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-5.1.c(2), Chapter 2, Appeals, Discipline, and Separations, expires on December 28, 2015. See: 47 N.J.R. 1689(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.

Chapter 2, Appeals, Discipline and Separations, was renamed Appeals, Discipline, and Separations by R.2014 d.099, effective June 2, 2014. See: 45 N.J.R. 500(a), 46 N.J.R. 1331(c).

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

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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

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 appeal of the determination of her layoff rights was untimely pursuant to N.J.A.C. 4A:2-1.1(b). She was aware of the determination when she received notification of her separation from employment, but she did not file an appeal requesting to be placed on the Special Reemployment List (SRL) until over a year after the layoff. Even if the merits of the matter were considered, she failed to show that the Division of State and Local Operations did not properly apply the uniform regulatory criteria found in N.J.A.C. 4A:8-2.1 et seq. She was not permanent in the title Social Worker 2 at the time of her displacement and, therefore, could not be placed on an SRL for that title. In re Tysen Graham, Dep't. of Human Serv., CSC DKT. No. 2014-658, 2013 N.J. CSC LEXIS 1089, Final Decision (December 6, 2013).

Employee's appeal of his placement on temporary unpaid leave was dismissed because it was untimely pursuant to N.J.A.C. 4A:2-1.1(b). It was clear that the employee was aware of his situation but there was no documentation that he ever pursued the matter with either the Township or filed an appeal with the Civil Service Commission until three years and seven months later. Because the Township completely and egregiously failed to comply with the established layoff procedures, the Civil Service Commission imposed a fine of $5000 on the Township for its acts and omissions pursuant to N.J.S.A. 11A:10-3 and N.J.A.C. 4A:10-2.1(a)2. In re James Anderson, Twp. of Berkeley, CSC Dkt. No. 2013-1033, 2013 N.J. CSC LEXIS 814, Final Decision (September 20, 2013).

Civil Service Commission denied the appeal of a decision of the Division of Classification and Personnel Management that upheld the bypass of an applicant's name on the eligible list for fire fighter. His appeal of the bypass on two certifications was untimely under N.J.A.C. 4A:2-1.1(b), and he provided no reason why he did not file the appeal. In re Phillip cherry, Fire Fighter (M2320H), Asbury Park, CSC Dkt. No. 2013-530, 2013 N.J. CSC LEXIS 634, Final Decision (May 21, 2013).

Given that a candidate's position would be properly classified as Management Assistant and the eligibility list for that position was incomplete, good cause was established to consider her eligibility appeal that was untimely filed under N.J.A.C. 4A:2-1.1(b). In re Lynn Brzozowski and Kimberly Sampson, Jersey City Sch. Dist. CSC Dkt. Nos. 2012-3182, 2012-3193, 2013 N.J. CSC LEXIS 535, Final Decision (May 15, 2013).

Failure by an employee to appeal what he claimed to be an improper reduction of his salary in the position of Program Support Specialist 3 within 20 days of the date on which he had notice that the salary as originally determined was incorrect and a lower salary would apply foreclosed any review of that decision. The purpose of the 20-day appeal deadline imposed by N.J.A.C. 4A:2-1.1(b) was to establish a threshold of finality, and that rule was properly enforced where, as here, the employee not only waited nine months to file the appeal but provided no explanation for the unreasonable delay. In re Jack Laurie, Department of Community Affairs, CSC Docket No. 2013-559, 2013 N.J. CSC LEXIS 202, Final Decision (March 8, 2013).

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).

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.

Case Notes

Police officer failed to establish that he was entitled to interim relief from the action of the appointing authority suspending him as unfit for duty within the meaning of N.J.A.C. 4A:2-2.5(a)1, which suspension was based on the department's charges that the office falsified a police report relating to a burglary of the officer's vehicle in which a semi-automatic handgun was stolen. Specifically, claiming that the officer had falsely stated in that report that he did not know who had stolen the gun when in fact the officer knew that it had been taken by a drug dealer, the department had charged the officer with neglect of duty, incompetence, conduct unbecoming a public employee, and inability to perform duties within the meaning of N.J.A.C. 4A:2-2.3(a). The nature and seriousness of the charges supported the necessity for an immediate suspension. Moreover, the officer did not establish that he had satisfied the criteria for interim relief in N.J.A.C. 4A:2-1.2. In re Johnson, City of Long Branch, CSC Docket No. 2013-1912, 2013 N.J. CSC LEXIS 1155, Decision on Request for Interim Relief (November 26, 2013).

Pursuant to N.J.A.C. 4A:2-1.2(c), a police officer was not entitled to a stay and interim relief of her removal on charges of chronic or excessive absenteeism, neglect of duty, conduct unbecoming a public employee, incompetency, inefficiency or failure to perform duties; insubordination, and other sufficient cause. Because there were a number of disputes regarding material facts, the Civil Service Commission would not attempt to determine the sufficiency and credibility of the evidence based on an incomplete written record. The record was not clear as to when an investigation was started, or when sufficient information was obtained to bring such charges. Thus, there was not a sufficient basis to dismiss any administrative charges as a violation of the 45-day rule. The Commission would not determine if the penalty was appropriate. While the Commission sympathized with the officer's financial situation, the harm that she was suffering while awaiting her hearing was purely financial and could be remedied by the granting of back pay should she prevail in the appeal. If the matter was not concluded within the time period prescribed in N.J.A.C. 4A:2-2.13(g), the officer would be entitled to begin receiving her regular pay pursuant to N.J.A.C. 4A:2-2.13(h). In re Tamieka Dwyer, City of East Orange, CSC Dkt. No. 2014-488, 2013 N.J. CSC LEXIS 1029, Decision of Civil Service Commission (November 8, 2013).

Employee was not entitled to interim relief of his 30-day suspension pursuant to N.J.A.C. 4A:2-1.2(c). He did not contest that he was absent for an unapproved amount of time, and the Civil Service Commission declined to attempt to determine the merits or the proper disciplinary penalty based on an incomplete record. Even if there were procedural violations at the department level, there were deemed cured by the granting of a de novo hearing at the Office of Administrative Law. Moreover, he failed to show the danger of immediate or irreparable harm or how the public interest would be served by granting his request when he had already served his suspension. In re Philip Rodriguez, City of East Orange, CSC Dkt. No. 2013-2143, 2013 N.J. CSC LEXIS 1007, Final Decision (November 7, 2013).

Appointing authority was not entitled to a stay of the Civil Service Commission's decision, pursuant to N.J.A.C. 4A:2-1.2(c), reversing an employee's removal contingent upon his successful completion of a psychological fitness for duty examination pending the outcome of its appeal to the Superior Court, Appellate Division. The fact that the appointing authority simply disagreed with the Commission's determination did not demonstrate that it had a clear likelihood of success on the merits or that it, or the township citizens, were in danger of immediate or irreparable harm. Had the appointing authority complied with the Commission's order and worked with the employee in the selection of the psychiatrist or psychologist by agreement of both parties and if it were then determined that he was not fit for duty, it could have taken steps to remove the employee from his position. In re Kevin Kingston, Twp. of Verona, CSC Dkt. No. 2013-2872, 2013 N.J. CSC LEXIS 478 (June 27, 2013).

Police officer who was immediately suspended from employment as permitted by N.J.S.A. 11A:2-13 and N.J.A.C. 4A:2-2.5(a)1 after being charged with offenses including violating sick leave polices, failing to timely notify of a change in residence, falsifying official records and failing to update recall information despite the fact that he was on sick leave at the time did not establish that there were grounds for relief under N.J.A.C. 4A:2-1.2(c). The nature and seriousness of the charges supported the imposition of an immediate suspension from employment because the officer, as a police officer, held a highly visible and sensitive position in the community so that such an officer's failure to follow all applicable rules clearly impacted the proper function of the police department. Nor was the fact that the officer was out on sick leave on the date of his suspension provide any basis for relief from the immediate suspension. In re Glen Green, CSC Dkt. No. 2013-1446, 2013 N.J. CSC LEXIS 585, Final Order (June 26, 2013).

Police officer was not entitled to interim relief of his immediate suspension under N.J.A.C. 4A:2-1.2(c). Although he alleged that his absences were authorized by a doctor's note, he failed to submit that note, and the Civil Service Commission declined to determine the merits or the proper disciplinary penalty based on an incomplete record. Any procedural violations by the appointing authority were deemed cured by the granting of a de novo hearing at the Office of Administrative Law. The officer also failed to show the danger of immediate or irreparable harm. If his termination was not sustained, there were available mechanisms for relief, such as back pay. In re John Batiuk, CSC Dkt. No. 2013-1490, 2013 N.J. LEXIS 561 (June 26, 2013).

County correction officer was not entitled to interim relief of his immediate suspension pursuant to N.J.A.C. 4A:2-1.2(c) because the nature and seriousness of the charges of violating departmental rules regarding the possession of cellular phones supported the necessity for an immediate suspension under N.J.S.A. 11A:2-13 and N.J.A.C. 4A:2-2.5(a)1. If the charges were ultimately sustained on appeal, the officer subjected the correctional facility and the public to possible harm by bringing a cellular phone into a secured facility. In re Christopher Chin, Cnty. of Cape May, CSC Dkt. No. 2013-1264, 2013 N.J. CSC LEXIS 348, Request For Interim Relief (April 4, 2013).

Police officer was not entitled to interim relief of his immediate suspension without pay under N.J.A.C. 4A:2-1.2(c). There was no dispute that the appointing authority possessed a valid basis to impose an immediate suspension pursuant to N.J.S.A. 11A:2-13 and N.J.A.C. 4A:2-2.5(a)1. The harm he was suffering was monetary in nature and could be remedied, and it was clearly potentially harmful to the appointing authority and the public if an employee who was alleged to be unfit was allowed to remain on the job. In re Michael Watts, West Orange, CSC Dkt. No. 2013-1967, 2013 N.J. CSC LEXIS 271, Final Decision (April 4, 2013).

Applicant's request that the Civil Service Commission issue a stay pending his appeal, to the Superior Court, Appellate Division, of the Commission's decision that the applicant did not possess one year of

required continuous permanent service as of the closing date for the examination for Sheriff's Officer Lieutenant (PC0993N), Essex County, and thus was ineligible for the examination was denied. Because the Commission's decision was amply supported by substantial evidence, the applicant failed to demonstrate that he had a clear likelihood of success on the merits within the meaning of N.J.A.C. 4A:2-1.2(c). Moreover, even if he had so demonstrated, N.J.A.C. 4A:4-6.3(c) made it clear that the appeal did not provide a basis to hold up the appointment process. That was because there were other mechanisms for relief in the event that the applicant prevailed on appeal. In re Edward Esposito, CSC Dkt. No. 2013-1899, 2013 N.J. CSC LEXIS 89, Final Decision (February 25, 2013).

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 Glouchester, 96 N.J.A.R.2d (CSV) 475.

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

4A:2-1.4 Burden of proof

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

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

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

Amended by R.1989 d.569, effective November 6, 1989.
See: 21 N.J.R. 1766(a), 21 N.J.R. 3448(b).
Added new (b) and relettered old (b) as (c).

Case Notes

Fire department officials who were laid off by a township following a change in administration did not carry their burden per N.J.A.C. 4A:2-1.4(c) to show that the layoff was actuated by a bad faith motivation within the meaning of N.J.A.C. 4A:8-2.6(c) because while the proper layoff proceedings were not initially followed, those errors were corrected. Moreover, neither of the officials adduced any bona fide evidence of bad faith, and the fact that one of the officials indicated that the township's business administrator was rude to him, that fact alone was insufficient to constitute bad faith on the part of the township. To the contrary, the preponderance of credible evidence demonstrates that the township laid off the officials for purposes of efficiency and economy per N.J.A.C. 4A:8-1.1(a) based on changes in administration and the form of government. In re Hendrickson, Jr., et al, Vernon Twp., Dep't of Public Safety, OAL DKT. NO. CSV 4683-13, OAL DKT. NO. CSV 4684-13 (Consolidated), 2014 N.J. AGEN LEXIS 474, Initial Decision (August 5, 2014).

An owner of an auto who had repeatedly complained to the dealer about a foul odor being emitted by the air conditioning system did not meet his burden per N.J.S.A. 11A:2-21 and N.J.A.C. 4A:2-1.4(a) to show that a nonconformity or condition existed in his vehicle that was likely to cause death or serious bodily injury or which substantially impaired the use, value or safety of the vehicle. The owner had driven more than 13,000 miles in the vehicle and there was no evidence corroborating the owner's claim about a foul odor nor any showing that any such odor caused any illness. Weinstock v. Lexus, OAL Dkt. No. CMA 02837-14, 2014 N.J. AGEN LEXIS 187, Initial Decision (April 11, 2014).

An Administrative Law Judge (ALJ) concluded that the owner of a vehicle did not establish by a fair preponderance of the evidence that his complaints about the function of the "keyless go" feature of the vehicle constituted a nonconformity or a condition which substantially impaired the use, safety or value of the vehicle within the meaning of N.J.A.C. 4A:2-1.4(a). The manufacturer's representative performed extensive diagnostic testing on the keys and remotes, provided software updates, performed short tests for codes; programmed the engine control unit; conducted multiple road tests, inspected the fly wheel ring gear; removed and replaced the crank shaft hall sensor and cleared codes; conducted a complete vehicle inspection and performed service consistent with factory recommendations; replaced the interior keyless go antenna; and removed and replaced the antenna and function tested the replacement. Given the facts, which included that the owner had operated the vehicle for all but 10 days (during which service was performed) since October 2012 and had driven 19,000 miles without a documented incident, the evidence did not support a claim that there was a continuing nonconformity that substantially impaired the use value or safety of the vehicle. Kerwyn Pierre v. Mercedes-Benz USA, Inc., OAL Dkt. No. CMA 02921-14, 2014 N.J. AGEN LEXIS 166, Initial Decision (April 10, 2014).

An Administrative Law Judge (ALJ) concluded that a consumer who was prosecuting a Lemon Law claim against various automotive entities had not established, as required by N.J.A.C. 4A:2-1.4(a) and by a fair preponderance of the credible evidence, that the noise emitted by the vehicle under certain operating conditions was a nonconformity within the meaning of N.J.A.C. 13:45A-26.2 for which a remedy might be obtained under the Lemon Law. That conclusion was based on the ALJ's determination that the consumer had presented no evidence of any mechanical difficulty caused by the noise; had presented no evidence to substantiate a claim that the value of the vehicle was diminished because of the noise; and had not substantiated his claim that the alleged nonconformity was likely to cause death or serious bodily injury. Stanislaw Labuda v. Chrysler Group, LLC, OAL Dkt. No. CMA 17548-13, 2014 N.J. AGEN LEXIS 66, Initial Decision (January 24, 2014).

On remand, an administrative law judge found that a psychiatric hospital did not meet its burden of proof under N.J.S.A. 11A:2.21 and N.J.A.C. 4A:2-1.4(a) that a senior medical security officer committed abuse of a patient. The security officer was credible and detailed in his testimony, and another security officer, who had an unobstructed view of the incident, corroborated his version of his actions. His actions were in response to the patient's grabbing his genitals in the confined space of the facility's store and were defensive in nature. In re Curtis Robinson, Dep't of Human Servs., Ann Klein Forensic Psychiatric Hosp., OAL Dkt. No. CSV 14260-12, 2013 N.J. AGEN LEXIS 303, Initial Decision (December 2, 2013).

Employee did not sustain the burden of proving, as required by N.J.A.C. 4A:2-1.4(c), that he was entitled to a retroactive employment date for the position of Correction Sergeant pursuant to N.J.A.C. 4A:4-1.10(c). The fact that another candidate with the same ranking for certification was appointed before the employee was of no consequence

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

4A:2-1.5 Remedies

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

(b) Back pay, benefits and counsel fees may be awarded in disciplinary appeals and where a layoff action has been in bad faith. See N.J.A.C. 4A:2-2.10. In all other appeals, such relief may be granted where the appointing authority has unreasonably failed or delayed to carry out an order of the Civil Service Commission or where the Commission finds sufficient cause based on the particular case. A finding of sufficient cause may be made where the employee demonstrates that the appointing authority took adverse action against the employee in bad faith or with invidious motivation.

