

A-4



STATE OF NEW JERSEY

In the Matter of Christopher Monahan
Township of Scotch Plains,
Department of Recreation

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC DKT. NO. 2016-4051
OAL DKT. NO. CSV 08691-16

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ISSUED: **MAR 10 2017** BW

The appeal of Christopher Monahan, Greenskeeper, Township of Scotch Plains, Department of Recreation, 10 working day suspension, on charges, was heard by Administrative Law Judge Kimberly A. Moss, who rendered her initial decision on February 7, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on March 9, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

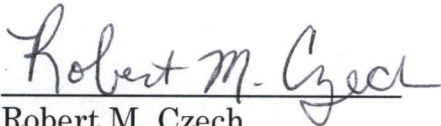
ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Christopher Monahan.

Re: Christopher Monahan

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
MARCH 9, 2017



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 08691-16

AGENCY DKT. NO. 2016-4051

**IN THE MATTER OF CHRISTOPHER
MONAHAN, TOWNSHIP OF SCOTCH PLAINS
DEPARTMENT OF RECREATION.**

Steven I Adler, Esq., for appellant (Mandelbaum Salsburg, attorneys)

Amanda E. Miller, Esq., for respondent (Decotiis, Fitzpatrick & Cole,
attorneys)

BEFORE **KIMBERLY A. MOSS**, ALJ:

Record Closed: January 23, 2017

Decided: February 7, 2017

STATEMENT OF THE CASE

Appellant, Christopher Monahan (Monahan), appeals his ten day suspension by respondent, Township of Scotch Plains Department of Recreation (Scotch Plains or respondent), on charges of violation of federal drug and alcohol use by and testing of employees who perform functions related to the operation of commercial vehicles and other sufficient cause. At issue is whether Monahan engaged in the alleged conduct, and, if so, whether that warrants a ten-day suspension.

PROCEDURAL HISTORY

On April 18, 2016, respondent served Monahan with a Preliminary Notice of Disciplinary Action. A departmental hearing was held on April 26, 2016. Respondent served Monahan with a Final Notice of Disciplinary Action dated May 5, 2016, sustaining charges of violation of federal drug and alcohol use by and testing of employees who perform functions related to the operation of commercial vehicles and issued a ten-day suspension.

Following Monahan's appeal to the Civil Service Commission, it transmitted the matter to the Office of Administrative Law (OAL) pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, where it was filed on June 10, 2016, for determination as a contested case. A motion for Summary Decision was filed by respondent on November 2, 2016. Petitioner filed opposition on November 22, 2016. I denied that motion on November 28, 2016. The hearing was held on December 2, 2016. Respondent submitted closing briefs on January 18, 2017. Appellant submitted closing briefs on January 20, 2017, at which time I closed the record.

FACTUAL DISCUSSION

I **FIND** the following undisputed **FACTS**:

Monahan has been employed by Scotch Planes for thirty-three years. Monahan has had numerous random drug screenings as an employee of Scotch Plains. On April 16, 2016, Monahan was on a list of individuals to be given a random drug and alcohol test by Lexann Francis (Francis) an on-site collector. Monahan reported for the testing to give a urine sample. He was told that he had not provided enough urine and would have to provide another sample. Monahan left the building where the testing was taking place before attempting to give an additional urine sample. Monahan received an employee handbook from Scotch Plains in 2012.

TESTIMONY

Lexann Francis

Francis works for Valley Medical Group as a collector tech. Her duties include drug and alcohol testing. She has trained as a collector tech and has retraining every three to five years. She follows the collection guidelines of the Department of Transportation (DOT). Francis has done on-site testing for Scotch Plains for sixteen years.

