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STATE OF NEW JERSEY.

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Kevin Enright,
Hazlet Township

CSC Docket No. 2015-1723

Request for Reconsideration

ISSUED: MAR - 9 2015

(CSM)

Hazlet Township (Hazlet), represented by Bruce W. Padula, Esq., requests reconsideration of the attached decision rendered on October 1, 2014, which modified the removal of Kevin Enright, a Laborer 1 with Hazlet, to a six month suspension.

By way of background, Enright was removed effective August 7, 2013 on charges of insubordination, inability to perform duties, conduct unbecoming a public employee, violation of federal law/regulations concerning alcohol use by employees who operate commercial vehicles, other sufficient cause, and violation of the Township policies on drug, alcohol and driver's licenses. Specifically, it was asserted that the appellant failed to notify the appointing authority that he was convicted of reckless driving and his license was suspended for 90 days. It was also asserted that the appellant abused sick time by requesting a leave of absence to care for his girlfriend when the leave was actually to cover the time he lost his driver's license. In her initial decision, the Administrative Law Judge (ALJ) concluded that Enright was not verbally abusive to his superiors nor did he countermand any lawful orders, that he was not found guilty of driving under the influence, his off duty reckless driving conviction did not have a connection with his employment, and that it was not shown that a driver's license was required to perform the duties of a Laborer. However, the ALJ sustained the charge of violation of the appointing authority's driver's license policy and recommended modifying the removal to a three month suspension. The Civil Service Commission (Commission) agreed with the Findings of Fact of the ALJ, but found that the appointing authority also sustained the charges of insubordination and conduct

unbecoming a public employee as well as violation of the driver's license policy and imposed a six month suspension.

On reconsideration, the appointing authority asserts that the Commission erred by considering discipline meted out to other employees and that there is no legal obligation for an employer to accommodate an employee who loses his license by providing him with non-driving duties. In this regard, it maintains that the concept of progressive discipline does not require an appointing authority to equalize discipline among employees. Rather, it only requires an employer to consider the egregiousness of the offense, the employee's length of service and the employee's disciplinary history. Further, the appointing authority argues that the Commission's conclusion that other employees who lost their license were provided non-driving duties is not supported by the record because, unlike Enright, those employees were never required to drive a vehicle. Specifically, it maintains that David Rooke, Public Works Superintendent, testified that those employees were permitted to continue doing the work they were assigned prior to losing their license, which did not include driving a vehicle. Additionally, the appointing authority argues that the Commission's reliance on the Laborer 1 job specification is misplaced because it ignores the fact that driving is an essential part of Enright's job and ignores the findings of a desk audit, which found that another individual with the title of Laborer 1, Jonathan Uhl, was performing duties under a different classification, and therefore, should be designated as a Driver. Instead of pursuing a desk audit, Enright filed a grievance, where he admitted that he was required to drive a truck for at least three years. Thus, even though it did not formally alter his title to Truck Driver Heavy, the appointing authority contends that Enright can lose his license, lie about it, and not be removed. Therefore, since Rooke's testimony was misconstrued concerning the duties of other employees and the fact that Enright could not perform his daily duties because he lost his license, the appointing authority maintains that the removal should be upheld.

Although provided the opportunity, Enright did not submit any additional information or argument for the Commission to review.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

In the present matter, the appointing authority has not met the standard for reconsideration. Essentially, the appointing authority argues that Enright's filing of a grievance maintaining that he performs actual driving duties evidences that his

