

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.

Sufficient cause not demonstrated to award back pay where employee was not entitled to a permanent appointment based on successful completion of the working test period, but rather was simply entitled to a new four-month working test period. In re Afolo, OAL Dkt. No. CSV 4145-07, 2008 N.J. AGEN LEXIS 546, Final Decision (May 7, 2008).

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.

Even if a nursing home institutional attendant was legitimately ill and falsified a doctor's note only to avoid being sent home and missing more work, the attendant's conduct warranted removal; the attendant was responsible for a vulnerable population and held a position of trust, i.e., the maintenance of patient records (modifying 2008 N.J. AGEN LEXIS 358). In re Bundy, OAL Dkt. No. CSV 724-08, Final Decision (July 16, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 360) adopted, which concluded that removal of a city laborer employed for 19 years was proper because he tested positive on a random drug test, after having executed a Letter of Conditional Employment agreement; the agreement was a condition of the laborer's return to employment after admitting to a drug problem and undergoing rehabilitation, and the positive drug test was within 90 days of his return. In re Hayward, OAL Dkt. No. CSV 03287-08, Final Decision (July 16, 2008).

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 224) adopted, which concluded that removal was warranted for a laborer who had a lifting

restriction preventing him from performing the essential functions of the position and who was found, despite his testimony to the contrary, to have frequently refused to perform job requirements. In re Delgado, OAL Dkt. No. CSV 9697-07 (CSV 11940-05 On Remand), 2008 N.J. AGEN LEXIS 721, Final Decision (May 21, 2008).

In determining the proper penalty for a public employee's infraction, several factors must be considered, including the seriousness of the underlying incident, the concept of progressive discipline, when appropriate, and the employee's prior record. In re Pettiford, OAL Dkt. No. CSV 8801-07, 2008 N.J. AGEN LEXIS 719, Merit System Board Decision (May 21, 2008).

As a law enforcement officer, a Correction Officer is held to a higher standard than a civilian public employee. In re Pettiford, OAL Dkt. No. CSV 8801-07, 2008 N.J. AGEN LEXIS 719, Merit System Board Decision (May 21, 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).

Initial Decision (2008 N.J. AGEN LEXIS 194) adopted, which concluded that removal of a senior correction officer was warranted, notwithstanding a largely unblemished record, after the officer ignored directives barring familiarity and dealings between correction officers and inmates and smuggled in voluminous amounts of food for an inmate; the officer's misconduct was so severe that progressive discipline was bypassed. In re Battle, OAL Dkt. No. CSV 06489-07, 2008 N.J. AGEN LEXIS 578, Final Decision (May 7, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 227) adopted, which concluded that a correction officer's removal was proper based on a positive drug test for marijuana; although no witnesses with personal knowledge were found on remand to testify regarding the drug testing procedure and chain of custody, the documentary evidence was sufficient to meet the appointing authority's burden of proof. In re Brown, OAL Dkt. No. CSV 12280-06 (CSV 8874-04 On Remand), 2008 N.J. AGEN LEXIS 602, Final Decision (May 7, 2008).

