

**CHAPTER 2****APPEALS, DISCIPLINE AND SEPARATIONS****Authority**

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

**Source and Effective Date**

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

**Chapter Expiration Date**

In accordance with N.J.S.A. 52:14B-5.1b, Chapter 2, Appeals, Discipline and Separations, expires on July 1, 2015. See: 43 N.J.R. 1203(a).

**Chapter Historical Note**

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

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

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

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

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

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**SUBCHAPTER 1. APPEALS****4A:2-1.1 Filing of appeals**

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

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

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

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

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

(e) A party in an appeal may be represented by an attorney, authorized union representative or authorized appointing

authority representative. See N.J.A.C. 1:1-5.4 for contested case representation at the Office of Administrative Law.

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

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

Added new (d)1.-2.

#### Law Review and Journal Commentaries

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

#### Case Notes

Employee's failure to appear at scheduled hearings on a removal action supported employer's motion to dismiss appeal, especially where the employee lied about the reason he failed to appear; however, because the removal became final for failure to appear, the employer did not have the authority to order a subsequent removal based on the employee's action in lying during the administrative process (adopting result in 2005 N.J. AGEN LEXIS 519 on other grounds). In re Drayton, OAL Dkt. No. CSV 2151-05, 2005 N.J. AGEN LEXIS 1250, Final Decision (November 3, 2005).

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

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

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

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

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

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

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

#### 4A:2-1.2 Stay and interim relief requests

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

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

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

1. Clear likelihood of success on the merits by the petitioner;

2. Danger of immediate or irreparable harm if the request is not granted;

3. Absence of substantial injury to other parties if the request is granted; and

4. The public interest.

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

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

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

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

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

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

Changed title from "Interim relief."

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

#### 4A:2-1.3 Adjournments

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

1. Unavoidable appearance by an attorney for a party in any state or federal court; or

2. Illness of a party evidenced by an affidavit and a doctor's certificate.

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

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

#### Case Notes

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

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

#### 4A:2-1.4 Burden of proof

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

**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.

Although employee was not permanent in the title of Supervisor, Traffic Maintenance, the employee's underlying permanent status in a career service title gave him the right to appeal a suspension; it was axiomatic that, in accepting a provisional appointment to a higher title, the employee did not relinquish the rights he had as a permanent employee. In re *Agins*, OAL Dkt. No. CSV 4062-06, 2007 N.J. AGEN LEXIS 1053, Merit System Board Remand Decision (July 25, 2007).

In the absence of permanent status in a career service title, the Board lacks jurisdiction to entertain major discipline appeals and there is no right to a hearing. In re *Gooden*, OAL Dkt. No. CSV 6905-05, 2006 N.J. AGEN LEXIS 630, Final Decision (May 24, 2006).

**4A:2-2.2 Types of discipline**

(a) Major discipline shall include:

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

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

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

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

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

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

**Case Notes**

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

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

Initial Decision (2008 N.J. AGEN LEXIS 746) adopted, which concluded that a county correctional officer was properly removed from office for sleeping while on duty, the first time when the officer was stationed in a hospital room in the early morning with a shackled inmate and the second time when the officer was assigned to a dorm in the county correctional facility where inmates were seen milling around him. The danger to himself and others was so blatantly obvious and his explanations so lacking in credibility that it was clear that the officer did not understand the nature of the job he was in, and these two incidents were so egregious in nature as to warrant his immediate removal. In re *O'Mullan*, OAL Dkt. No. CSV 12226-05, 2008 N.J. AGEN LEXIS 1091, Final Decision (December 17, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 765) adopted, which concluded that a police officer was properly removed on allegations of domestic abuse, even after the victim recanted her earlier statements, because the evidence demonstrated that the officer not only abused the victim but lied about it and attempted to procure false testimony from his friend; removal was appropriate despite the officer's military history and honorable conduct in his neighborhood. In re *Mayfield*, OAL Dkt. No.

CSV 6564-07, 2008 N.J. AGEN LEXIS 1063, Final Decision (December 3, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 846) adopted, which concluded that a campus police sergeant was properly removed after he purchased and injected anabolic steroids in an effort to impress his girlfriend with his increased muscle mass and then refused to identify the individual who sold him the substance and related paraphernalia. In re Fleming, OAL Dkt. No. CSV 6485-07, 2008 N.J. AGEN LEXIS 1231, Final Decision (November 6, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 841) adopted, which found, on conflicting evidence, that a police officer was properly suspended for 20 days after he was rude when approached by three women from a daycare center who were concerned that there was gang activity nearby, refusing to take a report and later submitting a false report about his whereabouts; however, because the officer had an unblemished disciplinary history and had been a member of the department for 13 years, a 20-day suspension was appropriate, even if more extensive discipline may have been authorized. In re Henriques, OAL Dkt. No. CSV 01462-08, 2008 N.J. AGEN LEXIS 1202, Final Decision (November 6, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 849) adopted, which concluded that a correction lieutenant, who twice refused to cooperate with the Special Investigations Division by ordering a correction officer to provide a specimen for a drug testing urinalysis, frustrated an important drug-testing policy and was guilty of unbecoming conduct and a neglect of duty; however, the lieutenant had served for many years and had not been the subject of major discipline, so a 15-day, rather than 45-day suspension, was appropriate. In re Dudich, OAL Dkt. No. CSV 10114-07, 2008 N.J. AGEN LEXIS 1083, Civil Service Comm'n Decision (November 6, 2008).