Amended by R.2012 d.007, effective January 3, 2012.
See: 43 N.J.R. 2395(a), 44 N.J.R. 65(a).
In (b), substituted "Civil Service Commission or where the Commission" for "Commissioner or Board or where the Board", and inserted the last sentence.

Case Notes

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

Correction officer seeking enforcement of a settlement agreement was not entitled to counsel fees under N.J.A.C. 4A:2-2.12(a). That regulation was inapplicable because the matter did not present an adjudication of the merits of the disciplinary charges and levied against the officer before the Commission. In addition, the officer would not have a basis for receiving counsel fees under N.J.A.C. 4A:2-1.5 because the record did not indicate that the appointing authority's action was based on any improper motivation. In re Benita Cisrow, Dep't. of Corr., CSC DKT. No. 2013-2347, 2013 N.J. CSC LEXIS 999, Final Decision (November 8, 2013).

Although an applicant for Fire Fighter was bypassed pursuant to N.J.A.C. 4A:4-4.8(a)3 because he had been deemed to be medically unfit, once he took and passed a second medical examination, at the request of the Fire Director, his appointment was mandated. The Personnel Director could not claim that the applicant was not provided by a bona fide offer of employment made by the Fire Director. She was present when the offer was made but did not object or withdraw the offer. However, the applicant was not entitled to counsel fees and back pay under N.J.A.C. 4A:2-1.5(b) because the failure to appoint was not done in bad faith or with invidious motivation. The appointing authority had legitimate concerns about the applicant's medical fitness and presented reasonable, yet unpersuasive arguments, for its actions. In re Joseph Piserchio, Fire Fighter (M2377H), Newark, CSC Dkt. No. 2013-573, 2013 N.J. CSC LEXIS 311, Final Decision (April 17, 2013).

Although a Senior Security Guard was not properly laid off when the appointing authority improperly utilized a seasonal position where a permanent appointment was needed, sufficient cause was not established for an award of back pay or counsel fees under N.J.A.C. 4A:2-1.5(b). The record did not evidence that the original determination of layoff rights was done in bad faith or with invidious motivation. Therefore, the matter was akin to administrative error and generally, no vested or other rights are accorded by an administrative error. In re Michael Morris, City of Trenton, CSC Dkt. No. 2012-1733, 2013 N.J. CSC LEXIS 276, Final Decision (April 3, 2013).

Record in proceedings brought by an employee to challenge the action of the Department of Corrections in reassigning him to a different work location without initiating appropriate, prior disciplinary proceedings afforded no basis for an award of counsel fees to the employee under N.J.A.C. 4A:2-1.5(b) because such an award was properly made only where the appointing authority unreasonably failed or delayed to carry out an order of the Civil Service Commission or where the Commission found sufficient cause based on the particular case. Here, since the Department returned the employee to his prior location well within the 20-day period provided in the Commission's order, no basis for a fee award was present. In re Robert Trent, Department of Corrections, CSC Docket No. 2012-2923, 2013 N.J. CSC LEXIS 203, Final Decision (March 8, 2013).

Although the Commission found that a correction officer recruit was improperly removed following his working test period, the Commission did not find that he was entitled to a permanent appointment based on the successful completion of his working test period, only that he was simply entitled to a new six-month working test period. Therefore, sufficient cause was not demonstrated to award back pay and counsel fees. In re Salva, OAL Dkt. No. CSV 941-09, 2010 N.J. CSC LEXIS 616, Final Decision (January 13, 2010).

Where a police officer was retired due to a disability and the appointing authority amended the Final Notice of Disciplinary Action to reflect his retirement and did not pursue the disciplinary charges against him, the officer's appeal of his discipline was moot. However, no sufficient cause was presented that the appointing authority acted in bad faith, which would have entitled the officer to attorney's fees. In re Bowles, OAL Dkt. No. CSV 3256-09, 2009 N.J. AGEN LEXIS 816, Final Decision (July 22, 2009).

Even though an employee was entitled to a new working test period due to irregularities during the original working test period, the employee was not entitled to back pay and counsel fees because there was no determination that he successfully completed the working test period and was, therefore, entitled to a permanent appointment; rather, the employee was simply entitled to a new three-month working test period, during which time his performance would be evaluated. In re Bernal, OAL Dkt. No. CSV 3154-07, 2008 N.J. AGEN LEXIS 1054, Final Decision (October 22, 2008).

Although Department of Education Manager was found not to have violated the New Jersey State Policy Prohibiting Discrimination in the Workplace, N.J.A.C. 4A:7-3.1, he was not entitled to back pay or counsel fees; pursuant to N.J.A.C. 4A:2-1.5, the employee did not show that the actions of the appointing authority in finding a violation of the State Policy and terminating his unclassified position were made in bad faith (adopting in part and rejecting in part 2007 N.J. AGEN LEXIS 177). In re Hearn, OAL Dkt. No. CSV 04991-05, Final Decision (October 10, 2007).

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

Reinstated county correction officer was not entitled to recover counsel fees because the appointing authority did not unreasonably delay implementing the Board's order after the parties were unsuccessful in attempting to resolve the amount of back pay due; the record also failed to indicate that the appointing authority's actions were based on any improper motivation. In re Martin, OAL Dkt. No. CSV 6599-03 (CSV 8656-98 On Remand), 2005 N.J. AGEN LEXIS 1211, Final Decision (July 13, 2005).

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

4A:2-1.6 Reconsideration of decisions

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

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

1. The new evidence or additional information not presented at the original proceeding which would change the outcome and the reasons that such evidence was not presented at the original proceeding; or

2. That a clear material error has occurred.

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

Amended by R.2006 d.271, effective July 17, 2006.
See: 37 N.J.R. 4345(a), 38 N.J.R. 3016(b).
In (a), substituted "Within 45 days of" for "Upon the".

Case Notes

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

Senior corrections officer was an employee on date when complaint which formed basis of harassment conviction was filed, for purposes of forfeiture statute. Moore v. Youth Correctional Institute at Annandale, 230 N.J.Super. 374, 553 A.2d 830 (A.D.1989), affirmed 119 N.J. 256, 574 A.2d 983.

Senior corrections officer's criminal conviction for harassing his immediate superior was one "involving or touching" his employment. Moore v. Youth Correctional Institute at Annandale, 230 N.J.Super. 374, 553 A.2d 830 (App.Div.1989) affirmed 119 N.J. 256, 574 A.2d 983.

An applicant who was deemed to be ineligible for the promotional examination for Supervisor 1 MVC (PS3710T), Motor Vehicle Commission based on his failure to establish that he possessed the required experience per N.J.A.C. 4A:4-2.6(a) was not entitled to reconsideration of that ruling because he did not show, as required by N.J.A.C. 4A:2-1.6(b), the existence of new evidence or additional information not presented at the original proceeding that would change the outcome and the reasons that such evidence was not presented at the original proceeding; or that a clear material error had occurred. That is, the applicant's experience (or lack thereof) was addressed in the original decision and he did not demonstrate clear material error or that new information would change the outcome. In re Dioses, et al., Supervisor 1 MVC (PS3710T), Motor Vehicle Comm'n, CSC Docket No. 2014-936, Final Administrative Action (December 6, 2013).

Candidate was not entitled to reconsideration of a final determination upholding the bypass of his name on the County Correction Officer eligible list pursuant to N.J.A.C. 4A:2-1.6(b). Although the appointing authority might not have supplied the candidate with the materials he requested, the candidate had the opportunity to reply to the appointing authority's response to his appeal and fully submitted documentation in attempt to refute the basis for the bypass of his name. The fact remained that the candidate did not list his motor vehicle accidents or fully explain the circumstances to deem them "incidents" as he claimed. In re Jesse Suttor, Cnty. Corr. Officer (S9999K), Passaic Cnty., CSC Dkt. No. 2013-216, 2013 N.J. CSC LEXIS 972, Final Decision (October 2, 2013).

Civil Service Commission found that an employee did not meet the standard for reconsideration of the denial of her request for a hearing with respect to her demotion under N.J.A.C. 4A:2-1.6(b) and did not sustain her burden of establishing the timeliness of her appeal under N.J.A.C. 4A:2-4.2. The employee did not dispute that she was personally served the Final Notice of Disciplinary Action, and she provided no valid explanation as to why the appeal was not filed within the permitted timeframe when she was clearly apprised of the procedural requirements for filing an appeal. In re Joyce Maldonado, Berkeley Twp, CSC Dkt. No. 2014-150, 2013 N.J. CSC LEXIS 934, Final Decision (October 2, 2013).

City's request for reconsideration of a prior decision of the Civil Service Commission granting relief to an employee who established that he had been improperly laid off, which relief included the rescission of the layoff and the restoration of the employee to the stated position with seniority and benefits was denied because the city did not show, as required by N.J.A.C. 4A:2-1.6(b), that a clear material error had occurred. Moreover, new evidence before the Commission corroborated the employee's original claim that he was displaced from his position in favor of his successor because the city wished to reward the successor for contributions made to the mayoral campaign. That evidence thus established that the city knowingly and purposely violated civil service laws and rules to place the successor in the position occupied by the employee and demonstrated animus towards the employee. That showing was more than sufficient to support a grant of back pay and counsel fees as authorized by N.J.A.C. 4A:2-2.10 and N.J.A.C. 4A:2-2.12. In re Morris, CSC Docket No. 2013-2927, 2013 N.J. CSC LEXIS 758, Final Administrative Decision (September 4, 2013).

Order by an appellate division court that the Civil Service Commission reconsider some part of an earlier ruling involving a public employee is not a request for reconsideration by an appointing authority that must meet the standards of N.J.A.C. 4A:2-1.6. In re Joseph Napoleone, CSC Dkt. No. 2013-3243, 2013 N.J. CSC LEXIS 481, Final Decision (August 7, 2013).

Applicant who challenged the score awarded to him on certain technical components of the promotional examination for Deputy Fire Chief (PM1145N) did not persuade the Civil Service Commission that he was entitled to reconsideration of its decision sustaining those scores as permitted by N.J.A.C. 4A:2-1.6(b) because the applicant's concerns were fully addressed in the challenged decision, which explained that the possible courses of action (PCAs) utilized in the scoring were not inclusive of all aspects of behavior in a presentation, which behaviors were viewed holistically. Because the applicant did not establish either that new evidence or additional information was properly considered or that a clear material error had occurred, reconsideration was not warranted. In re James Costa, Deputy Fire Chief (PM1145N), Newark, DOP Dkt. No. 2013-2780, 2013 N.J. CSC LEXIS 680, Final Decision (July 19, 2013).

Reconsideration of the Civil Service Commission's denial of an employee's request for sick leave injury benefits was proper under N.J.A.C. 4A:2-1.6(b) when the employee presented new evidence that the de Quervain's tenosynovitis he had previously suffered as the result of a wrist injury had resolved at some point and that he was out of work only for carpal tunnel syndrome. The appointing authority failed to present any arguments or evidence in response to this medical documentation. In re Frank DeVita, Dep't of Corr., CSC Dkt. No. 2013-2554, 2013 N.J. CSC LEXIS 421, Final Decision (June 26, 2013).

Reconsideration of candidates' failure to indicate possession of the required certification for an open competitive examination for Hazardous Materials Responder, Union County, was granted pursuant to N.J.A.C. 4A:2-1.6(b) based on the presentation of new information. A review of the certificates provided on reconsideration revealed that the certificates were issued by the New Jersey State Police, Homeland Security Branch, Special Operations Section, Hazardous Materials Response Unit and met the standards in the examination announcement. Thus, the candidates sufficiently documented that they had completed the required Level 2 Emergency Medical Operations training. In re William Billson and Alexandra Califf, Hazardous Materials Responder (C0281P), Union Cnty., CSC Dkt. Nos. 2013-2978, 2013-2979, 2013 N.J. CSC LEXIS 659, Final Decision (June 5, 2013).

Reconsideration of a denial of an employee's appeal of a Civil Service Commission ruling that she lacked the required minimum experience and thus was ineligible for a promotional examination for Technical Assistant Personnel (PS0229G), Department of Environmental Protection was denied. Even if the Commission had sustained the employee's claim that she spent 20% of her workweek performing out-of-title technical, clerical personnel work, that additional experience credit would yield about 11 months of experience, still nine months short of the minimum requirement. Moreover, the employee's concerns were fully addressed in the prior ruling. Because the employee did not show that a clear material error had occurred in the original determination or that new or additional information would change the outcome of the appeal, she did not establish grounds for reconsideration per N.J.A.C. 4A:2-1.6(b). In re Melissa Burk-Pocino, Technical Assistant Personnel (PS0229G), Dep't of Env't Prot., DOP Docket No. 2013-2174, 2013 N.J. CSC LEXIS 321, Final Agency Action (April 19, 2013).

Former manager of a county nutrition program did not make the showing required by N.J.A.C. 4A:2-1.6(b) to obtain reconsideration of a prior order removing her from her position for misconduct including conduct unbecoming public employee, misuse of public property and other sufficient cause. The manager's request for reconsideration did not include new evidence or additional information that would change the outcome nor did the manager show that a clear, material error occurred in the original decision. Specifically, there was no showing that error was committed with respect to credibility determinations made by the administrative law judge and the manager also failed to show that the proceedings were unfair in any manner. In re Gonzales, CSC Docket No. 2012-3487, 2013 N.J. CSC LEXIS 322, Final Agency Action (April 17, 2013).

City demonstrated that its failure to properly dispose of a certification containing the names of three eligibles for the position of Electrical Inspector (M2399N), Mount Holly, including a continuing failure to respond to requests relating to the duties of a provisionally appointed employee, resulted from significant turnover in key positions in the city and associated communication and management lapses. Since this was new information that was not considered by the Civil Service Commission when it assessed a $1,000 fine against the city for its non-compliance, reconsideration of the fine as requested by the city was appropriate per N.J.A.C. 4A:2-1.6(b) as well as rescission of the fine. In re Electrical Inspector (M2399N), Mount Holly, CSC Docket No. 2013-2284, 2013 N.J. CSC LEXIS 199, Final Agency Action (April 17, 2013).

Grounds meeting the criteria in N.J.A.C. 4A:2-1.6(b) for reconsideration of a decision rejecting an applicant's appeal for admission into the applicant pool for a certain civil service examination were not shown because the applicant's concerns about the decision had been addressed in the prior decision and because he failed to demonstrate either that a clear material error had occurred or that he was in possession of new information which would change the outcome. The "new information" presented by the applicant at best tended to show that he had misunderstood the application process but that was not grounds for acceptance of an untimely appeal, especially because the due date for applications was in August 2010 and the applicant did not raise the issue until February 2012. In re Ditsche, Entry Level Law Enforcement Examination (S9988M), DOP Dkt. No. 2013-2065, 2013 N.J. CSC LEXIS 228, Final Agency Action (April 8, 2013).

Employee was not entitled to reconsideration of a decision pursuant to N.J.A.C. 4A:2-1.6(b) of the Civil Service Commission upholding her release at the of her working test period. The Commission already considered her request for copies of confidential documents to challenge the good faith of the appointing authority's decision to release her, and she did not provide any legal precedent indicating that she was entitled to the information protected by N.J.S.A. 52:27D-420. She did not show that the Commission made a material error by refusing her access to redacted case files. In re Beverly-Ann Schilling, Ocean Cnty. Bd. of Social Svcs., CSC Dkt. No. 2013-957, 2013 N.J. CSC LEXIS 263, Final Decision (April 4, 2013).