position should have been classified as Truck Driver, Heavy. Thus, as his position should have been classified as Truck Driver, Heavy, and driving is an essential function of that title, his removal was appropriate as his license was suspended. The Commission disagrees. As stated in the prior decision, Enright's official Civil Service title is Laborer 1 and the fact that he may have performed out-of-title Truck Driver, Heavy duties does not transform his title absent a classification determination by this agency or a provisional appointment to Truck Driver, Heavy. In this regard, the foundation of position classification, as practiced in New Jersey, is the determination of duties and responsibilities being performed at a given point in time as verified by this agency through an audit or other formal study. Thus, classification reviews are based on a current review of assigned duties and any remedy derived therefrom is prospective in nature since duties which may have been performed in the past cannot be reviewed or verified. Given the evolving nature of duties and assignments, it is simply not possible to accurately review the duties an employee may have performed six months ago or a year ago or several years ago. This agency's established classification review procedures in this regard have been affirmed following formal Civil Service Commission review and judicial challenges. See *In the Matter of Community Service Aide/Senior Clerk (M6631A)*, *Program Monitor (M6278O)*, and *Code Enforcement Officer (M0041O)*, Docket No. A-3062-9002T2 (App. Div. June 15, 2004). Accordingly, since no classification audit was conducted by this agency and the job specification for Laborer 1 does not require driving, notwithstanding any potential misconstruing of Rooke's testimony, the ALJ's conclusion that most of the duties of a Laborer 1 can be performed without the need for a driver's license, particularly since Enright did not receive compensation for those duties, is supported by the record.

With respect to the argument that another employee's classification determination evidences that Enright's position would have included driving duties, a classification determination cannot be based solely on a comparison to the duties of another position, *especially if that position is misclassified*. See *In the Matter of Carol Maita, Department of Labor* (Commissioner of Personnel, decided March 16, 1995). In this case, Enright never filed for a desk audit with this agency and he never received compensation for his asserted out-of-title work that he raised during the grievance process. The fact that another employee's position was reclassified does not evidence that Enright's position was misclassified. Therefore, the findings of a classification appeal for another position are irrelevant in this matter.

Regarding the appointing authority's concern that progressive discipline was not properly utilized, as stated in the prior decision, 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). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record.


George v. North Princeton Developmental Center, 96 N.J.A.R. 2d (CSV) 463. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. See *Henry v. Rahway State Prison*, 81 N.J. 571 (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). Initially, the Commission did not compare the discipline meted out to other employees when it considered the penalty for Enright's offense. It did consider that other employees were not removed when their licenses were suspended and, as explained above, it was only determined that most of the duties performed by a Laborer 1 can be performed without the need for a driver's license. Regardless, in this case, the Commission imposed the highest penalty it is permitted to impose short of removal, a six month suspension, based on the egregiousness of Enright's conduct, notwithstanding his unblemished disciplinary history.

ORDER

Therefore, it is ordered that this request for reconsideration be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION
ON THE 4TH DAY OF MARCH, 2015



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

- c. **Bruce W. Padula, Esq.**
Curtiss T. Jameson, Esq.
Kevin Enright
Joseph Gambino

A-3



STATE OF NEW JERSEY

**DECISION
OF THE
CIVIL SERVICE COMMISSION**

In the Matter of Kevin Enright,
Hazlet Township

CSC Docket No. 2014-508
OAL Docket No. CSV 12816-13

ISSUED: **OCT 27 2014** (CSM)

The appeal of Kevin Enright, a Laborer 1, with Hazlet Township, of his removal effective August 7, 2013, on charges, was heard by Administrative Law Judge Patricia M. Kerins, (ALJ), who rendered her initial decision on July 28, 2014. 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, as well as the exceptions and cross exceptions filed by the parties, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on October 1, 2014, accepted and adopted the Findings of Fact as contained in the attached initial decision but did not adopt the ALJ's recommendation to modify the removal to a three month suspension. Rather, the Commission modified the removal to a six month suspension.

DISCUSSION

The appellant was removed effective August 7, 2013 on charges of insubordination, inability to perform duties, conduct unbecoming a public employee, violation of federal law/regulations concerning alcohol use by employees who operate commercial vehicles, other sufficient cause, and violation of the Township policies on drug, alcohol and driver's licenses. Specifically, it was asserted that the appellant failed to notify the appointing authority that he was convicted of reckless driving and his license was suspended for 90 days. It was also asserted that the appellant abused sick time by requesting a leave of absence to care for his girlfriend

