In the Matter of Michael Wolff, Salem County
CSC Docket No. 2010-403
(Civil Service Commission, decided February 24, 2010)

The appeal of Michael Wolff, a County Correction Officer with Salem County, of his removal, effective June 17, 2009[1], on charges, was heard by Administrative Law Judge Bruce M. Gorman (ALJ), who rendered his initial decision on January 21, 2010. Exceptions were filed on behalf of the appointing authority, and cross-exceptions were filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on February 24, 2010, accepted and adopted the Findings of Fact and Conclusions of Law as contained in the attached initial decision and the recommendation to modify the removal to a six-month suspension.

DISCUSSION

The appellant was charged with conduct unbecoming a public employee, insubordination, and other sufficient cause. Specifically, the appointing authority asserted that the appellant engaged in a verbal confrontation with the Sheriff and other County officials during a meeting on June 15, 2009. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In his initial decision, the ALJ found that the appellant was summoned to a meeting with Charles Miller, the Salem County Sheriff, Raymond Skradzinski, the Warden of the Salem County Jail, Anthony Wright, the Deputy Warden, and Robin Weinstein, the Deputy County Administrator, on June 15, 2009. Based on a notice he received regarding the meeting, the appellant believed that the meeting was convened solely to advise him of the results of an investigation of a complaint he filed regarding overtime assignments. However, after he was advised of the results of the investigation, Weinstein proceeded to serve the appellant with a Preliminary Notice of Disciplinary Action (PNDA) related to two alleged confrontations the appellant had with supervisors regarding his overtime complaint, and to read the charges on the PNDA to the appellant. At the hearing at the OAL, Miller, Skradzinski, Weinstein and the appellant all testified as to the events that followed service of the PNDA. Specifically, Miller, Skradzinski, and Weinstein all recalled that the appellant stood up, stated that he was protected by the "Whistleblower Act," and advised the participants in the meeting that the meeting was over and they could speak further with his attorney. Miller ordered the appellant to be seated three times, instructing him that the meeting was not over. The appointing

[1] Although the Final Notice of Disciplinary Action contains a removal effective date of July 15, 2009, the appellant was immediately suspended pending his departmental hearing, commencing on June 17, 2009.

authority's witnesses also recounted that the appellant used profanity, repeatedly saying "bullshit" and referring to them as "fucking clowns." Although the appellant's recollection of the meeting differed slightly from that of the appointing authority's witnesses, the ALJ found that the appellant's testimony was not credible. The ALJ found that the appellant's conduct constituted conduct unbecoming a public employee, and that the charge of "other sufficient cause" could be "merged" into the charge of conduct unbecoming a public employee. The ALJ also found that the appellant was not guilty of insubordination. The ALJ found that the appellant did ultimately comply with Miller's order to remain in the room and was, at least, returning to his seat. Thus, the ALJ recommended dismissing the charge of insubordination.

With regard to the penalty, the ALJ noted that the appellant received 15 reprimands and eight disciplinary suspensions, seven of which were minor disciplinary suspensions, during his 19 years of employment. However, the ALJ did not consider a 90-hour suspension, which is equivalent to 11.25 eight-hour work days, as part of the appellant's disciplinary history, since the appellant's appeal of that disciplinary action remains pending at the OAL. In addition, the ALJ found that the circumstances surrounding the appellant's outburst mitigated the egregiousness of his offense. Specifically, the ALJ emphasized that the appellant entered the meeting with no prior notice that disciplinary action would be taken against him. The ALJ surmised that, had the appellant been aware of the true reason for the meeting, he would have had an attorney or union representative with him, and the appellant would not have attempted to leave the meeting and advise the participants to contact his attorney. The ALJ also found that Weinstein should have immediately terminated the meeting when the appellant asserted his "right to counsel." Further, the ALJ considered the fact that the appellant was off duty at the time of the meeting, and he underscored that the meeting was not held at the jail where the appellant worked. Although noting that the appellant acted entirely inappropriately for an individual in his position, the ALJ recommended modifying the removal to a six-month suspension based on the above mitigating circumstances.

