL Dkt. No. CSV 6599-03 (CSV 8656-98 On Remand), 2005 N.J. AGEN LEXIS 1211, Final Decision (July 13, 2005).

Suspended employee not entitled to back pay and benefits for accepting plea agreement. *Ward v. Department of Labor*, 97 N.J.A.R.2d (CSV) 180.

Firefighter entitled to back pay for period of suspension while awaiting outcome of criminal indictment. *Naro v. Trenton Fire Department*, 96 N.J.A.R.2d (CSV) 234.

Reinstatement of guard at correctional facility was required when he did not intentionally trip or kick inmate. *Finley v. Wagner Youth Correctional Facility*, 95 N.J.A.R.2d (CSV) 676.

Agency awarding employee back pay was entitled to offset unemployment benefits as long as state was reimbursed. *Bellamy v. Essex County Hospital*, 95 N.J.A.R.2d (CSV) 652.

Public employee was entitled to back pay for period of indefinite suspension that was improper, incorrect and invalid. *Gonzalez v. Essex County*, 95 N.J.A.R.2d (CSV) 200.

Medical expenses to be paid after improper reduction in force action. *Takakjian v. Fairview Borough Board of Education*, 93 N.J.A.R.2d (EDU) 184.

Employee was entitled to back pay following acquittal. *Scouler v. Housing Services and Code Enforcement, City of Camden*, 93 N.J.A.R.2d (CSV) 40.

Employee not entitled to back pay for period of suspension even if she successfully completed intervention program. *Amison v. New Jersey Department of Environmental Protection*, 92 N.J.A.R.2d (CSV) 568.

Employee was entitled to back pay for period of suspension pending disposition of criminal charges. *Kelly v. City of Camden*, 92 N.J.A.R.2d (CSV) 537.

Initial suspension from employment violated due process; later valid removal; no entitlement to back pay. *Brantley v. New Jersey State Prison*, 92 N.J.A.R.2d (CSV) 37.

Employee entitled to reinstatement and back pay. N.J.S.A. 11A:1-1 et seq. *Holmes v. Essex County*, 91 N.J.A.R.2d (CSV) 65.

Appellant, removed from employment and later reinstated with back pay, denied counsel fees; appellant entitled to award of 30 vacation days (citing former N.J.A.C. 4:1-5.5). *Harrington v. Dep't of Human Services*, 11 N.J.A.R. 537 (1989).

Appellant suspended and subsequently removed from title of Senior Systems Analyst reinstated to duties appropriate to his permanent title; appointing authority failed to support charges of falsifying residency address, falsely signing affidavit with intent to defraud county and failing to complete assignments timely and correctly (citing former N.J.A.C. 4:1-16.14). *Valluzzi v. Bergen County*, 10 N.J.A.R. 89 (1988), adopted—*Merit System Bd.*, App.Div. A-3269-87, 3/3/88.

4A:2-2.11 Interest

(a) When the Commissioner or Board makes an award of back pay, it may also award interest in the following situations:

1. When an appointing authority has unreasonably delayed compliance with an order of the Commissioner or Board; or
2. Where the Board finds sufficient cause based on the particular case.

(b) Where applicable, interest shall be at the annual rate as set forth in New Jersey court rules, R.4:42-11.

(c) Before interest is applied, an award of back pay shall be reduced in accordance with N.J.A.C. 4A:2-2.10(d)2 and 3.

Administrative Correction.
See: 26 N.J.R. 198(a).

4A:2-2.12 Counsel fees

(a) The Civil Service Commission shall award partial or full reasonable counsel fees incurred in proceedings before it and incurred in major disciplinary proceedings at the departmental level where an employee has prevailed on all or substantially all of the primary issues before the Commission.

(b) When the Commission awards counsel fees, the actual amount shall be settled by the parties whenever possible.

(c) Subject to the provisions of (d) and (e) below, the following fee ranges shall apply in determining counsel fees:

1. Associate in a law firm: \$100.00 to \$150.00 per hour;
2. Partner or equivalent in a law firm with fewer than 15 years of experience in the practice of law: \$150.00 to \$175.00 per hour; or
3. Partner or equivalent in a law firm with 15 or more years of experience in the practice of law, or, notwithstanding the number of years of experience, with a practice concentrated in employment or labor law: \$175.00 to \$200.00 per hour.