Francis is given a list of approximately three employees from Valley Medical group. The list is a random list of safety sensitive employees. It includes employees who are required to have a commercial driver's license. She arrives on site and locates the supervisor. She gives the supervisor the list of people to be tested. Prior to the test, the employee's identification is checked and the custody and control form is done. The employees are asked if they need to take anything out of their pockets, the employee then chooses a test cup. Francis puts a line on the cup to show the amount of urine that is required for the test. If the employee does not provide enough urine, the sample is discarded and the employee is told to drink water and stay in her eye sight and do not leave. When an employee does not provide enough urine it is called shy bladder. The testing site is the garage of the Department of Public Works. The entrance to the garage is between where her table is set up and the restroom. There is another set of doors fifty yards from the restroom. Francis can see both doors from the table.

On April 14, 2016, Francis was on-site testing in Scotch Plains. She was going to other test sites after Scotch Plains but was not rushing to leave the site. Francis sets up outside of the supervisor's office. The testing site is where her supplies and kits are. Monahan came for testing on April 14, 2016, at approximately 7:15 a.m. She told him to choose a cup. Francis marked the cup with a line to show the amount of urine that was required. She puts the mark at the sixty-five milliliter (ML) on the cup. The cup has a temperature strip and she marks the cup above the temperature strip. The temperature strip is always near seventy-five ML. The cup has a line at forty-five ML. Monahan was

told not to run the water. Francis did not secure the water source but did check that the toilet had a blue covering agent in it. She also took the garbage can out of the room. Francis does not sit during the testing process.

Monahan was the first person she tested that day. She asked him to empty his pockets and he took out his wallet. He provided a urine sample that was not sufficient for testing. She did not have to hold the cup to the light to know that the sample was insufficient. Francis followed the shy bladder guidelines. For shy bladder guidelines the tester has to wait up to three hours for the employee to provide a sufficient urine sample. She told Monahan that he had to provide another sample, to drink water, and not to leave until he provided a second sample. She told him if he left it would be considered a refusal. She discarded the insufficient sample in accordance with the protocol. Francis next prepared the chain of custody form for the next person to be tested. She did not see Monahan drink any water after he was told that he had to provide a sufficient sample. As Francis was doing the procedure with the next person, she realized that Monahan had left. Monahan did not ask her if he could leave. Francis was the only collector present at that time.

When an employee leaves in the middle of shy bladder testing, it is considered a refusal to test. Monahan returned after 8:00 a.m. He was advised that since he left the site that it was considered a refusal and the test could not be completed. Monahan became upset when he could not provide another sample. He never stated that he had provided a sufficient urine sample. Francis called Alexander Mirabella, the city administrator, and informed him that Monahan had left the testing area before completing the testing. She faxed a report to Mirabella from Westfield, which was her next stop. On Monahan's report controlled substance and alcohol use testing, Francis did not check that Monahan did not provide sufficient urine. The specimen bottle was not released to Fed Ex as stated in the custody and control form. Francis filled out this form prior to the testing being completed.

Francis had previously tested Monahan more than ten times. He was always told that he had to provide 45 ML of urine for the test to be complete.

Alexander Mirabella

Mirabella is the municipal manager and appointing authority for Scotch Plains. Scotch Plains has a drug and alcohol testing policy for employees with commercial driving licenses. Valley Medical does the drug and alcohol testing.

On April 14, 2016, three employees were called for testing. Mirabella was informed that one of the employees, Monahan, left the testing area which is considered a refusal. He gathered information and then spoke to Monahan. Monahan stated that he was called for the test and he left the area to conduct other business. After the meeting Monahan emailed him to further explain his version of what happened. In the email Monahan stated that he gave a urine sample and was told it was insufficient. He drank five bottles of water. He then left the testing site in a golf cart to go to his jobsite. When he returned to the testing site, he was told that his leaving the test site was considered a refusal. Mirabella spoke to witnesses Frank Dinizzo, Nick Dinizzo, Franco Sabino, Richard Dare, and Ron Walkonic, who all saw Monahan leave the test site. They also knew that you could not leave the test site.

The employees are given an Employee Handbook, which contains the drug policies one of which is if an employee refuses a drug test they are subject to disciplinary action. The Handbook follows the DOT guidelines. The Handbook does not state where the drug testing site is located or what happens when an employee gives an insufficient urine sample.