In its exceptions to the ALJ's initial decision, the appointing authority first contends that the insubordination charge against the appellant was improperly dismissed. It argues that, as a law enforcement officer, the appellant's compliance with orders from a superior cannot be reluctant or eventual, as was the case here. The appointing authority also asserts that a charge of insubordination can be supported by the disrespectful conduct displayed by the appellant. In addition, the appointing authority takes issue with several of the mitigating factors cited by the ALJ. The appointing authority argues that the failure to notify the appellant of impending disciplinary action is of no moment, since it had absolutely no legal obligation to give advance notice. The appointing authority maintains that it "went above and beyond" by even giving the appellant five days advance notice of the

meeting. Moreover, the appointing authority avers that the ALJ incorrectly opined that Weinstein should have terminated the meeting immediately when the appellant asserted his "right to counsel." It asserts that the June 15, 2009 meeting was not an "investigatory interview;" rather, it simply intended to serve the appellant with a PNDA, read him the charges against him, and advise him of his right to a hearing. The appointing authority contends that there is no right to an attorney or union representation during such a meeting. Further, the appointing authority argues that whether or not the appellant was on or off duty at the time of the meeting is irrelevant, since law enforcement officers are held to a higher standard of conduct, both on and off duty. Similarly, it asserts that the location of the meeting should not serve as a mitigating circumstance. It underscores that the meeting took place at the County Administration Building, which is still an official County facility. Finally, the appointing authority challenges the ALJ's failure to consider the appellant's 90-hour suspension as part of his disciplinary history and the ALJ's decision to bifurcate the appellant's appeal of that suspension from the instant matter. The appointing authority argues that it has been prejudiced by the ALJ's decision to separate the matters, since he did not consider the 90-hour suspension for purposes of progressive discipline.

In his cross-exceptions, the appellant contends that the ALJ properly considered the facts that the appellant was off duty and outside of his work facility when this incident occurred, since these factors demonstrate that what occurred "was an exchange between people who were acting in a civilian setting." The appellant also argues that the 90-hour suspension should not be considered since he has appealed that suspension and intends to present a full defense of the charges. Moreover, the appellant maintains that the mitigating circumstances considered by the ALJ were appropriate and support modifying his removal.

Upon its *de novo* review of the record, the Commission agrees with the ALJ's determination of the charges and his finding that the appellant's testimony was not credible. Initially, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See also, In re Taylor*, 158 *N.J.* 644 (1999) (quoting *State v. Locurto*, 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super*. 527 (App. Div. 2004). Nevertheless, upon review, the ALJ's

determinations in this respect are proper, and the Commission finds the credible evidence in the record supports the ALJ's findings. In addition, the Commission agrees that the charge of insubordination should be dismissed under these particular circumstances. The witnesses confirmed that, despite his stated desire to end the meeting, the appellant did not leave the room when Miller advised that the meeting was not over. Moreover, it appears from the testimony that the appellant was, indeed, in the process of returning to his chair, albeit reluctantly and not without protesting, after being ordered by Miller to sit down. In any event, he did not disobey Miller's instructions. Accordingly, the ALJ properly upheld the charges of conduct unbecoming a public employee and other sufficient cause.

As to the penalty, in addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway State Prison*, 81 *N.J.* 571, 580 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007). *See also, In the Matter of Tammy Hermann,* 192 *N.J.* 19 (2007). A review of the record reveals that the appellant had a significant record of prior discipline in his 19 years of service. Specifically, the record reflects 15 reprimands and nine disciplinary suspensions, seven of which were minor disciplinary infractions. The Commission emphasizes that the appellant's previous major discipline, the 90-hour suspension currently pending at the OAL, is properly considered as part of his disciplinary history. *See In the Matter of Robert Johnson v. State of New Jersey, Department of Corrections, Adult Diagnostic and Treatment Center*, Docket No. A-4382-99T3 (App. Div. July 3, 2001).[2]

In addition, it must be noted that the ALJ's finding that the appointing authority committed significant errors when it failed to properly notify the appellant of the purpose of the meeting and when it failed to honor the appellant's purported right to counsel during that meeting is misplaced. There is no requirement that employees receive advance notice of the planned service of disciplinary charges; indeed, there is no requirement that a PNDA be personally served upon an employee. Likewise, there is no "right" to counsel or union

[2] The Commission also notes that it is, thus, unnecessary to address the appointing authority's arguments regarding the failure to consolidate the removal and 90-hour suspension appeals. In this regard, the appointing authority argued that it was prejudiced by the separation of the appeals when the ALJ declined to consider the 90-hour suspension as part of the appellant's past disciplinary record.

representation when an employee is served with disciplinary charges or at any stage of the administrative disciplinary appeal process. *See Mira Shah v. Union County Human Services,* Docket No. A-2772-99T2 (App. Div. October 8, 2004) (The Appellate Division emphasized that neither the United States nor the New Jersey Constitution guaranteed a right to counsel to parties in civil or administrative proceedings). *See also, David v. Strelecki,* 51 *N.J.* 563 (1968), *cert. denied,* 393 *U.S.* 933 (1968) ("[I]t is equally clear that the special rules attaching to criminal proceedings do not extend to administrative hearings"). In addition, as the appointing authority notes, this was not an "investigatory interview." *N.L.R.B. v. Weingarten, Inc.,* 420 *U.S.* 251 (1975) (An employer must permit an employee to have a representative present at an investigative interview if the employee requests representation and the employee reasonably believes the interview may result in disciplinary action). Thus, the ALJ's finding that Weinstein should have immediately terminated the meeting when the appellant mentioned he had an attorney is disregarded.

