

(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

ALJ's determination that the appointing authority failed to prove by a preponderance of the credible evidence that an employee abused a resident could not be disturbed on appeal to the Civil Service Commission because the ALJ presented numerous specific reasons why the clients' testimony was not worthy of credit; the ALJ's rationale for finding the clients' testimony not credible was detailed, logical, and reasonable, and therefore, afforded due deference. In re Fairmon, OAL Dkt. No. CSV 3289-08, 2008 N.J. AGEN LEXIS 1216, Civil Service Comm'n Decision (September 10, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 397) adopted, in which the ALJ concluded, on conflicting evidence, that an off-duty police officer ran down the middle of a street with his service weapon in the air, effectively dispersing more than 100 people who had assembled to participate in illegal drag racing and then lied to Internal Affairs about what happened; progressive discipline was bypassed and he was removed because his actions jeopardized an undercover sting operation and also went to the heart of his ability to be trusted and function as a police officer. In re Beltre, OAL Dkt. No. CSV 07910-06, 2008 N.J. AGEN LEXIS 1411, Final Decision (July 30, 2008).

Appointing authority failed to present any evidence to establish that a correction officer who shared her home with her husband knew or was aware of the illegal items in a locked closet or that she had the means to access that closet; there was no basis to find that she engaged in conduct that constituted either possession of a controlled dangerous substance or unlawful possession of a weapon based on her mere presence at the address in question (adopting 2008 N.J. AGEN LEXIS 18). In re Henderson, OAL Dkt. No. CSV 9214-07, 2008 N.J. AGEN LEXIS 626, Merit System Board Decision (April 23, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 188) adopted, which determined that a correction officer's assertion that his gun was holstered at the scene of an altercation involving his son was not credible, based in part on his contradictory testimony during an unemployment hearing and also on the testimony of other witnesses; the correction officer, who failed to call the police regarding the altercation and brandished his service weapon at the scene, was properly terminated. 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 55) adopted, which concluded that, in view of the divergent testimony presented by the employee and a fellow senior probation officer, and a credibility determination with regard to the critical facts, the employee had a knife in her desk drawer, but did not communicate a threat; charge of conduct unbecoming a public employee dismissed. In re Rodriguez, OAL Dkt. No. CSV 05518-06, 2008 N.J. AGEN LEXIS 576, Merit System Board Decision (March 12, 2008).

Initial Decision (2007 N.J. AGEN LEXIS 826) adopted, which concluded that employee, a senior correction officer, did not facilitate a romantic relationship between an inmate and another correction officer or act as their lookout; nothing on the record supported the assertion that the employee manipulated her work schedule so that the couple could spend time together, and apart from uncorroborated hearsay originating from a highly unreliable source, there was no independent proof that the employee knew about the clandestine activity and failed to report it. Even though the Department of Corrections may have had reason to suspect that the employee aided or abetted the other officer's improper conduct, mere suspicion was no substitute for competent evidence at an

administrative hearing. In re Livingston, OAL Dkt. No. CSV 05786-06, 2008 N.J. AGEN LEXIS 577, Merit System Board Decision (January 30, 2008).

Initial Decision (2007 N.J. AGEN LEXIS 772) adopted, which found, based on the ALJ's credibility determinations, that a male corrections department sergeant made inappropriate sexual comments to a female senior corrections officer; the sergeant, who denied making the comments, was suspended without pay for 10 days. In re LaPoint, OAL Dkt. No. CSV 5590-07, 2008 N.J. AGEN LEXIS 506, Final Decision (January 16, 2008).

ALJ's conclusion, on conflicting evidence, that a cottage training technician was not guilty of patient abuse was not arbitrary, capricious, or unreasonable; the finding that the slapping sound was the result of a latex glove rather than the slapping of a patient was supported by competent evidence, given the ALJ's advantage of hearing, seeing, and assessing the credibility of the witnesses before him (adopting 2007 N.J. AGEN LEXIS 468). In re Bice-Bey, OAL Dkt. No. CSV 8296-06, 2007 N.J. AGEN LEXIS 1161, Merit System Board Decision (November 21, 2007).

