A-4

STATE OF NEW JERSEY

In the Matter of Dominic Genovese,
Middlesex County

CSC Docket No. 2014-2000
OAL Docket No. CSV 02422-14

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCT 22 2014 (HS)

The appeal of Dominic Genovese, a Truck Driver with Middlesex County, of his removal, effective January 8, 2014, on charges, was heard by Administrative Law Judge Barry E. Moscowitz (ALJ), who rendered his initial decision on August 25, 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, 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 initial decision. However, the Commission did not adopt the ALJ's recommendation to modify the removal to a 90-day suspension. Rather, the Commission upheld the removal.

DISCUSSION

The appointing authority removed the appellant on charges of conduct unbecoming a public employee; misuse of public property, including motor vehicles; and other sufficient cause. Specifically, it asserted that on January 2, 2014, the appellant salted the parking lot of a privately owned car wash while working overtime. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In his initial decision, the ALJ set forth the testimony provided and found that the appointing authority's witness, Gary Vesce, General Supervisor Roads with Middlesex County, was credible. On January 2, 2014, Middlesex County was under watch for a snow storm, and it had just started to snow at 5:00 p.m. At 5:25 p.m., Vesce's supervisor instructed him to watch the car wash on Old Georges Road. At 5:40 p.m., Vesce arrived at the car wash, drove around it, and observed that it had an inner roadway and an outer roadway. At that time, the snow had just begun to stick, Vesce saw no tire marks on either the inner or outer roadway, and the driveway had not been salted or plowed. Vesce proceeded to park his truck at the gas station across the street and watch the car wash. At 6:25 p.m., Vesce observed a County truck enter the car wash and drive around the inner roadway. The truck was a single-axle truck with a salt spreader, and Vesce saw salt being spread in its lights. Vesce proceeded to drive to the car wash, where he drove around the inner roadway, observed the snow begin to melt under the salt, and heard the salt crunch under his tires. Vesce knew the appellant was the driver of the truck because he met up with the truck on Old Georges Road and spoke with the driver, who was the appellant. The appellant, at that time, mentioned that he was the truck driver assigned to Old Georges Road. The ALJ noted that the appellant did not testify to dispute Vesce's testimony.

The ALJ also set forth the appellant's recent disciplinary history. Specifically, the appellant received a six-day suspension for incompetency, inefficiency, or failure to perform duties and other sufficient cause, effective February 9, 2013; a three-day suspension for incompetency, inefficiency, or failure to perform duties and other sufficient cause, effective February 13, 2013; a 20-day suspension for incompetency, inefficiency or failure to perform duties, insubordination, conduct unbecoming a public employee, neglect of duty, and other sufficient cause, effective June 19, 2013; and a one-day suspension for conduct unbecoming a public employee and other sufficient cause, effective November 25, 2013.

Based on the foregoing, the ALJ concluded that the appointing authority had satisfied its burden of proof with regard to all of the charges since it was clear that the appellant salted a privately owned parking lot. However, the ALJ noted that there was no evidence that the appellant had a private deal with the owner of the car wash to salt the parking lot. The ALJ also noted that no authority exists to suggest that the misuse of public property, including motor vehicles is any more serious a cause for discipline than any other cause. Therefore, he stated that progressive discipline still guides the determination of the penalty. Based on the foregoing and the appellant's disciplinary history, the ALJ concluded that a more fitting penalty was a 90-day suspension.

In its exceptions, the appointing authority argues that the ALJ erred in reducing the penalty to a 90-day suspension. In this regard, the appointing

authority asserts that the appellant departed from his assigned route and spread valuable County roadway salt over a private parking lot, where he had no legitimate reason to be. The appellant's actions improperly depleted salt that otherwise would have been spread on public highways and took time away from the appellant's assignment to spread salt on County roadways, imperiling public safety. Although the appointing authority admits a lack of "hard evidence" pointing to a private deal, the appointing authority argues that such arrangements may be made secretly and that it "strains credulity" to believe that the appellant had no reason for his actions. The appointing authority maintains that the appellant's actions were egregious and undermined public trust in public employees. The appointing authority submits that based upon the totality of circumstances, including the appellant's recent disciplinary history, his removal was justified.

