

CHAPTER 2

APPEALS, DISCIPLINE AND SEPARATIONS

Authority

N.J.S.A. 2C:51-2, 11A:1-2(e), 11A:2-6, 11A:2-11(h), 11A:2-13 et seq., 11A:4-15(c), 11A:7-1 et seq., 11A:8-4 and 52:14B-10(c); and 49 CFR Parts 382 et seq.

Source and Effective Date

R.2008 d.215, effective July 1, 2008.
See: 40 N.J.R. 1402(a), 40 N.J.R. 4520(a).

Chapter Expiration Date

Chapter 2, Appeals, Discipline and Separations, expires on July 1, 2013.

Chapter Historical Note

Chapter 2, Appeals, Discipline and Separations, was adopted as R.1987 d.407, effective October 5, 1987. See: 19 N.J.R. 1013(a), 19 N.J.R. 1827(a). See, also, Title Historical Note prior to N.J.A.C. 4A:1.

Pursuant to Executive Order No. 66(1978), Chapter 2, Appeals, Discipline and Separations, was readopted as R.1992 d.414, effective September 22, 1992. See: 24 N.J.R. 2491(a), 24 N.J.R. 3716(a).

Pursuant to Executive Order No. 66(1978), Chapter 2, Appeals, Discipline and Separations, was readopted as R.1997 d.435, effective September 22, 1997. See: 29 N.J.R. 3102(a), 29 N.J.R. 4455(b).

Chapter 2, Appeals, Discipline and Separations, was readopted as R.2003 d.112, effective February 13, 2003. See: 34 N.J.R. 3570(a), 35 N.J.R. 1407(b).

Chapter 2, Appeals, Discipline and Separations, was readopted as R.2008 d.215, effective July 1, 2008. See: Source and Effective Date. See, also, section annotations.

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SUBCHAPTER 1. APPEALS

4A:2-1.1 Filing of appeals

(a) All appeals to the Commissioner or Board shall be in writing, signed by the person appealing (appellant) or his or her representative and must include the reason for the appeal and the specific relief requested.

(b) Unless a different time period is stated, an appeal must be filed within 20 days after either the appellant has notice or should reasonably have known of the decision, situation or action being appealed.

(c) The appellant must provide any additional information that is requested, and failure to provide such information may result in dismissal of the appeal.

(d) Except where a hearing is required by law or these rules, or where the Commissioner or Board finds that a material and controlling dispute of fact exists that can only be resolved by a hearing, an appeal will be reviewed on a written record. In written record appeals:

1. Each party must serve copies of all materials submitted on all other parties; and
2. A party may review the file at the Department of Personnel during business hours.

(e) A party in an appeal may be represented by an attorney, authorized union representative or authorized appointing authority representative. See N.J.A.C. 1:1-5.4 for contested case representation at the Office of Administrative Law.

Amended by R.1992 d.414, effective October 19, 1992.
See: 24 N.J.R. 2491(a), 24 N.J.R. 3716(a).
Added new (d)1.-2.

Law Review and Journal Commentaries

Civil Service—Disability Retirement—Police Seniority. Judith Nallin, 133 N.J.L.J. No. 13, 55 (1993).

Case Notes

Time in which fire fighter was required to appeal decision of township board of fire commissioners classifying fire fighters commenced when fire fighter learned of representations. *Matter of Tavani*, 264 N.J.Super. 154, 624 A.2d 75 (A.D.1993).

Appeals to Department of Personnel (DOP) and Merit System Board by police officer were timely. *Matter of Allen*, 262 N.J.Super. 438, 621 A.2d 87 (A.D.1993).

Removal of provisional juvenile detention officer from eligible list was improper without hearing by Merit System Board to resolve good faith factual disputes. *Matter of Wiggins*, 242 N.J.Super. 342, 576 A.2d 932 (A.D.1990).

Civil Service Comm'n acted within its discretionary powers to deny hearing and only allow petitioner to submit additional facts for review (citing former N.J.A.C. 4:1-5.1). *Honachefsky v. New Jersey Civil Service Comm'n*, 174 N.J.Super. 539, 417 A.2d 67 (App.Div.1980).

Employee's failure to appear at scheduled hearings on removal action supports employer's motion to dismiss appeal. *Maycheck v. Atlantic City Housing Authority*, 97 N.J.A.R.2d (CSV) 182.

No timely appeal to the Merit Systems Board. N.J.S.A. 11A:1-1 et seq. *Pryor v. Township of Morristown*, 92 N.J.A.R.2d (CSV) 18.

Time limits for appeal construed to have been met when petitioner was advised a letter sent prior to final notice of disciplinary action would act to reinstate her appeal (citing former N.J.A.C. 4:1-5.3). *Clark v. New Jersey Dep't of Agriculture*, 1 N.J.A.R. 315 (1980).

4A:2-1.2 Stay and interim relief requests

(a) Upon the filing of an appeal, a party to the appeal may petition the Commissioner for a stay or other relief pending final decision of the matter.

(b) A request for a stay or interim relief shall be in writing, signed by the petitioner or his or her representative and must include supporting information for the request.

(c) The following factors will be considered in reviewing such requests:

1. Clear likelihood of success on the merits by the petitioner;
2. Danger of immediate or irreparable harm if the request is not granted;
3. Absence of substantial injury to other parties if the request is granted; and
4. The public interest.

(d) The filing of a petition for interim relief will not stay administrative proceedings or processes.

(e) Each party must serve copies of all materials submitted on all other parties.

(f) Following a final administrative decision by the Commissioner or the Board, and upon the filing of an appeal from

that decision to the Appellate Division of Superior Court, a party to the appeal may petition the Commissioner for a stay or other relief pending a decision by the Court in accordance with the procedures and standards in (b) and (c) above. See N.J. Court Rules 2:9-7.

(g) See N.J.A.C. 1:1-12.6 for interim relief rules on matters pending before the Office of Administrative Law.

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

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

Changed title from "Interim relief."

Added new (f) and relettered old (f) as (g) with stylistic revisions.

4A:2-1.3 Adjournments

(a) Any party requesting an adjournment of a hearing or other review must establish good and sufficient reason for such request. Such reason may include, but is not limited to:

1. Unavoidable appearance by an attorney for a party in any state or federal court; or
2. Illness of a party evidenced by an affidavit and a doctor's certificate.

(b) Where an adjournment is found not to be for good and sufficient reason, the Commissioner or Board may impose a fine or penalty.

(c) See N.J.A.C. 1:1-9.6 for Office of Administrative Law adjournment rules.

Case Notes

Appeal of suspension of deceased medical technician was dismissed without prejudice. *McCormick v. City of Gloucester*, 96 N.J.A.R.2d (CSV) 475.

Appeal dismissed due to retirement and resignation of employees (citing former N.J.A.C. 4:1-5.9). *Tyler et al. v. City of Paterson*, 2 N.J.A.R. 272 (1979).

4A:2-1.4 Burden of proof

(a) In appeals concerning major disciplinary actions, N.J.A.C. 4A:2-2.1 et seq., the burden of proof shall be on the appointing authority.

(b) In appeals concerning minor disciplinary actions, see N.J.A.C. 4A:2-3.7(f) for burden of proof standards.

(c) In all other Commissioner and Board appeals, the burden of proof shall be on the appellant.

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 (b) and relettered old (b) as (c).

Case Notes

Police officer was reinstated when removed on hearsay evidence that was less than competent. *Rhodes v. Union City Police Department*, 95 N.J.A.R.2d (CSV) 643.

Assault upon a patient was not sufficiently proven to justify removal of therapy program assistant. *Berrien v. Department of Human Services*, 95 N.J.A.R.2d (CSV) 629.

Termination of training technician at developmental center was not justified absent evidence of endangering a client through neglect of duty. *Forde v. Hunterdon Developmental Center*, 95 N.J.A.R.2d (CSV) 577.

Suspension of public employee was not warranted when appointing authority failed to carry burden of proof on charge of insubordination. *Pennoh v. North Princeton Developmental Center*, 95 N.J.A.R.2d (CSV) 514.

Insufficient evidence precluded removal of corrections officer on charges of unbecoming conduct. *Parham v. Department of Corrections*, 95 N.J.A.R.2d (CSV) 439.