(d) If an attorney has signed a specific fee agreement with the employee or employee's negotiations representative, the attorney shall disclose the agreement to the appointing authority. The fee ranges set forth in (c) above may be adjusted if the attorney has signed such an agreement, provided that the attorney shall not be entitled to a greater rate than that set forth in the agreement.

(e) A fee amount may also be determined or the fee ranges in (c) above adjusted based on the circumstances of a particular matter, in which case the following factors (see the Rules of Professional Conduct of the New Jersey Court Rules, at RPC 1.5(a)) shall be considered:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. The fee customarily charged in the locality for similar legal services, applicable at the time the fee is calculated;
3. The nature and length of the professional relationship with the employee; and
4. The experience, reputation and ability of the attorney performing the services.

(f) Counsel fees incurred in matters at the departmental level that do not reach the Civil Service Commission on appeal or are incurred in furtherance of appellate court review shall not be awarded by the Commission.

(g) Reasonable out-of-pocket costs shall be awarded, including, but not limited to, costs associated with expert and subpoena fees and out-of-State travel expenses. Costs associated with normal office overhead shall not be awarded.

(h) The attorney shall submit an affidavit and any other documentation to the appointing authority.

(i) If settlement on an amount cannot be reached, either party may request, in writing, Commission review.

(j) See N.J.A.C. 4A:2-2.13 for situations in which certain law enforcement officers or firefighters have appealed a removal.

Amended by R.2001 d.424, effective November 19, 2001.

See: 33 N.J.R. 2725(a), 33 N.J.R. 3280(a), 33 N.J.R. 3895(a).

Rewrote (a) and (c); added new (d) through (g), and recodified existing (d) and (e) as (h) and (i).

Special amendment, R.2009 d.221, effective June 10, 2009 (to expire July 1, 2010).

See: 41 N.J.R. 2720(a).

Substituted "Civil Service Commission" for "Merit System Board" and "Commission" for "Board" throughout; and added (j).

In accordance with N.J.S.A. 52:14B-5.1c, special amendment R.2009 d.221 expires on December 28, 2010.

See: 42 N.J.R. 693(a).

Case Notes

After considering both N.J.A.C. 4A:2-2.12(e) and N.J. Ct. R. Prof. Conduct 1.5(a), counsel for an official at a mental health residential facility was entitled to an hourly fee of \$250, given the complexity of the case and the amount of skill required to adequately represent his client, who was subject to discipline for failing to develop an intervention plan to deal with a patient's behavioral disorder, and that patient died, as counsel had to be alert to the potential implications for his client of the testimony put forth by each of the various witnesses; further, the court did not think it could seriously be disputed that attorneys of a similar background and experience as counsel herein would customarily charge an equivalent or greater amount for their services in this type of case. In

re Malone, 381 N.J. Super. 344, 886 A.2d 181, 2005 N.J. Super. LEXIS 340 (App.Div. 2005).

Merit System Board had the statutory authority to make an award to township police officer for counsel fees incurred in connection with police department hearing which had preceded officer's appeal to the Merit System Board, regarding officer's claim for reinstatement; the departmental hearing was an integral part of the civil service process. *Burris v. Police Department, Township of West Orange*, 769 A.2d 1112 (2001).

Regulation mandating the award of counsel fees was intended to apply in cases where disciplinary charges did not arise out of employee's lawful exercise of powers in furtherance of official duties. *Marjarum v. Township of Hamilton*, 336 N.J. Super. 85 (A.D. 2001).

Statute and its accompanying regulation, allowing Merit System Board to award fees to employee who has prevailed on all or substantially all of the primary issues, authorized fee award to police officer. *Oches v. Township of Middletown Police Dept.*, 155 N.J. 1, 713 A.2d 993 (N.J. 1998).

Municipal employee whose removal was mitigated to six-month suspension by Merit System Board was not entitled to award of counsel fees as prevailing party under regulation. *Walcott v. City of Plainfield*, 282 N.J. Super. 121, 659 A.2d 532 (A.D. 1995).

Initial Decision (2008 N.J. AGEN LEXIS 613) adopted, which concluded that while the appointing authority had withdrawn some of the charges against a township police officer, the Merit System Board had sustained the other serious charges against the officer resulting in his removal from office, and the officer's request for counsel fees lacked merit since he had not prevailed on all or substantially all of the primary issues of his appeal. In re *Hawkins*, OAL Dkt. No. CSV 4469-05, 2008 N.J. AGEN LEXIS 1222, Final Decision (December 3, 2008).