when the leave was actually to cover the time he lost his driver's license. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In her initial decision, the ALJ indicated that on October 29, 2011 the appellant was involved in an off duty car accident and was issued a citation for reckless driving and operating under the influence. After the accident, David Rooke, Public Works Superintendent, discussed the status of the charges with the appellant on several occasions and told the appellant to keep him informed of the outcome. On April 22, 2013, the appellant was found not guilty of operating under the influence but was found guilty of the reckless driving infraction, incurring a 90 day suspension of his license. However, Rooke did not learn of the license suspension from the appellant, but rather from Dennis Pino, Municipal Administrator. Pino testified that he had received a request for a leave of absence from the appellant, but was not initially aware of the fact that his license had been suspended. Rather, the appellant explained to Pino that the girlfriend with whom he resided was experiencing serious health issues and he needed to care for her. In a subsequent meeting, the appellant admitted to Pino that his license was suspended. Rooke testified that other employees were not removed during license suspensions but were allowed to perform other duties that did not involve the operation of vehicles, but Pino stressed that the appellant's work as a "Laborer" could require operation of vehicles and acknowledged that the appellant had been working out-of-title performing the duties of a Truck Driver, Heavy.

The appellant testified that he performs a variety of duties, including those of a Truck Driver, Heavy and that when questioned by Rooke, he would provide whatever information was requested regarding the status of his pending motor vehicle accident case. The appellant also indicated that he had gastrointestinal symptoms from April 22, 2013 through the following week, and, given his health, he requested that his attorney advise the appointing authority of his need for a leave of absence. He testified that he did not initially inform the appointing authority about his license suspension due to his illness, and thus, requested that his attorney advise the appointing authority of his need for a leave of absence. However, the appellant stated that he did not review the letter sent to the appointing authority and was upset because it did not explain the reasons for the request, such as his license suspension and the need to care for his partner who had undergone heart surgery.

The ALJ determined that Pino and Rooke credibly testified that neither the appellant nor anyone on his behalf advised his supervisor or the appointing authority for at least a week that his driver's license had been suspended. The ALJ also found the appellant's testimony about his partner's illness and the care she needed to be credible and his request for a leave of absence to care for her could have constituted a valid reason to support his request for a leave of absence.

However, the ALJ did conclude that the appellant's testimony that his personal illness precluded him from immediately advising his superiors regarding his license suspension was not credible and found that his failure to do so violated the appointing authority's policy. Therefore, since the appellant was not verbally abusive to his superiors nor did he countermand any lawful orders, he was not found guilty of driving under the influence, his off duty reckless driving conviction did not have a connection to his employment, and the appointing authority did not show that a license was required to perform the duties of a Laborer, the ALJ found that the appointing authority did not sustain the charges of insubordination, drug and alcohol abuse by persons operating motor vehicles, violation of the appointing authority's drug and alcohol policy, conduct unbecoming a public employee, and inability to perform duties. However, the ALJ sustained the charge of violation of the appointing authority's driver's license policy and recommended modifying the removal to a three month suspension.

In its exceptions to the ALJ's decision, the appointing authority presents that the ALJ erred in relying on the appellant's title of "Laborer" when he in fact admitted that his title is Truck Driver, Heavy. The appointing authority emphasizes that it was uncontroverted that the appellant was performing the duties of a Truck Driver, Heavy, and, since he could no longer perform those duties, he should be terminated. It also argues that the charge of insubordination should be sustained as the appellant failed to keep it informed of the status of his motor vehicle summonses and that his off duty motor vehicle accident in fact has a relationship to his employment. In this regard, the appellant failed to comply with his supervisor's direction to keep him informed of the status of his pending charges and he failed to follow the sick leave and driver's license policies in an attempt to cover up his suspended license by requesting leave to care for his girlfriend. Moreover, the appointing authority contends that it was improper for the ALJ to rely on testimony concerning the discipline meted out to other employees in determining a proper penalty and that the ALJ did not address the appellant's violation of the attendance policy. Therefore, since the appellant was unable to perform the essential functions of his position, the appointing authority maintains that the removal should be upheld.

In response, the appellant states that he was in fact a "Laborer", not a Truck Driver, Heavy and that he informed the appointing authority of all the charges pending against him, his hearing dates, and his eventual license suspension. The appellant maintains that his conduct was not unbecoming and that consideration of what is done for other employees whose licenses are suspended is relevant.