Charges of misconduct were insufficient to sustain suspension of corrections officer in absence of credible evidence in record. *Tyson v. Department of Corrections*, 95 N.J.A.R.2d (CSV) 419.

Removal of training technician was not warranted when sole witness to alleged beating of client was not credible. *Murray v. Department of Human Services*, 95 N.J.A.R.2d (CSV) 407.

Removal of nurse was not warranted absent credible proof of actual assault on patient. *Fontenot v. Ancora Psychiatric Hospital*, 95 N.J.A.R.2d (CSV) 291.

Prison worker's removal for insubordination not supported by sufficient evidence. *Balkaran v. Northern State Prison*, 95 N.J.A.R.2d (CSV) 256.

No preponderance of credible evidence that layoffs were in bad faith. *Edwards v. Department of Community Affairs Employee Layoffs*, 95 N.J.A.R.2d (CSV) 29.

Charges in disciplinary proceedings against police officers with respect to sports betting were not sustained. *State Police v. Hall, Buhan*, 95 N.J.A.R.2d (POL) 1.

Proof; patient abuse. *Rivera v. Woodbine Developmental Center*, 94 N.J.A.R.2d (CSV) 705.

Appointing authority Proved that employee was incompetent, inefficient, failed to perform her duties and conducted herself in a manner unbecoming a public employee. *Janowski v. Bergen County Department of the Judiciary*, 94 N.J.A.R.2d (CSV) 550.

Employee was entitled to all reasonable inferences from his evidence that layoff was in bad faith. *Beattie v. Camden County Department of Buildings and Operations*, 94 N.J.A.R.2d (CSV) 529.

There was not sufficient proof that guard was sleeping on duty. *Webster v. Burlington County Jail*, 94 N.J.A.R.2d (CSV) 389.

Evidence insufficient; neglect of duty or conduct unbecoming public employee. *Karl v. New Brunswick Police Department*, 94 N.J.A.R.2d (CSV) 199.

Failure to prove that correction officer was guilty of missing a call-in. *Mowenn v. New Jersey State Prison*, 93 N.J.A.R.2d (CSV) 545.

Discrimination or harassment not shown to have caused unsatisfactory evaluation; termination at end of probationary period. *Amin v. Department of Transp.*, 93 N.J.A.R.2d (CSV) 406.

Failure to adhere to documenting requirements; urine testing. *Riley v. Southern State Correctional Facility*, 93 N.J.A.R.2d (CSV) 385.

Order to submit urine specimens for drug testing was not justified. *Riley v. Southern State Correctional Facility*, 93 N.J.A.R.2d (CSV) 385.

Evidence did not show failure to report client abuse. *Grant v. North Princeton Developmental Center*, 93 N.J.A.R.2d (CSV) 332.

Failure of proof that employee was guilty of client abuse. *Locklear v. New Lisbon Developmental Center*, 93 N.J.A.R.2d (CSV) 197.

Failure of proof that employee disobeyed order. *Lott v. Woodbridge Developmental Center*, 93 N.J.A.R.2d (CSV) 141.

Abuse of client not proven. *Brent v. Vineland Developmental Center*, 93 N.J.A.R.2d (CSV) 82.

There was failure of proof that employee sought compensation improperly. *Cressinger v. Newark Board of Education*, 93 N.J.A.R.2d (CSV) 63.

Absent showing that inspector passed noncomplying vehicle suspension was unwarranted. *Inge v. Division of Motor Vehicles*, 93 N.J.A.R.2d (CSV) 47.

Town failed to sustain burden of proof and removal was unwarranted. *Corso v. West New York*, 93 N.J.A.R.2d (CSV) 43.

Confession to drug use was not subject to independent corroboration and was cause for state trooper's dismissal. *State Police v. Naranjo*, 93 N.J.A.R.2d (POL) 17.

It was not shown that employee was guilty of client abuse. *Hopkins v. New Jersey Department of Human Services*, 93 N.J.A.R.2d (CSV) 17.

Evidence; sleeping while on duty; removal not warranted. *Glenn v. Department of Corrections*, 92 N.J.A.R.2d (CSV) 918.

Evidence; intention to steal sneakers from impounded car; removal not warranted. *Walsh v. City of Vineland*, 92 N.J.A.R.2d (CSV) 833.

Evidence; inappropriate physical contact with a client; suspension not warranted. *Stewart v. Arthur Brisbane Child Treatment Center*, 92 N.J.A.R.2d (CSV) 827.

Evidence; physical abuse of a client; removal not warranted. *Mestres v. New Lisbon Developmental Center*, 92 N.J.A.R.2d (CSV) 823.

Failure of proof; layoff in bad faith; presumption that measures removing them were for reasons of economy. In the Matter of Layoffs of Certain Employees of Bergen Pines County Hospital, 92 N.J.A.R.2d (CSV) 779.

Proof failed to show that employee resigned under duress or that her employer acceded to her efforts to rescind. *Torres v. Buttonwood Hospital*, 92 N.J.A.R.2d (CSV) 753.

Psychiatric technician's medical condition and history was not sufficient to deprive her of employment. *Smith v. Essex County Hospital Center*, 92 N.J.A.R.2d (CSV) 702.

Failure to prove that employee engaged in an act of client abuse. *Brooks v. Ancora Developmental Center*, 92 N.J.A.R.2d (CSV) 664.

Failure to show that officer was improperly bypassed for promotion to police captain. *Hannafey v. Middletownship*, 92 N.J.A.R.2d (CSV) 594.

Failure to sustain disciplinary charge. *Angiuoli v. New Lisbon Developmental Center*, 92 N.J.A.R.2d (CSV) 570.

Failure to obtain a second urine sample for retesting did not prevent removal of police officers. *Higgins v. Department of Corrections*, 92 N.J.A.R.2d (CSV) 525.

Evidence failed to establish abuse of client. *Woolridge v. Ancora Psychiatric Hospital*, 92 N.J.A.R.2d (CSV) 316.

Failure to prove that employee stuck his finger in client's eye. *Jones v. New Lisbon Developmental Center*, 92 N.J.A.R.2d (CSV) 291.

Failure to establish neglect of duty and/or conduct unbecoming a police officer. *Ogonowski v. Police Department, Atlantic City*, 92 N.J.A.R.2d (CSV) 264.

Failure of evidence to support charge of physical abuse of patient. *Van Doimen v. Greystone Park*, 92 N.J.A.R.2d (CSV) 223.

Failure to establish physical abuse of clients; removal not justified. *Hannah v. Vineland Developmental Center*, 92 N.J.A.R.2d (CSV) 195.

Failure to sustain burden of proof; suspension. *DeSantis v. New Jersey Training School*, 92 N.J.A.R.2d (CSV) 193.

Evidence was sufficient to find employee guilty of coercion and intimidation of a co-worker; removal. *Perrin v. N.J. Veteran's Memorial Home, Vineland*, 92 N.J.A.R.2d (CSV) 148.

Evidence was insufficient to find that officer struck juvenile; removal not justified. *Dorsey v. Department of Corrections, Atlantic City*, 92 N.J.A.R.2d (CSV) 92.

Evidence was insufficient to find that nurse struck two patients. *Baker v. North Princeton Developmental Center, State Dept. of Human Services*, 92 N.J.A.R.2d (CSV) 84.

Evidence was insufficient to find that care worker slapped a patient; removal. N.J.S.A. 11A:2-21. *Gholston v. North Jersey Developmental Center*, 92 N.J.A.R.2d (CSV) 82.

Evidence established abuse of patient. *Williams v. Marlborough Psychiatric Hosp., State Dept. of Human Services*, 92 N.J.A.R.2d (CSV) 66.

Evidence was insufficient to find inappropriate physical contact with inmate. *Sepulveda v. New Jersey Training School for Boys, Jamesburg*, 92 N.J.A.R.2d (CSV) 65.

Evidence established that employee abused resident; removal. *New Jersey Veterans' Memorial Home, Parimus v. Cotton*, 92 N.J.A.R.2d (CSV) 60.

Release at end of working test period; failure to meet burden of establishing bad faith. N.J.S.A. 11A:4-15, 4A:2-4.1. *Jackson v. Meadowview Hosp., Hudson County*, 92 N.J.A.R.2d (CSV) 49.