Unrefuted positive test result for drug use has uniformly been held by the Merit System Board to warrant removal from employment for law enforcement employees. In re Brown, OAL Dkt. No. CSV 12280-06 (CSV 8874-04 On Remand), 2008 N.J. AGEN LEXIS 602, Final Decision (May 7, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 221) adopted, which concluded that a sign maker's separation from employment in the city's public works department was proper for inability to perform essential duties under N.J.A.C. 4A:2-2.3(a)3; the sign maker's loss of function due to an injury was permanent, causing an inability to perform about a third of the duties, the city had accommodated the employee by allowing time for recovery and light or limited duty, and the city did not have permanent light or limited duty available. Under these circumstances, a resignation in good standing, rather than removal, was appropriate in order to avoid stigma to the employee. In re Drake, OAL Dkt. No. CSV 8579-07 (CSV 8618-06 On Remand), 2008 N.J. AGEN LEXIS 526, Final Decision (May 7, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 222) adopted, which found that the city was well within its rights to request a water works laborer to return to work until providing additional medical documentation to further verify his medical condition, and when the employee did not return to work, the city properly considered the absences unauthorized and the employee to have abandoned his position, pursuant to N.J.A.C. 4A:2-6.2(b) and (c). However, the employee did get the documentation to the city and thus his actions were not so grave as to warrant termination; instead, a 60-day suspension was appropriate. In re Boyd, OAL Dkt. No. CSV 8836-07, 2008 N.J. AGEN LEXIS 625, Merit System Board Decision (May 7, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 188) adopted, which emphasized that law enforcement officers, including correction officers, are held to the highest standards of conduct, as they are vested with powers and responsibilities not held by other public employees. In re Porch, OAL Dkt. No. CSV 01307-07 (CSV 9567-06 On Remand), 2008 N.J. AGEN LEXIS 574, Final Decision (April 23, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 200) adopted, which concluded that a county maintenance repairer was properly removed after pleading guilty to receipt of stolen property and breach of the peace, given the employee's previous six-month suspension and the sensitive areas in which maintenance repairers must work. In re Ditchkus, OAL Dkt. No. CSV 10252-07, 2008 N.J. AGEN LEXIS 587, Final Decision (April 23, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 191) adopted, which concluded that termination was proper for a public works laborer who was informed after surgery that he must be at full capacity to work and thereafter did not call in sick on a daily basis or provide a doctor's note specifying the date he could return to full duty. The progressive penalties required for termination of a civil service employee pursuant to *West New York v. Bock*, 38 N.J. 500 (1962), were sufficient where the laborer had received multiple warnings of termination over the years due to excessive absenteeism; although the previous disciplinary actions were minor and there were none from March 2004 until Sept. 2006, the impact on the city's small public works department was major and enhanced suspensions would have only penalized the city. In re Pressley, OAL Dkt. No. CSV 4501-07, 2008 N.J. AGEN LEXIS 503, Final Decision (April 23, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 197) adopted, which concluded that a building maintenance worker, who drove a township motor vehicle while under the influence of alcohol, resulting in suspension of his driver's license for two years, was properly removed; assuming that the employee was disabled by alcoholism, the township had repeatedly accommodated him despite previous offenses and there was no township employment available for him that did not require a driver's license. In re Overton, OAL Dkt. No. CSV 8542-07, 2008 N.J. AGEN LEXIS 525, Final Decision (April 23, 2008).

Initial Decision (2007 N.J. AGEN LEXIS 43) adopted, which concluded that a laborer charged with 57 occasions of absenteeism without notice to superior or good cause was improperly terminated where the county failed to impose progressive discipline prior to removal. In re Porter, OAL Dkt. No. CSV 1146-06, 2007 N.J. AGEN LEXIS 347, Merit System Board Decision (March 16, 2007).

Appointing authority's attempt to impose punishment at a later date for excessive absences previously addressed in a letter of reprimand was improper; reviving a stale charge in an attempt to impose a greater penalty at a later date is improper, and double punishment for the same offenses will be rejected. In re Porter, OAL Dkt. No. CSV 1146-06, 2007 N.J. AGEN LEXIS 347, Merit System Board Decision (March 16, 2007).

Removal of correction officer, and not 60-day suspension, was proper where employee had a short employment tenure and prior major discipline; moreover, the activation of a false fire alarm is a serious offense especially given the heightened security concerns in a correctional facility and the risk to the safety of the other officers and inmates (officer yelled and set off fire alarm when he was denied permission to contact his son's daycare center after being ordered to work overtime). In re Bell, OAL Dkt. No. CSV 3527-05, 2006 N.J. AGEN LEXIS 771, Final Decision (August 9, 2006).

Suspension of 120 working days, rather than 90 working days, was the appropriate penalty where the employee's decision to report to work while having a blood alcohol level above the prescribed amounts placed the employee and others in potential danger and could have led to more severe consequences had he been assigned to drive on the day in question; although the employee's disciplinary history did not evidence any formal discipline, the employee had three prior incidents involving alcohol and one incident involving marijuana since he began working for

the county in 1997. In re Eastlack, OAL Dkt. No. CSV 270-05, 2006 N.J. AGEN LEXIS 206, Final Decision (January 25, 2006).