Correction officer was not entitled to counsel fees although the penalty against the officer was modified from removal to a 60-day suspension; the officer did not prevail on all or substantially all of the primary issues in the appeal because two of the charges against the officer were sustained and major discipline was imposed. In re *Pettiford*, OAL Dkt. No. CSV 8801-07, 2008 N.J. AGEN LEXIS 719, Merit System Board Decision (May 21, 2008).

Employee was entitled to an award of partial counsel fees where she prevailed on one of two charges against her, including an allegation of conduct unbecoming a public employee; the remaining charge of neglect of duty for failure to place \$5 in the proper place was not egregious. In re *Payton*, OAL Dkt. No. CSV 7740-05, 2007 N.J. AGEN LEXIS 1168, Merit System Board Decision (January 17, 2007).

Charge of possession of controlled, dangerous substance was not supported by credible evidence and required public employee's reinstatement after removal. *Ramos v. Department of Corrections*, 95 N.J.A.R.2d (CSV) 413.

Removal of plant operator not justified; charges against him were indefinite and inconsistent with job requirements. *Onori v. City of Burlington Department of Public Works*, 95 N.J.A.R.2d (CSV) 53.

Police officer was entitled to reimbursement of the expenses of his defense when allegations against the officer were dismissed. *Black v. Lakehurst Borough Police Department*, 94 N.J.A.R.2d (CSV) 35.

Reasonable and partial attorney fee award. *Gill v. State Dept. of Health*, 92 N.J.A.R.2d (CSV) 142.

Reprimand and ten days' suspension would be reversed and attorney fees would be awarded. *Neal v. Police Dept., City of New Brunswick*, 92 N.J.A.R.2d (CSV) 52.

Officer was entitled to unmitigated back pay but was not entitled to attorney fees or interest. N.J.S.A. 11A:11-5. *Franklin v. City of Atlantic City*, 91 N.J.A.R.2d (CSV) 71.

Appellant, removed from employment and later reinstated with back pay, denied counsel fees; appellant entitled to award of 30 vacation days (citing former N.J.A.C. 4:1-5.6). *Harrington v. Dep't. of Human Services*, 11 N.J.A.R. 537 (1989).

4A:2-2.13 Removal appeals of certain law enforcement officers and firefighters

(a) For purposes of this section:

1. "Law enforcement officer" or "officer" is defined as an individual employed as a permanent, full-time member of a State, county, or municipal law enforcement agency who is statutorily empowered to act for the detection, investigation, arrest, conviction, detention, or rehabilitation of persons violating the criminal laws of this State and statutorily required to successfully complete a training course approved by, or certified as substantially equivalent to such an approved course, by the Police Training Commission. See N.J.S.A. 52:17B-66 et seq. With the exception of the Juvenile Justice Commission, which is covered by this definition, the Department of Law and Public Safety shall not be considered a law enforcement agency for purposes of this definition.

2. "Firefighter" is defined as a full-time, paid firefighter employed by a public fire department as provided in N.J.S.A. 40A:14-200.

3. "Appellant" refers to a "law enforcement officer" or "firefighter" as defined in (a)1 and 2 above.

4. "Removal," "removal date," and "removal effective date" shall mean the first date on which the law enforcement officer or firefighter is separated from employment without pay.

(b) If the law enforcement officer or firefighter requests a departmental hearing regarding his or her removal in accordance with N.J.A.C. 4A:2-2.5, the appointing authority shall conduct a hearing within 30 days of the removal's effective date, unless:

1. The officer or firefighter agrees to waive his or her right to the hearing; or

2. The officer or firefighter and the appointing authority agree to an adjournment of the hearing to a later date.

(c) The appointing authority shall issue a Final Notice of Disciplinary Action within 20 days of the hearing and serve the Final Notice to the appellant either by personal service or certified mail. If the appointing authority does not hold a hearing as required in (b) above, the appointing authority shall issue a Final Notice within 30 days of the removal effective date.