April 14, 2016, was Monahan's first day back to work after a vacation. He was beginning new duties.

Richard Dare

Richard Dare (Dare) works for Scotch Plains doing maintenance and repair. Monahan was his supervisor. Monahan explained the drug testing policy to Dare and a group of other people. He told them that there was random testing, that they had to stay in the facility until the testing was done and the testing was done in the DPW

building. This conversation was not done in connection with Dare being a new hire. There were six people present during this conversation. Dare worked in the Recreation Department for Scotch Plains until 2015.

Christopher Monahan

Monahan has been employed by Scotch Plains for thirty-three years. He is the facility and golf course manager. He works for the Recreation Department which shares space with DPW. He went on vacation in early April 2016. Once he returned he would have increased job responsibilities. The drug testing was done in the front sixth of the recreation building. The recreation section is in the right rear section of the building. The drug testing table is in the left two-thirds of the building.

Monahan began getting drug tested approximately twenty years ago. Francis is the only person that he can remember who has drug tested him. In prior testing he had to wait to give a full urine sample. He waited near the building but not in the testing area. Previously he went to the recreation area while waiting to give a second sample, other employees left before the second test. Monahan later stated that he does not know if any of the people he saw were in the shy bladder protocol. Monahan had never previously given insufficient urine in a drug test. The people he saw walking around were waiting to give a urine sample.

Monahan arrived at work at 7:00 a.m. He learned that he was to be tested at 7:10 a.m. He went to the testing area and saw Francis and the kits. Two-thirds of the area is visible from the testing table. He did not see other employees that were not being tested that day using the rest room. There were people walking around at this time. Monahan waited five to ten minutes before providing a urine sample. He was not asked to take anything out of his pockets. Francis drew a line on the sample cup. He was told to fill the cup to the line and give the cup back to Francis. He would normally turn on the water and flush the toilet to facilitate using the bathroom. The urine sample that he gave was at the area where the temperature strip was. The sample was more than 45 ML.

Monahan gave Francis the cup with urine, she held it eye level and told him that the sample was not sufficient and he would have to provide another sample. He was not told that he could not leave the site or he had to stay in a specific area. He drank two bottles of water that he retrieved from a water cooler next to the testing table. Monahan went outside, spoke to some people then took a golf cart to the golf course. He went to the pro shop where his office is to conduct golf course business. He checked emails and receipts. He returned to the testing site seven or eight minutes later. He did not leave township property.

When Monahan returned to the testing site Francis told him that he was in violation. He asked could he give the sample at that time and was told that he could not. He had previously left the testing area prior to giving a urine sample and never told that he had violated the policy. He was not told that he had the right to get his own test done.

Monahan does not recall speaking to Dare about drug testing. The most he would have said is that there was random drug testing. On cross-examination he stated he never told any of the people that work for him that there would be random drug testing or the drug testing procedures. Monahan emailed Mirabella and stated that he had provided four ounces of urine.

He went home and put four ounces in a cup that was similar to the cup used in the testing. He estimated that was the amount of urine he provided to Francis. Four ounces is 120 ML. He believes that the urine sample that he provided was seventy-five ML. Monahan did not write down the sample size or take a photograph of it. He had previously received the Employee Handbook, which he reviewed approximately five years ago.

Monahan did not tell Francis that he had provided a sufficient amount of urine. He did not know in April 2016 what the dimensions of the testing site were. He did not ask about the dimensions of the test site.

FINDINGS OF FACT

In light of the contradictory testimony presented by respondent's witnesses and appellant, the resolution of the charges against Monahan requires that I make credibility determinations with regard to the critical **FACTS**.

The choice of accepting or rejecting the witness's testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 60 N.J. 546 (1974); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961).