Inconsistencies in record precluded finding as to making of false and misleading official statements. *State Police v. Suarez*, 92 N.J.A.R.2d (POL) 29.

Evidence was insufficient to justify removal. *Robinson v. Salem County*, 92 N.J.A.R.2d (CSV) 20.

Alleged misrepresentation of facts by police officer as to presence of radar unit in troop car was not substantiated. *State Police v. McClelland*, 92 N.J.A.R.2d (POL) 19.

Evidence was insufficient to find that human services assistant mentally or physically abused patient. *Pierce v. Vineland Developmental Center, New Jersey Department of Human Services*, 92 N.J.A.R.2d (CSV) 15.

Witness standoff left false statement charge unsubstantiated and required police officer's exoneration. *State Police v. Crawford*, 92 N.J.A.R.2d (POL) 9.

Evidence was sufficient to justify removal from employment. *Bigley v. Hunterdon Developmental Center*, 92 N.J.A.R.2d (CSV) 5.

False report charge was not substantiated and precluded dismissal of police officer. *State Police v. McGovern*, 92 N.J.A.R.2d (POL) 1. Failure to prove that employee engaged in patient abuse. *Walker v. Violend Developmental Center*, 91 N.J.A.R.2d (CSV) 91.

Failure to prove that employee engaged in patient abuse. *Walker v. Violend Developmental Center*, 91 N.J.A.R.2d (CSV) 91.

Evidence was sufficient to find abuse of patient and threatening supervisor. *Knight v. Trenton Psychiatric Hosp.*, 91 N.J.A.R.2d (CSV) 85.

Evidence was sufficient to find employee falsified his attendance record. *Edmonds v. Ancora Psychiatric Hospital*, 91 N.J.A.R.2d (CSV) 67.

Evidence was insufficient to support patient's allegation of physical abuse. *Almedia v. Atlantic County Department of Health Institutions*, 91 N.J.A.R.2d (CSV) 49.

Evidence established neglect of duty, willful violation of law, conduct unbecoming public employee and dishonest and immoral conduct. *Smith v. Municipal Court of the Township of Hamilton*, 91 N.J.A.R.2d (CSV) 37.

Release from position at end of extended working test period; failure to establish that employer acted in bad faith. *Nardone v. New Jersey Commission for the Blind Visually Impaired*, 91 N.J.A.R.2d (CSV) 35.

Evidence was sufficient to find that worker burned client with hot water and failed to fully report the injuries. *Witcher v. New Lisbon Developmental Center*, 91 N.J.A.R.2d (CSV) 31.

Evidence was sufficient to find technician punched a patient in the face. *Willis v. Trenton Psychiatric Hosp.*, 91 N.J.A.R.2d (CSV) 27.

Discharge at end of working test period; failure to establish that employer acted in bad faith. *O'Connor v. Health Services Center of Camden County*, 91 N.J.A.R.2d (CSV) 23.

Evidence was sufficient to find neglect of duties, insubordination, and unbecoming conduct. *McIver v. Newark Housing Authority*, 91 N.J.A.R.2d (CSV) 19.

Evidence was sufficient to find absenteeism and tardiness and deliberate and material false misrepresentation on employment application. N.J.S.A. 11A:4-10. *Essex County Jail v. Burchett*, 91 N.J.A.R.2d (CSV) 5.

Evidence was sufficient to find chronic, excessive and abusive absenteeism and lateness. N.J.S.A. 4A:2-2.3. *Daniels v. Evergreen Manor, Camden County*, 91 N.J.A.R.2d (CSV) 3.

Appellant failed to show that employer (Newark Free Public Library) acted in bad faith in denying her a fair evaluation of her work performance and releasing her at the end of her working test period based on claim that her services were unsatisfactory (citing former N.J.A.C. 4:1-5.10). *Davis v. Newark Public Library*, 9 N.J.A.R. 84 (1987).

Burden of proof rests with employee challenging economic layoff (citing former N.J.A.C. (4:1-5.10). *Tyler et al. v. City of Paterson*, 2 N.J.A.R. 272 (1979).

In an appeal from a disciplinary action, the burden of proof is on the appointing authority (citing former N.J.A.C. 4:1-5.10). *Clark v. New Jersey Dep't of Agriculture*, 1 N.J.A.R. 315 (1980).

4A:2-1.5 Remedies

(a) Seniority credit may be awarded in any successful appeal.

(b) Back pay, benefits and counsel fees may be awarded in disciplinary appeals and where a layoff action has been in bad faith. See N.J.A.C. 4A:2-2.10. In all other appeals, such relief may be granted where the appointing authority has unreasonably failed or delayed to carry out an order of the Commissioner or Board or where the Board finds sufficient cause based on the particular case.

Case Notes

A wrongfully discharged employee was entitled to both vacation leave and sick leave credits. Rule invalid (citing former N.J.A.C. 4:1-5.5(a)). *Eaddy v. Dep't of Transp.*, 208 N.J.Super. 156, 505 A.2d 162 (App.Div. 1986) appeal dismissed 105 N.J. 569, 523 A.2d 200.

Appellant suspended and subsequently removed from title of Senior Systems Analyst was reinstated to duties appropriate to his permanent title (citing former N.J.A.C. 4:1-5.5). *Valluzzi v. Bergen County*, 10 N.J.A.R. 89 (1988), adopted—Merit System Bd., App.Div. A-3269-87, 3/3/88.

4A:2-1.6 Reconsideration of decisions

(a) Within 45 days of receipt of a decision, a party to the appeal may petition the Commissioner or Board for reconsideration.

(b) A petition for reconsideration shall be in writing signed by the petitioner or his or her representative and must show the following:

1. The new evidence or additional information not presented at the original proceeding which would change the outcome and the reasons that such evidence was not presented at the original proceeding; or
2. That a clear material error has occurred.

(c) Each party must serve copies of all materials submitted on all other parties.

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

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

In (a), substituted "Within 45 days of" for "Upon the".

Case Notes

A motion for reconsideration of a final administrative decision must be made within the period provided for the taking of an appeal. *Matter of Hill*, 241 N.J.Super. 367, 575 A.2d 42 (A.D.1990).

Senior corrections officer was an employee on date when complaint which formed basis of harassment conviction was filed, for purposes of forfeiture statute. *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 (App.Div.1989) affirmed 119 N.J. 256, 574 A.2d 983.

4A:2-1.7 Specific appeals

(a) For specific appeal procedures see:

1. Awards in State service (N.J.A.C. 4A:6-6.10);
2. Classification (N.J.A.C. 4A:3-3.9);
3. Discipline, major (N.J.A.C. 4A:2-2);
4. Discipline, minor (N.J.A.C. 4A:2-3);
5. Discrimination in State service (N.J.A.C. 4A:7-3.2 and 3.3);
6. Employment list removal for medical reasons (N.J.A.C. 4A:4-6.5);
7. Employment list removal for psychological reasons (N.J.A.C. 4A:4-6.5);
8. Examinations (N.J.A.C. 4A:4-6);
9. Grievances (N.J.A.C. 4A:2-3);
10. Layoffs (N.J.A.C. 4A:8-2.6);
11. Overtime in State service (N.J.A.C. 4A:3-5.10);

12. Performance Assessment Review in State service (N.J.A.C. 4A:6-5.3);

13. Reprisals (N.J.A.C. 4A:2-5);

14. Resignations (N.J.A.C. 4A:2-6);

15. Salary (job reevaluation) in state service (N.J.A.C. 4A:3-4.3);

16. Sick leave injury in State service (N.J.A.C. 4A:6-1.7); and

17. Supplemental compensation on retirement in State service (N.J.A.C. 4A:6-3.4).

(b) Any appeal not listed above must be filed in accordance with N.J.A.C. 4A:2-1.1.

Administrative correction to (a), with deletion of (a)11 and renumbering of old (a)12-18 to new (a)11-17.

See: 22 N.J.R. 165(a).

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

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

Deleted ".1 et seq." following N.J.A.C. references throughout; in (a)5, substituted "and 3.3" for "through 4A:7-3.4"; and in (a)11, deleted "et seq." following N.J.A.C. reference.