Initial Decision (2007 N.J. AGEN LEXIS 582) adopted, which found that two senior correction officers were improperly terminated after an inmate escaped underneath a truck as it left the facility. One officer was at lunch when the escape occurred, no mirrors were provided to the officers, and facility policy did not require the other officer to crawl under trucks to perform an inspection as they left. In re Cowans, OAL Dkt. No. CSV 10725-06 and CSV 10748-06 (Consolidated), 2007 N.J. AGEN LEXIS 1062, Merit System Board Decision (November 8, 2007).

Initial Decision (2007 N.J. AGEN LEXIS 368) adopted, which found that the appointing authority failed to meet its burden of proof to demonstrate by a preponderance of the evidence that a senior medical security officer abused a patient; in assessing conflicting evidence, any number of circumstances could have caused the patient's injuries and the record contained additional evidence that tended to establish the officer's innocence, including the testimony of fellow officers that they had never witnessed him engage in any abusive or improper behavior directed toward patients and that he had a reputation for truthfulness. In re Scipio, OAL Dkt. No. CSV 4447-06, 2007 N.J. AGEN LEXIS 1126, Merit System Board Decision (October 10, 2007).

Initial Decision (2007 N.J. AGEN LEXIS 432) adopted, which found that the appointing authority failed in its burden of proving that a cottage training technician falsely reported an incident of possible patient abuse where it offered no direct testimony by those alleged to be present at the incident and chose to rely upon investigative statements of some, but not all, of those alleged to have been present at the incident; the investigative statement of a key witness was missing from its file and the technician was credible in her testimony. In re Frake, OAL Dkt. No. CSV 45-06, 2007 N.J. AGEN LEXIS 1129, Merit System Board Decision (October 10, 2007).

Initial Decision (2007 N.J. AGEN LEXIS 614) adopted, which concluded that the appointing authority met its burden of proving that a senior correction officer was properly removed for testing positive for cocaine; although the officer contended that a hair follicle test revealed no drugs were in her system, there was no evidence submitted to suggest that the hair follicle test – performed nearly a month after the urinalysis was performed – was proof that no drugs were in her system when the initial drug test was performed and there was no evidence to indicate that it was a scientifically reliable test. In re Morris, OAL Dkt. No. CSV 8075-04, 2007 N.J. AGEN LEXIS 1160, Final Decision (October 10, 2007).

Initial Decision (2007 N.J. AGEN LEXIS 552) adopted, which concluded that a Human Services Technician was entitled to dismissal of the disciplinary charges against him where the appointing authority treated a charge of possession of a controlled dangerous substance as fact, even though the technician pleaded guilty to a municipal ordinance violation of loitering; furthermore, the appointing authority merely relied on the record that the technician was convicted of loitering, with no testimony establishing that his conduct disrupted the efficient operation

of the hospital or destroyed respect for governmental employees. In re Love, OAL Dkt. No. CSV 8835-06, 2007 N.J. AGEN LEXIS 1172, Merit System Board Decision (September 12, 2007).

Thirty-day suspension of a sheriff's officer for failing to report her partner's smoking in a sheriff's vehicle was improper where the smoking violation was "trivial," smoking in a vehicle was common, and no other sheriff's officer was ever previously charged with a smoking violation; in addition, the penalty given to the officer stood in stark contrast to the four-day suspension that her partner received and such a discrepancy was ludicrous and nonsensical (adopting 2007 N.J. AGEN LEXIS 465). In re Ivan, OAL Dkt. No. CSV 4720-03 and CSV 8676-03 (Consolidated), 2007 N.J. AGEN LEXIS 1132, Merit System Board Decision (August 29, 2007), *aff'd per curiam*, No. A-1070-07T2, 2009 N.J. Super. Unpub. LEXIS 764 (App.Div. April 28, 2009).

Termination of a sheriff's officer for her failure to qualify with her service weapon after nine attempts over a period of three days was proper, in spite of any animus that may have been established by her unwarranted suspension for an unrelated smoking incident; the range staff had no duty to guarantee her successful qualification and the ultimate responsibility was on the officer, who admittedly failed to practice (adopting 2007 N.J. AGEN LEXIS 465). In re Ivan, OAL Dkt. No. CSV 4720-03 and CSV 8676-03 (Consolidated), 2007 N.J. AGEN LEXIS 1132, Final Decision, (August 29, 2007), *aff'd per curiam*, No. A-1070-07T2, 2009 N.J. Super. Unpub. LEXIS 764 (App.Div. April 28, 2009).