Initial Decision (2005 N.J. AGEN LEXIS 402) adopted, which emphasized that the concept of progressive discipline does not mean that all possible measures must be taken; instead, an examination of the frequency, number, and continuity of the employer's warnings, reprimands, counseling and other measures, without necessarily including suspensions, indicates the progression of discipline (chronic lateness case). In re Jackson, OAL Dkt. No. CSV 01869-04, 2005 N.J. AGEN LEXIS 1074, Final Decision (September 7, 2005).

Initial Decision (2005 N.J. AGEN LEXIS 402) adopted, which found that language of a disciplinary settlement agreement, providing that the settlement would not be used as a precedent in any other matter, did not foreclose the use of the prior discipline to decide whether there had been progressive discipline. In re Jackson, OAL Dkt. No. CSV 01869-04, 2005 N.J. AGEN LEXIS 1074, Final Decision (September 7, 2005).

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 361) adopted, which concluded that a correction officer committed no infraction by failing to submit written proof of her family emergency because the emergency was that the officer's young daughter was locked out of the house, a

situation that would not generate written proof. In re Irizarry, OAL Dkt. No. CSV 03298-07, Final Decision (Aug. 27, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 314) adopted, which concluded, *inter alia*, that an employee charged with excessive absenteeism presented no basis to find that the appointing authority violated FMLA rights in connection with her absences to care for her son when he was suspended from school; the record did not contain sufficient evidence substantiating the suspensions, supporting the pediatrician's opinion, and relating the school suspensions to the son's psychological/emotional problems. In re Paoella, OAL Dkt. No. CSV 118-08, 2008 N.J. AGEN LEXIS 707, Final Decision (June 11, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 317) adopted, which concluded that undisputed testimony established that a sanitation department laborer used reasonable force to defend himself when a co-worker pushed him; thus, the 10-day suspension of the laborer was not justified. In re Greene, OAL Dkt. No. CSV 5322-06, 2008 N.J. AGEN LEXIS 501, Merit System Board Decision (May 21, 2008).

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).

Initial Decision (2008 N.J. AGEN LEXIS 219) adopted, which concluded that county policy mandated removal of an equipment operator who refused to provide a second sample during a drug test, considering his drug test record; the presence or absence of random selection for the testing in question had not been demonstrated with persuasive scientific evidence, and even if so found, absence of randomness would not, on the present record, have forestalled application of the rules directing termination. In re Riggins, OAL Dkt. No. CSV 4788-07, 2008 N.J. AGEN LEXIS 555, Final Decision (May 7, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 218) adopted, which concluded that city failed to meet its burden of proof that a police lieutenant, assigned as desk supervisor, neglected his duty by failing to maintain order and control over a subordinate officer when a detective entered the precinct in a disorderly manner looking for a relative who was under arrest; the lieutenant did all that he could to subdue the ranting and raving of the detective. In re Mercado, OAL Dkt. No. CSV 7901-07, 2008 N.J. AGEN LEXIS 518, Merit System Board Decision (May 7, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 223) adopted, which found that conduct unbecoming a police officer included engaging in outside employment while on sick leave and failing to obtain approval for, and making a false statement to an Internal Affairs investigator about, the outside employment; removal was neither unduly harsh nor disproportionate. In re Howard, OAL Dkt. No. CSV 9338-06, 2008 N.J. AGEN LEXIS 627, Final Decision (May 7, 2008).

Matter remanded because an incident report completed to document an employee's refusal to submit to a drug screening and for the purpose of pursuing discipline was not a routine report admissible under N.J.R.E. 803(c)(6); the supervisor who completed the report did not testify. In re Richardson, OAL Dkt. No. CSV 5339-07, 2008 N.J. AGEN LEXIS 502, Merit System Board Decision (April 23, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 192) adopted, which concluded that 10-day suspension for unbecoming conduct was proper where the ALJ found, on conflicting testimony, that a cook employee