A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). A fact finder "is free to weigh the evidence and to reject the testimony of a witness even though not contradicted when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521-22 (1950); see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to observe the demeanor of the witnesses, I **FIND** Francis, Mirabella, and Dare are credible. Francis's testimony regarding the procedure for the urine testing was clear. Her reasoning for putting a line on the cup above the forty-five-ML line was understandable. She admitted that she did not secure the water source but did check that the toilet had the blue covering agent. Mirabella was also credible his testimony regarding his conversation with Monahan and Monahan's email were uncontested. Dare has no reason to not be truthful regarding Monahan speaking to a group of people who he supervised regarding drug tests. I **FIND** Monahan to be less credible, his testimony was contradictory. He stated that he previously had gone to

the recreation area before being required to give a second urine sample. He later testified that he had never previously given an insufficient urine sample. He testified that he gave a four-ounce urine sample but four ounces is one hundred and twenty MLs. He testified that other workers left the test site before a second test but later testified that he did not know if the other workers were in the shy bladder protocol.

Having reviewed the testimony and evidence and credibility of the witnesses, I make the following additional **FINDINGS of FACTS**:

When Monahan reported for the urine test, he did not provide a urine sample that was at least forty-five ML. A urine sample must be at least forty-five ML. When someone does not provide a sufficient urine sample the tester disregards the insufficient sample. The tester then tells the employee to drink fluids. If the employee leaves the test site before the collection process is complete, the tester must discontinue the collection. This is considered a refusal to test. There is no requirement for the tester to inform the employee that failure to remain at the test site constitutes a refusal. Francis told Monahan that he had to give another urine sample, drink water and do not leave the area. He was in the shy bladder protocol. He was supposed to wait and provide a second sample with sufficient urine. Monahan drank some water and left the DPW building where the testing was taking place.

Monahan went to his office in the pro shop of the golf course and returned to the testing site at approximately 8:00 a.m. Francis informed him that his leaving the test site prior to giving the second urine sample is considered a refusal to take the urine test. He asked could give the urine sample now but Francis said that he could not.

Monahan has been taking drug and alcohol tests for Scotch Plains for twenty years. It strains credibility to believe that he did not know where the testing site was. When he was told that he was going to be tested on April 16, 2016, he went to the DPW garage where the collection table was located. Monahan had previously told Dare and approximately five other employees about the drug policy and that the drug testing was done in the DPW building and that they had to stay at the testing site until the testing was completed.

LEGAL ANALYSIS AND CONCLUSION

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the charges of violation of federal drug and alcohol use by and testing of employees who perform functions related to the operation of commercial vehicles and other sufficient cause are sustained.

The purpose of the Civil Service Act is to remove public employment from political control, partisanship, and personal favoritism, as well as to maintain stability and continuity. Connors v. Bayonne, 36 N.J. Super. 390 (App. Div.), certif. denied, 19 N.J. 362 (1955). The appointing authority has the burden of proof in major disciplinary actions. N.J.A.C. 4A:2-1.4. The standard is by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962). Major discipline includes removal or fine or suspension for more than five working days. N.J.A.C. 4A:2-2.2. Employees may be disciplined for insubordination, neglect of duty, conduct unbecoming a public employee, and other sufficient cause, among other things. N.J.A.C. 4A:2-2.3. An employee may be removed for egregious conduct without regard to progressive discipline. In re Carter, 191 N.J. 474 (2007). Otherwise, progressive discipline would apply. W. New York v. Bock, 38 N.J. 500 (1962).

Hearings at the OAL are de novo. Ensslin v. Twp. of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994), certif. denied, 142 N.J. 446 (1995).

49 C.F.R. § 40.65(a) provides:

As a collector, you must check the following when the employee gives the collection container to you:

(a) Sufficiency of specimen. You must check to ensure that the specimen contains at least 45 mL of urine.

(1) If it does not, you must follow "shy bladder" procedures (see § 40.193(b)).

(2) When you follow "shy bladder" procedures, you must discard the original specimen, unless another problem (i.e., temperature out of range, signs of tampering) also exists.

(3) You are never permitted to combine urine collected from separate voids to create a specimen.

(4) You must discard any excess urine.