Initial Decision (2007 N.J. AGEN LEXIS 247) adopted, which found that a senior correction officer was properly removed following his positive drug test that revealed the presence of cocaine; the appointing authority presented evidence that it complied with random protocol and testing procedures and the officer declined to present competing expert testimony. In re Pecorella, OAL Dkt. No. CSV 4663-06, 2007 N.J. AGEN LEXIS 1131, Final Decision (June 20, 2007).

Safety specialist's seven-day suspension for knowingly entering false information on school bus inspection reports was reversed because, even if the appointing authority could show that the specialist failed to conduct thorough inspections, it failed to meet its burden of proving that he knowingly entered false information on the reports; of the two reports at issue, one was never entered into evidence and the appointing authority never presented any evidence that the specialist was the author of the second report. In re Greiner, OAL Dkt. No. CSV 7150-06, 2007 N.J. AGEN LEXIS 1153, Merit System Board Decision (June 20, 2007).

Although the appointing authority requested dismissal as it could not prove the sexual harassment charges against the Correction Sergeant without the cooperation of the sole witness, the Merit System Board could not ignore the seriousness of the accusation against a supervisor and was compelled to invoke its subpoena powers so that the witness, who was currently employed by the Department of Corrections, could be called to testify on remand. In re LaPoint, OAL Dkt. No. CSV 3585-06, Final Decision (April 25, 2007).

Initial Decision (2007 N.J. AGEN LEXIS 59) adopted, which concluded that a police officer did not meet his burden of showing that the rationale stated for not promoting him to sergeant on two separate occasions was pre-textual; it was not the appointing authority's burden to be more specific in identifying the information, namely the individuals promoted did not have serious or sustained disciplinary records worse than the officer, but it was the officer who had the burden of showing specific irregularities in the reason given for the bypasses that would have made them pre-textual. In re Bradley, OAL Dkt. No. CSV 5837-02, 2007 N.J. AGEN LEXIS 354, Final Decision (March 14, 2007).

Initial Decision (2007 N.J. AGEN LEXIS 32) adopted, which concluded that the appointing authority failed in its burden of proving that a correction officer abused an inmate because testimony that the officer continuously stomped the heel of his boot on the arm of a female inmate as she left her arm protruding from her cell through the food port was not entirely credible; the two inmate witnesses who claimed to have seen the incident were not credible, not simply because of their criminal

status, but because of the inconsistencies in their statements and testimony. In re Messinger, OAL Dkt. No. CSV 8947-05, 2007 N.J. AGEN LEXIS 1173, Merit System Board Decision (February 28, 2007).

Upon an independent review of the record, including a review of a videotape, the Merit System Board agreed with the ALJ's findings that a Human Services employee at a psychiatric hospital was aware of a patient's injury and failed to report it, but the Board rejected the ALJ's same conclusions as to a second employee; the videotape showed one employee going into the room where the injured patient was along with the individual who was responsible for the patient's injury, but the videotape did not definitely show that the second employee was aware of the patient's injury, given the fact that the second employee's view was blocked by others (adopting in part and rejecting in part 2006 N.J. AGEN LEXIS 733). In re Green, OAL Dkt. No. CSV 2832-05 and CSV 2835-05, 2006 N.J. AGEN LEXIS 1107, Merit System Board Decision (December 20, 2006).

Initial Decision (2006 N.J. AGEN LEXIS 891) adopted, which concluded that the appointing authority failed in its burden of proving that a Human Services Technician witnessed an incident between a patient and another staff member, but failed to take appropriate action thereafter; in fact, the evidence demonstrated that the technician quickly went to where the other staff member and the patient had fallen, gained control over the situation, called for assistance, escorted the patient to the Quiet Room, and prepared a statement describing the incident. In re Fortson, OAL Dkt. No. CSV 8699-05, 2006 N.J. AGEN LEXIS 1130, Merit System Board Decision (December 6, 2006).

Initial Decision (2006 N.J. AGEN LEXIS 966) adopted, which concluded, on conflicting evidence, that a Human Services Assistant refused to take a patient to the bathroom and that his actions in physically stopping the patient from going to the bathroom amounted to inappropriate physical contact and mistreatment of a patient; 10-day suspension was appropriate. In re Parks, OAL Dkt. No. CSV 8702-05, 2006 N.J. AGEN LEXIS 1131, Merit System Board Decision (December 6, 2006).