Employee did not provide a valid explanation for her failure to file an appeal, as N.J.A.C. 4A:2-4.2 required, within the 20 day period after her receipt of notice that she was being returned to her permanent title of Cottage Training Technician after she received an unsatisfactory rating for her working test period as a Cottage Training Supervisor. Since the Appeal Rights Letter specifically advised her to file her appeal directly with the Commission within 20 days of her receipt of the notice, the employee's explanation that she understood that a departmental EEO Officer would "handle everything" did not meet the criteria in N.J.A.C. 4A:2-1.6(b) that had to be met in order to win reconsideration of a prior Commission decision. In re Ginger Ferrell New Lisbon Developmental Center Department of Human Services, CSC Docket No. 2013-1335, 2013 N.J. CSC LEXIS 370, Final Decision (April 3, 2013).

Employee's failure to file, per N.J.A.C. 4A:2-1.6(a), a timely request that the Civil Service Commission reconsider its prior decision returning the employee to a prior position on a finding that the Department of Corrections' action in reassigning him was improper because it had not initiated appropriate disciplinary proceedings prior to the reassignment, which reconsideration presumably would have sought additional relief in the form of an award of counsel fees award as permitted by N.J.A.C. 4A:2-2.12, afforded grounds for the denial of the employee's request for fees, nor did the employee articulate any grounds on which the 45 day deadline for the filing of a reconsideration request was properly extended. In re Robert Trent, Department of Corrections, CSC Docket No. 2012-2923, 2013 N.J. CSC LEXIS 203, Final Decision (March 8, 2013).

Grounds were not shown for reconsideration by the Civil Service Commission of its determination that rejected a finding by the Administrative Law Judge (ALJ) that the employee had good cause to refuse to comply with an order of his supervisor and instead finding that the employee was properly disciplined for insubordination. The employee failed to show that clear material error within the meaning of N.J.A.C. 4A:2-1.6(b) had occurred in connection with the consideration of his supervisor's testimony, alleged by the employee to have been the result of improper coaching and manipulation, because, in fact, the ALJ had rejected that testimony as not credible and the Commission had accepted that credibility determination in its review, which had focused on the issue of good cause. In re Alex Siniavsky, Department of Corrections, CSC Docket No. 2012-3664, 2013 N.J. CSC LEXIS 209, Final Decision (March 7, 2013).

County was not entitled to relief on its claim that, prior to the issuance of the initial decision of the Administrative Law Judge (ALJ), it had entered into a binding settlement agreement between it and a wrongly-removed county correction officer to settle her back pay and benefit claims because the purported agreement was never brought before the ALJ or the Civil Service Commission as contemplated by N.J.A.C. 1:1-19.1. Nor did the county bring the purported agreement to the attention of the ALJ in a timely manner by a motion to reopen the record per N.J.A.C. 1:1-18.5(c) or, once the ALJ ruled, by the filing of a request per N.J.A.C. 1:1-18.8(d) to extend the deadline for the filing of its objections to the ALJ's ruling. Because the county did not bring the agreement to either the ALJ or the Commission, neither arbiter ever considered it and there was no basis for "reconsideration" of the matter as permitted by N.J.A.C. 4A:2-1.6(b). In re Keisha Henderson, Essex County, CSC Docket No. 2013-1607, 2013 N.J. CSC LEXIS 180, Final Decision (March 7, 2013).

Civil Service Commission refused to reconsider its prior ruling finding that an employee who had failed to appear to take the oral portion of an examination for the position of Battalion Fire Chief (PM0146P), Newark, ostensibly because he was attending his daughter's high school graduation, was not entitled to be granted a make-up examination, which ruling was based on the Commission's finding that the circumstances presented by the employee did not meet the criteria in N.J.A.C. 4A:4-2.9(c) but was a schedule conflict that was not a valid reason for a make-up examination. Moreover, because the employee did not show that a clear material error occurred or present new evidence or additional information which would change the outcome of the case as well as valid reasons for his failure to present such evidence during the original proceeding, the employee had failed to meet the standards in N.J.A.C. 4A:2-1.6(b) upon which a request for reconsideration was properly granted. In re Dorian Herrill, Battalion Fire Chief (PM0146P), Newark, CSC Docket No. 2013-1447, 2013 N.J. CSC LEXIS 27, Final Decision (February 8, 2013).

Fire captain was not entitled to reconsideration of a Civil Service Commission decision pursuant to N.J.A.C. 4A:2-1.6(b) because he did not present new or additional information that would have changed the outcome of the case. As provided in the original decision, he did not have displacement rights to the title of Fire Prevention Specialist because he was neither properly serving as a provisional nor was he permanent in that title. There was no record of the City appointing him from a certification as required under N.J.A.C. 4A:4-1.10(a). In re Agripino Figueroa, City of Camden, CSC Dkt. No. 2012-2660, 2013 N.J. CSC LEXIS, Final Decision (January 10, 2013).

4A:2-1.7 Specific appeals

(a) For specific appeal procedures see:

1. Awards in State service (N.J.A.C. 4A:6-6.10);
2. Classification (N.J.A.C. 4A:3-3.9);
3. Discipline, major (N.J.A.C. 4A:2-2);
4. Discipline, minor (N.J.A.C. 4A:2-3);
5. Discrimination in State service (N.J.A.C. 4A:7-3.2 and 3.3);
6. Employment list removal for medical reasons (N.J.A.C. 4A:4-6.5);
7. Employment list removal for psychological reasons (N.J.A.C. 4A:4-6.5);
8. Examinations (N.J.A.C. 4A:4-6);
9. Grievances (N.J.A.C. 4A:2-3);
10. Layoffs (N.J.A.C. 4A:8-2.6);
11. Overtime in State service (N.J.A.C. 4A:3-5.10);
12. Performance Assessment Review in State service (N.J.A.C. 4A:6-5.3);
13. Reprisals (N.J.A.C. 4A:2-5);
14. Resignations (N.J.A.C. 4A:2-6);
15. Salary (job reevaluation) in state service (N.J.A.C. 4A:3-4.3);
16. Sick leave injury in State service (N.J.A.C. 4A:6-1.7); and
17. Supplemental compensation on retirement in State service (N.J.A.C. 4A:6-3.4).

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

Administrative correction to (a), with deletion of (a)11 and renumbering of old (a)12-18 to new (a)11-17.
See: 22 N.J.R. 165(a).
Amended by R.2006 d.271, effective July 17, 2006.
See: 37 N.J.R. 4345(a), 38 N.J.R. 3016(b).
Deleted ".1 et seq." following N.J.A.C. references throughout; in (a)5, substituted "and 3.3" for "through 4A:7-3.4"; and in (a)11, deleted "et seq." following N.J.A.C. reference.

Case Notes

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

4A:2-1.8 Appeal processing fees

(a) A $20.00 processing fee shall be charged for all appeals and requests for relief filed with the Civil Service Commission, subject to the exemptions in (e) below, except that no fee shall be charged for the following types of appeals:

1. Stay or interim relief (N.J.A.C. 4A:2-1.2), except that:
   i. Interim relief requests filed pursuant to N.J.A.C. 4A:2-2.5(e) (violation of departmental disciplinary hearing requirements) are subject to the appeal fee; and
   ii. Requests for stay filed pursuant to N.J.A.C. 4A:2-1.2(f) are subject to the appeal fee;
2. Petition for reconsideration of an appeal that is not subject to an appeal fee (see N.J.A.C. 4A:2-1.6);
3. Grievance in State service (N.J.A.C. 4A:2-3.1);
4. Reprisal or political coercion (N.J.A.C. 4A:2-5.2);
5. Classification (N.J.A.C. 4A:3-3.9);
6. Job reevaluation (N.J.A.C. 4A:3-4.3);
7. Waiver of salary overpayment (N.J.A.C. 4A:3-4.21);
8. Retroactive appointment date (N.J.A.C. 4A:4-1.10);
9. Extension of an eligible list (N.J.A.C. 4A:4-3.3);
10. Revival of an eligible list (N.J.A.C. 4A:4-3.4);
11. Relaxation of the intergovernmental transfer rule (N.J.A.C. 4A:4-7.1A);
12. Relaxation of the donated leave rule (N.J.A.C. 4A:6-1.22);
13. Layoff rights (N.J.A.C. 4A:8-2.6(a)2);
14. Enforcement of a Civil Service Commission decision or a determination by a Division of the Civil Service Commission (N.J.A.C. 4A:10-2.1); or
15. Appointment waiver (N.J.A.C. 4A:10-2.2).

(b) The fee shall be paid by check or money order, made payable to NJCSC, and submitted with the appeal.

(c) Appeals filed on behalf of multiple appellants must include a $20.00 fee for each appellant, except that:

1. In cases where, on behalf of all similarly situated members of a unit represented by a union, an attorney or authorized union representative files a request for a stay or other interim relief that does not fall under N.J.A.C. 4A:2-1.2, because it does not pertain to a pending appeal, such request is only subject to one $20.00 fee; and

2. Appeal fees as described above may be combined in one check or money order.

EXAMPLE 1: An attorney representing a local union seeks an order on behalf of all affected unit members to stay a layoff from occurring in response to a proposed layoff plan. The request does not fall under N.J.A.C. 4A:2-1.2, because it does not pertain to a pending appeal. Therefore, the request is subject to a fee. However, as it is filed on behalf of all similarly situated union members by an authorized representative, the attorney is only required to submit one $20.00 fee in total, rather than a fee for each unit member.

EXAMPLE 2: An attorney appeals the good faith of a layoff on behalf of 20 members of an affected unit represented by a local union. The attorney also seeks an order to stay the layoff from occurring pending a hearing on the good faith layoff appeal. The pending appeal, regarding the good faith of the layoff, is subject to a fee. Therefore, the attorney is required to submit a $20.00 fee for each appellant in the good faith layoff appeal for a total of $400.00. The attorney decides to submit a check for $400.00, rather than write 20 checks in the amount of $20.00 for each appellant, although either approach is permissible. However, no separate fee is required for the stay request because it pertains to the pending appeal. See N.J.A.C. 4A:2-1.8(a)1.

(d) Appeals received without a fee shall not be processed unless the appellant submits, within the time required by written notice from the Commission, the required fee, or proof of exemption as described in (e) below. Fees received after the due date shall not be accepted unless good cause is shown by the appellant.

(e) An appellant shall be granted a waiver of the fee if the appellant:

1. Has established veterans' preference pursuant to N.J.S.A. 11A:5-1 et seq.; or

2. Provides documentation showing that he or she is receiving General Assistance benefits, benefits under the Work First New Jersey Act, or Supplemental Security Income. Proof must consist of one of the following:

i. General Assistance—a copy of the appellant's benefits identification card (if one was issued) or a letter from the appellant's local municipal welfare director;

ii. Work First New Jersey Act—a copy of the appellant's Families First card; or

iii. Supplemental Security Income—a copy of the appellant's latest annual award letter or proof of the applicant's Medicaid identification number for S.S.I. benefits.

(f) The fee is for processing purposes only and shall not be refunded for any reason except when submitted in error for an exempt appeal.

New Rule, R.2011 d.173, effective June 20, 2011.
See: 43 N.J.R. 470(a), 43 N.J.R. 1419(b).

Case Notes

Counsel who represented a police officer who prevailed on his claim that he had been wrongly removed from his position was entitled to compensation at the hourly rate of $175, not at his billed rate of $375, because counsel provided insufficient information to justify an award at the billed rate. Specifically, the certification did not elaborate as to the specific nature or subject matter of cases for which he was paid at the $375 hourly rate nor any basis on which it could be concluded that he has particular expertise in labor or employment law. In the absence of such a showing, an award based on an hourly rate of $175 was proper under N.J.A.C. 4A:2-2.12. As for the related claim for costs, because subpoenas were not required to be served by process servers, the cost thereof was not reimbursable per N.J.A.C. 1:1-11.2, while the $20 appeal processing fee was also nonreimbursable per N.J.A.C. 4A:2-1.8(f). In re Hulse, Newark, CSC Docket No. 2013-3505, 2013 N.J. CSC LEXIS 1151, Final Administrative Action (December 6, 2013).

Candidate who was ineligible to take a promotional examination for County Services Specialist (PS1394K), Department of Children and Families because she did not meet the minimum requirements by the closing date could not recover her $20 fee paid for filing an appeal under N.J.A.C. 4A:2-1.8(f) because the fee was for processing purposes only and was not refundable unless it had been submitted in error, which was not the case here. In re Brown, et al., Cnty. Servs. Specialist, (PS1394k), Dep't. of Children and Families, CSC Dkt. Nos. 2013-1705, 2013-1818, 2013-1707, 2013-1712, 2013-1741, 2013-1745, 2013-1792, 2013-1782, 2013-1799, 2013-1755, 2013-1756, 2013-1868, 2013-1736, 2013-1676, 2013-1735 and 2013-1757, 2013 N.J. CSC LEXIS 1168, Final Admin. Action (November 20, 2013).

Appointing authority improperly denied a correction officer's request for sick leave injury benefits on the basis that her injury was the result of a preexisting should injury pursuant to N.J.A.C. 4A:6-1.6(d)2. It failed to provide any medical documentation in support of its determination, while the correction officer provided a medical note indicating that the prior shoulder surgery was unrelated to the present injury. However, the correction officer did not show that her appeal was exempt from the fee imposed under N.J.A.C. 4A:2-1.8(f). In re Cheryl Hoffman, Dep't. of Corr., CSC Dkt. No 2012-577, 2013 N.J. CSC LEXIS 497, Final Decision (July 17, 2013).

Applicant who prevailed on appeal from a ruling of the Division of Selection Services and Recruitment (DSR) that she did not adequately justify her failure to attend an examination was not entitled to relief from the filing fee for the appeal imposed by N.J.A.C. 4A:2-1.8 because the same was a processing fee levied on all appellants other than those who were exempted by rule. The applicant's claim that the fee was "unfair" did not afford grounds for relief therefrom. In re Donna Kaczor, Clerk 3 (C0753P), Bergen Cnty., CSC Dkt. No. 2013-2592, 2013 N.J. CSC LEXIS 624, Final Decision (May 16, 2013).

Applicant was not entitled to retake an open competitive examination for Administrative Clerk (M0208P). Although she alleged that numerous announcements were made over the school intercom that created a disturbance in taking the examination, she failed to challenge the manner in which the examination was administered at the examination site as required by N.J.A.C. 4A:4-6.4(c). Because the appeal fee she paid was for processing only and was not submitted in error for an exempt appeal, she was not entitled to a refund of the appeal fee under N.J.A.C. 4A:2-1.8(f). In re Nicole M. Jackson, Admin. Clerk (M0208P), East Orange, CSC Dkt. No. 2013-659, 2013 N.J. CSC LEXIS 61, Final Decision (January 9, 2013).

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.

Because a city employee who was serving as the provisional deputy director of human services did not hold that title in a permanent capacity within the meaning of N.J.A.C. 4A:2-2.1(a), she lacked standing under N.J.A.C. 4A:8-2.6 to appeal her demotion from that position as part of a general layoff of city employees necessitated by fiscal constraints. In re City of Trenton Layoffs, Dep't of Admin. & Fin., OAL Dkt. No. CSV 876-11, AGENCY Dkt. Nos. 2011-2141 et al., 2014 N.J. AGEN LEXIS 70, Initial Decision (February 10, 2014).

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 semicolon 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.