Case Notes

Appeals to Department of Personnel (DOP) and Merit System Board by police officer were timely. *Matter of Allen*, 262 N.J.Super. 438, 621 A.2d 87 (A.D.1993).

SUBCHAPTER 2. MAJOR DISCIPLINE**Cross References**

Applicability of this subchapter to SES members, see N.J.A.C. 4A:3-2.9.

4A:2-2.1 Employees covered

(a) This subchapter applies only to permanent employees in the career service or a person serving a working test period.

(b) Appointing authorities may establish major discipline procedures for other employees.

(c) When the State of New Jersey and the majority representative have agreed pursuant to the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.3, to a procedure for appointing authority review before a disciplinary action is taken against a permanent employee in the career service or an employee serving a working test period, such procedure shall be the exclusive procedure for review before the appointing authority.

(d) When the State of New Jersey and the majority representative have agreed pursuant to the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.3, to a disciplinary review procedure that provides for binding arbitration of disputes involving a disciplinary action which would be otherwise appealable to the Board under N.J.A.C. 4A:2-

2.8, of a permanent employee in the career service or a person serving a working test period, such procedure shall be the exclusive procedure for any appeal of such disciplinary action.

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

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

Added (c) and (d).

Case Notes

Department of Energy was not equitably estopped from returning employee to his permanent position as senior engineer when promotional examination was not given between date of his provisional appointment and date of demotion (citing former N.J.A.C. 4:1-16.8). *O'Malley v. Department of Energy*, 109 N.J. 309, 537 A.2d 647 (1987).

Doctrine of equitable estoppel inapplicable to allow provisional employee to retain position (citing former N.J.A.C. 4:1-16.8). *Omrod v. N.J. Dep't of Civil Service*, 151 N.J.Super. 54, 376 A.2d 554 (App.Div.1977) certification denied 75 N.J. 534, 384 A.2d 513.

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.

4A:2-2.2 Types of discipline

(a) Major discipline shall include:

1. Removal;
2. Disciplinary demotion; and
3. Suspension or fine for more than five working days at any one time.

(b) See N.J.A.C. 4A:2-2.9 for minor disciplinary matters that are subject to a hearing, and N.J.A.C. 4A:2-3 for all other minor disciplinary matters.

(c) The length of a suspension in a Final Notice of Disciplinary Action, a Board decision or a settlement, when expressed in "days," shall mean working days, unless otherwise stated.

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

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

In (a)2, added "and" at the end; in (a)3, substituted a period for a semi-colon at the end; deleted (a)4 and (a)5; and added (b) and (c).

Case Notes

Employee did not demonstrate that Department of Labor's request to reallocate career position of Director to SES was made in bad faith and without complying with statutory procedures governing disciplinary proceedings. *Matter of Baykal*, 707 A.2d 467, 309 N.J.Super. 424.

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.

Initial Decision (2008 N.J. AGEN LEXIS 287) adopted, which concluded that mitigating circumstances existed to reduce a correction officer's penalty for failing to conduct half-hour inmate counts, resulting in a delay in the discovery of a fatally ill inmate; removal was not

justified where the officer was a new transferee with only five days on the job who had never served a third shift nor worked in an administrative segregation unit and thus did not have sufficient training to have been assigned to such a sensitive position. In re Washington, OAL Dkt. No. CSV 5886-07, 2008 N.J. AGEN LEXIS 715, Merit System Board Decision (June 11, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 293) adopted, which concluded that an eight-day suspension was warranted for a police officer's failure to obey an order to holdover and work overtime and failure to communicate through regular channels; the police officer had worked 42 hours during the three previous days. In re Hannibal, OAL Dkt. No. CSV 12920-05, 2008 N.J. AGEN LEXIS 607, Final Decision (May 7, 2008).

Employee suspended for 10 days from position as account clerk for failure to deposit money (\$700,000) within 48-hour period required by N.J.S.A. 40A:5-15 and late deposit by mail of \$355,000; 10-day suspension upheld and \$500 fine imposed. *Kennedy v. City of Burlington*, 11 N.J.A.R. 20 (1988).

4A:2-2.3 General causes

(a) An employee may be subject to discipline for:

1. Incompetency, inefficiency or failure to perform duties;
2. Insubordination;
3. Inability to perform duties;
4. Chronic or excessive absenteeism or lateness;
5. Conviction of a crime;
6. Conduct unbecoming a public employee;
7. Neglect of duty;
8. Misuse of public property, including motor vehicles;
9. Discrimination that affects equal employment opportunity (as defined in N.J.A.C. 4A:7-1.1), including sexual harassment;
10. Violation of Federal regulations concerning drug and alcohol use by and testing of employees who perform functions related to the operation of commercial motor vehicles, and State and local policies issued thereunder; and
11. Other sufficient cause.

Amended by R.1990 d.308, effective June 18, 1990.

See: 22 N.J.R. 1015(b), 22 N.J.R. 1915(a).

Added misuse of public property, including motor vehicles.

Amended by R.1994 d.618, effective December 19, 1994.

See: 26 N.J.R. 3507(a), 26 N.J.R. 5000(a).

Amended by R.1995 d.415, effective August 7, 1995.

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

Added (a)10, and recodified former (a)10 as (a)11.

Case Notes

Appellate court's reversal of the Merit System Board's (MSB's) decision to remove a public employee from her job was in error as the appellate court impermissibly imposed its own judgment as to the proper penalty when the MSB's penalty was not illegal, unreasonable, nor shocking to any sense of fairness; the MSB's decision to remove the employee for waving a cigarette lighter retrieved from her purse in the face of a five-year-old child in a room containing oxygen tanks

recognized legitimate public policy reasons for not retaining the employee since she lost the trust of her employer. *In re Herrmann*, 192 N.J. 19, 926 A.2d 350, 2007 N.J. LEXIS 721 (2007).

Appellate court erred by treating the principle of progressive discipline as a mandate of law and rejecting a Merit System Board's opinion terminating a police officer for sleeping on the job. *In re Carter*, 191 N.J. 474, 924 A.2d 525, 2007 N.J. LEXIS 702 (2007).

As a county employee, an accountant, had been proven incompetent, the Merit System Board erred in reversing his termination and in imposing a six-month suspension; an accountant who could not prepare a bank reconciliation was of no value to a county treasurer's office, and a suspension would not make him competent, since he always maintained that he performed his work properly. *Klusaritz v. Cape May County*, 387 N.J. Super. 305, 903 A.2d 1095, 2006 N.J. Super. LEXIS 231 (App.Div. 2006).

In circumstances where an employee cannot competently perform the work required of his position, termination rather than progressive discipline is the appropriate action. *Klusaritz v. Cape May County*, 387 N.J. Super. 305, 903 A.2d 1095, 2006 N.J. Super. LEXIS 231 (App.Div. 2006).

A public employee cannot be dismissed for failure to submit to a procedure violative of his state and federal constitutional rights. *Reames v. Department of Public Works, City of Paterson*, 310 N.J. Super. 71, 707 A.2d 1377 (A.D. 1998).

Off-duty firefighter's utterance of racial epithet at on-duty police officer during traffic stop constituted conduct unbecoming both firefighter and public employee. *Karins v. City of Atlantic City*, 706 A.2d 706, 152 N.J. 532 (N.J. 1998).

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).

Issue of forfeiture of public employment by turnpike utility worker did not have to be first addressed by administrative agency to determine whether there was any relationship between crimes committed and employment duties. *State v. Baber*, 256 N.J. Super. 240, 606 A.2d 891 (L. 1992).

Turnpike utility worker's convictions for failure to deliver drugs to police and for simple assault upon two police officers were offenses "involving or touching" his job so as to justify forfeiture of employment. *State v. Baber*, 256 N.J. Super. 240, 606 A.2d 891 (L. 1992).

Order directing forfeiture of public employment may be incorporated in sentence of criminal convictions. *State v. Baber*, 256 N.J. Super. 240, 606 A.2d 891 (L. 1992).

Forfeiture of public employment, for conviction of failure to file gross income tax return was not a bill of attainder. *Ayars v. New Jersey Dept. of Corrections*, 251 N.J. Super. 223, 597 A.2d 1084 (A.D. 1991).