Initial Decision (2006 N.J. AGEN LEXIS 699) adopted, which concluded that a junior sergeant was properly demoted to the position of correction officer where the appointing authority demonstrated by a preponderance of the evidence that the sergeant failed to perform a weapons check during her shift; the fact that she and her supervising partner may have created some other informal type of arrangement regarding the execution of their shift duties did not absolve her of her responsibility to perform that weapons inspection as the junior sergeant and as mandated by institutional policy. In re Golden, OAL Dkt. No. CSV 918-03, 2006 N.J. AGEN LEXIS 865, Final Decision (September 20, 2006).

Initial Decision (2006 N.J. AGEN LEXIS 435) adopted, which found that developmental center caregiver was properly removed for abusing a patient and sleeping while on duty. Although the caregiver denied the charges, testimony was presented that the caregiver had turned on an overhead light while a resident was sleeping, pulled her out of bed after noticing that she had urinated on herself, refused to give another resident a bathroom key, and yelled at a resident who had vomited on herself. In re Oluku, OAL Dkt. No. CSV 11932-05, 2006 N.J. AGEN LEXIS 768, Final Decision (August 9, 2006).

Appointing authority failed in its burden of proving that a senior correction officer was guilty of conduct unbecoming a public employee, improper or unauthorized contact with an inmate, and undue familiarity with an inmate based, in large part, on the fact that the inmate's testimony was not credible; although it would have been improper to use the inmate's incarceration as the sole basis for finding him not credible, the inmate's incarceration was only one factor and others included the inmate's demeanor and conflicting accounts of what occurred (adopting 2006 N.J. AGEN LEXIS 340). In re Jenkins, OAL Dkt. No. CSV 6363-04, 2006 N.J. AGEN LEXIS 775, Merit System Board Decision (July 19, 2006).

Appointing authority failed in its burden of proving that a senior correction officer was guilty of conduct unbecoming a public employee,

improper or unauthorized contact with an inmate, and undue familiarity with an inmate based, in part, on the fact that the ALJ was not convinced that the letters presented by the inmate were written by the officer; the ALJ was free to determine what weight to afford the handwriting expert's opinion and, contrary to the appointing authority's assertions, the ALJ did not discount the expert's opinion, but determined that the expert's opinion on its own was insufficient for the appointing authority to meet its burden of proof (adopting 2006 N.J. AGEN LEXIS 340). In re Jenkins, OAL Dkt. No. CSV 6363-04, 2006 N.J. AGEN LEXIS 775, Merit System Board Decision (July 19, 2006).

Initial Decision (2006 N.J. AGEN LEXIS 341) adopted, which concluded that the appointing authority failed to meet its burden of proving that a prison worker neglected his duty when he allegedly failed to discover a knife-like weapon among a prisoner's personal belongings during a search; the appointing authority did not prove that, following his search, the box was secured from tampering before the contraband was discovered, and other officials handling the box after his search failed to properly document their custody of the box. In re Ortiz, OAL Dkt. No. CSV 6670-04, 2006 N.J. AGEN LEXIS 628, Merit System Board Decision (July 19, 2006).

Initial Decision (2006 N.J. AGEN LEXIS 64) adopted, which concluded that the appointing authority did not meet its burden of proof against a senior correction officer, where the appointing authority's expert witness testified that it was equally as likely that the positive reading for marijuana was caused by passive inhalation as by active inhalation. In re Lore, OAL Dkt. No. CSV 544-05, 2006 N.J. AGEN LEXIS 538, Merit System Board Decision (May 24, 2006).

Appointing authority satisfied its burden of demonstrating that a budget officer's performance and work product remained unsatisfactory, despite being given ample notice and opportunity to correct his deficiencies, follow orders, and timely complete his assigned duties; even after the imposition of a 10-day suspension, the officer continued to submit untimely and inaccurate work and continued to refuse to complete assigned tasks and sign required time sheets for a significant period after his suspension, which justified the appointing authority's decision to remove him. In re Lucas, OAL Dkt. No. CSV 8051-02, 2006 N.J. AGEN LEXIS 564, Final Decision (May 10, 2006), aff'd per curiam, No. A-5532-05T3, 2007 N.J. Super. Unpub. LEXIS 1233 (App.Div. November 16, 2007).