Human Services Technician who, on three occasions within a few minutes, kicked the wheelchair of a resident of a veterans home with enough force to propel it backwards was properly removed from her position on a finding that she had engaged in conduct unbecoming a public employee and was guilty of neglect of duty in violation of N.J.A.C. 4A:2-2.2 and N.J.A.C. 4A:2-2.3(a). The technician expressed apparent impatience with the resident's repeated attempts to leave the T.V. room despite the absence of any directive or instruction that prohibited the resident from freely moving around the unit in which she resided. The technician's conduct in kicking the resident's wheelchair repeatedly as the resident tried to exercise her privilege of departing the T.V. room constituted an unacceptable restraint on the resident's freedom. Although the resident suffered from some confusion, she was alert and aware of her surroundings, and the technician's actions were humiliating and resulted in mental anguish to the resident. Notwithstanding the lack of physical injury to the resident, the technician's conduct, nevertheless, strayed mightily from the standards expected of a certified nursing assistant and provided adequate grounds for her removal from her position. In re Brownwest-Dunbar, N.J. Veterans Memorial Home Menlo Park, Dep't of Military & Veterans Affairs,

4A:2-2.6 Hearings before the appointing authority

(a) The hearing shall be held before the appointing authority or its designated representative.

(b) The employee may be represented by an attorney or authorized union representative.

(c) The parties shall have the opportunity to review the evidence supporting the charges and present and examine witnesses. The employee shall not be required to testify, but an employee who does testify will be subject to cross-examination.

(d) Within 20 days of the hearing, or such additional time as agreed to by the parties, the appointing authority shall make a decision on the charges and furnish the employee either by personal service or certified mail with a Final Notice of Disciplinary Action. See N.J.A.C. 4A:2-2.13 for the issuance of a Final Notice in removal appeals by certain law enforcement officers and firefighters.

Special amendment, R.2009 d.221, effective June 10, 2009 (to expire July 1, 2010).
See: 41 N.J.R. 2720(a).
In (d), inserted the last sentence.
Readopted by R.2010 d.176, effective July 22, 2010.
See: 42 N.J.R. 693(a), 42 N.J.R. 1855(a).
Provisions of R.2009 d.221 readopted without change.

Case Notes

Due process. Carr v. Sharp, C.A., 454 F.2d 271 (1971).

Requirement of exhaustion of administrative remedies. City of New Brunswick v. Speights, 157 N.J.Super. 9, 384 A.2d 225 (Co.1978).

Res judicata: delay in hearing: limits on de novo hearing. In re Darcy, 114 N.J.Super. 454, 277 A.2d 226 (1971).

Civil Service Commission lacked the authority to review the claims made by a now-former county employee that the appointing authority failed to call several witnesses at a departmental hearing convened following her suspension because the scope of the Commission's review of such hearings as established by N.J.A.C. 4A:2-2.5 and N.J.A.C. 4A:2-2.6 was limited and did not extend to such matters. In the Matter of Cheryl Goins, Essex County, CSC Dkt. No. 2013-274, 2013 N.J. CSC LEXIS 118, Final Decision (February 20, 2013).

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

Public employee voluntarily and deliberately planned his nonappearance at hearing and was not entitled to further hearing. Cue v. Camden County, 92 N.J.A.R.2d (CSV) 131.

4A:2-2.7 Actions involving criminal matters

(a) When an appointing authority suspends an employee based on a pending criminal complaint or indictment, the employee must be served with a Preliminary Notice of Disciplinary Action. The notice should include a statement that N.J.S.A. 2C:51-2 may apply to the employee, and that the employee may choose to consult with an attorney concerning the provisions of that statute.

1. The employee may request a departmental hearing within five days of receipt of the Notice. If no request is made within this time, or such additional time as agreed to by the appointing authority or as provided in a negotiated agreement, the appointing authority may then issue a Final Notice of Disciplinary Action under (a)3 below. A hearing shall be limited to the issue of whether the public interest would best be served by suspending the employee until disposition of the criminal complaint or indictment. The standard for determining that issue shall be whether the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services.

2. The appointing authority may impose an indefinite suspension to extend beyond six months where an employee is subject to criminal charges as set forth in N.J.A.C. 4A:2-2.5(a)2, but not beyond the disposition of the criminal complaint or indictment.

i. Where an employee who has been indefinitely suspended enters Pre-Trial Intervention (PTI) or has received a conditional discharge, the criminal complaint or indictment shall not be deemed disposed of until completion of PTI or until dismissal of the charges due to the employee's satisfaction of the conditions in a conditional discharge, as the case may be.

ii. An appointing authority may continue an indefinite suspension until completion of PTI or until satisfaction of the conditions imposed in a conditional discharge. If an appointing authority chooses not to continue an indefinite suspension during the PTI period or during the period of conditional discharge, it may restore the employee to employment or initiate disciplinary action against the employee.

3. Where the appointing authority determines that an indefinite suspension should be imposed, a Final Notice of Disciplinary Action shall be issued stating that the employee has been indefinitely suspended pending disposition of the criminal complaint or indictment.

(b) When a court has entered an order of forfeiture pursuant to N.J.S.A. 2C:51-2, the appointing authority shall notify the employee in writing of the forfeiture and record the forfeiture in the employee's personnel records. The appointing authority shall also forward a copy of this notification to the Department of Personnel.

1. If the criminal action does not result in an order of forfeiture issued by the court pursuant to N.J.S.A. 2C:51-2, the appointing authority shall issue a second Preliminary Notice of Disciplinary Action specifying any remaining charges against the employee upon final disposition of the criminal complaint or indictment. The appointing authority shall then proceed under N.J.A.C. 4A:2-2.5 and 2.6.

(c) Where an employee has pled guilty or been convicted of a crime or offense which is cause for forfeiture of em-

ployment under N.J.S.A. 2C:51-2 but the court has not entered an order of forfeiture, the appointing authority may seek forfeiture by applying to the court for an order of forfeiture. The appointing authority shall not hold a departmental hearing regarding the issue of the applicability of N.J.S.A. 2C:51-2. If the court declines to enter an order of forfeiture in response to the appointing authority's application, the appointing authority may hold a departmental hearing regarding other disciplinary charges, if any, as provided in (b)1 above.

Amended by R.1989 d.569, effective November 6, 1989.
See: 21 N.J.R. 1766(a), 21 N.J.R. 3448(b).
In (a)1: added text, "The standard ... public services."
Amended by R.1992 d.414, effective October 19, 1992.
See: 24 N.J.R. 2491(a), 24 N.J.R. 3716(a).
Revised (a).
Public Notice: Notice of Receipt of a Petition for Rulemaking.
See: 29 N.J.R. 5333(a).
Amended by R.2000 d.433, effective October 16, 2000.
See: 32 N.J.R. 2275(a), 32 N.J.R. 3870(a).
Rewrote (b) and (c).
Amended by R.2006 d.271, effective July 17, 2006.
See: 37 N.J.R. 4345(a), 38 N.J.R. 3016(b).
Added (a)2i and (a)2ii.

Case Notes

Forfeiture of public office was not unconstitutional. State v. Timoldi, 277 N.J.Super. 297, 649 A.2d 872 (A.D.1994), certification denied 142 N.J. 449, 663 A.2d 1356.

Merit System Board of State Department of Personnel did not have exclusive jurisdiction for prosecution of forfeiture action against senior corrections officer. State v. Lee, 258 N.J.Super. 313, 609 A.2d 513 (A.D.1992).

Whether public employee's conviction involves or touches employment does not depend upon whether criminally proscribed acts took place within immediate confines of employment's daily routine. Moore v. Youth Correctional Institute at Annandale, 230 N.J.Super. 374, 553 A.2d 830 (A.D.1989), affirmed 119 N.J. 256, 574 A.2d 983.

Senior corrections officer's criminal conviction for harassing his immediate superior was one "involving or touching" his employment. Moore v. Youth Correctional Institute at Annandale, 230 N.J.Super. 374, 553 A.2d 830 (A.D.1989), affirmed 119 N.J. 256, 574 A.2d 983.

Finite period of suspension of an employee that spanned more than 11 months was improper under N.J.S.A. 11A:20 and N.J.A.C. 4A:2-2.4(a) because it spanned more than six months. The appointing authority should have issued a Final Notice of Disciplinary Action pursuant to N.J.A.C. 4A:2-2.7(a)1 and (a)3 indicating that the employee had been indefinitely suspended pending disposition of a criminal complaint against him, but that did not occur. Due to this procedural error, the Civil Service Commission ordered that the employee's County and Municipal Personnel System record be revised to indicate that he was suspended for a period of six months. In re Dennis McReynolds, Atlantic City, CSC Dkt. No. 2013-3117, 2013 N.J. CSC LEXIS 583, Referred for Hearing (June 27, 2013).

Initial Decision (2010 N.J. AGEN LEXIS 537) adopted, which found that although a senior correction officer was properly removed for conduct unbecoming after she shoplifted on two occasions, the charge of criminal matters under N.J.A.C. 4A:2-2.7 was dismissed because there was no criminal conviction as of the date of the disciplinary proceedings. N.J.A.C. 4A:2-2.7 involved pre-conviction procedural actions including an indefinite suspension pending the disposition criminal case; the municipal court shoplifting charges were dismissed or downgraded to a municipal ordinance. In re Noseworthy, OAL Dkt. No. CSR 12158-09 and CSR 12159-09 (Consolidated), 2010 N.J. AGEN LEXIS 691, Final Decision (April 28, 2010).

Immediate and indefinite suspension of a supervisor in the Division of Sanitation pending disposition of a criminal complaint was proper. The supervisor was arrested for using his official position to facilitate the theft of gasoline for his personal benefit. Because the charge involved the supervisor's job, it fell within the scope of N.J.A.C. 4A:2-2.5(a)2, making the immediate suspension proper. The indefinite suspension pending disposition of the criminal complaint under N.J.A.C. 4A:2-2.7(a) were necessary to maintain order and effective direction of public services. The charges raised the concerns that he might steal city property or that his presences might send the wrong message to other employees. In re Paul Drayton, City of Newark, OAL Dkt. No. CSV03780-08, 2008 N.J. AGEN LEXIS 1547, Initial Decision (November 21, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 108) adopted, which concluded that a campus police officer was properly suspended upon allegations that he used university equipment to send numerous e-mails to a fellow employee whom he was pursuing romantically, e-mailed a confidential police report to her, and posted an offensive and menacing MySpace.com profile in her name after being rejected; the officer's misconduct involved, and directly touched upon, his employment. In re Mandi, OAL Dkt. No. CSV 4824-07, 2008 N.J. AGEN LEXIS 559, Final Decision (April 23, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 85) adopted, which concluded that a police officer was properly indefinitely suspended from his position pending the outcome of criminal charges against him after it was alleged that he was stealing items from impounded vehicles; the charges against him not only involved dishonesty but also a breach of the public trust by the very police officer whose duty it was to protect and preserve the property he allegedly appropriated for his own use. In re Halpern, OAL Dkt. No. CSV 7414-07, 2008 N.J. AGEN LEXIS 516, Final Decision (March 26, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 60) adopted, which dismissed a police officer's appeal from his indefinite suspension; the township appropriately suspended the officer indefinitely after he was charged with second-degree crimes and the case was inactive for years at the officer's request. In re Nemes, OAL Dkt. No. CSV 8464-00, 2008 N.J. AGEN LEXIS 522, Final Decision (February 27, 2008).

Employee's highly inappropriate comment advocating violence to a developmentally challenged student coupled with the employee's prior history of an alleged altercation with a fellow employee provided a sufficient basis for the appointing authority to order a fitness for duty psychological examination. However, the indefinite suspension of the employee for refusing to take the psychological examination was improper, as indefinite suspension is limited by N.J.A.C. 4A:2-2.7 to matters in which there is a pending criminal complaint or indictment (adopting in part and rejecting in part 2007 N.J. AGEN LEXIS 704). In re Veronelli, OAL Dkt. No. CSV 3881-07, 2007 N.J. AGEN LEXIS 1023, Merit System Board Decision (December 5, 2007).

A corrections officer who was suspended per N.J.A.C. 4A:2-2.7 and thereafter removed from his position for conduct unbecoming a public employee after he was charged with possessing cocaine and gave a voluntary statement confessing that he indeed did possess cocaine and had been buying and using cocaine for six years was not entitled to participate in a County Early Retirement Incentive Program (CERIP). CERIP eligibility relied on a participant being a current employee who agreed to retire on July 1, 2002. Because the officer had been removed effective February 1, 2002, he was not eligible for participation. In re Ferreira, Union Cty. Dep't of Public Safety, OAL DKT. NO. CSV3771-02, 2007 N.J. AGEN LEXIS 1305, Initial Decision (September 25, 2007).

Initial Decision (2006 N.J. AGEN LEXIS 963) adopted, which found that the appointing authority was authorized to suspend a senior correction officer indefinitely without pay pending the outcome of his criminal charges; it was alleged that the officer sold a cellular phone to an inmate for $300 and the criminal charges were, therefore, directly

by the Police and Fireman's Retirement System that he was no longer disabled. Although a doctor refused to give him a scheduled psychological examination because he arrived late, his reinstatement was not contingent upon a medical or psychological examination. However, the Fire Captain was not entitled to back pay or counsel fees under N.J.A.C. 4A:2-10 because this was not a disciplinary matter. In re Stephen Phillips, Twp. of West Orange, CSC Dkt. No. 2012-1029, 2013 N.J. CSC LEXIS 304, Final Decision (April 17, 2013).

Definition of the term "reasonable efforts" as used in N.J.A.C. 4A:2-2.10(d) with relation to efforts by an ex-employee to obtain employment during a period of separation from public employment does not require a specific number of contacts or attempts to be made during that period. Rather, the determination as to whether the employee made reasonable efforts to find suitable employment shall be based on the totality of the circumstances, including, but not limited to, the nature of the disciplinary action taken against the employee and the nature of the employee's public employment. Applying that rule here on specific facts, the Department of Military and Veterans' Affairs failed to carry its burden to show that the separated employee (later ordered reinstated) was not entitled to more than $4,600 in back pay based on her alleged failure to use reasonable efforts to find substitute employment. In re Michelle Taylor, Department of Military and Veterans' Affairs, CSC Docket No. 2012-3286, 2013 N.J. CSC LEXIS 184, Final Decision (March 7, 2013).

After a police officer was suspended for 30 days on charges of improperly allowing the private tow of a disabled vehicle, failing to notify his dispatcher, and giving false statements during the investigation, the Civil Service Commission modified the suspension to an official written reprimand and granted the officer back pay, benefits, and seniority under N.J.A.C. 4A:2-2.10. Notwithstanding his failure to follow the policy regarding utilization of a City-contracted tow, the officer's actions were arguably reasonable given that the vehicle clearly presented a road hazard and warranted a significant mitigation of the penalty. Further, the Commission determined that the officer was not guilty of the other charges and he did not have a significant disciplinary history. The officer was also entitled to an award of counsel fees in the amount of 25 percent of services under N.J.A.C. 4A:2-2.12 because he prevailed on all but one charge. In re Daniel Caetano, City of Newark, OAL Dkt. No. CSV 13338-11, 2013 N.J. CSC LEXIS 109, Civil Service Comm'n. Decision (March 6, 2013).

Administrative law judge's recommendation of the reduction of the 30-day working day suspension of a county corrections officer on charges of incompetency, inefficiency or failure to perform duties, insubordination, conduct unbecoming a public employee, and other sufficient cause to a 5-day suspension was improper. After concluding that a 20-day working day suspension was the appropriate penalty, given the corrections officer's failure to comply with the orders of superior in the paramilitary setting of a correctional facility, the Civil Service Commission granted the corrections officer 10 days of back pay, benefits, and seniority pursuant to N.J.A.C. 4A:2-2.10. However, he was not entitled to counsel fees under N.J.A.C. 4A:2-2.12(a) because he did not prevail on all or substantially all of the primary issues of the appeal. He was found guilty of the charges and the Commission only modified the penalty. In re Vincent De Ponte, Monmouth Cnty., OAL Dkt. No. CSV 5497-12, 2013 N.J. CSC LEXIS 31, Civil Service Comm'n. Decision (March 6, 2013).