Upon an independent review of the record, the Commission agrees with all of the ALJ's Findings of Fact and concludes that the appointing authority has not met its burden of proof regarding the charges of inability to perform duties, violation of federal law/regulations concerning alcohol use by employees who operate

commercial vehicles, other sufficient cause, and violation of the Township policy on drug and alcohol. However, the appointing authority has met its burden of proof regarding the charges of insubordination, conduct unbecoming a public employee, and violation of the driver's license policy. Additionally, for the reasons set forth below, the Commission finds that the appellant's misconduct warrants a higher penalty.

Initially, the Commission rejects the appointing authority's argument that the appellant's title is a Truck Driver, Heavy because he filed a grievance arguing that he performs actual driving duties and all Laborers are required to possess a Commercial Driver's License (CDL). According to the job specification for Truck Driver, Heavy, an incumbent primarily drives a truck with a tandem/dual rear axles, to transport materials, equipment or people and does other related work. Conversely, a Laborer 1 primarily performs varied types of manual and unskilled laboring work, may drive a truck in connection with laboring work on occasion and does other related duties as required. Moreover, the appellant's official Civil Service title is Laborer 1 and the fact that he *may* have performed out-of-title Truck Driver, Heavy duties does not transform his title absent a classification determination by this agency or a provisional appointment to Truck Driver, Heavy by the appointing authority. Further, it cannot be ignored that Rooke credibly testified that other employees were not removed during license suspensions but were allowed to perform duties that did not involve the operation of vehicles. Additionally, the ALJ determined that Pino was "less certain" that any temporary loss of license would require termination and the work of a Laborer could require operation of vehicles, hence the requirement for a CDL. Therefore, the ALJ's conclusion that, even though a CDL is required by the appointing authority, most of the duties performed by a Laborer can be performed without the need for a driver's license, particularly since the appellant did not receive compensation for those duties, is supported by the record. Accordingly, the charge of inability to perform duties has not been sustained.

However, the Commission finds that the appellant's failure to comply with the orders of his supervisor to keep him apprised of the status of his pending motor vehicle case and his involvement in an off duty motor vehicle incident that resulted in the temporary loss of his license constituted insubordination and conduct unbecoming a public employee. In this regard, the Commission utilizes a more expansive definition of insubordination. Specifically, the Commission is not bound or constrained by the black letter legal definition of "insubordination." *In the Matter of Fulvio Stanziale*, Docket No. A-3492-00T5 (App. Div. April 11, 2002) (Appellant's conduct in which he refused to provide complete and accurate information when requested by a superior constituted insubordination). Therefore, the appellant's failure to apprise his superiors of his license suspension as required by Township policy constitutes insubordination. Although the term is not precisely defined, conduct unbecoming a public employee is conduct that adversely affects morale or

efficiency or has a tendency to destroy public respect for governmental employees and confidence in the operation of public services. See *In re Emmons*, 63 N.J. Super. 136 (App. Div. 1960). Moreover, unbecoming conduct may include behavior which is improper under the circumstances, may be less serious than a violation of the law, but which is inappropriate on the part of a public employee because it is disruptive of governmental operations. Clearly, the appellant's failure to apprise his superiors of his license suspension in a timely manner and his off-duty conduct which led to the temporary suspension of his license is conduct that affected the efficiency of the operation of public services and tends to destroy the public respect for government employees. Accordingly, the appellant's actions also constitute conduct unbecoming a public employee.

In determining the proper penalty, the Commission's review is *de novo*. 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). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 N.J.A.R. 2d (CSV) 463. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. See *Henry v. Rahway State Prison*, 81 N.J. 571 (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).

In this case, the appellant's failure to timely comply with the policy to advise his superiors of his license suspension and his disregard of Rooke's directive to keep him apprised of the status of his case cannot be ignored. Notwithstanding the fact that the appellant has an unblemished disciplinary history in his five years of employment, the facts of this case demonstrate that he attempted to hide the fact that his license was suspended by requesting a personal leave of absence to care for his ill girlfriend. Such conduct, while not worthy of removal, warrants severe sanction. Therefore, the Commission finds that a six month suspension is appropriate for the appellant's actions.