Police officer was properly removed on a finding that he was unable to perform his duties where a restraining order for domestic violence prevented him from carrying a weapon and, even though the order was ultimately lifted, the ALJ found, on conflicting evidence, that the officer was not psychologically fit to serve as a police officer; the ALJ was within its right to credit one expert's testimony over another's and conclude that the officer presented a danger to himself and others (adopting 2006 N.J. AGEN LEXIS 67). In re Bergus, OAL Dkt. No. CSV 7416-02, 2006 N.J. AGEN LEXIS 631, Final Decision (April 5, 2006), aff'd per curiam, No. A-4669-05T1, 2007 N.J. Super. Unpub. LEXIS 2655 (App.Div. August 14, 2007).

In a civil administrative proceeding, even though possible loss of government employment is involved, an employee's silence in the face of highly relevant assertions well within the employee's personal knowledge can give rise to an adverse inference and can constitute one element among others in an ALJ's consideration of the employee's ultimate culpability (adopting 2006 N.J. AGEN LEXIS 42). In re Terry, OAL Dkt. No. CSV 7420-02, 2006 N.J. AGEN LEXIS 1122, Final Decision (March 8, 2006), aff'd per curiam, No. A-4451-05T1, 2007 N.J. Super. Unpub. LEXIS 2973 (App.Div. August 23, 2007).

Police officer was properly removed where the appointing authority proved by a preponderance of the evidence that she lied about her relationship with a felon in her pre-employment psychological interview, pre-employment application, and interview with Internal Affairs (adopting 2006 N.J. AGEN LEXIS 42). In re Terry, OAL Dkt. No. CSV 7420-02, 2006 N.J. AGEN LEXIS 1122, Final Decision (March 8, 2006), aff'd per curiam, No. A-4451-05T1, 2007 N.J. Super. Unpub. LEXIS 2973 (App.Div. August 23, 2007).

Initial Decision (2006 N.J. AGEN LEXIS 44) adopted, which found on conflicting testimony that a developmental center employee kicked a patient in or near the groin. The patient had Down Syndrome and was deaf. In re Mount, OAL Dkt. No. CSV 10610-04, 2006 N.J. AGEN LEXIS 1097, Final Decision (March 8, 2006).

Administrative Law Judge erred in dismissing an employee's appeal from a 30-day suspension where neither the employee nor the appointing authority presented any evidence regarding the disciplinary action; the appointing authority had the burden of proof and where it failed to present any evidence in support of its action, the proper result was to dismiss the charges and reverse the penalty (adopting in part and rejecting in part 2005 N.J. AGEN LEXIS 702). In re Cooper, OAL Dkt. No. CSV 3639-03 and CSV 5037-04 (Consolidated), 2006 N.J. AGEN LEXIS 1109, Merit System Board Decision (March 8, 2006).

In a disciplinary action brought against a senior correction officer after his positive drug test for marijuana, discrepancies regarding other specimens and the container used to collect the officer's sample did not undermine the reasonable probability that the officer's specimen had not been altered in any important respect between collection and analysis; the ALJ's findings otherwise were unreasonable and contrary to the credible evidence in the record. In re Gonsalvez, OAL Dkt. No. CSV 8601-02, 2006 N.J. AGEN LEXIS 1128, Final Decision (February 22, 2006), aff'd per curiam, No. A-4080-05T5, 2007 N.J. Super. Unpub. LEXIS 1369 (App.Div. October 31, 2007).

In a disciplinary action against a correction officer recruit on claims that he made inappropriate sexual comments, exposed himself, and masturbated in front of a fellow recruit, the ALJ's determination that the complaining witness was not credible was unreasonable and contrary to the evidence in the record where the witness's account of the critical details of the incident remained consistent, and the minor inconsistencies cited by the ALJ regarding the precise words uttered by the recruit, his exact location during the masturbation, and the time of the witness's telephone call to her supervisor were of little consequence; additionally, the record was devoid of any reason why the complaining witness would lie about what occurred during the shift in question. In re Royster, OAL Dkt. No. CSV 6360-04, 2005 N.J. AGEN LEXIS 1087, Final Decision (December 7, 2005), aff'd per curiam, No. A-2435-05T5, 2007 N.J. Super. Unpub. LEXIS 1260 (App.Div. April 19, 2007).