Calculation of the back pay owed by the appointing authority to a County Correction Sergeant who was found to have been improperly removed from his position did not include holiday pay because holiday pay was clearly excluded from a back pay award by N.J.A.C. 4A:2-2.10(d)1. However, the appointing authority's claim that the back pay award did not include any amount on account of "shift pay" was incorrect because a shift differential, being the amount that was payable based on the shift to which the employee was assigned, was classified for such purposes as regular wages, and the back pay award to which the sergeant was entitled in fact included "shift pay" as claimed. In re Mark Lyszczak, CSC Docket No. 2012-1651, 2013 N.J. CSC LEXIS 119, Final Decision (February 20, 2013).

After an administrative law judge (ALJ) upheld the charge of incompetency, inefficiency, or failure to perform duties against a county correction officer who left an inmate's cell door open and failed to note or report unusual incidents or imminent behavior of an inmate on suicide watch, the ALJ erred in recommending a 30-day working day suspension instead of removal. The Civil Service Commission imposed a 90 working day suspension instead of removal, which entitled the officer to mitigated back pay, benefits, and seniority pursuant to N.J.A.C. 4A:2-2.10. However, the officer was not entitled to an award of counsel fees under N.J.A.C. 4A:2-2.12 because he did not prevail on the primary issue on appeal, which was the merit of the charges, not the appropriateness of the penalty imposed. In re Wade Rosenberger, CSC Dkt.. No. 2012-3046, 2013 N.J. CSC LEXIS 129, Civil Service Comm'n Decision (January 23, 2013).

Initial Decision (2009 N.J. AGEN LEXIS 321) adopted, which found that county correction sergeant was entitled to reinstatement where respondent failed to meets its burden of proof that the officer violated a fraternization policy by having a relationship with a parolee. The officer testified that she did not know of the parolee's status when she hired him to perform home improvement work and that, upon learning that was the case, she immediately reported her association with the parolee to her supervisor. In re Ford, OAL Dkt. No. CSV 12530-08 and CSV 7175-06 (On Remand), 2009 N.J. CSC LEXIS 67, Civil Service Comm'n Decision (September 2, 2009).

Although an employee with the Department of Children and Family services uttered, "if I return to work and my supervisor and any of her flunkies harass me, I will grab her about the neck and rip her eyes out," the employee should not have been subject to discipline where the comment was made in a therapeutic setting during a psychiatric evaluation, was not an actual threat, and the employee did not otherwise display any violent tendencies. In re Bellamy, OAL Dkt. No. CSV 8866-06, 2009 N.J. AGEN LEXIS 807, Civil Service Comm'n Decision (March 25, 2009).

Since removal from position of supervising sheet metal worker with public school district was modified to a six-month suspension, employee was entitled to mitigated back pay, benefits, and seniority. In re Delli Santi, OAL Dkt. No. CSV 11901-07, 2008 N.J. AGEN LEXIS 1088, Civil Service Commission Decision (September 24, 2008).

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

Initial Decision (2008 N.J. AGEN LEXIS 228) adopted, which concluded that the appointing authority had the right to impose an indefinite suspension without pay under N.J.A.C. 4A:2-2.5(a)2 on a correction officer until June 26, the date when the officer pleaded guilty to downgraded charges, rather than only until March 7, the date when the County Prosecutor chose to downgrade the indictable offense, as the downgrade was specifically conditioned on a guilty plea. In re Paris, OAL Dkt. No. CSV 12208-06, 2008 N.J. AGEN LEXIS 708, Final Decision (June 11, 2008).

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

Although a police officer was exonerated on criminal charges that he sexually assaulted three women, he was not entitled to reinstatement or back pay because he still remained subject to disciplinary proceedings, including conduct unbecoming a police officer. In re Cofone, OAL Dkt. No. CSV 6774-05 (CSV 2578-01 and CSV 6148-03 On Remand), 2006 N.J. AGEN LEXIS 776, Final Decision (July 19, 2006), aff'd per curiam, No. A-0306-06T5, 2008 N.J. Super. Unpub. LEXIS 1694 (App.Div. July 16, 2008).

Disciplinary action was not properly taken against two correctional officers on a county's claim of incompetence, inefficiency or failure to perform duties per N.J.A.C. 4A:2-2.3(a)1; neglect of duty per N.J.A.C. 4A:2-2.3(a)7, or other sufficient cause per N.J.A.C. 4A:2-2.3(a)11, which cause was claimed to be their failure to properly report and incident between an inmate and another officer and neglecting to appropriately handle that situation. First, the officers were not responsible to directly handle a complaint about another officer on another shift because neither of the disciplined officers supervised the officer against whom the complaint had been lodged. Second, there was no showing that the officers attempted to evade their responsibility once they became aware of the complaint but they used common sense and discretion in evaluating it and in reporting the claim, which did not include a claim that the inmate had been injured, to the charged officers' lieutenant. That verbal report was all that was required; the facility rules required that there be a verbal or a written report, not both. Nor were the charged officers required to investigate the complaint; again, their responsibility was to report the complaint to their supervisor, which they did. Because the officers were not subject to discipline for their conduct, moreover, they were entitled to receive back pay, benefits and counsel fees resulting from the disciplinary proceedings per N.J.A.C. 4A:2-2.10 and N.J.A.C. 4A:2-2.12. In re Grupico, Burlington Cty., and in re McLeod, Burlington Cty., OAL DKT. NO. CSV2489-06, OAL DKT. NO. CSV2490-06 (CONSOLIDATED), AGENCY DKT. NOS. 2006-1621-I and 2006-1622-I (CONSOLIDATED), 2007 N.J. AGEN LEXIS 1302, Initial Decision (October 4, 2007).

Correction officer, who was unreasonably denied a leave of absence during her working test period, was entitled to back pay from the date she was medically cleared to return to work (August 5, 2005), rather than from the date of her removal (June 7, 2005); because it could not be assumed that the officer would have passed her working test period, she was entitled to back pay for 10 months (the part of the one-year working test she did not complete) or until her reinstatement, whichever was first. In re Mortimer, OAL Dkt. No. CSV 6378-05, 2006 N.J. AGEN LEXIS 543, Merit System Board Decision (April 26, 2006).

Initial Decision (2005 N.J. AGEN LEXIS 483) adopted, which found that city was required to pay back wages to police officer after criminal charges against him were dismissed, there was no administrative action against him, and he had mitigated his losses during his period of separation; after termination, the officer had increased his hours at his second job, which constituted sufficient mitigation of his back pay award. In re Russo, OAL Dkt. No. CSV 11729-03, 2005 N.J. AGEN LEXIS 1077, Final Decision (November 22, 2005).

Reinstated county correction officer was entitled to back pay for the period of time in which he sought substitute employment because the appointing authority did not provide any evidence that suitable substitute employment was available, nor did it overcome the officer's testimony that his search for substitute employment took place in the period right after he was terminated; however, the officer was not entitled to back pay for the period of time that he attended school on a full-time basis because he was not actively seeking substitute employment. In re Martin, OAL Dkt. No. CSV 6599-03 (CSV 8656-98 On Remand), 2005 N.J. AGEN LEXIS 1211, Final Decision (July 13, 2005).

Reinstated county correction officer was not entitled to recover his monthly expenses for medications not covered by his spouse's health insurance because he was only entitled to recover additional amounts expended to maintain health insurance coverage during the period of improper suspension or removal. In re Martin, OAL Dkt. No. CSV 6599-03 (CSV 8656-98 On Remand), 2005 N.J. AGEN LEXIS 1211, Final Decision (July 13, 2005).

Reinstated county correction officer was not entitled to recover unpaid accrued vacation time because, pursuant to N.J.A.C. 4A:6-1.2, vacation leave not taken in a given year could only be carried over to the following year; it could not be accrued and carried over from year to year. In re Martin, OAL Dkt. No. CSV 6599-03 (CSV 8656-98 On Remand), 2005 N.J. AGEN LEXIS 1211, Final Decision (July 13, 2005).

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

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

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

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

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

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

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

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

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

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

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

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

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

4A:2-2.11 Interest

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

1. When an appointing authority has unreasonably delayed compliance with an order of the Commissioner or Board; or

2. Where the Board finds sufficient cause based on the particular case.

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

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

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

Case Notes

Reinstated employee was not entitled to interest on a back pay award made by an appointing authority in connection with the employee's reinstatement because N.J.A.C. 4A:2-2.11 authorizes such an award where there is evidence that the appointing authority unreasonably delayed compliance with the Civil Service Commission's order or in any way acted in bad faith. On the facts here, the appointing authority's belief that the employee had not made reasonable efforts to find substitute employment was not unreasonable nor did it act in bad faith. In re Michelle Taylor, Department of Military and Veterans' Affairs, CSC Docket No. 2012-3286, 2013 N.J. CSC LEXIS 184, Final Decision (March 7, 2013).

4A:2-2.12 Counsel fees

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

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

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

1. Associate in a law firm: $100.00 to $150.00 per hour;

2. Partner or equivalent in a law firm with fewer than 15 years of experience in the practice of law: $150.00 to $175.00 per hour; or

3. Partner or equivalent in a law firm with 15 or more years of experience in the practice of law, or, notwithstanding the number of years of experience, with a practice concentrated in employment or labor law: $175.00 to $200.00 per hour.

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

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

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

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

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

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

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

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

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

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

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

Amended by R.2001 d.424, effective November 19, 2001.
See: 33 N.J.R. 2725(a), 33 N.J.R. 3280(a), 33 N.J.R. 3895(a).
Rewrote (a) and (c); added new (d) through (g), and recodified existing (d) and (e) as (h) and (i).
Special amendment, R.2009 d.221, effective June 10, 2009 (to expire July 1, 2010).
See: 41 N.J.R. 2720(a).
Substituted "Civil Service Commission" for "Merit System Board" and "Commission" for "Board" throughout; and added (j).
Readopted by R.2010 d.176, effective July 22, 2010.
See: 42 N.J.R. 693(a), 42 N.J.R. 1855(a).
Provisions of R.2009 d.221 readopted without change.

Case Notes

After considering both N.J.A.C. 4A:2-2.12(e) and N.J. Ct. R. Prof. Conduct 1.5(a), counsel for an official at a mental health residential facility was entitled to an hourly fee of $250, given the complexity of the case and the amount of skill required to adequately represent his client, who was subject to discipline for failing to develop an intervention plan to deal with a patient's behavioral disorder, and that patient died, as counsel had to be alert to the potential implications for his client of the testimony put forth by each of the various witnesses; further, the court did not think it could seriously be disputed that attorneys of a similar background and experience as counsel herein would customarily charge an equivalent or greater amount for their services in this type of case. In re Malone, 381 N.J. Super. 344, 886 A.2d 181, 2005 N.J. Super. LEXIS 340 (App.Div. 2005).

Merit System Board had the statutory authority to make an award to township police officer for counsel fees incurred in connection with police department hearing which had preceded officer's appeal to the Merit System Board, regarding officer's claim for reinstatement; the departmental hearing was an integral part of the civil service process. Burris v. Police Department, Township of West Orange, 769 A.2d 1112 (2001).

Regulation mandating the award of counsel fees was intended to apply in cases where disciplinary charges did not arise out of employee's

lawful exercise of powers in furtherance of official duties. Marjarum v. Township of Hamilton, 336 N.J.Super. 85 (A.D. 2001).

Statute and its accompanying regulation, allowing Merit System Board to award fees to employee who has prevailed on all or substantially all of the primary issues, authorized fee award to police officer. Oches v. Township of Middletown Police Dept., 155 N.J. 1, 713 A.2d 993 (N.J. 1998).

Municipal employee whose removal was mitigated to six-month suspension by Merit System Board was not entitled to award of counsel fees as prevailing party under regulation. Walcott v. City of Plainfield, 282 N.J.Super. 121, 659 A.2d 532 (A.D.1995).

Civil Service Commission adopted the recommendation of an administrative law judge (ALJ) that an appointing authority failed to sustain its burden of proof with regard to charges of other sufficient cause, unauthorized use of force pursuant to N.J.A.C. 4A:2-2.3(a)11 and conduct unbecoming a public employee pursuant to N.J.A.C. 4A:2-2.3(a)6 filed against a County Correction Officer. The officer was justified in his use of force because an inmate was acting in a violent manner and had to be subdued. However, the Commission did not agree with the ALJ's determination that the officer did not file a use-of-force report and reversed the removal. Because the charges were dismissed, the officer was entitled to mitigated back pay, benefits, seniority, and reasonable counsel feels pursuant to N.J.A.C. 4A:2-2.10 and N.J.A.C. 4A:2-2.12. In re Joseph Graffagnino, Middlesex Cnty., OAL Dkt. No. CSR 9216-13, 2013 N.J. CSC LEXIS 1147, Final Decision (December 18, 2013).

Action by an appointing authority in removing an employee from her position as a Judiciary Account Clerk, Judiciary was unwarranted because the employer failed to prove that the employee falsified her time reports for January 18, 2012, which was a day on which she was called for jury duty but thereafter released when it was determined that her service was not needed. While she gave imprecise information to her superior regarding the length of time she spent was at the courthouse after jury duty, which if knowing and willful, could have constituted insubordination or conduct unbecoming within the meaning of N.J.A.C. 4A:2-2.2-2.3, she was not charged as having done so, and the totality of the record showed that the decision to remove her was arbitrary, capricious, and unreasonable as well as not supported by substantial evidence on the record. Moreover, not only was the employee entitled to be reinstated into her position with back pay, benefits and seniority but the appointing authority was also responsible for reasonable counsel fees per N.J.A.C. 4A:2-2.12. In re Wang, Judiciary, Union Vicinage, CSC DKT. NO. 2013-211, OAL DKT. NO. CSV 11707-12, 2013 N.J. CSC LEXIS 1072, Final Administrative Action (December 18, 2013).

Counsel who represented a police officer who prevailed on his claim that he had been wrongly removed from his position was entitled to compensation at the hourly rate of $175, not at his billed rate of $375, because counsel provided insufficient information to justify an award at the billed rate. Specifically, the certification did not elaborate as to the specific nature or subject matter of cases for which he was paid at the $375 hourly rate nor any basis on which it could be concluded that he has particular expertise in labor or employment law. In the absence of such a showing, an award based on an hourly rate of $175 was proper under N.J.A.C. 4A:2-2.12. As for the related claim for costs, because subpoenas were not required to be served by process servers, the cost thereof was not reimbursable per N.J.A.C. 1:1-11.2, while the $20 appeal processing fee was also nonreimbursable per N.J.A.C. 4A:2-1.8(f). In re Hulse, Newark, CSC Docket No. 2013-3505, 2013 N.J. CSC LEXIS 1151, Final Administrative Action (December 6, 2013).

After the Superior Court of New Jersey, Appellate Division, reversed a Civil Service Commission's decision modifying the removal of a County Correction Officer to a 10 working day suspension, the Commission, on remand, concluded that the officer was entitled to back pay, benefits, and seniority pursuant to N.J.A.C. 4A:2-2.10 for the 10 working day suspension that was reversed less any monies actually earned during that time. Because all charges were dismissed, the officer was also entitled to counsel fees solely for those incurred in furtherance of her appeal to the Commission under N.J.A.C. 4A:2-2.12(f). In re Donna Jackson, Hudson Cnty., CSC DKT. No. 2014-1226, 2013 N.J. CSC LEXIS 1101, Civil Service Comm'n. Decision (December 6, 2013).

Employee who was serving as a Personnel Assistant 2, Department of Military and Veterans Affairs was properly disciplined per N.J.A.C. 4A:2-2.3(a) for insubordination, conduct unbecoming a public employee and creating a disturbance on state property, all of which violations arose out of a confrontation between the employee and his immediate supervisor which occurred during a meeting in which the supervisor was addressing what she had concluded to be the employee's improper use of time and was advising him that he was required to produce a doctor's note for any absences in accord with N.J.A.C. 4A:6-1.4(d). The record amply supported the supervisor's claim that the employee had conducted himself in an insubordinate and inappropriate manner. That said, given the record here, the sanction of removal was too severe and a 180 day suspension was more appropriate. That finding meant that the employee was entitled to back pay, benefits and related benefits, but no award of counsel fees was appropriate under N.J.A.C. 4A:2-2.12(a) because the Commission had upheld the merits of the charges. In re Serdiuk, Dep't of Military & Veterans Affairs, CSC DKT. NO. 2013-739, OAL DKT. NO. CSV 7323-12, 2013 N.J. CSC LEXIS 1164, Final Administrative Action (December 4, 2013).