Forfeiture of public employment for conviction for failure to file gross income tax return did not violate double jeopardy. *Ayars v. New Jersey Dept. of Corrections*, 251 N.J. Super. 223, 597 A.2d 1084 (A.D. 1991).

Dismissal was appropriate sanction for refusal by correction officers to submit to mandatory drug testing. *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.

When public employee is convicted of petty disorderly persons offense, analysis of nexus between crime and employment is required to determine if there is sufficient relationship between the two to warrant harsh penalty of forfeiture. *Moore v. Youth Correctional Institute at Annandale*, 119 N.J. 256, 574 A.2d 983 (1990).

When public employee is convicted of petty disorderly persons offense, connection between conviction and employment will have to be examined initially by governmental department in which employee works, then by appropriate administrative agencies, and employee will retain right to appeal to appellate division. *Moore v. Youth Correctional Institute at Annandale*, 119 N.J. 256, 574 A.2d 983 (1990).

Employees who are convicted of petty disorderly persons offense and recognize that their offense does touch and involve their employment can for good cause request county prosecutor or Attorney General to petition sentencing court for waiver of resultant forfeiture of public employment. *Moore v. Youth Correctional Institute at Annandale*, 119 N.J. 256, 574 A.2d 983 (1990).

Even in cases in which public employee does not obtain formal waiver of forfeiture of public employment resulting from conviction of petty disorderly persons offense, department should consider whether punishment of forfeiture fits crime. *Moore v. Youth Correctional Institute at Annandale*, 119 N.J. 256, 574 A.2d 983 (1990).

Inquiry into whether offense by public employee involves and touches on public employment to extent of meriting forfeiture of employment requires careful examination of facts and evaluation of various factors. *Moore v. Youth Correctional Institute at Annandale*, 119 N.J. 256, 574 A.2d 983 (1990).

Offense committed by public employee would not be considered not to involve or touch employment, so as to support forfeiture of public employment, based on fact that offense does not take place during employment hours or on employment grounds. *Moore v. Youth Correctional Institute at Annandale*, 119 N.J. 256, 574 A.2d 983 (1990).

Evidence supported determination that criminal conviction for harassing immediate superior warranted forfeiture of public employment. *Moore v. Youth Correctional Institute at Annandale*, 119 N.J. 256, 574 A.2d 983 (1990).

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 as a senior corrections officer. *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.

Department of Energy was not equitably estopped from returning employee to his permanent position as senior engineer when promotional examination was not given between date of his provisional appointment and date of demotion (citing former N.J.A.C. 4:1-1.1). *O'Malley v. Department of Energy*, 109 N.J. 309, 537 A.2d 647 (1987).

Tenure of public officer governed by Civil Service Commission; broad discretion conferred upon appointing authority regarding grounds for removal (citing former N.J.A.C. 4:1-6.9). *State v. DeMarco*, 107 N.J. 562, 527 A.2d 417 (1987).

Off-duty police officer, involved in fatal accident which was basis for his conviction of death by auto, disqualified from unemployment compensation effective the date of his suspension pending discharge (citing former N.J.A.C. 4:1-16.9). *Connell v. Board of Review*, 216 N.J. Super. 403, 523 A.2d 1099 (App.Div. 1987).

Initial Decision (2008 N.J. AGEN LEXIS 290) adopted, which concluded that dismissal was justified where an assistant water treatment plant operator failed a drug test, after having signed a last-chance agreement; the failure of a public employee to abide by the terms of a last-chance agreement constitutes sufficient cause for dismissal. *In re McBride*, OAL Dkt. No. CSV 10111-07, 2008 N.J. AGEN LEXIS 585, Final Decision (May 21, 2008).

Working day suspension of 120 days rather than removal was appropriate where a police officer's deficiencies, while serious, were in one area only, that of report preparation, and the officer was otherwise able to successfully execute the duties of police officer (adopting in part and modifying in part 2008 N.J. AGEN LEXIS 290). In re Linthicum, OAL Dkt. No. CSV 10251-07, 2008 N.J. AGEN LEXIS 703, Merit System Board Decision (May 21, 2008).

Tax collector's refusal to comply with new business hours; cause for suspension without pay. Newfield Borough v. Moynihan, 94 N.J.A.R.2d (CAF) 2.

Incompetence and poor judgement exhibited by Casino Control Commission's Chief of Staff with respect to employee buyouts and meal recompensation merited three-month suspension without pay and demotion. In the Matter of Papp, 96 N.J.A.R.2d (CCC) 1.

Lack of specificity in assignment defeats employer's suspension action for neglect of duty. Stevenson v. Burlington County Mosquito Control Commission, 97 N.J.A.R.2d (CSV) 702.

Removal of utilities employees due to unbecoming conduct and falsification of records affirmed. Phillips and Williams v. Deptford Township Municipal Utilities Authority, 97 N.J.A.R.2d (CSV) 695.

Probationary firefighter removed after testing twice for drug use and signing certifications authenticating testing procedures. McHugh v. City of East Orange Fire Department, 97 N.J.A.R.2d (CSV) 692.

Building engineer's appropriate action to solve building's mechanical problems inappropriate subject for removal. Clark v. Northern State Prison, 97 N.J.A.R.2d (CSV) 686.

Excessive absences justify classified employee's removal. Cesaretti v. Atlantic County, 97 N.J.A.R.2d (CSV) 680.

Corrections officer terminated for over-familiarity with inmate. Anderson v. East Jersey State Prison, 97 N.J.A.R.2d (CSV) 675.

Suspension of hospital attendant due to excessive absenteeism modified. Shapiro v. Burlington County, 97 N.J.A.R.2d (CSV) 673.

Suspension of correction officer for unbecoming conduct due to falsification of time records affirmed. Rodriguez v. Cumberland County, 97 N.J.A.R.2d (CSV) 671.

Removal of juvenile detention officer for excessive absenteeism affirmed. King v. Cumberland County, 97 N.J.A.R.2d (CSV) 664.

Demotion of correction sergeant due to failure to follow policies regarding removal of inmate affirmed. Gianni v. Albert C. Wagner Youth Correctional Facility, 97 N.J.A.R.2d (CSV) 661.

Termination of human services technician for physical abuse of patient reduced to suspension. Farmer v. Marlboro Psychiatric Hospital, 97 N.J.A.R.2d (CSV) 660.

Employee's workload backlog not grounds for suspension if work pace within reasonable levels within agency. Teel v. Mercer County Board of Social Services, 97 N.J.A.R.2d (CSV) 657.

Supervisor's threat of assault justifies suspension. Viteritto v. Northern State Prison, 97 N.J.A.R.2d (CSV) 655.

Suspension and removal of police officer due to unbecoming conduct, insubordination and assault affirmed. Schreck v. Township of Woodbridge Police Department, 97 N.J.A.R.2d (CSV) 645.

Suspension of sergeant for unbecoming conduct due to inappropriate use of force against resident affirmed. Mullins v. New Jersey Training School for Boys, Jamesburg, 97 N.J.A.R.2d (CSV) 643.

Excessive absences justify youth worker's removal. Evans v. Mercer County Youth Detention Center, 97 N.J.A.R.2d (CSV) 637.

Removal of building maintenance worker for excessive absenteeism due to work-related injury inappropriate. Allison v. Trenton Housing Authority, 97 N.J.A.R.2d (CSV) 633.

Suspension of Safety Specialist due to chronic or excessive lateness affirmed. Williams v. Division of Motor Vehicles, 97 N.J.A.R.2d (CSV) 632.

Employee's physical abuse of institutional client justifies removal. Vinson v. Vineland Developmental Center, 97 N.J.A.R.2d (CSV) 630.

Removal of Maintenance Repairer based on erroneous information not justified. Peters v. Hackensack Housing Authority, 97 N.J.A.R.2d (CSV) 628.

Removal due to refusal to cooperate with alcohol testing affirmed. Parham and Day v. Department of Transportation, 97 N.J.A.R.2d (CSV) 621.

Removal of laborer due to persistent misconduct affirmed. O'Brick v. Township of Pennsauken, Department of Public Works, 97 N.J.A.R.2d (CSV) 617.