In his cross exceptions, the appellant stresses that there was no evidence proving the existence of a private deal between the appellant and the car wash owner. According to the appellant, his conduct consisted only of being seen turning around in a car wash lot with his salt-spreader operating. The appellant argues that the appointing authority did not offer any proof of a motive for his actions and did not allege misappropriation of salt. Rather, the appointing authority "merely" alleged that the appellant was observed salting a private lot on a particular day and time and accordingly charged him with misuse of public property, including motor vehicles. The appellant also claims there is no basis to find that his actions improperly depleted salt in a meaningful way or imperiled public safety since no evidence was presented regarding the "quantum or quality" of salt laid down, Vesce did not examine how much salt was dispensed, and Vesce did not indicate how long it took the appellant to drive around the outer loop of the car wash. The appellant further posits that there is no basis to find that the public roads would have been so snow-covered as to render them dangerous for the few moments he was seen driving around the lot since no testimony was offered regarding the amount of snow that had fallen, Vesce observed him at the initial onset of snowfall, and the appellant was not seen plowing the lot. The appellant adds that Vesce did not ask the appellant why he had been at the car wash. The appellant describes his disciplinary record as consisting only of a "few actions" taken in the prior year for accidents in his County truck. Based on the preceding, the appellant contends that the ALJ's initial decision should not be modified.

Based on its *de novo* review of the record, the Commission agrees with the ALJ's disposition of the charges. However, with regard to the penalty, the Commission does not agree with the ALJ's recommendation to modify the removal to a 90-day suspension. In determining the proper penalty, the Commission's review is also *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission 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 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. Moreover, 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 the instant matter, it must initially be noted that the appellant's actions were serious. In this regard, it is clear that the appellant improperly used County resources when he drove his County truck onto private property and spread County roadway salt on the lot. Moreover, the appellant offered no testimony. Although it is acknowledged that no evidence of a private deal between the appellant and the owner of the car wash was adduced, a consideration of the appellant's actions suggests either the existence of such a deal or else a complete lack of judgment on the appellant's part. In addition, it bears emphasizing that four disciplinary actions had already been taken against the appellant in the year prior to the date of the current infraction. These disciplinary actions included a six-day suspension and a 20-day suspension, both of which are major disciplinary actions. The appellant also received a three-day suspension and a one-day suspension. The appellant was sufficiently apprised of the need to correct deficiencies in his performance. Accordingly, based on the seriousness of the appellant's offense and his recent disciplinary history, which includes two major disciplinary actions, the Commission concludes that removal is the appropriate penalty.

ORDER

The Civil Service Commission finds that the appointing authority's action in removing the appellant was justified. Therefore, the Commission affirms that action and dismisses the appellant's appeal.

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 1ST DAY OF OCTOBER, 2014

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, NJ 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 02422-14
CSC DKT. NO. 2014-2000

IN THE MATTER OF DOMINIC GENOVESE, MIDDLESEX COUNTY, DEPARTMENT OF PUBLIC WORKS.

Justin Schwam, Esq., for petitioner (Weissman & Mintz, LLC, attorneys)

Benjamin D. Leibowitz, Esq., for respondent

Record Closed: July 29, 2014 Decided: August 25, 2014

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

On January 2, 2014, while working overtime in anticipation of a snow storm, Genovese, a truck driver with Middlesex County, salted the parking lot of a privately owned car wash. Should progressive discipline be bypassed and Genovese be terminated? No. Under interpretive caselaw, the punishment must be proportionate to the offense and progressive discipline may be bypassed only when the disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record.

PROCEDURAL HISTORY

On January 7, 2014, Middlesex County served Genovese, a truck driver with the county, a Preliminary Notice of Disciplinary Action, charging Genovese with conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); misuse of public property, including motor vehicles, in violation of N.J.A.C. 4A:2-2.3(a)(8); and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11). The notice specifies that on January 2, 2014, at 6:25 p.m., while working overtime, Genovese salted the parking lot of a privately owned car wash. As such, Middlesex County removed him from his position effective January 8, 2014.

On February 4, 2014, Middlesex County served Genovese with a Final Notice of Disciplinary Action, sustaining the charges.

On February 18, 2014, Genovese appealed the determination.

On February 27, 2014, the Civil Service Commission transmitted the case to the Office of Administrative Law under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On July 29, 2014, I held the hearing and closed the record.

FINDINGS OF FACT

Based on the testimony the parties provided, and my assessment of its credibility, together with the documents the parties submitted, and my assessment of their sufficiency, I **FIND** the following as **FACT**:

January 2, 2014

On August 19, 2002, Genovese began his employment with Middlesex County as a laborer. On April 18, 2005, he was promoted to truck driver. But on January 2, 2014, at 6:25 p.m., while working overtime in anticipation of snow storm, Genovese salted the parking lot of a privately owned car wash. Gary Vesce, the general road supervisor for Middlesex County, witnessed the incident.

Vesce testified that on January 2, 2014, Middlesex County was under watch for a snow storm, and at 5:00 p.m., it had just started to snow. Vesce further testified that at 5:25 p.m., his supervisor, Tom Vogel, instructed him to watch the car wash on Old Georges Road. Vesce testified that at 5:40 p.m., he arrived at the car wash and drove around it.