County corrections officer who had been removed from his position with a county department of adult corrections on findings that the officer had engaged in conduct unbecoming an officer, had filed a false police report, and had been negligent in the performance of his duties was entitled to recover back pay under N.J.A.C. 4A:2-2.10 and attorney's fees under N.J.A.C. 4A:2-2.12 based on a determination of the Civil Service Commission that the charges were unproven and that he should be reinstated immediately. In re Reedinger, Middlesex Cnty., Dep't. of Adult Corr., CSC Dkt. No. 2013-3155, 2013 N.J. CSC LEXIS 1146, Decision of the Civil Serv. Comm'n (November 20, 2013).

Correction officer seeking enforcement of a settlement agreement was not entitled to counsel fees under N.J.A.C. 4A:2-2.12(a). That regulation was inapplicable because the matter did not present an adjudication of the merits of the disciplinary charges and levied against the officer before the Commission. In addition, the officer would not have a basis for receiving counsel fees under N.J.A.C. 4A:2-1.5 because the record did not indicate that the appointing authority's action was based on any improper motivation. In re Benita Cisrow, Dep't. of Corr., CSC DKT. No. 2013-2347, 2013 N.J. CSC LEXIS 999, Final Decision (November 8, 2013).

Senior Correction Officer whose removal was modified to a six month suspension was not entitled to an award of counsel fees under N.J.A.C. 4A:2-2.12(a). Because the Civil Service Commission dismissed some of the charges against the officer but sustained other serious charges and imposed major discipline, the officer did not prevail on all or substantially all of the primary issues of the appeal. In re Keith Wickham, Jr., CSC Dkt. No. 2013-1195, 2013 N.J. CSC LEXIS 692, Final Decision (September 18, 2013).

The Civil Service Commission approved of an initial decision by an Administrative Law Judge (ALJ) that a county, as the appointing authority for an employee who was a Senior Carpenter in the Department of Public Works and Engineering, had established that the employee was guilty of incompetency, inefficiency or failure to perform duties within the meaning of N.J.A.C. 4A:2-2.3(a)1 as well as conduct that was "unbecoming a public employee" within the meaning of N.J.A.C. 4A:2-2.3(a)6 as a result of his having fallen asleep in his county-owned vehicle when it was parked in a public parking lot. However, given the employee's decent employment and disciplinary record, the 90 day suspension recommended by the ALJ was too severe and it was properly reduced to a 45-day suspension. While the employee thus was entitled to recover 45 calendar days of back pay, benefits, and seniority pursuant to N.J.A.C. 4A:2-2.10, the employee was not entitled to counsel fees because N.J.A.C. 4A:2-2.12(a) provided for such an award only where an employee prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action, and the primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. In re Pedulla, Monmouth

APPENDIX

MAJOR DISCIPLINARY APPEAL FORM

New Jersey Civil Service Commission - Division of Merit System Practices and Labor Relations

Mail completed form to: Civil Service Commission, Unit H, P.O. Box 312, Trenton, NJ 08625-0312.

1. Your Name: _____

Address: _____

_____ Daytime Telephone: ( ) _____

(City) (State) (Zip Code)

Email: _____

2. Will you be represented by a lawyer or union representative at the hearing? ☐ YES ☐ NO
If YES, complete Section 2.

Representative Name: _____

Union or Law Firm: _____

Address: _____

_____ Telephone: ( ) _____

(City) (State) (Zip Code)

Email: _____

3. Give a copy of this form and attachments to your Personnel Officer/Employer Representive
Personnel Officer's/
Employer Representive's Name: _____

Address: _____

_____ Telephone: ( ) _____

(City) (State) (Zip Code)

Email: *(if known)* _____

4. Your or your representative's signature

▶ _____ Date: _____

5. **ATTACH the following to this form:**

1. Preliminary Notice of Disciplinary Action.
2. Final Notice of Disciplinary Action.
3. Check or Money Order for $20.00 payable to NJCSC.

NOTE: Your appeal will NOT be processed unless Sections 1-4 are completed and the three documents listed in Section 5 are included. Pursuant to P.L. 2010, c. 26, effective July 1, 2010 there is a $20 fee for disciplinary appeals. Please include the required $20 fee with your appeal. Payment must be made by check or money order only, payable to NJ CSC and sent to the CSC, Unit H, P.O. Box 312, Trenton, N.J. 08625. Persons receiving public assistance pursuant to P.L. 1947, c.156 (C.44:8-107 *et seq.*), P.L.1973, c. 256 (C.44:7-85 *et seq.*), or P.L.1997, c.38 (C.44:10-55 *et seq.*), and veterans as defined by N.J.S.A.11A:5-1 *et seq.* are exempt from this appeals fee. If you have been suspended or removed, you should seek alternate employment. In case your penalty is reduced, failure to seek alternate employment could reduce your back pay award.

DPF-714 revised 07-23-10

▶ **Hand Deliver:** 3 Station Plaza, 44 South Clinton Ave., Trenton NJ

New Rule, R.1998 d.518, effective November 2, 1998.
See: 30 N.J.R. 2325(a), 30 N.J.R. 3935(a).
Repeal and New Rule, R.2012 d.008, effective January 3, 2012.
See: 43 N.J.R. 2396(a), 44 N.J.R. 65(b).

SUBCHAPTER 3. MINOR DISCIPLINE AND GRIEVANCES

4A:2-3.1 General provisions

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

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

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

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

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

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

A police officer who accessed confidential police records without authorization was properly found, per N.J.A.C. 4A:2-2.3, to have engaged in conduct unbecoming a police officer and/or public employee, to have committed insubordination, and to have conducted personal business while on duty was properly disciplined for those violations. However, the township's action in suspending the officer for ten days was not justified, nor was the recommendation of the Administrative Law Judge (ALJ) that the officer receive an oral reprimand proper because an oral reprimand was not a form of minor discipline specified in N.J.A.C. 4A:2-3.1(a). The Civil Service Commission thereupon modified the suspension to a formal written reprimand. In re Kafton, Jackson Twp. Police Dep't, CSC DKT. NO. 2012-184, OAL DKT. NO. CSV 8824-11, 2013 N.J. CSC LEXIS 1068, Final Administrative Action (December 18, 2013).

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).

Although a departmental hearing on the issue of an employee's three-day suspension was conducted beyond the regulatory time period of N.J.A.C. 4A:2-3.2(b)1, there was no evidence that the delay had an adverse impact on the matter. The record reflected that the employee received notice of the discipline and a hearing was held. Thus, he had adequate notice to respond to the appointing authority's allegations. Moreover, there was no Civil Service law or rule which mandated the dismissal of the charges for procedural violations. In re Robert A Giangrasso, Dep't. of Transp., CSC Dkt. No. 2012-3463, 2013 N.J. CSC LEXIS 183, Final Decision (March 6, 2013).

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.

Case Notes

To the extent that a suspended senior corrections investigator raised arguments concerning the discovery process for his departmental hearing, discovery is not addressed in N.J.A.C. 4A:2-3.6. Thus, the Civil Service Commission did not have jurisdiction to address such arguments. In re Adrian Ellison, Dep't. of Corr., CSC Dkt. No. 2013-3124, 2013 N.J. CSC LEXIS 753, Final Decision (October 17, 2013).

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

(a) Minor discipline may be appealed to the Commission 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 Civil Service Commission shall review the appeal upon a written record or such other proceeding as the Commission 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 without further review of the merits of the appeal and the Commission's decision will be a final administrative decision.

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

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

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

2. Grievance appeals must present 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 without further review of the merits of the appeal and the Commission's decision will be a final administrative decision.

(c) Appeals shall include:

1. A copy of the Appeal of Minor Discipline Action form or Civil Service Commission grievance 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 Civil Service Commission 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 Commission 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.
Amended by R.2014 d.099, effective June 2, 2014.
See: 45 N.J.R. 500(a), 46 N.J.R. 1331(c).
Rewrote the section.

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 appro-

priateness 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

Evidence adduced by an employee in support of his challenge to a decision of the Department of Children and Families releasing him at the end of his working test period (WTP) for unsatisfactory performance within the meaning of N.J.A.C. 4A:2-4.1 and N.J.A.C. 4A:4-5.4(a) did not show that the decision was made in bad faith. To be sure, the employee complimented the efforts made by his supervisors. That being so, the employee did not carry his burden of proof per N.J.A.C. 4A:2-4.3(b) to show that the appointing authority had acted in bad faith, and the Administrative Law Judge's recommendation that the appeal be dismissed was approved and adopted. In re Jeremy Rodas, Dep't of Children & Families, CSC Dkt. No. 2012-3204, OAL Dkt. No. CSV 12410-12, 2013 N.J. CSC LEXIS 657, Final Decision (June 26, 2013).

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.

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

Case Notes

Civil Service Commission found that an employee did not meet the standard for reconsideration of the denial of her request for a hearing with respect to her demotion under N.J.A.C. 4A:2-1.6(b) and did not sustain her burden of establishing the timeliness of her appeal under N.J.A.C. 4A:2-4.2. The employee did not dispute that she was personally served the Final Notice of Disciplinary Action, and she provided no valid explanation as to why the appeal was not filed within the permitted timeframe when she was clearly apprised of the procedural requirements for filing an appeal. In re Joyce Maldonado, Berkeley Twp, CSC Dkt. No. 2014-150, 2013 N.J. CSC LEXIS 934, Final Decision (October 2, 2013).

Employee did not provide a valid explanation for her failure to file an appeal, as N.J.A.C. 4A:2-4.2 required, within the 20 day period after her receipt of notice that she was being returned to her permanent title of Cottage Training Technician after she received an unsatisfactory rating for her working test period as a Cottage Training Supervisor. Since the Appeal Rights Letter specifically advised her to file her appeal directly with the Commission within 20 days of her receipt of the notice, the employee's explanation that she understood that a departmental EEO Officer would "handle everything" did not meet the criteria in N.J.A.C. 4A:2-1.6(b) that had to be met in order to win reconsideration of a prior Commission decision. In re Ginger Ferrell New Lisbon Developmental Center Department of Human Services, CSC Docket No. 2013-1335, 2013 N.J. CSC LEXIS 370, Final Decision (April 3, 2013).

Initial Decision (2006 N.J. AGEN LEXIS 325) adopted, which dismissed an employee's appeal from her removal as moot based on her failure to timely file an appeal of her release at the end of the working test period. In re Drummond, OAL Dkt. No. CSV 6845-05, 2006 N.J. AGEN LEXIS 629, Final Decision (June 7, 2006).

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

4A:2-4.3 Board hearing

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

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

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

Case Notes

An Administrative Law Judge concluded that an employee who failed to meet the standards for promotion to the position of Family Service Specialist 1 (FSS1) did not satisfy her burden to show that the evaluations of her working test period (WTP) were performed in bad faith within the meaning of N.J.A.C. 4A:2-4.3(b) because the employee did not show that the evaluators were motivated by bias, animosity or other sinister attitude. It was insufficient to merely argue that the evaluations, which were based on the agency's conclusion that the employee was behind in her work and was unable to catch up notwithstanding various accommodations, were not fair or properly decided. The purpose of the WTP as established by N.J.A.C. 4A:1-1.3 and N.J.A.C. 4A:4-5.1 was to enable the appointing authority to evaluate an employee's work performance and conduct in order to determine whether the employee merited permanent status. It had operated to do so in this case. Lisa Brown v. Dep't of Children & Families, OAL Dkt. No. CSV 2630-13, AGENCY Dkt. No. 2013-1984, 2014 N.J. AGEN LEXIS 175, Initial Decision (April 8, 2014).

Employee who was terminated from her position at the end of her Working Test Period (WTP) for excessive absenteeism failed to establish bad faith termination within the meaning of N.J.A.C. 4A:2-4.3(b). Even though her absences were related to a debilitating illness, an appointing authority should not have to be burdened with what was in essence a part-time employee holding a full-time job. Other employees cannot be expected to cover for absent colleagues for unreasonable periods of time or under unreasonable circumstances as such circumstances cause disruption, hardship, and dissension in the workplace. An appointing authority has the right to expect a consistency of employee attendance in order to properly fulfill its mission. The pattern of absenteeism demonstrated over four months by the employee compromised her training as well as the efficiency expected by the public and had the capacity for harm to the public. Inasmuch as attendance is an essential function of most jobs, termination of the employee's employment was appropriate on these facts. In re Barbarita Melendez, Superior Ct. of New Jersey, Hudson Vicinage, OAL Dkt. NO. CSV 04350-13, AGENCY Dkt. NO. 2013-2353, 2013 N.J. AGEN LEXIS 353, Initial Decision (December 26, 2013).

Appointing authority for a senior building maintenance worker at a state university was justified in releasing the worker at the end of her extended working test period. The record established that the worker had multiple altercations with coworkers in front of faculty, students and others and did not properly complete her assignments; did not do required cleaning; and that the work that she did do was not up to standards. Moreover, even though such deficiencies were brought to her attention on multiple occasions, her work continued to be unsatisfactory and altercations continued to occur in the presence of students and others. Next, the evidence showed that the worker also did not adhere to the break schedule and took unscheduled breaks; was frequently on the telephone in offices; had her headphones in while working; yelled at supervisors and was not respectful; and behaved inappropriately towards coworkers. Even though her working test period was extended twice in order to give her ample opportunity to conform to policies and procedures and improve the quality of her work, she did not do so. Given the state of the evidence in the record, the worker did not establish by a preponderance of the competent and credible evidence as required by N.J.A.C. 4A:2-4.3(b) that bad faith was involved in the appointing authority's formulation of the opinion that the worker's service was unsatisfactory. In re Melissa Brown, Montclair State University, CSC DKT. NO. 2011-4793, OAL DKT. NO. CSV 04763-12 (ON REMAND), 2013 N.J. CSC LEXIS 812, Final Administrative Decision (August 15, 2013).

The Civil Service Commission rejected a determination of an Administrative Law Judge that an assistant family service worker who had been released at the end of his working test period had satisfied his burden per N.J.A.C. 4A:2-4.3(b) to show that his working test period was conducted in bad faith because the Commission's review of the record evidenced no bad faith and in fact supported the conclusion that there were sufficient problems during the worker's working test period to justify his release including three complaints filed in a three month period, all of which were based on the worker's improper use of a cell

phone while operating a state-owned vehicle and/or his improper operation of such a vehicle. Inasmuch as disciplinary action during a working test period, especially relating to performance, can provide sufficient justification to release an employee. That being said, though the ALJ's Findings of Fact were properly accepted and adopted, the Commission rejected the ALJ's recommendation to reverse the release at the end of the working test period in favor of an order upholding the worker's release at the end of the test period. In re Shawn Pressley, OAL Dkt. No. CSV 00731-12, 2013 N.J. CSC LEXIS 471, Final Decision (August 15, 2013).

Evidence adduced by an employee in support of his challenge to a decision of the Department of Children and Families releasing him at the end of his working test period (WTP) for unsatisfactory performance within the meaning of N.J.A.C. 4A:2-4.1 and N.J.A.C. 4A:4-5.4(a) did not show that the decision was made in bad faith. To be sure, the employee complimented the efforts made by his supervisors. That being so, the employee did not carry his burden of proof per N.J.A.C. 4A:2-4.3(b) to show that the appointing authority had acted in bad faith, and the Administrative Law Judge's recommendation that the appeal be dismissed was approved and adopted. In re Jeremy Rodas, Dep't of Children & Families, CSC Dkt. No. 2012-3204, OAL Dkt. No. CSV 12410-12, 2013 N.J. CSC LEXIS 657, Final Decision (June 26, 2013).