refused four direct orders from her supervisors and openly dared them to charge her with insubordination. In re Johnson-McCall, OAL Dkt. No. CSV 4825-07, 2008 N.J. AGEN LEXIS 560, Final Decision (April 9, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 80) adopted, which found that termination of a police aide for failure to timely and satisfactorily respond to a 911 call was warranted where the aide neglected to refer and prioritize a domestic violence call to the dispatcher. In re Flagler, OAL Dkt. No. CSV 1302-06, 2008 N.J. AGEN LEXIS 527, Final Decision (April 9, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 104) adopted, which concluded that termination was proper for a university cleaning employee who was found, on conflicting testimony, to have threatened another employee, while off-campus and off-duty, and to have made false charges against a supervisor; although the phrase "conduct unbecoming," is not defined in the New Jersey Statutes or in the New Jersey Administrative Code, as noted by the New Jersey Supreme Court, the phrase is an elastic one, and has been defined as "any conduct which adversely affects . . . morale or efficiency . . . [or] which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." In re Ufomba, OAL Dkt. No. CSV 00440-06, 2008 N.J. AGEN LEXIS 572, Final Decision (March 26, 2008).

Suspension of 10 days was warranted, where there was no dispute that the county employee served on the advisory board of a community group that was seeking county approval of a proposed redevelopment project on county property; despite repeated warnings by supervisors, the employee continued to make contact with other public and private officials in his capacity as a Senior Planner with the county in an attempt to further the goals of the community group. The employee's activities constituted conduct unbecoming a public employee, misuse of county property, and violation of the Local Government Ethics Law, N.J.S.A. 40A:9-22.5. In re Reid, OAL Dkt. No. CSV 2045-06, 2007 N.J. AGEN LEXIS 1044, Final Decision (January 17, 2007).

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.

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

1. The name, title, mailing address and telephone number of the appointing authority representative to whom the notices were provided;
2. The employee's name, mailing address and telephone number; and
3. The action that is being appealed.

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

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

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

Amended by R.1995 d.416, effective August 7, 1995.
See: 27 N.J.R. 1837(b), 27 N.J.R. 2884(b).

In (a), added the provision governing receipt of notice by the employee's attorney or union representative.
Amended by R.1998 d.518, effective November 2, 1998.
See: 30 N.J.R. 2325(a), 30 N.J.R. 3935(a).

Added (c) through (e).
Special amendment, R.2009 d.221, effective June 10, 2009 (to expire July 1, 2010).
See: 41 N.J.R. 2720(a).

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

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 Commission hearings

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

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

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

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

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

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

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

Amended by R.1995 d.417, effective August 7, 1995.

See: 27 N.J.R. 1838(a), 27 N.J.R. 2885(a).

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

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

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

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

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

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

In (b), added the second sentence.

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

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

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

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).

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

Removal of a high school security guard for chronic or excessive absenteeism and violation of Consent Order was modified to a resignation in good standing, where the employee's absences were due to her disability, domestic violence incidents, and/or child care concerns; although the employee may not have provided timely documentation for her absences, she did eventually present documentation. In re Sanders, OAL Dkt. No. CSV 11115-07, 2008 N.J. AGEN LEXIS 591, Final Decision (April 23, 2008).

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

Six-month suspension rather than 20-day suspension was appropriate for a police sergeant found on conflicting testimony to have blamed a totally emotional and distraught woman for causing her son's death, used profanity towards her, and punched the woman, who was half his size. In re Ricciardi, OAL Dkt. No. CSV 1851-06, 2007 N.J. AGEN LEXIS 1043, Final Decision (April 25, 2007).

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

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

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

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

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

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

(c) Where an employee, other than a municipal police officer, has been suspended based on a pending criminal complaint or indictment, following disposition of the charges the employee shall receive back pay, benefits and seniority if the employee is found not guilty at trial, the complaint or indictment is dismissed, or the prosecution is terminated.

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

2. Where disciplinary action has been taken following disposition of the complaint or indictment, such items shall not be awarded in case of removal. In case of suspension, where the employee has already been suspended for more than six months pending disposition of the complaint or indictment, the disciplinary suspension shall be applied against the period of indefinite suspension. The employee shall receive back pay for the period of suspension beyond six months, but the appointing authority may for good cause deny back pay for the period beyond the disciplinary suspension up to a maximum of six months.

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

1. Back pay shall not include items such as overtime pay 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 Civil Service Commission decision reversing or modifying a removal or

reversing an indefinite suspension and the date of actual reinstatement. The award of back pay for this time period shall be reduced only by the amount of money that was actually earned during that period, including any unemployment insurance benefits received.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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 *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).