Nurse's removal for backdating facility report on client modified. Milbourne v. Vineland Developmental Center, 97 N.J.A.R.2d (CSV) 614.

Lack of evidence defeats appointing authority's disciplinary charges. Jensen v. North Princeton Developmental Center, 97 N.J.A.R.2d (CSV) 612.

Junior officer's disobedience warrants suspension for unbecoming conduct. Heigler v. Gloucester County, Office of Sheriff, 97 N.J.A.R.2d (CSV) 607.

Removal of truck driver for causing disturbance on state property affirmed. Grimaldi v. Vineland Developmental Center, 97 N.J.A.R.2d (CSV) 604.

Choking institutionalized juvenile justifies technician's removal for client mistreatment. Fouco v. Woodbine Developmental Center, 97 N.J.A.R.2d (CSV) 601.

Removal of clerk typist due to excessive absenteeism and unauthorized use of property unwarranted. Crumidy v. Middlesex County Board of Taxation, 97 N.J.A.R.2d (CSV) 596.

Removal for neglect of duty due to absence reduced to three month suspension. Coppola v. Township of Gloucester, Department of Recreation, 97 N.J.A.R.2d (CSV) 593.

Public employee failing to report for assignment and repeatedly failing to comply with supervisor's directives justifies removal. Bright v. Arthur Brisbane Child Treatment Center, 97 N.J.A.R.2d (CSV) 586.

Removal of clerk typist due to absenteeism modified to suspension. Viereck v. City of Gloucester City, Department of Administration, 97 N.J.A.R.2d (CSV) 573.

Suspensions and removal of institutional attendant for use of insulting language modified. Whitehead v. Monmouth County, 97 N.J.A.R.2d (CSV) 569.

Removal of service officer for neglect of duty remanded. Avanti v. Department of Military and Veteran's Affairs, 97 N.J.A.R.2d (CSV) 564.

Failure to seek treatment but continuing to arrive to work while intoxicated justifies removal of security guard. Joseph v. Jersey City State College, 97 N.J.A.R.2d (CSV) 561.

Hospital technician's inaction resulting in danger to others justifies removal. Polansky v. Hunterdon Developmental Center, 97 N.J.A.R.2d (CSV) 549.

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.

(e) Appeals concerning violations of this section may be presented to the Commissioner 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).

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).

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.

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.

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.

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).

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).

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 Board hearings

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

(b) Major discipline hearings will be heard by the Board or referred to the Office of Administrative Law for hearing before an administrative law judge. Minor discipline matters will be heard by the Board 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 Board 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 Board 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 Board 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 Board may adopt, reject or modify the recommended report and decision of an administrative law judge. Copies of all Board decisions shall be served personally or by regular mail upon the parties.

(d) The Board 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.

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).

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 Board 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 and holiday premium pay.

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 Merit System Board 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 Merit System Board 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 Board 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, Board review of the outstanding issue. In a Board 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.

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.

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).

Merit System Board's role in determining whether to award back pay for periods of disciplinary suspension is adjudicatory. *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).

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 Merit System Board 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 Board.

(b) When the Board 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 Merit System Board on appeal or are incurred in furtherance of appellate court review shall not be awarded by the Board.

(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, Board review.

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).

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).

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).

APPENDIX

New Jersey Department of Personnel—Division of Merit System Practices and Labor Relations

MAJOR DISCIPLINARY APPEAL FORM

Use this form to submit an appeal of a major disciplinary action to the Merit System Board.

1. Your Name: _____
 Address: _____
 _____ Daytime
 _____ Telephone: _____
 _____ (City) _____ (State) _____ (Zip Code)

2. Will you be represented by a lawyer or union representative at the hearing? ____ Yes ____ No
 If yes, complete Section 2.
 Representative Name: _____
 Union or Law Firm: _____
 Address: _____
 _____ Telephone: _____
 _____ (City) _____ (State) _____ (Zip Code)

3. Give a copy of this form and attachments to your Personnel Officer
 Personnel Officer's Name: _____
 Address: _____
 _____ Telephone: _____
 _____ (City) _____ (State) _____ (Zip Code)

4. _____
 _____ (Your or your representative's signature) _____ (Date)

NOTE: Your appeal will NOT be processed unless Sections 1-4 are completed and the first two documents listed in Section 5 are included. Failure to submit all required information within 20 days after you receive the Final Notice of Disciplinary Action may result in a reduced back pay award.

5. ATTACH the following to this form:

- Preliminary Notice of Disciplinary Action.
- Final Notice of Disciplinary Action.
- A statement of the reason(s) for the appeal and the requested relief (optional).

Mail to: Merit System Board
 Department of Personnel
 Hearings Unit—Unit H
 PO Box 312
 Trenton, NJ 08625-0312

Hand Delivery: 3 Station Plaza
 44 South Clinton Avenue, Trenton

New Rule, R.1998 d.518, effective November 2, 1998.
 See: 30 N.J.R. 2325(a), 30 N.J.R. 3935(a).

SUBCHAPTER 3. MINOR DISCIPLINE AND GRIEVANCES

4A:2-3.1 General provisions

(a) Minor discipline is a formal written reprimand or a suspension or fine of five working days or less.

(b) A grievance is an employee complaint regarding any term or condition which is beyond the employee's control and is remedial by management.

(c) The causes for minor disciplinary actions shall be the same as for major disciplinary actions. See N.J.A.C. 4A:2-2.3.

(d) This subchapter shall not apply to local service, where an appointing authority may establish procedures for processing minor discipline and grievances.

(e) In State service, this subchapter shall only apply to:

(c) The following shall apply during a hearing at the department level:

1. An employee may be represented by legal counsel, an authorized union representative or appear on his or her own behalf. An employee may also be represented by such other agent as agreed to by the appointing authority. In a group grievance, a member of the group may be designated as the group representative;

2. Permission for a reasonable number of relevant witnesses shall be granted upon the request of the employee or his or her representative or agent;

3. The employee or his or her representative or agent shall act as a spokesperson for the grievant and one person shall act as a spokesperson for the department; and

4. The spokesperson for either party shall have the right to present evidence and examine witnesses.

(d) Any grievance meeting shall be attended only by a designated supervisor, a spokesperson for the department, the grievant, or a spokesperson in a group grievance situation, and the grievant's representative. The department may also permit the attendance of resource persons possessing direct information important to the clarification of the matter.

(e) Departmental management shall schedule minor discipline and grievance hearings or grievance meetings during the employee's regular work hours as far as possible.

(f) The employee or employee agent, if applicable, and witnesses shall be given time off with pay from their regular work duties to participate in hearings or grievance meetings. Such time off shall include reasonable travel time and shall not extend to any time necessary for the preparation of a grievance.

4A:2-3.7 Appeals from appointing authority decisions: State service

(a) Minor discipline may be appealed to the Board under a negotiated labor agreement or within 20 days of the conclusion of departmental proceedings under this subchapter, provided any further appeal rights to mechanisms under the agreement are waived.

1. The Commissioner shall review the appeal upon a written record or such other proceeding as the Commissioner directs and determine if the appeal presents issues of general applicability in the interpretation of law, rule, or policy. If such issues or evidence are not fully presented, the appeal may be dismissed and the commissioner's decision will be a final administrative decision.

2. Where such issues or evidence under (a)1 above are presented, the Board will render a final administrative decision upon a written record or such other proceeding as the Board directs.

(b) Grievances may be appealed to the Commissioner within 20 days of the conclusion of Step Two procedures under these rules or the conclusion of departmental procedures under a negotiated agreement.

1. The Commissioner shall review the appeal on a written record or such other proceeding as the Commissioner directs and render the final administrative decision.

2. Grievance appeals must present issues of general applicability in the interpretation of law, rule, or policy.

(c) Appeals shall include:

1. A copy of the Appeal of Minor Discipline Action form or Department of Personnel grievances form and all written records and decisions established during departmental reviews; and

2. Written argument and documentation.

(d) A copy of all material submitted to the Department of Personnel must be served on the employee's appointing authority.

(e) Failure to submit the material specified in (c) above may result in dismissal.

