

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 Civil Service Commission shall be in writing, signed by the person appealing (appellant) or his or her representative and include the reason for the appeal and the specific relief requested. See N.J.A.C. 4A:2-1.8 for appeal processing fees.

(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, this chapter or N.J.A.C. 4A:8, or where the Civil Service Commission 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 Civil Service Commission 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.

Amended by R.2011 d.173, effective June 20, 2011.

See: 43 N.J.R. 470(a), 43 N.J.R. 1419(b).

In (a) and the introductory paragraph of (d), substituted "Civil Service Commission" for "Commissioner or Board"; in (a), deleted "must" preceding "include", and inserted the last sentence; in the introductory paragraph of (d), inserted ", this chapter", and substituted "N.J.A.C. 4A:8" for "these rules"; and in (d)2, substituted "Civil Service Commission" for "Department of Personnel".

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.

1. Minor discipline appeals of permanent employees in the career service or persons serving a working test period. Appointing authorities may establish procedures for other employees.

2. Grievance appeals of any employees in the career or unclassified services.

(f) Grievance procedures shall not be used to address any matter for which there is another specific type of appeal to the Commissioner or Board.

(g) These rules shall not be utilized to review a matter exclusively covered by a negotiated labor agreement.

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 (c) and relettered old (c)-(f) as (d)-(g), with no change in text.

Case Notes

While an Administrative Law Judge properly concluded that a correction officer did not verbally abuse inmates or other officers when, in a justifiably agitated condition, he randomly yelled in the presence of a fellow officer and inmates, and that such conduct constituted, at most, a disturbance on State property, the ALJ could not simply order that a 10-day suspension be modified to an oral reprimand. An oral reprimand was not minor discipline within the meaning of N.J.A.C. 4A:2-3.1(a); therefore, the Commission modified the officer's discipline to an official written reprimand (adopting in part and rejecting in part 2010 N.J. AGEN LEXIS 45). In re Desmond, OAL Dkt. No. CSV 8989-08, 2010 N.J. CSC LEXIS 584, Final Decision (March 10, 2010).

Appointing authority's reduction in penalty to a five-day suspension divested the Commission of jurisdiction over the matter; if there was no mechanism available to the employee to pursue a minor disciplinary action under standards and procedures established by his appointing authority or by a negotiated labor agreement, the employee could seek relief through the Law Division of the Superior Court of New Jersey. In re Poeppel, OAL Dkt. No. CSV 6153-08, 2009 N.J. AGEN LEXIS 1007, Final Decision (March 25, 2009).

Initial Decision (2007 N.J. AGEN LEXIS 819) adopted, which found that where the appointing authority changed an employee's discipline from a 10-day to a five-day suspension, the matter changed from a major disciplinary action to a minor disciplinary action over which the Office of Administrative Law had no jurisdiction. In re Lewis, OAL Dkt. No. CSV 4216-07, 2008 N.J. AGEN LEXIS 547, Final Decision (January 30, 2008).

Minor disciplinary actions insufficient basis for independent removal action. Range v. Newark Board of Education, 97 N.J.A.R.2d (CSV) 700.

Petition dismissed for lack of jurisdiction. Harrison v. Buttonwood Hospital, 97 N.J.A.R.2d (CSV) 250.

4A:2-3.2 Minor discipline appeal to appointing authority: State service

(a) Where departmental minor discipline appeal procedures are established by a negotiated agreement, such agreement shall be the applicable appeal process.

(b) Employees not covered by a negotiated agreement or covered by an agreement that does not address a minor discipline appeal process shall request a departmental hearing within five days of receipt of a notice of discipline or such additional time as may be agreed to by the appointing authority.

1. The departmental hearing shall be conducted within 30 days of such request unless adjourned by the consent of the parties.

2. The burden of proof shall be on the appointing authority.

3. The department shall make a final written disposition of the charges within 20 days of the hearing on Appeal of Minor Discipline Action form, unless the parties have consented to a time extension. The lack of response by the department within this period shall be considered a denial of the appeal.

(c) See N.J.A.C. 4A:2-3.6 for conduct and scheduling and 4A:2-3.7 for appeal to the Board.

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).

4A:2-3.3 Grievance appeal to appointing authority: State service

(a) Where departmental grievance procedures are established by a negotiated agreement, such agreement shall be the applicable appeal process.

(b) An employee not covered by a negotiated agreement or covered by an agreement that does not address a grievance appeal process shall utilize the appeal procedures in this subchapter.

(c) When a grievance directly concerns and is shared by more than one grievant, the grievants may appeal as a group to the first level of supervision common to the grievants.

(d) A department may consolidate two or more grievances on the same issue and process them as a group grievance. All grievants shall be promptly notified of this action.

(e) An employee may amend a grievance during the initial step at which it is processed. Such amendment may only be made for the purpose of clarification and shall not be utilized to change the nature of the grievance or to include additional items.

(f) The burden of proof shall be on the employee.

4A:2-3.4 Grievance procedure: Step One: State service

(a) A grievance shall be presented in writing on the Department of Personnel grievance form to the office or individual designated by the department to process the matter. It must be filed within 30 calendar days from either the date on which the alleged act occurred or the date on which the

grievant should reasonably have known of its occurrence. Efforts should be made to resolve the matter informally.