Initial Decision (2010 N.J. AGEN LEXIS 55) adopted, which found that a family services worker was properly released at the end of her working test period because the use of a provisional family service worker to train and evaluate her while the immediate supervisor was on vacation for two weeks was not so irregular or so prejudicial that it constituted bad faith on the part of the County. In re Rachmiel, OAL Dkt. No. CSV 11354-09, 2010 N.J. CSC LEXIS 586, Final Decision (March 10, 2010).

Although the Commission found that a correction officer recruit was improperly removed following his working test period, the Commission did not find that he was entitled to a permanent appointment based on the successful completion of his working test period, only that he was simply entitled to a new six-month working test period. Therefore, sufficient cause was not demonstrated to award back pay and counsel fees. In re Salva, OAL Dkt. No. CSV 941-09, 2010 N.J. CSC LEXIS 616, Final Decision (January 13, 2010).

Initial Decision (2009 N.J. AGEN LEXIS 446) adopted, which found that a hospital provided a technical assistant with appropriate training for her position, but that she was unable to perform the duties expected of her during the working test period, as observed by her co-workers, other staff, as well as by her supervisor; the assistant's performance did not improve even after being afforded an extension of the working test period and there was simply no evidence that the termination was based on anything other than her performance. In re Graves, OAL Dkt. No. CSV 4701-08, 2009 N.J. AGEN LEXIS 985, Final Decision (August 19, 2009).

Initial Decision (2009 N.J. AGEN LEXIS 439) adopted, which found that a sheriff's officer was properly removed where the officer, while on probation and on duty, lent her car to her sister's boyfriend, who was then arrested for possession of a handgun and possession of a controlled dangerous substance while driving her car; the officer lied about directly lending the car to the boyfriend in her report to her supervisor and such misconduct went to the heart of the officer's ability to be trusted and function appropriately in her position, warranting the bypass of progressive discipline and justifying her removal. In re Ocasio, OAL Dkt. No. CSV 01171-08, 2009 N.J. AGEN LEXIS 958, Final Decision (July 22, 2009).

Initial Decision (2009 N.J. AGEN LEXIS 285) adopted, which found that a Public Safety Telecommunicator Trainee was properly released at the conclusion of her working test period; the trainee received classroom training, on the job training, and remedial training, evidencing that the appointing authority did not rush to judgment on her performance, but provided her training and a reasonable time to show she was capable of performing the duties of her assignment. In re Mitchell, OAL Dkt. No. CSV 1478-09, 2009 N.J. AGEN LEXIS 969, Final Decision (June 24, 2009).

Initial Decision (2009 N.J. AGEN LEXIS 158) adopted, which found that a family service worker was properly released at the end of her working test period where she was unproductive, error prone, and failed to acquire the level of knowledge necessary to function as a family service worker; additionally, although she needed supervision, she failed to seek guidance when she was underperforming. In re Johnson, OAL Dkt. No. CSV 07526-08, 2009 N.J. AGEN LEXIS 963, Final Decision (May 27, 2009).

Initial Decision (2009 N.J. AGEN LEXIS 68) adopted, which held that, although it was true that a youth worker was working in a facility with residents who were street wise, manipulative, and were capable of making false allegations against him, the scope and variety of charges leveled against him during the working test period demonstrated that he was inappropriate and unprofessional; there were allegations that he used inappropriate restraining techniques, foul language, taunted a resident, and was tardy on numerous occasions. In re Macklin, OAL Dkt. No. CSV 02016-08, 2009 N.J. AGEN LEXIS 888, Final Decision (April 15, 2009).

Initial Decision (2009 N.J. AGEN LEXIS 109) adopted, which found that an animal control officer was properly removed at the end of his probationary work period after the ALJ found, on conflicting evidence, that the officer had sexually harassed a worker, disobeyed a direct order, and conducted private business while on duty. In re Kanis, OAL Dkt. No. CSV 782-07, 2009 N.J. AGEN LEXIS 996, Final Decision (March 25, 2009).

Initial Decision (2009 N.J. AGEN LEXIS 7) adopted, which found that a building management specialist was properly terminated following his working test period where: he was either absent or late on 27 out of the 60 days, causing the work to be redistributed within the unit; produced a work product which was incomplete, lacking in critical information or contained errors; was insubordinate in that he hung-up on his supervisor who called to discuss an incident that had taken place in the office; and, demonstrated a lack of veracity on two occasions. In re Robinson, OAL Dkt. No. CSV 12165-07, 2009 N.J. AGEN LEXIS 804, Final Decision (February 25, 2009).

Initial Decision (2008 N.J. AGEN LEXIS 771) adopted, which concluded that an employee was properly returned to her former title after a working test period for the position of Head Cottage Training Supervisor after she allowed telephone contact between a patient and her alleged abuser, who also worked in the facility; the employee's actions were seen as a failure to exercise sound judgment and give due attention to a significant occurrence at the Group Home. In re Pennington, OAL Dkt. No. CSV 10039-07, 2008 N.J. AGEN LEXIS 1081, Final Decision (September 24, 2008).

Social Service Aide was entitled to a new working test period because, in failing to provide the aide with timely written notification of his deficiencies through the progress reports required by N.J.A.C. 4A:4-5.3, the appointing authority denied him a fair evaluation of his work performance and the authority's release of the aide for deficiencies in job performance that were not adequately brought to his attention through the required progress reports evidenced a lack of good faith. In re Maldonado, OAL Dkt. No. CSV 07337-04, 2008 N.J. AGEN LEXIS 396, Initial Decision (June 6, 2008), adopted (Civil Service Comm'n July 30, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 316) adopted, which concluded that an employee failed to demonstrate that the decision to release her at the end of her working test period was made in bad faith; in a probationary employee's appeal of termination, the only issue is whether the appointing authority exercised good faith in determining that the employee was not competent to satisfactorily perform the duties of the position. In re Villecca, OAL Dkt. No. CSV 2978-06, 2008 N.J. AGEN LEXIS 710, Final Decision (June 25, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 316) adopted, which explained that if the appointing authority's decision to release an employee at the end of the working test period is based on actual observations of the employee's performance of the duties of the position, and is an honest assessment as to whether the employee will be able to satisfactorily

and efficiently perform those duties, it must be considered to have been formed in good faith. In re Villecca, OAL Dkt. No. CSV 2978-06, 2008 N.J. AGEN LEXIS 710, Final Decision (June 25, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 217) adopted, which concluded that a probationary Supervising Family Service Specialist 2 should be afforded a new working-test period rather than demoted, based on credibility determinations, the employee's satisfactory ratings during five years as a provisional supervisor, and the timing of the unsatisfactory reports, which only began to surface after the employee's return from emergency leave and his filing of a hostile work environment claim. In re Afolo, OAL Dkt. No. CSV 4145-07, 2008 N.J. AGEN LEXIS 546, Final Decision (May 7, 2008).

Where the Merit System Board did not find that an employee was entitled to a permanent appointment based on the successful completion of the employee's working test period, but rather that the employee was simply entitled to a new working test period, sufficient cause was not demonstrated to award back pay. In re Afolo, OAL Dkt. No. CSV 4145-07, 2008 N.J. AGEN LEXIS 546, Final Decision (May 7, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 189) adopted, which concluded that a clerk typist had presented no evidence that her release at the end of the working test period was based on anything other than her performance, and thus failed to sustain burden of showing bad faith. The only requirement to justify release at the end of the working test period is good faith. In re Ehrenkranz, OAL Dkt. No. CSV 4026-07, 2008 N.J. AGEN LEXIS 545, Final Decision (April 23, 2008).

Initial Decision (2007 N.J. AGEN LEXIS 830) adopted, which concluded that a correction officer failed to show by a preponderance of the competent and credible evidence that the appointing authority's determination releasing him at the end of his working test period was made in bad faith where the evidence revealed that the officer had difficulty dealing with inmates and was not forceful enough with them, as evidenced by the inmate who refused to go back into his cell when ordered to do so, as well as the officer's reluctance to charge an inmate who threw bleach at him; the facility performed and graded the officer's two evaluations in good faith and had legitimate concerns as to his ability to perform. In re Britton, OAL Dkt. No. CSV 8350-06, 2008 N.J. AGEN LEXIS 520, Final Decision (January 30, 2008).

An Administrative Law Judge (ALJ) concluded that a city police department had not shown that the termination of a probationary officer at the end of the 12-month working test period (WTP) as permitted by N.J.A.C. 4A:4-5.1 was in good faith as required by N.J.A.C. 4A:2-4.3(b) and that the officer was entitled to have a 6 month extension of the WTP. The officer had served only four months of the WTP when, in January 2004, he was called back to active duty by the U.S. Army and deployed to Iraq. The officer only returned to duty with the city in April 2005. Even though N.J.A.C. 4A:4-5.2(d) did not specify that a WTP was to consist on one uninterrupted year, the military-service based interruption in the officer's WTP lasted 17 months and placed the officer at a distinct disadvantage. It also put in doubt the validity of the performance evaluations on which the city had relied in terminating the officer. On these facts, it did not appear that the officer had been fairly evaluated, and his WTP was properly extended by six months so that a fair evaluation might be made. In re Howe, City of Clifton, OAL DKT. NO. CSV3601-06, AGENCY DKT. NO. 2006-2849-I, 2008 N.J. AGEN LEXIS 1545, Initial Decision (January 9, 2008).

Initial Decision adopted, which concluded, based on the testimony and record presented, that the probationary employee, a county correction officer, failed to show bad faith on the part of the appointing authority in terminating him. His protestations that he was completely caught off guard when he received the negative evaluation and subsequent termination did not comport with the weight of the evidence, as: (1) the employee failed to show that enforcement was directed at him particularly, but rather was a general change in attitude by the new administration; (2) the claim that the county had the obligation to provide additional training to help him with his skills was equally unfounded, as the county provided him with four months of training; and (3) the employee provided no explanation for the 13 instances in which he took sick time either before or after regularly scheduled time off, and an employer looking at the record could validly question a probationary employee's commitment to the job based on this pattern (2007 N.J. AGEN LEXIS 708 adopted as clarified). In re Matus, OAL Dkt. No. CSV 5064-07, 2007 N.J. AGEN LEXIS 1029, Final Decision (December 5, 2007).

Initial Decision (2007 N.J. AGEN LEXIS 665) adopted, which concluded that a correction officer recruit was properly removed following her one-year testing period because, although she received satisfactory ratings after her first six months of employment, the recruit had attendance problems and was advised that her absences were unauthorized; the recruit incurred 11 sick days with no sick leave to cover them and her supervisor formed an honest assessment that she would not be able to satisfactorily and efficiently perform the duties of a corrections officer if the appointment became permanent. In re Petty, OAL Dkt. No. CSV 60-07, 2007 N.J. AGEN LEXIS 1141, Final Decision (December 5, 2007).

An Administrative Law Judge (ALJ) concluded that two trainees who were dismissed by the Department of Corrections from the Correctional Staff Training Academy (CSTA) were not required to prove bad faith on the part of the Department in having dismissed them. Even though the Department urged the application of a bad faith standard such as that which applied to working test periods in N.J.A.C. 4A:2-4.3, the regulations governing appeals to the Police Training Commission in N.J.A.C. 13:1-9.1 did not impose any specific burden of proof. That being so, the trainees were properly required to prove that the Department did not have good cause within the meaning of N.J.A.C. 13:1-7.2(a)8 to dismiss them from the CSTA. Reid v. Dep't of Corr. Training Acad.; Weaver v. Dep't of Corr. Training Acad.; OAL DKT. NO. PTC2091-07 (CONSOLIDATED) OAL DKT. NO. PTC2092-07, AGENCY DKT. NO. CJ07-1369-HPT (CONSOLIDATED) AGENCY DKT. NO. CJ07-1370-HPT, 2007 N.J. AGEN LEXIS 1280, Initial Decision (October 1, 2007).

Initial Decision (2007 N.J. AGEN LEXIS 593) adopted, which concluded that a Department of Transportation employee failed to establish by a preponderance of the competent and credible evidence that there was any bad faith involved in the decision to demote her to her prior-held permanent title (technical assistant personnel) at the conclusion of her six-month working test period; the employee was given critiques and the opportunity to improve, including an extension of the working test period to give her an additional opportunity to succeed. In re Stubbs, OAL Dkt. No. CSV 6150-06, 2007 N.J. AGEN LEXIS 1145, Final Decision (September 26, 2007).

Initial Decision (2007 N.J. AGEN LEXIS 280) adopted, in which a county employee was returned to his prior position after completion of his working test period. The employee's supervisor had testified that the employee had continued difficulty completing required tasks to an acceptable level of competence in the prescribed time for the required tasks and no bad faith had been shown. In re Woodford, OAL Dkt. No. CSV 11157-04, 2007 N.J. AGEN LEXIS 1064, Final Decision (June 20, 2007).

Initial Decision (2007 N.J. AGEN LEXIS 143) adopted, which found that a social services clerk failed to establish her release at the end of the working test period was done in bad faith; the appointing authority had no choice but to release the clerk after the reception area, which worked fine prior to her arrival, became dysfunctional and clients witnessed arguments between the clerk and her co-worker. In re Barnes, OAL Dkt. No. CSV 2885-05, 2007 N.J. AGEN LEXIS 1099, Final Decision (April 25, 2007).

Initial Decision (2006 N.J. AGEN LEXIS 1028) adopted, which concluded that a Motor Vehicle Commission service center employee, who was terminated at the end of the working test period, failed to carry the burden of proof of bad faith where, despite the employee's conflicting testimony, the appointing authority provided detailed documentation indicating that most of the employee's errors were of a serious nature and required extra work by co-workers. Moreover, despite an extended working test period and additional remedial instruction, the employee showed no improvement in the ability to handle crucially important tasks, indicating that the appointing authority had more than adequate

justification for terminating the employee. In re Acosta, OAL Dkt. No. CSV 227-06, Final Decision (January 31, 2007).

Initial Decision (2006 N.J. AGEN LEXIS 736) adopted, which concluded that the police department had ample non-discriminatory reasons to terminate a police officer at the end of her one-year working test period, including an unacceptably high absentee record of 37 or 38 days and inadequate report-writing ability; contrary to the officer's assertions, she had adequate notice of the department's dissatisfaction with her performance and ample opportunity to correct her deficiencies during the course of her working test period, even absent a formal six-month written report. In re Ausby, OAL Dkt. No. CSV 5735-04, 2006 N.J. AGEN LEXIS 863, Final Decision (October 4, 2006).

Petitioner failed to meet his burden of proving that the appointing authority's action in demoting him to his prior permanent title as Senior Engineer at the end of an extended working test period for Principal Engineer was in bad faith; the working test period was not one during which petitioner was to be given further training to qualify himself for the position and the evidence demonstrated that petitioner simply did not have the requisite skills. In re Olofintuyi, OAL Dkt. No. CSV 4571-05, 2006 N.J. AGEN LEXIS 619, Final Decision (June 21, 2006).

Initial Decision (2006 N.J. AGEN LEXIS 239) adopted, which found that a county welfare services employee had properly been terminated at the end of her working test period. Evidence was presented that the employee had performed unsatisfactorily in classroom training and her productivity was below acceptable standards, requiring excessive supervision, and there was no proof that the county based its determination on factors other than observations of the employee's actual performance or that the county was wrongly influenced by bias, prejudice, or other improper motive. In re Yanes, OAL Dkt. No. CSV 11481-04, 2006 N.J. AGEN LEXIS 560, Final Decision (April 5, 2006).

Initial Decision (2006 N.J. AGEN LEXIS 35) adopted, which found that the probationary or working test period under N.J.A.C. 4A:4-5.1 is part of the testing process and an employee must demonstrate competency to discharge the duties of the position without further training; only upon a showing of bad faith under N.J.A.C. 4A:2-4.3 will an employer's decision to release an employee be scrutinized. In re Mabson, OAL Dkt. No. CSV 2164-05, 2006 N.J. AGEN LEXIS 1101, Final Decision (March 8, 2006).