(d) The officer or firefighter shall have 20 days from the date of receipt of the Final Notice to appeal the removal. Receipt of the Final Notice on a different date by the appellant's attorney or negotiations representative shall not affect this appeal period. If the appellant does not receive the Final Notice as required by (c) above, he or she shall file an appeal of removal within a reasonable time. The officer or firefighter shall file the appeal simultaneously with the Office of Administrative Law and the Civil Service Commission using the Law Enforcement Officer and Firefighter Removal Appeal Form in the Appendix to this section. If the appellant files an appeal within 20 days of receipt of the Final Notice with the Civil Service Commission but not with the Office of Administrative Law, or the appellant files an appeal within 20 days of receipt of the Final Notice with the Office of Administrative Law but not with the Commission, the appeal shall still be considered timely. However, if the appellant fails to submit the appeal within 20 days to either the Office of Administrative Law or the Commission, the appeal shall be considered untimely and the Commission shall dismiss the appeal. See N.J.A.C. 1:4B for processing of the appeal at the Office of Administrative Law.

(e) Once the administrative law judge at the Office of Administrative Law who is presiding over an officer or firefighter's removal appeal renders an initial decision, the Office of Administrative Law shall immediately transmit the decision to the Commission for review.

(f) The Commission shall complete its review and issue its final administrative determination regarding the appellant's removal appeal within 45 days of the Commission's receipt of the administrative law judge's initial decision. If the Commission does not issue its final administrative determination within 45 days, the administrative law judge's initial decision shall be deemed the final administrative determination, except that the Commission may, at its discretion, extend its review period by no more than an additional 15 days. If the Commission does not issue a final administrative determination by the end of the additional 15-day period, the administrative law judge's initial decision shall be deemed the final administrative determination, unless, for good cause, the Chairperson of the Commission provides a signed order of extension to the Director of the Office of Administrative Law and serves copies on all affected parties.

(g) The Commission's final administrative determination shall be rendered within 180 calendar days from the date on

which the officer or firefighter was initially suspended without pay, except that:

1. This 180-day limit shall not apply to disciplinary charges related to a pending criminal investigation, nor to disciplinary charges which allege conduct that would constitute a violation of criminal law and which seek removal from employment. See N.J.S.A. 40A:14-201(a).

(h) If the Commission fails to render a final administrative determination of an appeal of an officer's or firefighter's removal from employment within the required 180 days, the appellant shall begin receiving the base salary that he or she was receiving at the time of his or her removal and shall continue to receive such salary until the Commission renders a final administrative determination, provided, however, that the following days shall not be counted toward the 180-day period:

1. The period between the date of removal and the date on which the officer or firefighter requests a departmental hearing;

2. The period of agreed-upon adjournment of a departmental hearing;

3. The period between the date of removal and the date on which the appellant appeals a Final Notice of Disciplinary Action with the Office of Administrative Law and the Civil Service Commission;

4. If applicable, the gap in time between the date of timely filing of an appeal with the Office of Administrative Law and the date of filing of the appeal with the Civil Service Commission;

5. If applicable, the gap in time between the date of timely filing with the Civil Service Commission and the date of filing of the appeal with the Office of Administrative Law;

6. The period of time for which appellant or his or her attorney or negotiations representative requests and is granted postponement of a hearing or other delay;

7. The period of time during which the appellant or his or her attorney or negotiations representative causes by his or her actions a postponement, adjournment or delay of a hearing;

8. The period of time for which the appellant or his or her attorney or negotiations representative agrees with the appointing authority to a postponement or delay of a hearing;

9. The period of time during which the administrative law judge or the Civil Service Commission, for good cause, postpones or delays a hearing;

10. The period of time for which the administrative law judge has been granted an extension for filing an initial decision in accordance with N.J.A.C. 1:1-18.8; and

11. The period of time for which the Commission has extended its period of review of the administrative law judge's initial decision in accordance with (f) above.

(i) The following are special circumstances which may affect the receipt of the appealing officer's or firefighter's base salary after the 180-day period:

1. If the appellant or the appellant's representative requests and is granted, or otherwise causes by his or her actions, the postponement, adjournment, or delay of a hearing, the appellant shall not receive full pay during the period of postponement, adjournment, or delay of a hearing.

2. The appellant shall not continue to receive his or her base salary if the administrative law judge's initial decision recommends that the appellant's appeal be denied, unless and until such time as the Civil Service Commission renders a final administrative decision rejecting the administrative law judge's recommendation and ordering the appellant's reinstatement to employment.