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

Initial Decision (2008 N.J. AGEN LEXIS 228) adopted, which concluded that the appointing authority had the right to impose an indefinite suspension without pay under N.J.A.C. 4A:2-2.5(a)2 on a correction officer until June 26, the date when the officer pleaded guilty

to downgraded charges, rather than only until March 7, the date when the County Prosecutor chose to downgrade the indictable offense, as the downgrade was specifically conditioned on a guilty plea. In re *Paris*, OAL Dkt. No. CSV 12208-06, 2008 N.J. AGEN LEXIS 708, Final Decision (June 11, 2008).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4A:2-2.11 Interest

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

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

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

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

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

4A:2-2.12 Counsel fees

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

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

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

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

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

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

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

2. The fee customarily charged in the locality for similar legal services, applicable at the time the fee is calculated;

3. The nature and length of the professional relationship with the employee; and

4. The experience, reputation and ability of the attorney performing the services.

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

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

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

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

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

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

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

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

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

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

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

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).

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

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

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

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

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

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

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

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

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

(a) For purposes of this section:

1. "Law enforcement officer" or "officer" is defined as an individual employed as a permanent, full-time member of a State, county, or municipal law enforcement agency who is statutorily empowered to act for the detection, investigation, arrest, conviction, detention, or rehabilitation of persons violating the criminal laws of this State and statutorily required to successfully complete a training course approved by, or certified as substantially equivalent to such an approved course, by the Police Training Commission. See N.J.S.A. 52:17B-66 et seq. With the exception of the Juvenile Justice Commission, which is covered by this definition, the Department of Law and

Public Safety shall not be considered a law enforcement agency for purposes of this definition.

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

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

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

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

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

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

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

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

(e) Once the administrative law judge at the Office of Administrative Law who is presiding over an officer or firefighter's removal appeal renders an initial decision, the Office

of Administrative Law shall immediately transmit the decision to the Commission for review.

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

(g) The Commission's final administrative determination shall be rendered within 180 calendar days from the date on which the officer or firefighter was initially suspended without pay, except that:

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

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

1. The period between the date of removal and the date on which the officer or firefighter requests a departmental hearing;
2. The period of agreed-upon adjournment of a departmental hearing;
3. The period between the date of removal and the date on which the appellant appeals a Final Notice of Disciplinary Action with the Office of Administrative Law and the Civil Service Commission;
4. If applicable, the gap in time between the date of timely filing of an appeal with the Office of Administrative Law and the date of filing of the appeal with the Civil Service Commission;
5. If applicable, the gap in time between the date of timely filing with the Civil Service Commission and the

date of filing of the appeal with the Office of Administrative Law;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Initial Decision (2008 N.J. AGEN LEXIS 220) adopted, which concluded that a licensed practical nurse (LPN) was properly terminated under the designation of resignation not in good standing based on unauthorized absenteeism for five or more days, pursuant to N.J.A.C. 4A:2-6.2; the LPN had previously been disciplined numerous times for absenteeism, and in this instance the chronic absences critically affected the infirmity's ability to function. In re Uhland, OAL Dkt. No. CSV 08226-02, 2008 N.J. AGEN LEXIS 583, Final Decision (April 23, 2008).

Initial Decision (2007 N.J. AGEN LEXIS 666) adopted, which concluded that a psychiatric hospital employee's conduct fell within the definition of a resignation not in good standing under N.J.A.C. 4A:2-6.2(c) because whatever the employee believed about the length of her leave, she filed two sets of papers putting the end date prior to her return, did not go to the doctor until after the day she said she thought she was due back at work, and delayed several weeks in filing documentation that might have affected the hospital's willingness to take her back; however, balancing the need for adequate staffing in the facility with the employee's lack of prior discipline, a 90-day suspension rather than

resignation was warranted. In re Bazile, OAL Dkt. No. CSV 00478-07, Final Decision (November 21, 2007).

Initial Decision (2007 N.J. AGEN LEXIS 43) adopted, which concluded that a laborer was improperly removed for unauthorized excessive absenteeism, including two incremental five working day consecutive periods, where the county failed to impose progressive discipline prior to termination. In re Porter, OAL Dkt. No. CSV 1146-06, 2007 N.J. AGEN LEXIS 347, Merit System Board Decision (March 16, 2007).

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.