Since the penalty has been reduced, the appellant is entitled to back pay, benefits and seniority pursuant to N.J.A.C. 4A:2-2.10. However, the appellant is not entitled to counsel fees. 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 appellant has not prevailed on all or substantially all of the primary issues in the appeal since some of the charges were sustained. 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. See *Bazyt Bergus v. City of Newark*, Docket No. A-3382-00T5 (App. Div. June 3, 2002); *In the Matter of Mario Simmons* (MSB, decided October 26, 1999). See also, *In the Matter of Kathleen Rhoads* (MSB, decided September 10, 2002) (Counsel fees denied where removal on charges of insubordination, inability to perform duties, conduct unbecoming a public employee and neglect of duty was modified to a 15-day suspension on the charge of neglect of duty).

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.

ORDER

The Civil Service Commission finds that the action of the appointing authority in imposing discipline was justified, but 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 following the six month suspension to the date of his actual reinstatement. 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*.

**DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 1ST DAY OF OCTOBER, 2014**

Robert M. Czech

**Robert M. Czech
Chairperson
Civil Service Commission**

**Inquiries
and
Correspondence**

**Henry Maurer
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312**

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 12816-13

AGENCY DKT. NO. 2014-508

**IN THE MATTER OF
KEVIN ENRIGHT, HAZLET TOWNSHIP,
DEPARTMENT OF PUBLIC WORKS.**

**Curtiss T. Jameson, Esq., for appellant (Kroll, Heinmann, Carton, LLC,
attorneys)**

**Bruce W. Padula, Esq., for respondent (Cleary, Giacobbe, Alfieri, Jacobs, LLC,
attorneys)**

Record Closed: June 11, 2014

Decided: July 28, 2014

BEFORE PATRICIA M. KERINS, ALJ:

STATEMENT OF THE CASE

Appellant Kevin Enright (Enright) appeals his removal by respondent Hazlet Township (Hazlet) from his position as a Laborer with its Public Works Department. The removal action arose out of the suspension of his driver's license for ninety (90) days due to a non-work related accident.

PROCEDURAL HISTORY

Hazlet issued a Preliminary Notice of Disciplinary Action (PNDA) for removal of Enright on May 9, 2013, from his title of Laborer and suspended him immediately. After a departmental hearing, Hazlet issued a Final Notice of Disciplinary Action (FNDA) on August 7, 2013, removing appellant from his position. The sustained charges were listed as follows:

Violation of N.J.A.C. 4A:4-2-2.3

(a)(2) Insubordination

(a)(3) Inability to perform duties

(a)(6) Violation of federal law/regulations concerning alcohol use by employees who operate commercial vehicles

(a)(12) Other sufficient cause

Violation of the Following Township Policies: Drug and Alcohol Policy; Drivers License Policy; Attendance Policy; Sick Leave Policy.

On or about August 21, 2013, appellant filed an appeal of his removal with the Civil Service Commission. The matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case on September 9, 2013. The matter was heard at the OAL in Mercerville, New Jersey on February 24, 2014. The record remained open for the submission of further documentary evidence and post hearing memoranda. The record closed on June 11, 2014.

FACTUAL DISCUSSION

Many of the material facts in this matter are not in dispute. Enright has been employed by Hazlet's Department of Public Works (DPW) since 2007, becoming a permanent, full-time employee in 2008, with the title of Laborer. As required by Hazlet for the position, he obtained his Commercial Driver's License (CDL). In October 2012 he filed a grievance with Hazlet asserting that he had been working out of his title as a Heavy Truck Driver without appropriate pay (R-5). Although he eventually was

recommended for promotion to that title by Hazlet staff, the promotion was not effectuated prior to his removal, nor was he paid as a Heavy Truck Driver.

On October 29, 2011, Enright was involved in an off duty single car motor vehicle accident. He was issued a citation by Middletown Township police for reckless driving and operating under the influence. Hazlet became aware of the charges in 2011 and David Rooke (Rooke), DPW Superintendent, and Ken Kruk (Kruk), DPW Supervisor, discussed the status of the charges with Enright. On April 22, 2013, appellant was found not guilty of the operating under the influence charge but was found guilty of the reckless driving infraction, incurring a ninety-day suspension of his license (A-4). Enright took sick leave for April 22, 23, 24, 25, 26, 29, and 30, 2013. On or about April 24, 2013, he requested a ninety-day leave of absence for personal reasons by letter from his counsel (A-3). On May 2, 2013, Enright delivered a letter to Hazlet advising of his ninety-day license suspension (R-9). On May 9, 2013, Hazlet moved to terminate Enright from his position as Laborer and suspended him without pay. Enright's license was restored on July 22, 213.