49 C.F.R. § 40.193(a) and (b) provide:

(a) This section prescribes procedures for situations in which an employee does not provide a sufficient amount of urine to permit a drug test (i.e., 45 mL of urine).

(b) As the collector, you must do the following:

(1) Discard the insufficient specimen, except where the insufficient specimen was out of temperature range or showed evidence of adulteration or tampering (see § 40.65(b) and (c)).

(2) Urge the employee to drink up to 40 ounces of fluid, distributed reasonably through a period of up to three hours, or until the individual has provided a sufficient urine specimen, whichever occurs first. It is not a refusal to test if the employee declines to drink. Document on the Remarks line of the CCF (Step 2), and inform the employee of, the time at which the three-hour period begins and ends.

(3) If the employee refuses to make the attempt to provide a new urine specimen or leaves the collection site before the collection process is complete, you must discontinue the collection, note the fact on the "Remarks" line of the CCF (Step 2), and immediately notify the DER. This is a refusal to test.

(4) If the employee has not provided a sufficient specimen within three hours of the first unsuccessful attempt to provide the specimen, you must discontinue the collection, note the fact on the "Remarks" line of the CCF (Step 2), and immediately notify the DER.

(5) Send Copy 2 of the CCF to the MRO and Copy 4 to the DER. You must send or fax these copies to the MRO and DER within 24 hours or the next business day.

In this matter Monahan left the test area after he failed to provide a sufficient urine sample and was told to stay in the test area. The DOT regulations are clear that if an employee leaves the collection area during the shy bladder protocol prior to providing a sufficient urine sample that it is considered a refusal. Monahan left the collection site to go to his office, prior to giving a sufficient urine sample.

When determining the appropriate penalty to be imposed, the appointing authority must consider an employee's past record, including reasonably recent commendations and prior disciplinary actions. Bock, supra, 38 N.J. 500. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a); N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.4. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number and proximity of prior disciplinary infractions evaluated by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

In this case Monahan violated the federal drug testing policy by leaving the test area before providing a forty-five ML urine sample.

Under the circumstances, major discipline is appropriate; I **CONCLUDE** that the penalty of a ten-day suspension is appropriate.

ORDER

Based on the foregoing findings of fact and applicable law, it is hereby **ORDERED** that the determination of the Township of Scotch Plains, Department of Recreation that Christopher Monahan be suspended for ten days is **AFFIRMED**.

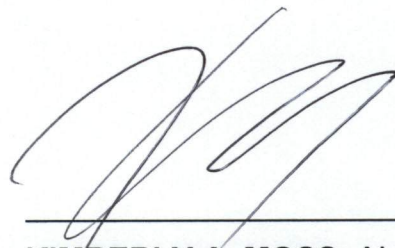
I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

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, P.O. 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.

2-7-17

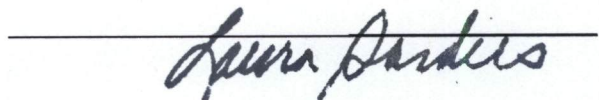
DATE



KIMBERLY A. MOSS, ALJ

Date Received at Agency:

FEB 13 2017



Date Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

WITNESSES

For Appellant:

Christopher Monahan

For Respondent:

Lexann Francis

Alexander Mirabella

Richard Dare

EXHIBITS

For Appellant:

None

For Respondent:

- R-1 Controlled Substance and alcohol use Testing Program Form dated April 14, 2016
- R-2 Urine Collection Kit
- R-3 Federal Drug Testing Custody and Control Form
- R-4 Preliminary Notice of Disciplinary Action dated April 18, 2016
- R-5 Email from Monahan to Mirabella dated April 14, 2016
- R-6 Not in Evidence
- R-7 Not in Evidence
- R-8 Township of Scotch Plains Employee Handbook
- R-9 Monahan signed receipt for Employee Handbook dated May 3, 2012
- R-10 Not in Evidence
- R-11 Not in Evidence
- R-12 Not in Evidence
- R-13 DOT Urine Specimen Collection Guidelines