Where a prison employee admitted to falsifying his attendance records and providing extravagant gifts to his supervisor, both at the behest and under threat from the supervisor, but failed to report the activities to higher level authorities, his actions could have potentially undermined the safety and security of the correctional facility; despite his lack of significant disciplinary history, the employee's removal was warranted because he had not shown himself to have the character or sense of responsibility to shield himself from the stresses and pressures of a correctional setting (adopting 2008 N.J. AGEN LEXIS 789). In re Elmaghrabi, OAL Dkt. No. CSV 3548-08, 2008 N.J. AGEN LEXIS 1217, Final Decision (October 22, 2008).

Thirty-working day suspension was warranted after two sheriff's officers engaged in irresponsible and reprehensible behavior by having a serious physical altercation while on duty in a public area in front of other county employees (adopting in part and rejecting in part 2008 N.J. AGEN LEXIS 764). In re Leach, OAL Dkt. No. CSV 6373-07 and CSV 6745-07 (Consolidated), 2008 N.J. AGEN LEXIS 1230, Civil Service Comm'n Decision (October 8, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 788) adopted, which concluded that a 20-day, rather than 30-day, suspension of a police officer was the appropriate penalty for leaving the township in a police vehicle without permission, being in a liquor store in violation of departmental rules, and then subsequently evading questions during an investigation of the incident; the officer was a 14-year veteran with a perfect disciplinary record and had been commended on five different occasions, whereas he was in the liquor store for only three minutes. In re Manson, OAL Dkt. No. CSV 2390-08, 2008 N.J. AGEN LEXIS 1213, Final Decision (October 8, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 619) adopted, which concluded that removal of a county correction officer was appropriate after two separate instances in which the officer filed a false report and used excessive force against an inmate; both events, although serious, would not have warranted termination, but the officer had four major disciplines for conduct unbecoming a public employee and neglect of duty, each entailing suspension of 30 days or more. In re Garcia, OAL Dkt. No. CSV 9777-07, 2008 N.J. AGEN LEXIS 1069, Final Decision (October 8, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 741) adopted, which found, on conflicting evidence, that a city laborer removed approximately \$30 of plumbing parts belonging to the City without permission or authorization and secreted them; however, the laborer's conduct did not warrant removal and a more appropriate penalty was a 30-working-day suspension, based on the fact that the laborer had been an employee for 19 years and had an unblemished record. In re Williams, OAL Dkt. No. CSV 01455-08, 2008 N.J. AGEN LEXIS 1201, Civil Service Comm'n Decision (September 24, 2008).

Removal from position of supervising sheet metal worker with public school district on grounds of (1) misrepresentation of facts of his criminal history on his job application and (2) abuse of authority by instructing subordinates to remove school district property for personal gain, was modified to six-month suspension where (1) school district did not prove that the alleged "crime" was in fact a crime and not a disorderly persons offense but (2) while that there was no policy concerning the disposal of scrap metal, it was abundantly clear that a public employee should not be able to profit when disposing of materials belonging to the appointing authority. That contractors were allowed to keep the salvaged proceeds for the sale of scrap they collected was inconsequential since the terms of a contract with an outside vendor may be clearly different from the responsibilities of employees with regard to appointing authority property. In re Delli Santi, OAL Dkt. No. CSV 11901-07, 2008 N.J. AGEN LEXIS 1088, Civil Service Comm'n Decision (September 24, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 745) adopted, which concluded that a police officer was properly removed from office for conduct unbecoming and other sufficient cause for allegedly going on a family vacation and being at a work site for his landscaping business while, in both instances, he was on extended sick leave and did not have permission of his supervisor, particularly since the General Order which described the police department's sick-leave policy was very specific where it stated that an officer on sick leave must remain "... at his home unless he receives a Supervisor's permission to leave." In re Wright, OAL Dkt. No. CSV 11929-07, 2008 N.J. AGEN LEXIS 1090, Final Decision (September 24, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 742) adopted, which concluded on conflicting testimony that a Judiciary Account Clerk 2 who was charged with unlawfully taking child support payments totaling \$2,000 and refraining from depositing the cash in a state account, was properly removed notwithstanding the clerk's largely unblemished prior record. Although the clerk was a 20-year employee and her prior record included only a six-day suspension, removal was the proper penalty since it went without saying that the theft of funds fell short of that which the public has a right to expect, especially in the court system. In re Shabazz-Allen, OAL Dkt. No. CSV 3592-06, 2008 N.J. AGEN LEXIS 1055, Final Decision (September 24, 2008).

Police officer who had justifiably arrested a citizen for drunk and disorderly behavior but then detained the citizen in municipal jail for an unreasonable amount of time for improper and retaliatory reasons, was properly removed from office where he had previously received a 120 working day suspension and the offending conduct reflected an egregious abuse of discretion and authority. While the discretion given to police officers to determine length of detention was meant to include consideration of factors such as a detainee's combative conduct while in custody and the availability of a responsible adult to whom a detainee can be released, the length of the arrestee's detention was directly related to the police officer's desire to frustrate and aggravate the arrestee's wife in retaliation for her negative vote as a member of a zoning board of adjustment against the police officer's wife's variance application. In re Sharin, OAL Dkt. No. CSV 4705-05, 2008 N.J. AGEN LEXIS 1225, Final Decision (September 24, 2008).

County correction lieutenant was properly suspended for 60 days on charges of conduct unbecoming a public employee, insubordination, and other sufficient cause after the lieutenant was seen yelling at a county correction captain in a belligerent manner, leading a witness to believe that the lieutenant was going to do physical harm to the captain; regardless of his disciplinary history, the lieutenant's offense was sufficiently egregious to warrant a 60-day suspension and, if anything,