In support of its decision to remove appellant, Hazlet presented the testimony of Rooke and Dennis Pino (Pino), Municipal Administrator. Rooke testified that after Enright's accident in 2011, he learned of the pending charges not from Enright but from a local citizen. He stated he discussed the status of the charges with him several times and told him to keep him informed on the outcome. Rooke did not learn of Enright's license suspension from appellant but rather from Pino. He confirmed that Enright called in his absences during the relevant period, and that he turned over Enright's letter request for a leave of absence to Pino without speaking to Enright regarding his request. Rooke confirmed that other DPW employees were not removed during license suspensions but were allowed to perform duties that did not involve the operation of vehicles.

Pino testified that he received Enright's request for a leave of absence from Rooke and spoke with Enright about it shortly thereafter. Enright did not advise him that his license had just been suspended for ninety days but explained that the girlfriend

with whom he resided was experiencing health issues related to a heart condition and he needed the leave to care for her. Pino testified he took no immediate action on the request as such leave requests were placed before the township committee. He then became aware of the license suspension and had a meeting with Enright and his father during which Enright admitted to the license suspension. Shortly thereafter, on May 2, 2013, he received appellant's letter (R-9) regarding the suspension.

After initially asserting that termination would be required for a Laborer without a CDL license, he was less certain that any temporary loss of license would require termination. Pino stressed that even the work of a Laborer could require the operation of vehicles, hence the requirement for a CDL. He acknowledged that as set forth in his grievance, Enright had been working out of title but had not yet been promoted from Laborer to Heavy Truck Driver.

In response, Enright testified on his own behalf. He described the evolution of his duties while working for Hazlet. In the first two years in his position as Laborer his duties included picking up leaves and recycling, mowing grounds and filling potholes. As the years passed, he performed other duties, including those of a heavy truck driver. When those duties were not acknowledged as such he filed a grievance to obtain the title and pay of the higher grade. At the time of his suspension in May 2013, he had not been awarded either the pay or the title.

He then testified to the facts of his October 2011 accident in which his vehicle rolled over in an early season snowstorm as he went around a curve. Although charged with driving under the influence, his breathalyzer reading was negative. After the accident Rooke approached him at work with questions about the accident. He stated that whenever he was questioned about the status of the case he would provide whatever information was requested by Hazlet.

According to Enright, he was ill with serious gastrointestinal symptoms April 22 through the following week. Given his health he requested his attorney to advise the township of his need for a leave of absence. He did not review the letter prior to it

being sent to the township and was upset that it did not explain the reasons for the request. Those reasons included not only his license suspension but his need to care for his partner who had just undergone serious heart surgery. Born with a rare heart defect, she had undergone a surgical procedure on April 22 and needed at-home care for a period of time. After he reviewed the letter sent by his attorney he was upset that it did not state the specifics of his request for the leave and he followed up with his own letter on May 2, 2013. He stated he did not initially inform Hazlet about his license suspension due to his illness. It was due to his illness in the days after his municipal court appearance that he requested his counsel to advise Hazlet.

Enright described how Hazlet had handled other instances of DPW employees who had license suspensions. He mentioned two individuals, Justice and DeRosa, who were given duties that did not require the operation of vehicles during their license suspensions.

In addition to testimony, both parties moved documentary evidence into the record. Included were the township policies on driver licenses and leaves of absence. The driver license policy as set forth in the Employee Handbook (R-12) provides:

Any employee performing work which requires the operation of a Hazlet Township vehicle must notify the immediate supervisor in those cases where a license is expired, suspended or revoked and/or who is unable to obtain an occupational permit from the State Department of Licensing. An employee that fails to report such an instance is subject to disciplinary action, including demotion or termination. An employee who fails to immediately report such revocation or suspension to their supervisor and continues to operate a Hazlet Township vehicle shall be subject to possible termination.

The Leave of Absence policy in that same handbook provides that a personal leave may be granted for up to six months at the sole discretion of the Township Committee.