Vesce specified that the car wash had an inner roadway and an outer roadway, that the snow had just begun to stick, and that he saw no tire marks in either the inner or outer roadway. To be clear, Vesce stated that the driveway had neither been salted nor plowed. Vesce continued that he then parked his truck in the gas station across the street and watched the car wash.

Vesce further testified that at 6:25 p.m., he saw a county truck turn right onto Old Georges Road from Route 130 North, but instead of continuing east on Old Georges Road, it turned right into the entrance of the car wash and drove around the inner roadway. Vesce noted that the county truck was a single-axle truck with a salt spreader and that he could see salt being spread in its lights. Vesce then testified that the county truck then drove out of the car, but then it drove back into it, only to stop in the entrance way, back out, and then continue on Old Georges Road.

Vesce recounted that he then drove out of the gas station and into the car wash where he drove around the inner roadway and saw the snow begin to melt under the salt and hear the salt crunch under his tires.

Vesce explained that he knew the driver of the truck was Genovese because he met up with the truck on Old Georges Road after it had turned around and returned west and spoke to its driver who was Genovese and that Genovese had told him that he was the truck driver assigned to Old Georges Road.

In short, I have no reason to doubt the truthfulness of this testimony, especially since Genovese did not testify at the hearing to dispute it. Indeed, I draw the adverse inference that Genovese did exactly what Vesce observed. Therefore, I specifically **FIND** that Middlesex County has easily proven by a preponderance of the evidence all of the allegations contained in its specifications attached to its Final Notice of Disciplinary Action.

Recent Discipline

On February 9, 2013, Genovese was suspended for six days for incompetency, inefficiency, or failure to perform duties in violation of N.J.A.C. 4A:2-2.3(a)(1), and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12).

On February 13, 2013, Genovese was suspended for three days for incompetency, inefficiency, or failure to perform duties in violation of N.J.A.C. 4A:2-2.3(a)(1), and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12).

On June 19, 2013, Genovese was suspended for twenty days for incompetency, inefficiency, or failure to perform duties in violation of N.J.A.C. 4A:2-2.3(a)(1), insubordination in violation of N.J.A.C. 4A:2-2.3(a)(2), conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6), neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7), and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12).

On November 25, 2013, Genovese was suspended for one day for conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6), and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12).

On November 25, 2013, Genovese was also given an oral reprimand for other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12).

CONCLUSIONS OF LAW

I.

In appeals concerning major disciplinary action, the appointing authority bears the burden of proof. N.J.A.C. 4A:2-1.4(a). The burden of proof is by a preponderance of the evidence, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), and the hearing is de novo, Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980). On such appeals, the Civil Service Commission may increase or decrease the penalty, N.J.S.A. 11A:2-19, and the concept of progressive discipline guides that determination, In re Carter, 191 N.J. 474, 483-86 (2007). "[T]he question for the courts is whether the punishment is 'so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness,'" and progressive discipline may be bypassed only when the disciplinary infractions are "so serious that removal is appropriate notwithstanding a largely unblemished prior record." Id. at 484.

In this case, on January 2, 2014, at 6:25 p.m., while working overtime in anticipation of snow storm, Genovese salted the parking lot of a privately owned car wash. This much is clear. Therefore, I **CONCLUDE** that Middlesex County has proven by a preponderance of the evidence all of the violations contained in its charges attached to its Final Notice of Disciplinary Action. The only determination left to be made then is the discipline to be imposed.

II.

Middlesex County argues that the misuse of salt in violation of N.J.A.C. 4A:2-2.3(a)(8) merits the bypass of progressive discipline because Genovese had a private deal with the owner of the car wash to do so. But those are not the facts of this case. Indeed, no evidence exists that Genovese had such a deal. Moreover, no authority exists that violation of N.J.A.C. 4A:2-2.3(a)(8) is any more serious an offense than the

violation of any other subsection. Thus progressive discipline still guides the determination.

Genovese, however, had already been disciplined five times in the past year. In particular, Genovese had been suspended for three days, six days, and twenty days. He had also received an oral reprimand together with a one-day suspension. Given this recent discipline, Genovese is subject to a greater penalty. Therefore, I **CONCLUDE** that Genovese, who would otherwise merit a thirty-day suspension for his misconduct, now merits a ninety-day suspension.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that Genovese be suspended without pay for ninety days.

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.

August 25, 2014
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: August 25, 2014

Date Mailed to Parties:

dr

APPENDIX

Witnesses

For Appellant:

None

For Respondent:

Gary Vesce

Documents

Joint:

J-1 Final Notice of Disciplinary Action

For Appellant:

None

For Respondent:

R-1 Picture of car wash (aerial view)

R-2 Picture of car wash (street level)

R-3 Picture of truck with salt spreader

R-4 Disciplinary History