Initial Decision (2006 N.J. AGEN LEXIS 65) adopted, which concluded that a Motor Vehicle Commission employee failed to establish that there was any bad faith involved in returning her, at the conclusion of the working test period, to her formerly held permanent title of Support Services Representative 2. The worker was given training, counseling, critiques, the opportunity to improve, and an extension of the working test period. Whether the appointing authority's judgment concerning the worker's performance was totally accurate was not the issue for determination; rather, the only determination to be made was whether the worker had shown by a preponderance of the competent and credible evidence that the determination releasing her at the end of the working test period was made in bad faith. In re Woolford, OAL Dkt. No. CSV 803-04, 2006 N.J. AGEN LEXIS 1125, Final Decision (March 8, 2006).

Initial Decision (2005 N.J. AGEN LEXIS 523) adopted, which found that a police officer failed to prove that the appointing authority acted in bad faith when it released her following her working test period; the failure to institute a disciplinary action in lieu of termination was not an act of bad faith where the offense of which the officer was accused occurred during her working test period, was investigated during her working test period, and was acted upon at the end of her working test period. In re Cooper, OAL Dkt. No. CSV 3473-05, 2005 N.J. AGEN LEXIS 1190, Final Decision (November 3, 2005).

Initial Decision (2005 N.J. AGEN LEXIS 407) adopted, which found that a Human Services Assistant failed to meet his burden of proving that his removal following a working test period was made in bad faith; the employee's supervisor testified as to the employee's various deficiencies, many of which were undisputed, including his lack of driver's license, his poor attendance records, his tardiness, and his dislike for reassignments. In re Tolbert, OAL Dkt. No. CSV 4337-01, 2005 N.J. AGEN LEXIS 1260, Final Decision (September 21, 2005).

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

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

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

SUBCHAPTER 5. EMPLOYEE PROTECTION AGAINST REPRISALS OR POLITICAL COERCION

4A:2-5.1 General provisions

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

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

Case Notes

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

Non-selection of a candidate's name on the certification of a Police Sergeant eligible list was proper. Given that he ranked lower on the eligible list than the candidates who were appointed, the appointing authority was not obligated to consider him for appointment under the Rule of Three pursuant to N.J.S.A. 11A:4-8, N.J.S.A. 11A:5-7, and N.J.A.C. 4A:4-4.8(a)3i. The records did not indicate that he established veteran's preference with the Department of Military and Veteran's Affairs. Thus his prior military experience did not establish that he was veteran for promotional purposes. There was also no evidence that the candidate was retaliated against in regard to his non-selection for appointment in violation of N.J.A.C. 4A:2-5.1(a). In re William Cullen, Berkeley Twp., DOP Dkt. No. 2013-1663, 2013 N.J. CSC Lexis 664, Final Decision (July 17, 2013).

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).

Petition for Rulemaking. See: 42 N.J.R. 1251(b).

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).

Policeman's claim that he was unaware that N.J.A.C. 4A:2-6.1 required him to provide no less than 14 days notice of resignation from his position despite the fact that the notice requirement was expressly set out in correspondence between his attorney and the city was not only rejected as lacking in credibility but the ALJ specifically found that the policeman had actual notice of the requirement and that his knowing failure to report for duty for the 14 day period following the date on which his resignation was tendered constituted, inter alia, a failure to perform duties and insubordination and supplied sufficient cause for his removal for violations of N.J.A.C. 4A:2-2.3(a). In re Bayard, OAL Dkt. No. CSR 3546-12, 2013 N.J. AGEN LEXIS 11, Initial Decision (January 17, 2013).

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 Psychiatric Hospital, 97 N.J.A.R.2d (CSV) 134.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4A:2-6.2 Resignation not in good standing

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

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

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

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

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

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

Public Notice on Resignation not in good standing.
See: 22 N.J.R. 3407(b).
Amended by R.1992 d.414, effective October 19, 1992.
See: 24 N.J.R. 2491(a), 24 N.J.R. 3716(a).
Revised (b)-(c).

Case Notes

Parking Enforcement Officer (PEO) for a city was properly deemed to have abandoned his position and to have resigned not in good standing per N.J.A.C. 4A:2-6.2(b) on account of his failure to report for work for 10 consecutive days. Though the PEO insisted that he had suffered an on-the-job injury and was pursuing a workers compensation claim through a lawyer who allegedly told him that he need not contact the city because the lawyer would do so, the PEO did not provide any documentation supporting these allegations. That is, he did not submit any medical records supporting his injury claim nor any documentation from his lawyer tending to show that he was pursuing a workers compensation claim. Thus, the rule in N.J.A.C. 4A:2-6.2(b) deeming any failure to report for more than five consecutive days as an abandonment of an employee's position was properly invoked. In re Ruggiero, City of Hoboken Dep't of Transp. & Parking, OAL DKT. NO. CSV 17224-13, AGENCY DKT. NO. 2014-1411, 2014 N.J. AGEN LEXIS 437, Initial Decision (July 31, 2014).

Telecommunications operator (employee) engaged in neglect of duty under N.J.A.C. 4A:2-2.3(a)7 when he failed to return to work at the end of the approved leave period, which was taken because his son was born with a brain abnormality. The initial three month approved leave was a reasonable necessity, but when his child improved he did not return to employment, but collected unemployment benefits and waited 20 months to appeal a resignation not in good standing. Regarding abandonment of job under N.J.A.C. 4A:2-6.2(b), even though both the employee and the Town of West New York Department of Public Safety procrastinated in resolving the concern about the employee's extended leave and return to work, the employee did not return for 20 months. Given the employee's clean disciplinary history and the situation where both parties deviated from regulatory disciplinary action procedures, the administrative law judge concluded that the penalty of resignation not in good standing was unreasonable and unwarranted and recommended that it should be modified to resignation in good standing. Manuel Suarez v. Town of West New York Dep't. of Public Safety, OAL DKT. No. 2013-2438, 2014 N.J. AGEN LEXIS 416, Initial Decision (July 22, 2014).

Employee was absent from duty for five or more consecutive business days without approval of his supervisor in violation of N.J.A.C. 4A:2-6.2 and he breached the terms of a Conditional Letter of employment, resulting in his resignation not in good standing and supporting other related charges against him under N.J.A.C. 4A:2-2.2, N.J.A.C. 4A:2-2.3(a)6; N.J.A.C. 4A:2-2.3(a)7; and N.J.A.C. 4A:2-2.3(a)11. There was no debate that he failed to report to work following his arrest and incarceration and that he failed to contact his supervisors to determine his date of return or to explain his non-appearance. Although he asserted that he called his supervisor, he offered no proof of this call. In re Ravin Morrison, City of Newark Dep't. of Eng'g., OAL Dkt. No. CSV 00844-14, 2014 N.J. AGEN LEXIS 359, Initial Decision (July 17, 2014).

Administrative law judge (ALJ) recommended the affirmation of the removal of a custodian due to chronic or excessive absenteeism and other sufficient cause pursuant to N.J.A.C. 4A:2-2.3(a). He was absent without authorization for thirty-one days, during which time he was incarcerated for failure to pay child support. He used his sick time but did not provide medical documentation and was not approved for sick leave. His absences caused him to neglect his duty and negatively impacted the custodial staff, and the ALJ concluded that the custodian did not avail himself of the proper avenues for obtaining leave. The charge of resignation not in good standing under N.J.A.C. 4A:2-6.2 was also sustained because his unauthorized absences were for five or more consecutive days. In re Jackie Lovett, State-Operated Sch. Dist. of the City of Newark, OAL Dkt. No. CSV 15460-13, 2014 N.J. AGEN LEXIS 89, Initial Decision (March 6, 2014).

An employee was not properly deemed to have resigned her position as a Building Maintenance Worker not in good standing per N.J.A.C. 4A:2-6.2(b). Though the employee was absent from duty for five or more consecutive days without the approval of her supervisor and though the employee had been disciplined in the past for chronic and excessive absenteeism within the meaning of N.J.A.C. 4A:2-2.3(a)4, the employee made an adequate showing that the absences at issue were necessitated by the employee's documented medical condition and that

her supervisors were aware of that medical condition and of the employee's inability to work by reason thereof. Moreover, because the appointing authority mailed a leave of absence packet intended to be completed by the employee to the wrong address, the supervisor's insistence that she complete and return the packet to her supervisor within two days of her receipt thereof was unreasonable. Under these facts, the penalty of removal not in good standing based on the employee's inability to submit confirmation of her medical condition and disability time within two days of the appointing authority's request was unwarranted, and the employee was entitled to have her separation from her position recorded as a resignation in good standing. In re Lumford, Hudson Cnty., Dep't of Roads & Public Prop., CSC DKT. NO. 2013-2694, OAL DKT. NO. CSV 05761-13, 2013 N.J. CSC LEXIS 1169, Final Administrative Action (December 4, 2013).

Clerk was absent from duty for five continuous days without proper notice pursuant to N.J.A.C. 4A:2-6.2. There was no debate that she failed to report to work after receiving a five-day letter or that she did not contact her supervisors to determine her date of return or to explain her non-appearance. There was also no doubt that she had adequate notice, under the five-day letter, of her return date. This unapproved absence resulted in a resignation by the clerk not in good standing. In re Cassandra E. Jones, Essex County, Department of Citizen Services, OAL Dkt. No. CSV 00037-13, N.J. AGEN LEXIS 244, Recommended Decision (September 6, 2013).

Youth correctional facility acted unlawfully when it terminated the employment of an individual who worked as a communications operator on the ground that she had abandoned her position within the meaning of N.J.A.C. 4A:2-2.3(a) and thus was deemed to have resigned "not in good standing" within the meaning of N.J.A.C. 4A:2-6.2(c). The undisputed facts established that the employee was suffering from a medical disability and that she had requested time off without pay, not leave under the federal Family and Medical Leave Act (FMLA). Because the employee was not asking for FMLA leave, it was improper for the facility to deny the request on the sole ground that the employee had used up any available FMLA leave. Moreover, given the medical evidence, it was incumbent on the facility to document the reasonableness of its determination to deny leave, and denial of the requested leave based solely upon the unavailability of FMLA time was an unreasonable denial. In re Marcia Davis, Mountainview Juvenile Correction Facility, Department of Corrections, OAL Dkt. No. CSV 07672-12, Agency Dkt. No. 2012-3257, 2013 N.J. AGEN LEXIS 188, Initial Decision (July 2, 2013).

Administrative law judge reversed the termination of a correction officer's employment as a resignation not in good standing under N.J.A.C. 4A:2-6.2(b) and instead imposed a 30-day suspension for sick leave abuse. She returned timely but prematurely from leave and suffered a relapse, and she was given a preliminary notice of disciplinary action on the same day she requested a new leave and an opportunity to produce back-up medical documentation. The County did not consider the request at all and imposed the resignation not in good standing and associated suspension. The officer's conduct did not bear the hallmarks of job abandonment; rather, it indicated an unsuccessful effort to return to active duty. In re Linda Tisby, Camden Cnty. Corr. Facility, OAL Dkt. Nos. CSV 16033-12, CSR 01202-13, 2013 N.J. AGEN LEXIS 92, Initial Decision (May 17, 2013).

Good cause existed to modify a painter's resignation from one not in good standing under N.J.A.C. 4A:2-6.2(b) to one of good standing in view of the undisputed fact that he was medically unable to return to his employment. In re James Brice, Newark Public Schools, OAL Dkt. No. CSV 10082-12, 2013 N.J. CSC LEXIS 658, Initial Decision (May 15, 2013).

An Administrative Law Judge (ALJ) concluded that a police aide was properly removed from her position in a city police department based on the city's showing that she had been absent without leave from duty for five or more consecutive business days without the approval of her supervisor in violation of N.J.A.C. 4A:2-6.2(b) and (c). Though the aide sought to justify her absence by claiming that she was advised by her lawyer not to return to work until an agreement relating to a prior disciplinary notice under which she had been suspended for six months was amended, the aide's other conduct was inconsistent with such an explanation. Moreover, the city showed that the aide had been advised as to the date on which she was required to return, had failed to contact the department to determine her return date, failed to advise her superiors as to why she did not return to work on that date, and failed to properly update her recall card with her current address and phone numbers so management could contact her regarding this issue. Given these facts, the aide was properly deemed to have resigned from her position. In re McClain, City of Newark Police Dep't, OAL Dkt. Nos. CSV 04146-11 and CSV 03413-12 (Consolidated), AGENCY Dkt. Nos. 2011-3995 and 2011-4038, 2012 N.J. AGEN LEXIS 742, Initial Decision (July 27, 2012).

Employee was unfairly "resigned not in good standing" for job abandonment where the appointing authority failed to attempt to seek additional information from his physician or send the employee for an employer-paid examination under N.J.A.C. 4A:6-1.4(g). The employee did not "fall off of the face of the earth," but rather, remained in contact with the appointing authority and attempted to obtain the requested information in support of his leave request (adopting 2009 N.J. AGEN LEXIS 442). In re Smith, OAL Dkt. No. CSV 241-09, 2009 N.J. CSC LEXIS 1550, Civil Service Comm'n Decision (October 21, 2009).

Although under certain circumstances a resignation not in good standing may be modified to a resignation in good standing when an employee, through no misconduct or fault of her own, could not perform her duties, an ALJ erred in so modifying an employee's penalty where the employee clearly engaged in misconduct and simply did not report to work as required for five business days; additionally, the ALJ applied the tenets of progressive discipline which were not usually considered when determining whether to modify a resignation not in good standing to a resignation in good standing (adopting in part and rejecting in part 2009 N.J. AGEN LEXIS 477). In re Jackson, OAL Dkt. No. CSV 10620-08, 2009 N.J. AGEN LEXIS 790, Final Decision (August 5, 2009).

Initial Decision (2009 N.J. AGEN LEXIS 287) adopted, which found that a truck driver was properly resigned not in good standing for his unreported and unauthorized absences following a 45-day suspension; the driver was informed of and familiar with the call-in policy and procedure and he failed to provide his employer with information regarding the medical reason for his absences, information about when he would return to work, or which days he would be absent. In re White, OAL Dkt. No. CSV 060-09, 2009 N.J. AGEN LEXIS 962, Final Decision (June 24, 2009).

Initial Decision (2009 N.J. AGEN LEXIS 114) adopted, which found that a secretary was properly resigned as not in good standing where she failed to report to work from the first week of October 2006 forward and did not contact her supervisors to advise them of her absence, to explain the reason for her failure to report to work or to seek approval for her month absence within the regulatory five-day period or at any time before the charges were issued against her; the secretary's contention that the appointing authority did not enforce its policy regarding the submission of leave of absence documentation as to her was not supported by the record. In re Bridges, OAL Dkt. No. CSV 7819-07, 2009 N.J. AGEN LEXIS 995, Final Decision (April 29, 2009).

Initial Decision (2009 N.J. AGEN LEXIS 69) adopted, which found that a senior food services handler was deemed to have resigned not in good standing after she failed to appear at work for two months; although she claimed to have suffered from depression, there was no evidence that she would have been entitled to medical leave had she requested it, since her alleged condition was undocumented, she was not receiving medication, and she did not appear to have been under a physician's care. In re Montgomery, OAL Dkt. No. CSV 02307-08, 2009 N.J. AGEN LEXIS 889, Final Decision (March 11, 2009).

Initial Decision (2009 N.J. AGEN LEXIS 38) adopted, which found that an assistant personnel director was properly resigned not in good standing after he had been granted multiple leave extensions and was examined by the County's physician and found fit to return to his position, but failed to do so. In re Simisak, OAL Dkt. No. CSV 6156-08, 2009 N.J. AGEN LEXIS 823, Final Decision (March 11, 2009).