Nevertheless, the Commission agrees with the ALJ's recommendation to modify the removal to a six-month suspension. Notwithstanding that the appointing authority was not obligated to notify the appellant that it intended to serve him with a PNDA at the June 15, 2009 meeting, it must be underscored that the appellant felt misled. He expected simply to be advised of the outcome of a complaint he filed regarding the assignment of overtime. The appellant's reaction to being served with a PNDA and having the charges read to him after being advised of the outcome of the investigation, while completely inappropriate, stemmed from his perception that the charges were "repercussions" for filing his complaint. While the Commission certainly does not condone the type of outburst presented here, it also recognizes that the appellant was apparently attempting to avoid any potential confrontation by terminating the meeting and referring any further communications to his attorney. The Commission also emphasizes that a law enforcement officer is held to a higher standard than a civilian public employee. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied,* 47 *N.J.* 80 (1966). *See also, In re Phillips*, 117 *N.J.* 567 (1990). Thus, the Commission concludes that a six-month suspension is the appropriate penalty. Such a serious penalty shall serve to warn the appellant that such conduct will not be tolerated in the future, and future disciplinary infractions may lead to his removal.

N.J.S.A. 40A:14-200, *et seq*. generally provides that law enforcement officers who are removed from employment are entitled to commence receiving their base salaries on the 181st day following their removal, with certain exceptions. It is noted that *N.J.A.C.* 4A:2-2.13(i)3 provides:

> If the administrative law judge's initial decision recommends reversal of the removal, or that the officer or firefighter receive discipline other than removal, the appellant shall receive his or her base salary on the

> date provided in the administrative law judge's initial decision, provided, however, that if the appellant is already receiving his or her base salary at the time of the administrative law judge's initial decision, the appellant shall continue to receive such base salary.

There is no indication in the record as to the date on which the ALJ determined the appellant should start receiving his base salary. Based on the information available to the Commission, the appellant is not scheduled to commence receiving his base salary until March 31, 2010. In this regard, *N.J.A.C.* 4A:2-2.13(a)4 provides that "removal" shall mean the first date on which the law enforcement officer is separated from employment without pay; in this case, the 180-day time frame commenced on June 17, 2009, the date on which the appellant was immediately suspended from employment. *N.J.A.C.* 4A:2-2.13(h)3 provides for the deduction of the time period between the date of the appellant's removal and the date of the filing of his appeal with the Commission and the OAL, which the record reflects was July 27, 2009. *N.J.A.C.* 4A:2-2.13(h)6 permits the deduction of any period of time for which the appellant or his or her attorney or negotiations representative requests and is granted an adjournment of a hearing. The record reflects that the OAL hearing in this matter was originally scheduled for November 2, 2009, but it was adjourned until January 8, 2010, at the appellant's request. Thus, this period of time is appropriately deducted, and the 181st date is March 31, 2010 (July 27, 2009 to November 2, 2009 + January 8, 2010 to March 31, 2010 = 180 days). Therefore, in the event that the appellant is not reinstated to employment by March 31, 2010, he should commence receiving his base salary at that time.

In addition, since the penalty has been modified from a removal to a six-month suspension, the appellant is entitled to mitigated back pay, benefits and seniority for the period following his six-month suspension, December 17, 2009, to the date of actual reinstatement, or March 31, 2010, whichever occurs first, pursuant to *N.J.A.C.* 4A:2-2.10.

N.J.A.C. 4A:2-2.12(a) provides for the award of reasonable counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel,* Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, the charges of conduct unbecoming a public employee and other sufficient cause were sustained and a six-month suspension was imposed. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. In the interim, as the court states in *Phillips*, *supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position. *See also, N.J.A.C.* 4A:2-2.13(i)4.

ORDER

The Civil Service Commission finds that the appointing authority's action in imposing a removal was not justified. Therefore, the Commission modifies the removal to a six-month suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority for the period from his six-month suspension to the date of actual reinstatement, or March 31, 2010, whichever is earlier. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

Further, if the appellant is not reinstated on or before March 31, 2010, he is to commence receiving payment of his base salary on that date.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.