3. If the administrative law judge's initial decision recommends reversal of the removal, or that the officer or firefighter receive discipline other than removal, the appellant shall receive his or her base salary on the date provided in the administrative law judge's initial decision, provided, however, that if the appellant is already receiving his or her base salary at the time of the administrative law judge's initial decision, the appellant shall continue to receive such base salary.

4. If the Civil Service Commission grants the officer's or firefighter's appeal, the appointing authority shall immediately reinstate the appellant to employment, and the appellant shall receive his or her base salary, as well as,

within 60 days of the issuance of the Commission's decision, all back pay, benefits, seniority, and counsel fees that may be due in accordance with N.J.A.C. 4A:2-2.10 and 2.12.

5. If the officer or firefighter appeals a Civil Service Commission decision upholding his or her removal to the Superior Court, Appellate Division, the appellant shall not be entitled to receive his or her base salary.

6. If the appointing authority appeals the Civil Service Commission decision to the Superior Court, Appellate Division, the officer or firefighter shall continue to receive his or her base salary during the pendency of the appeal.

(j) The following relates to an officer's or firefighter's obligation to reimburse his or her base salary to the appointing authority:

1. If the Civil Service Commission denies the officer's or firefighter's appeal, the appellant shall reimburse the appointing authority all pay he or she has received during the period of appeal. If the officer or firefighter fails to do so, the appointing authority may have a lien for the amount owed on any and all property and income to which the appellant has or will have an interest in, in accordance with N.J.S.A. 40A:14-205(b).

2. If the appellate court affirms the appointing authority's removal of the officer or firefighter, the appellant shall reimburse the appointing authority for all pay he or she has received during the period of appeal. If the officer or firefighter fails to do so, the appointing authority may have a lien for the amount owed on any and all property and income to which the appellant has or will have an interest in, in accordance with N.J.S.A. 40A:14-206(b).

APPENDIX

OFFICE OF ADMINISTRATIVE LAW/CIVIL SERVICE COMMISSION
LAW ENFORCEMENT OFFICER & FIREFIGHTER REMOVAL APPEAL FORM

Use this form to submit an appeal of removal of a law enforcement officer or firefighter to the Office of Administrative Law and Civil Service Commission

1.

Your Name: _____

Address: _____

(City) (State) (Zip Code) Telephone: () - _____

Email: _____

2.Will you be represented by a lawyer or union representative at the hearing? ☐ YES ☐ NO
If yes, complete the following:

Representative Name: _____

Union or Law Firm: _____

Address: _____

(City) (State) (Zip Code) Telephone: () - _____

Email: _____

3.

Give a copy of this form and attachments to your Personnel Officer/Employer Representative

Employing Agency Name: _____

Personnel Officer's/Employer Representative's Name: _____

Address: _____

(City) (State) (Zip Code) Telephone: () - _____

Email: _____

4.

Appointing Authority Representative for Appeal, if known

Name: _____

Address: _____

(City) (State) (Zip Code)

Telephone: () - _____ Fax #: () - _____

Email: _____

5.

Attach the following:

☐ Preliminary Notice of Disciplinary Action☐ Final Notice of Disciplinary Action

6.Date of incident subject to removal: _____
Date employee served with Final Notice of Disciplinary Action: _____

Note: Your appeal will not be processed unless this appeal form **with attachments** is completed, signed and submitted to the Office of Administrative Law **and** the Civil Service Commission. A copy of this appeal **must** also be served upon the appointing authority (your employer). You must submit this appeal to both the Office of Administrative Law and the Civil Service Commission within twenty (20) days after you receive the Final Notice of Disciplinary Action. If your appeal is not submitted within twenty (20) days, it will be dismissed. You must seek alternate employment; failure to do so may reduce the back pay award.

SIGNATURE**EMPLOYEE/EMPLOYEE REPRESENTATIVE****DATE**

Mail to: Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

AND

Civil Service Commission
Attention Hearings Unit-Unit H
P.O. Box 312
Trenton, NJ 08625-0312

Hand

Deliver: Civil Service Commission
3 Station Plaza
44 South Clinton Avenue
Trenton, NJ

AND

Office of Administrative Law
7th Floor
33 Washington Street
Newark, New Jersey

mmg

Special new rule, R.2009 d.221, effective June 10, 2009 (to expire July 1, 2010).
See: 41 N.J.R. 2720(a).

In accordance with N.J.S.A. 52:14B-5.1c, special new rule R.2009 d.221 expires on December 28, 2010.
See: 42 N.J.R. 693(a).