(f) In Commissioner or Board reviews, the employee shall present issues of general applicability in the interpretation of law, rule or policy (see (a)1 and (b)2 above). If that standard is met:

1. In grievance matters, the employee shall have the burden of proof.

2. In minor disciplinary matters, the appointing authority shall have the burden of proof.

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

In (f): Revised text to specify employee's responsibilities in presenting issues in appeals.

Added 1. and 2. regarding burden of proof.

SUBCHAPTER 4. TERMINATION AT END OF WORKING TEST PERIOD

4A:2-4.1 Notice of termination

(a) An employee terminated from service or returned to his or her former permanent title at the conclusion of a working test period due to unsatisfactory performance shall be given written notice in person or by certified mail by the appointing authority.

(b) The notice shall inform the employee of the right to request a hearing before the Board within 20 days of receipt of the notice.

(c) The notice shall be served not more than five working days prior to or five working days following the last day of the working test period. A notice served after this period shall create a presumption that the employee has attained permanent status.

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

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

Revised (c).

Administrative Correction to (c).

See: 25 N.J.R. 686(a).

Case Notes

Release at end of working test period appropriate absent employer's bad faith. *Brown v. State Department of Education*, 97 N.J.A.R.2d (CSV) 537.

Employee properly released at the end of working test period if poor performance assessment made in good faith. *Murry v. Geraldine L. Thompson Medical Home*, 97 N.J.A.R.2d (CSV) 371.

Employee's unsatisfactory performance during working test period warrants removal. *Tassoni v. County of Cape May*, 97 N.J.A.R.2d (CSV) 248.

Employee receiving poor evaluations terminated at end of working test period for failing to improve. *Raffa v. County of Cape May*, 97 N.J.A.R.2d (CSV) 203.

Employee terminated at end of working test period entitled to reinstatement if termination based on insufficient evaluations. *Polk v. City of Camden Utilities Department*, 97 N.J.A.R.2d (CSV) 163.

Park ranger's refusal to clean up park during working test period justifies termination. *Heim v. Monmouth County, Department of Parks*, 97 N.J.A.R.2d (CSV) 143.

Employee's abandonment of position during working test period justifies termination. *Kilpatrick v. Department of Community Affairs*, 97 N.J.A.R.2d (CSV) 115.

Release of public works employee at end of working test period is justified if agency's opinion that employee has performed in unsatisfactory manner was formed in good faith. *Raymond v. Trenton Department of Public Works*, 97 N.J.A.R.2d (CSV) 52.

Examining physician's prospective opinion as to corrections officer's future unfitness was insufficient to preclude officer's entrance into police training program. *Farrar v. Passaic County Sheriff's Department*, 96 N.J.A.R.2d (CSV) 780.

Excessive absenteeism during probationary period justified termination of employee. *Harris v. Northern State Prison*, 96 N.J.A.R.2d (CSV) 596.

County laborer's tardiness and absences justified termination at the end of the working test period. *Woodburn v. Ocean County Department of Roads*, 96 N.J.A.R.2d (CSV) 387.

Unsatisfactory performance justified release of county corrections officer following working test period. *Walker v. Camden County Sheriff's Department*, 96 N.J.A.R.2d (CSV) 295.

Unsatisfactory performance reviews justify county inspector's termination at end of working test period. *Plummer v. Monmouth County Department of Buildings and Grounds*, 96 N.J.A.R.2d (CSV) 129.

State human services department technician released following inadequate performance following working test period. *Patel v. State Department of Human Services*, 96 N.J.A.R.2d (CSV) 126.

County's removal of communications operator at end of working test period justified where operator's performance unsatisfactory and operator failed to show county acted in bad faith. *Ball v. Burlington County*, 96 N.J.A.R.2d (CSV) 33.

County social services board's good faith in evaluating income maintenance technician's performance justifies release after working test period. *Chandiramani v. Bergen County Board of Social Services*, 96 N.J.A.R.2d (CSV) 12.

Termination at end of working test period was justified when building service worker's monthly probationary progress reports were unsatisfactory. *Hamilton v. Essex County Hospital Center*, 95 N.J.A.R.2d (CSV) 580.

Release of income maintenance technician trainee after working test period was not in bad faith. *Montesi v. Burlington County*, 95 N.J.A.R.2d (CSV) 404.

Appellant failed to show that employer (Newark Free Public Library) acted in bad faith in denying her a fair evaluation of her work performance and releasing her at the end of her working test period based on claim that her services were unsatisfactory (citing former N.J.A.C. 4:1-13.7). *Davis v. Newark Public Library*, 9 N.J.A.R. 84 (1987).

4A:2-4.2 Time for appeal

(a) An appeal shall be made in writing to the Board no later than 20 days from the employee's receipt of written notification from the appointing authority of the termination from service or return to a former permanent title.

(b) If the appointing authority fails to provide the notice as specified in N.J.A.C. 4A:2-4.1, an appeal must be filed within a reasonable time.

Case Notes

Failure to appeal failure of second working test period precluded appeal from decision in first working test period. *Sansalone v. Vine-land Developmental Center*, 92 N.J.A.R.2d (CSV) 22.

4A:2-4.3 Board hearing

(a) An appeal to the Board shall be processed in accordance with N.J.A.C. 4A:2-2.9 et seq.

(b) The employee has the burden of proof to establish that the action was in bad faith.

(c) If bad faith is found by the Board, the employee shall be entitled to a new full or shortened working test period and other appropriate remedies. See N.J.A.C. 4A:2-1.5.

Case Notes

Untrustworthiness and instability justified return of bridge operator to former position of maintenance worker. *Howarth v. Department of Transportation*, 95 N.J.A.R.2d (CSV) 636.

Release of probationary public works repairer was justified for failure to obtain required commercial driver's license. *Kreudt v. Department of Public Works*, 95 N.J.A.R.2d (CSV) 584.

Termination at end of working test period was justified when building service worker's monthly probationary progress reports were unsatisfactory. *Hamilton v. Essex County Hospital Center*, 95 N.J.A.R.2d (CSV) 580.

SUBCHAPTER 5. EMPLOYEE PROTECTION AGAINST REPRISALS OR POLITICAL COERCION

4A:2-5.1 General provisions

(a) An appointing authority shall not take or threaten to take any reprisal action against an employee in the career, senior executive or unclassified service in retaliation for an employee's lawful disclosure of information on the violation of any law or rule, governmental mismanagement or abuse of authority.

(b) An appointing authority shall not take or threaten to take any action against an employee in the career service or an employee in the senior executive service with career status based on the employee's permissible political activities or affiliations. This subchapter shall also apply to State service employees in the unclassified service who do not serve in policy-making or confidential positions.

Case Notes

Failure of municipal employee to exhaust administrative remedies warranted dismissal of his claim alleging violations of administrative code section prohibiting person from being appointed under title not appropriate to the duties to be performed and section prohibiting reprisal. *Ferraro v. City of Long Branch*, 314 N.J.Super. 268, 714 A.2d 945 (N.J.Super.A.D. 1998).

Job title elimination done in bad faith if politically motivated. *Kirshbaum v. Camden County*, 97 N.J.A.R.2d (CSV) 197.

Layoff; proof of political motivation. *Pikolycky v. Department of Military and Veterans' Affairs*, 94 N.J.A.R.2d (CSV) 685.

Layoff of supervisor; not based on retaliation or political retribution. 94 N.J.A.R.2d (CSV) 569.

"Whistleblower" medical director justifiably dismissed. *Mendoza v. Wagner Youth Correctional Facility*, 94 N.J.A.R.2d (CSV) 135.

Agency employee voluntarily resigned from his position. *Sandell v. Department of Law and Public Safety*, 93 N.J.A.R.2d (CSV) 705.

4A:2-5.2 Appeals

(a) An employee may appeal a reprisal or political coercion action to the Board within 20 days of the action or the date on which the employee should reasonably have known of its occurrence.

(b) The appeal must be in writing and specify the basis for appeal.

(c) The Commissioner shall review the appeal and request any additional information, or conduct any necessary investigation.

(d) The Board shall decide the appeal on a review of the written record or such other proceeding as it deems appropriate.

(e) Where improper reprisal or political coercion is established, the Board shall provide appropriate protections and remedies to the employee.

Case Notes

Acts of reprisal for public disclosure of information on abusive use of State cars. *Cryan v. Human Services Department*, 92 N.J.A.R.2d (CSV) 275.