Also in evidence is the job description for Laborer (R-14) which defines the position as follows:

Under supervision, performs varied types of manual and unskilled laboring work, and may drive a truck in connection with laboring work on occasion; does other related duties as required.

It further provides that with regard to a license:

Appointees will be required to possess a driver's license valid in New Jersey only if the operation of a vehicle, rather than employee mobility, is necessary to perform essential duties of the position.

Appointees may be required to possess a valid Commercial Driver's License (CDL) and applicable endorsements for the class and type of vehicle being operated.

Pino and Rooke testified primarily to township policies and their interactions with Enright. Overall their testimony was credible that neither Enright nor anyone on his behalf advised his supervisor or other Hazlet officials for at least a week that his driver's license had been suspended.

In reviewing his testimony, Enright appeared as a young and not very articulate individual. He was credible in his description of his partner's illness and the fact that she needed care after her heart procedure. His request for a leave of absence to care for her could have constituted of a valid reason for such a leave. However, his testimony regarding his failure to immediately advise his superiors at Hazlet regarding his license suspension was less credible. As set forth in the specifications, and not contradicted in the record, he used sick leave for a total of seven (7) days from April 22 through April 30. As set forth in Hazlet's sick leave policy any absence of five (5) or over consecutive work days requires a doctor's verification of illness. No such evidence was presented by Enright to corroborate his claim that he was so disabled as not to be able to contact his superiors. While he did take steps to have his counsel contact Hazlet regarding a leave of absence, he did not present evidence that his illness was so

incapacitating that he was unable to personally notify his superiors of his license suspension or unable to make certain that his counsel had done it for him. I FIND that appellant did not advise his superiors of his license suspension within the time period required by the township policy.

DISCIPLINARY HISTORY

Petitioner has had no major disciplinary actions. The record only shows a written warning (R-8) on March 14, 2012, regarding safety rules.

LEGAL ANALYSIS AND CONCLUSIONS

A public employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-2.1; N.J.A.C. 4A:2-1.4(a). Atkinson v. Parsekian, 37 N.J. 143 (1962); In Re Polk, 90 N.J. 550 (1982).

In this matter Enright is charged with a number of infractions. The first charge is that of insubordination. Hazlet has not shown that Enright was verbally abusive in any way toward his supervisors. Nor was there evidence of a direct countermanding of any lawful direction from those supervisors by Enright. Hazlet has not met its burden on that charge.

Hazlet further sustained a charge under N.J.A.C. 4A: 2.2.3(a)(10) which cites a violation of "federal regulations concerning drug and alcohol use by and testing of employees who perform functions related to the operation of commercial motor vehicles" ¹ While Enright originally faced a charge of driving under the influence as a result

¹ In the FNDA Hazlet cites the violation of "N.J.A.C. 4A:4-2.3(a)(6)" which is the provision for conduct unbecoming. As Hazlet specifically used the language of (a)(10), the violation of federal regulations, that charge will be applied for purposes of this appeal. It should be noted that both charges were listed separately in the PNDA.

of his accident, he was not found guilty on that infraction. Hazlet presented no evidence that he was in any way in violation of a federal regulation regarding drug or alcohol by an employee who performs functions related to the operation of commercial motor vehicles. The charge as set forth in the FNDA is specific in its language relating it to drug and alcohol use. Although in its pleadings Hazlet cites a federal regulation regarding license suspensions, and a duty to notify an employer, that regulation as cited is not tied to the charge of a violation related to drugs or alcohol. Hazlet therefore has not sustained its burden of proving Enright committed a violation of federal regulations regarding drug or alcohol use.

Similarly, Hazlet has not shown a violation of the Township's Drug or Alcohol Policy by Enright. As noted above, Enright was not convicted of any drug or alcohol related offense as a result of his non work related motor vehicle accident.

Although the charge of conduct unbecoming an employee was set forth in the PNDA, it was not specifically set forth in the FNDA. Nevertheless, Hazlet did not sustain its burden on that charge. The off duty motor vehicle accident which resulted in the reckless driving conviction was not shown to have a sufficient connection to Enright's employment by Hazlet.