Initial Decision (2005 N.J. AGEN LEXIS 526) adopted, in which the ALJ found, on conflicting evidence, that a painter for the school district was guilty of conduct unbecoming a public employee and theft of school property after he attempted to take a camera from the school; the painter's contention that he intended to ask permission to temporarily borrow the camera was belied by the fact that, instead of seeking immediate permission, he took the camera to a different room and placed it under a drop cloth. In re Joyce, OAL Dkt. No. CSV 9392-03, 2005 N.J. AGEN LEXIS 1222, Final Decision (October 19, 2005).

On an independent review of the record, including review of a surveillance videotape, the Merit System Board disagreed with the ALJ's findings and concluded that the appointing authority met its burden of proof that a Human Services Assistant was guilty of abusing a patient; the video revealed that the assistant grabbed the patient, threw him down on the ground, did not offer any assistance, and left the scene. In re McKoy, OAL Dkt. No. CSV 8344-02, 2005 N.J. AGEN LEXIS 1218, Final Decision (October 19, 2005).

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.

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).

Senior youth worker who resigned before final disposition of her disciplinary case was not entitled to back pay, benefits, or seniority upon a finding that the penalty should have been modified and reduced because the worker failed to bring a separate appeal to pursue her claim that the resignation was made under duress; Merit System Board noted that worker could still appeal within 20 days of receipt of its decision (adopting 2006 N.J. AGEN LEXIS 152). In re *Thomas*, OAL Dkt. No. CSV 559-05, 2006 N.J. AGEN LEXIS 539, Final Decision (April 5, 2006).

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 Pyschiatric 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. Vine-land 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

Initial Decision (2008 N.J. AGEN LEXIS 847) adopted, which concluded that a city laborer was deemed to have abandoned his position when he was absent for more than five consecutive business days, and his absenteeism and lateness was chronic and excessive; the laborer was absent from work 22 times, late to work 11 times, failed to call in to work 2 times, and was also absent more than 19 consecutive days when he was incarcerated in a drug rehabilitation program, but never informed anyone. In re *Mickens*, OAL Dkt. No. CSV 07248-08, 2008 N.J. AGEN LEXIS 1206, Final Decision (November 6, 2008).

While appointing authority met its burden in establishing that a secretarial assistant 1 (non-stenographic) failed to return to work for five or more consecutive days after an approved leave of absence following her carpal tunnel surgery, discipline of a resignation not in good standing was modified to a 15-day suspension where there was a complete breakdown of communication between the employee and the appointing authority. The employee's supervisor failed to return the employee's calls, did not contact the employee when she failed to return to work, and did not communicate to the employee that a light duty plan was developed for her. The employee failed to state her needs to her supervisor, failed to find out if light duty was available and the details of any such accommodation, and failed to be more diligent in contacting the appointing authority with her medical needs and requirements. In re *Cannuli*, OAL Dkt. No. CSV 4533-07, 2008 N.J. AGEN LEXIS 1059, Civil Service Comm'n Decision (September 10, 2008).

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 infirmary's ability to function. In re *Uhland*, OAL Dkt. No. CSV 08226-02, 2008 N.J. AGEN LEXIS 583, Final Decision (April 23, 2008).

Resignation not in good standing was the proper disciplinary action after an employee failed to report to work for four consecutive days due to his incarceration; the appointing authority was under no obligation to provide the employee with a leave for incarceration (adopting in part and rejecting in part 2008 N.J. AGEN LEXIS 52). In re *Hidalgo*, OAL Dkt. No. CSV 4029-07 (CSV 6712-06 On Remand), 2008 N.J. AGEN LEXIS 1433, Final Decision (March 12, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 82) adopted, which found that a Human Services Assistant was properly removed following his conviction for simple assault and failure to appear at work for five consecutive days. In re *Hammie*, OAL Dkt. No. CSV 4526-07, 2008 N.J. AGEN LEXIS 554, Final Decision (March 12, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 64) adopted, which concluded that "resignation not in good standing" of a sanitation truck driver was the proper disciplinary action under N.J.A.C. 4A:2-6.2(b)