SUBCHAPTER 6. RESIGNATIONS

Subchapter Historical Note

Petition for Rulemaking.
See: 39 N.J.R. 4867(a).

4A:2-6.1 Resignation in good standing

(a) Any permanent employee in the career service may resign in good standing by giving the appointing authority at least 14 days' written or verbal notice, unless the appointing authority consents to a shorter notice.

(b) The resignation shall be considered accepted by the appointing authority upon receipt of the notice of resignation.

(c) A request to rescind the resignation prior to its effective date may be consented to by the appointing authority.

(d) Where it is alleged that a resignation was the result of duress or coercion, an appeal may be made to the Board under N.J.A.C. 4A:2-1.1.

Case Notes

Resignation may be rescinded prior to effective date upon appointing authority's approval (citing former N.J.A.C. 4:1-16.12). *Manusco v. No. Arlington Boro.*, 203 N.J.Super. 427, 497 A.2d 238 (App.Div.1985).

Refusal to accept rescission of resignation prior to its effective date constituted abuse of discretion. *Harmon v. Monmouth County Board of Social Services*, 97 N.J.A.R.2d (CSV) 541.

Police officer's resignation not in good standing for untimely resignation modified. *Polidoro v. City of New Jersey Police Department*, 97 N.J.A.R.2d (CSV) 239.

Employee suffering personal problems considered resigned in good standing. *DiMattia v. Department of Transportation*, 97 N.J.A.R.2d (CSV) 215.

Chronically absent employee granted resignation in good standing. *Caldwell v. Forensic Psychiatric Hospital*, 97 N.J.A.R.2d (CSV) 134.

Merit System Board approved removal of employee for unsatisfactory attendance, but modified her termination status from resignation not in good standing to resignation in good standing, where employee's absence followed denial of her request for indefinite leave of absence due to illness. *Bell v. Mid-State Correctional Facility*, 96 N.J.A.R.2d (CSV) 839.

Removal of clerk typist based upon five-day absence without approval of her supervisor was not warranted, and she would be treated as if she had resigned in good standing. *Neuschafer v. Vineland Developmental Center*, 96 N.J.A.R.2d (CSV) 766.

Resignation proposed by employee's union representative as alternative to discipline was not coerced. *Kwasniewski v. Probation Division*, 96 N.J.A.R.2d (CSV) 597.

Resignation in good standing was more appropriate than removal when injury was cause of training failure. *Gottlieb v. Monmouth County Sheriff*, 95 N.J.A.R.2d (CSV) 573.

Highway maintenance worker with bilateral carpal tunnel syndrome resigned in good standing by reason of an inability to perform job duties. *Kromenacker v. Department of Transportation*, 95 N.J.A.R.2d (CSV) 275.

Public employee who was convicted of offense involving theft from employer forfeited her position. *Gurenlian v. Ancora Psychiatric Hospital*, 94 N.J.A.R.2d (CSV) 599.

Failure to return to duty for five consecutive business days following leave of absence; resignation in good standing. *Apoldite v. Dept. of Treasury*, 93 N.J.A.R.2d (CSV) 459.

Unapproved absence was justified; resignation in good standing. *DeBlasio v. Division of Medical Assistance and Health Services*, 93 N.J.A.R.2d (CSV) 398.

Discharge would be classified as having resigned in good standing. *DeBlasio v. Division of Medical Assistance and Health Services*, 93 N.J.A.R.2d (CSV) 398.

Appeal of resignation not in good standing was moot. *Scott v. Department of Human Resources*, 93 N.J.A.R.2d (CSV) 339.

Removal modified to resignation in good standing. *Harwell v. Vineland Developmental Center*, 92 N.J.A.R.2d (CSV) 679.

Removal modified to resignation in good standing. *Ensslin v. Township of North Bergen*, 92 N.J.A.R.2d (CSV) 674.

Resignation considered as one in good standing. *Swinney v. Sheriff's Department, Camden County*, 92 N.J.A.R.2d (CSV) 614.

Settlement agreement; technician allowed to resign in good standing. *Di Lard v. Ancora Psychiatric Hospital*, 92 N.J.A.R.2d (CSV) 159.

Employee was not entitled to rescind his resignation. *Schaan v. Gloucester County Bd. of Social Services*, 92 N.J.A.R.2d (CSV) 152.

Sanitary inspector resigned under distress and refusal to allow him to rescind his resignation was unreasonable. *Manzo v. Jersey City Div. of Health*, 92 N.J.A.R.2d (CSV) 117.

Attempt to change resignation to a medical leave of absence; resignation would be changed from not-in-good standing to good standing. *Cheeseman v. Bayside State Prison*, 92 N.J.A.R.2d (CSV) 41.

Merit Service Board had no jurisdiction to hear an appeal from employee who voluntarily resigned her position. *Tatum v. John L. Montgomery Medical Home*, 91 N.J.A.R.2d (CSV) 45.

4A:2-6.2 Resignation not in good standing

(a) If an employee resigns without complying with the required notice in N.J.A.C. 4A:2-6.1, he or she shall be held as having resigned not in good standing.

(b) Any employee who is absent from duty for five or more consecutive business days without the approval of his or her superior shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing. Approval of the absence shall not be unreasonably denied.

(c) An employee who has not returned to duty for five or more consecutive business days following an approved leave of absence shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good

standing. A request for extension of leave shall not be unreasonably denied.

(d) Where an employee is resigned not in good standing under (a), (b), or (c), the employee shall be provided with notice and an opportunity for a departmental hearing under N.J.A.C. 4A:2-2.5, and Final Notice and a right to appeal to the Board under N.J.A.C. 4A:2-2.8. An employee shall be in unpaid status pending the departmental decision. Should an employee seek to return to employment pending the departmental decision, a review under N.J.A.C. 4A:2-2.5(b) shall be conducted prior to continuation of the unpaid status.

(e) Where the resignation is reversed, the employee shall be entitled to remedies under N.J.A.C. 4A:2-2.10.

(f) The appointing authority or the Board may modify the resignation not in good standing to an appropriate penalty or to a resignation in good standing.

Public Notice on Resignation not in good standing.

See: 22 N.J.R. 3407(b).

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

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

Revised (b)-(c).

Case Notes

Resignation pursuant to valid settlement agreement affirmed. *Fuller v. New Jersey Department of Environmental Protection*, 97 N.J.A.R.2d (CSV) 688.

Employee offering medical evidence for leave of absence defeats employer's resignation not in good standing action. *Wright v. Burlington County Juvenile Detention Center*, 97 N.J.A.R.2d (CSV) 555.

Storekeeper's abandonment of position justifies resignation not in good standing. *Aikens v. Riverfront State Prison*, 97 N.J.A.R.2d (CSV) 422.

Employee's unreliable work history and absence without approval justifies employer's resignation not in good standing. *Roberts v. Thomas Edison State College*, 97 N.J.A.R.2d (CSV) 382.

Progressive discipline supports suspension over resignation not in good standing when employee fails to report for duty. *Hargis v. Forensic Psychiatric Hospital*, 97 N.J.A.R.2d (CSV) 335.

Unreasonable denial of medical leave precludes employer's removal action for abandoning position. *Gilmore v. Veteran's Memorial Home*, 97 N.J.A.R.2d (CSV) 332.

Practical nurse's resignation not in good standing for job abandonment modified to resignation in good standing. *Miles v. Woodbridge Developmental Center*, 97 N.J.A.R.2d (CSV) 222.

Resignation not in good standing for absence from duty modified to resignation in good standing. *Bogar v. Department of Human Resources*, 97 N.J.A.R.2d (CSV) 189.

Removal of laborer for abandonment of position modified to resignation in good standing. *Niosi v. Department of Public Works*, 97 N.J.A.R.2d (CSV) 161.

Nurse's refusal to work due to unsubstantiated knee injury justified implied resignation not in good standing. *Gregg v. Woodbine Developmental Center*, 96 N.J.A.R.2d (CSV) 594.

Clerk who failed to provide timely medical documentation for extension of medical leave resigned not in good standing. *Littlejohn v. Division of Medical Assistance and Health Services*, 96 N.J.A.R.2d (CSV) 471.