(b) All grievances shall:

1. Specify the particular act or circumstance being grieved;
2. State the requested remedy; and
3. Indicate whether the employee is representing himself or herself or the name of the employee's counsel or agent.

(c) The office or individual receiving the grievance shall notify the employee of the scheduled hearing or grievance meeting date within seven days of receipt of the grievance. Such hearing or grievance meeting shall be conducted within 30 days of receipt of the grievance, unless an additional time period is agreed to by the parties.

(d) A written decision shall be rendered within 14 days after the conclusion of the hearing or grievance meeting.

(e) Lack of response by the department within the periods set forth in (c) and (d) above, unless the parties have consented to a time extension, shall be considered a negative response.

4A:2-3.5 Grievance procedure: Step Two

(a) A grievant may appeal to the Department head or his or her designee within 10 calendar days of:

1. Receipt of the written decision at Step One; or
2. A lack of timely response by the department. See N.J.A.C. 4A:2-3.4(e).

(b) The appeal shall be accompanied by material presented at Step One and any written records or decisions from Step One.

(c) The department shall notify the employee of the scheduled hearing or grievance meeting date within 10 days of receipt of the grievance.

(d) A written decision shall be rendered within 21 days after the conclusion of the hearing or grievance meeting.

(e) Lack of response by the department within the periods set forth in (c) and (d) above, unless the parties have consented to a time extension, shall be considered a denial of the grievance appeal.

4A:2-3.6 Conduct and scheduling of hearings and grievance meetings: State service

(a) A grievant shall be entitled to at least one hearing on a grievance prior to the conclusion of Step Two, unless the grievance is satisfactorily resolved at Step One. In addition, a department, at its option, may also schedule a grievance meeting at either Step One or Step Two of the grievance process.

(b) A department may advance a grievance to Step Two of the grievance process. Timely notice of this action shall be supplied to the grievant.

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

1. An employee may be represented by legal counsel, an authorized union representative or appear on his or her own behalf. An employee may also be represented by such other agent as agreed to by the appointing authority. In a group grievance, a member of the group may be designated as the group representative;
2. Permission for a reasonable number of relevant witnesses shall be granted upon the request of the employee or his or her representative or agent;
3. The employee or his or her representative or agent shall act as a spokesperson for the grievant and one person shall act as a spokesperson for the department; and
4. The spokesperson for either party shall have the right to present evidence and examine witnesses.

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

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

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

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

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

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

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

1. The Commissioner shall review the appeal on a written record or such other proceeding as the Commissioner directs and render the final administrative decision.
2. Grievance appeals must present issues of general applicability in the interpretation of law, rule, or policy.

(c) Appeals shall include:

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

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

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

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

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

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

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

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

Added 1. and 2. regarding burden of proof.

Case Notes

Initial Decision (2007 N.J. AGEN LEXIS 61) adopted, which explained that an appointing authority has the discretion to determine whether it will seek major or minor discipline of its employee and, even after an appeal of major disciplinary action to the Board and the Board's transmittal of the contested case to the Office of Administrative Law for hearing before an ALJ, an appointing authority has the inherent right to reduce a disciplinary penalty so that it no longer constitutes major disciplinary action and the employee no longer has a right to such a hearing; such a matter will be referred from the OAL to the Commissioner of Personnel for processing under minor disciplinary rules. In re Booker, OAL Dkt. No. CSV 6800-05, 2007 N.J. AGEN LEXIS 537, Final Decision (March 28, 2007).

Where a county correction officer grieved two minor disciplinary actions and the charges were sustained with no evidence that the officer appealed the actions further, the ALJ's decision to review the appropriateness of the "step one" and "step two" violation matters was improper, as those matters were not properly before her. In re Bowser, OAL Dkt. No. CSV 6519-06, 2007 N.J. AGEN LEXIS 356, Merit System Board Decision (March 14, 2007).

SUBCHAPTER 4. TERMINATION AT END OF WORKING TEST PERIOD

4A:2-4.1 Notice of termination

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

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

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

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

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

Revised (c).

Administrative Correction to (c).

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

Case Notes

New four-month working test period was granted in the title of Assistant District Parole Supervisor based on the totality of the circumstances, including the employee's satisfactory performance during the majority of the working test period and the lack of opportunity to remedy performance deficiencies brought to the employee's attention during the latter part of the working test period; the procedural irregularity caused by the fact that the working test period start date was not the same as the regular appointment date was not enough to justify granting permanent status to the employee under N.J.A.C. 4A:2-4.1(c). In re Bellini, OAL Dkt. No. CSV 3584-02, 2006 N.J. AGEN LEXIS 209, Final Decision (January 25, 2006).

Merit System Board directed the Division of Human Resource Information Services to reevaluate its practice of approving regular appointment dates that were not consistent with working test period start dates, resulting in uncertainties concerning the ending date of an employee's working test period and the time within which notice must be served under N.J.A.C. 4A:2-4.1(c). In re Bellini, OAL Dkt. No. CSV 3584-02, 2006 N.J. AGEN LEXIS 209, Final Decision (January 25, 2006).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4A:2-4.2 Time for appeal

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