Respondent also sustained a charge of inability to perform duties. While the license suspension did have a bearing on Enright's ability to perform some of his duties as a Laborer, Hazlet did not show by a preponderance of the evidence that Enright was unable to perform a Laborer's duties for the three months of his license suspension such to warrant removal. Although Hazlet presented general testimony regarding the various duties performed by its DPW staff, it was not specific as to its person power needs and requirements in the Laborer title during the three-month period of Enright's license suspension. While a CDL is required for the title in Hazlet, a review of a Laborer's duties shows that most of those duties can be performed without the need for a driver's license. Much of Hazlet's argument on this point goes to the duties Enright would have to perform as a Heavy Truck Driver, a title he was never awarded and for which he had not received compensation. Respondent chose to proceed with this

removal action from his title as Laborer and those are the duties under which his ability to perform are to be judged. It also must be noted that by the time respondent issued the FNDA removing Enright, his license had already been restored and he had served a three-month suspension. The testimony further showed that Hazlet had chosen on other occasions involving a loss of license to allow employees to perform duties that did not require a driver's license during a suspension period.

Hazlet did sustain its burden, however, on its charge of a violation of the township's driver's license policy. Neither Enright nor anyone on his behalf notified the township immediately of his license suspension and Enright did not show that his illness had so incapacitated him as to relieve him of that responsibility. Enright was aware of the need to so advise his superiors and did not do so.

A violation of the Hazlet Township Driver's License Policy is **SUSTAINED** and all other charges are **DISMISSED**.

The remaining issue is that of the appropriate discipline to be imposed. In applying the principles of progressive discipline, it must be noted that Enright has had no major disciplinary infractions and no suspensions. Clearly, he was not forthright and immediate in advising Hazlet regarding his license suspension for an off duty motor vehicle accident. While his partner may have needed his care and he may have otherwise qualified for a leave of absence, it was his duty to advise Hazlet that his license had been suspended as well. Nevertheless, the sanction of removal goes too far in this case. His license suspension was for a three-month period and Enright made no attempt to operate a township vehicle while on suspension. In this matter, a three-month suspension is appropriate discipline.

ORDER

The removal of appellant Kevin Enright from his employment is **REVERSED** and a three-month suspension is **ORDERED** in this matter.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 28, 2014
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency:

Date Mailed to Parties:

cmo

WITNESSES

For Appellant:

Kevin Enright

For Respondent:

David A. Rooke

Dennis Pino

EXHIBITS

For Appellant:

- A-1 Preliminary Notice of Disciplinary Action
- A-2 Final Notice of Disciplinary Action
- A-3 Letter from Stanley F. Werse, Esq., to Dave Rook, Hazlet Township,
dated April 24, 2013
- A-4 Motor Vehicle Commission Driver History Abstract
- A-5 Middle Township Municipal Court Ruling, dated May 28, 2013

For Respondent:

- R-1 Preliminary Notice of Disciplinary Action, dated May 9, 2013
- R-2 Final Notice of Disciplinary Action, dated August 7, 2013
- R-3 Letter from Dennis Pino to Mayor Belasco and Township Committee,
dated June 24, 2013
- R-4 Job Description of Truck Driver, Heavy
- R-5 Grievance filed by Appellant
- R-6 Disposition of Charges against Appellant from Middletown Township
Municipal Court

- R-7 Letter from Stanley F. Werse, Esq., to Dave Rook, Hazlet Township, dated April 24, 2013**
- R-8 Employee Warning Notice, dated March 14, 2012**
- R-9 Letter from Appellant to Dennis Pino, dated May 2, 2013**
- R-10 Letter from David A. Foley, Esq., to Hazlet Township, dated June 6, 2013**
- R-11 Letter from David A. Foley, Esq., to Hazlet Township, dated June 18, 2013**
- R-12 Township of Hazlet Employee Handbook**
- R-13 Receipt for Employee Handbook**
- R-14 Job Specification for Laborer 1**
- R-15 Agreement between Hazlet Township and Merchandise Drivers Local 641, IBT, January 1, 2010 to December 31, 2012**
- R-16 Agreement between Hazlet Township and Merchandise Drivers Local 641, IBT, January 1, 2013 to December 31, 2017**