



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Fortunato Montella,
Borough of Stanhope

Request for a Stay

CSC Docket No. 2017-3408

ISSUED: APRIL 20, 2018 (EG)

The Borough of Stanhope (Stanhope), represented by Deborah J. Bracaglia, Esq., petitions the Civil Service Commission (Commission) for a stay of the attached final decision rendered on March 22, 2017, which ordered Stanhope to pay Fortunato Montella \$34,862.21 in gross back pay and \$2,825.82 to maintain his health benefits, pending the outcome of its appeal to the Superior Court, Appellate Division.

As background, Montella was removed effective February 25, 2015 on charges of conduct unbecoming a public employee and other sufficient cause. Montella appealed his removal to the Commission and the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case. Following a hearing and the Commission's *de novo* review, Montella's removal was modified to a 120-working day suspension. Further, the Commission ordered that Montella be immediately reinstated and awarded mitigated back pay, benefits and seniority after the imposition of the 120-working day suspension up to his date of reinstatement. Thereafter, Stanhope sought enforcement of the Commission's decision with regard to mitigated back pay, benefits and seniority. On appeal, Stanhope argued that its Police Officers worked the "Pitman Schedule," meaning that Montella would work (14) twelve-hour shifts every twenty-eight (28) days. As such, it claimed that a 120-working day suspension would last from September 10, 2014 through May 6, 2015. Additionally, Stanhope argued that Montella failed to mitigate his loss of pay. It asserted that Montella only provided a listing six positions that he applied for which covered only two weeks out of the 13 months he was unemployed. It presented a listing of over 30 openings during the period in

question that Montella could have applied for. In response, Montella contended that the 120-working day suspension should be determined based on eight hour days, as opposed to the 12-hour days. As such, Montella claimed that the period of suspension would have ended February 16, 2015. With regard to mitigation, Montella indicated that he received unemployment benefits, had sought employment with four employers, worked for his parent's business and worked in his private business. Further, Montella argued that he was entitled to Cobra payments, private insurance payments and out-of-pocket medical expenses. The Commission found that Montella had made a reasonable effort to secure employment. With regard to the back pay dates, the Commission found that regardless of the schedule Montella worked, his suspension could not exceed six months. Thus, as Montella's suspension started on September 10, 2014, the end date was March 9, 2015. Therefore, Montella was awarded back pay from March 10, 2015 through the date of his reinstatement, October 16, 2015, and that based on the information in the record, Montella was entitled to an award of back pay of \$34,862.21. Further, regarding the reimbursement of medical expenses, the Commission determined that Montella was entitled to \$2,825.82 for maintaining his health insurance. However, it found that Montella was not entitled to any costs incurred during the period of the 120 working day suspension nor was he entitled to out-of-pocket medical expenses. The Commission also found that Montella's request to be reimbursed for premiums paid to subscribe to and maintain his health coverage through his wife's health insurance was not authorized under *N.J.A.C. 4A:2-2.10(d)*.

In the instant matter, Stanhope requests a stay of the Commission's decision ordering it to pay Montella mitigated back pay and health insurance pending the outcome of its appeal to the Appellate Division. In support of its request for a stay, Stanhope argues that it is requesting to maintain the status quo pending its appeal. Additionally, it argues that its taxpaying citizens would suffer financial harm if it was forced to pay the back pay award if the Commission's decisions were rendered null and void if it was successful on appeal. Stanhope argues that the prospect of it recouping monies paid to Montella would be slim. Further, it contends that it has presented meritorious and non-frivolous issues to the Appellate Division and that it has a strong chance of succeeding on appeal. In this regard, Stanhope argues that Montella's actions and his disciplinary history were severe enough to warrant a penalty of removal. Finally, it claims that Montella would not be harmed by a stay.

In response, Montella, represented by Peter B. Paris, Esq., argues that Stanhope has not met the standard for a stay. He contends that Stanhope has little likelihood for success on the merits as both the ALJ and the Commission determined that removal was inappropriate. In this regard, he notes that the Appellate Division will defer to the Commission on the merits. In addition, Montella asserts that Stanhope cannot prove nor did it argue that the Commission's March 22, 2017 decision was arbitrary, capricious, unreasonable or unsupported by

the credible evidence in the record. Further, he argues that Stanhope cannot show immediate or irreparable harm, as harm is generally considered irreparable if it cannot be redressed by monetary damages. Montella states that Stanhope's sole basis for staying the Commission's decision is financial in nature. He contends that if the Appellate Division does overturn the prior decisions, Stanhope has adequate remedies at law to recoup any excess back pay paid. Moreover, Montella asserts that he would be harmed by stay as this would withhold funds that he is entitled to and needs to pay his debts. Finally, he argues that the public interest is not harmed by requiring Stanhope to comply with the Commission's decision.

CONCLUSION

N.J.A.C. 4A:2-1.2(c) provides the following factors for consideration in evaluating petitions for interim relief:

1. Clear likelihood of success on the merits by the petitioner;
2. Danger of immediate or irreparable harm;
3. Absence of substantial injury to other parties; and
4. The public interest.

Also, *N.J.A.C.* 4A:2-1.2(f) allows a party, after receiving a final administrative decision by the Commission and upon filing an appeal to the Appellate Division, to petition the Commission for a stay pending the decision of the Appellate Division. *See also, N.J. Court Rules* 2:9-7.

Initially, there does not appear to be a clear likelihood of success on the merits of the appeal before the Superior Court, Appellate Division. It is well settled that an appellate court will reverse the final decision of an administrative agency only if it is arbitrary, capricious or unreasonable or if it is not supported by substantial credible evidence in the record as a whole, or if it violates legislative policy expressed or fairly to be implied in the statutory scheme administered by the agency. *See Karins v. City of Atlantic City*, 152 *N.J.* 532, 540 (1998); *Henry v. Rahway State Prison*, 81 *N.J.* 571, 579-80 (1980); *Mayflower Securities v. Bureau of Securities*, 64 *N.J.* 85, 92-93 (1973); *Campbell v. Civil Service Department*, 39 *N.J.* 556, 562 (1963).

In the present matter, Stanhope argues that the Commission's decision in modifying Montella's removal to a 120-working day suspension was arbitrary and capricious since it erred in reversing the removal. Specifically, it claims that Montella's actions and his disciplinary history warranted a removal. However, the Commission does not agree that the foregoing establishes that there is clear likelihood that Stanhope will be successful in its appeal. In this regard, all of Stanhope's arguments were addressed in the Commission's October 7, 2015

decision. The Commission specifically addressed Montella's actions, and his disciplinary history in determining the proper penalty.

Furthermore, Stanhope has not shown that it is in danger of immediate or irreparable harm if this request is not granted. In this regard, Stanhope argues that it will be harmed if its petition is not granted as it will be required to pay Montella monies that it thinks it would not be able to recover if it prevailed in the Appellate Division. However, the Commission does not agree as there are available mechanisms for relief for it to recoup any excess back pay amount paid if Stanhope prevails in the Appellate Division. Moreover, Stanhope has failed to demonstrate how the public would be harmed in the instant matter. As previously stated, it has options to recoup any excess monies paid to Montella should it prevail in the Appellate Division. Accordingly, Stanhope has failed to demonstrate any basis for a stay of the Commission's decision.

The Commission is specifically given the power to assess compliance costs and fines against an appointing authority, including all administrative costs and charges, as well as fines of not more than \$10,000, for noncompliance or violation of Civil Service laws or rules or any order of the Commission. *N.J.S.A. 11A:10-3; N.J.A.C. 4A:10-2.1(a)2. See In the Matter of Fiscal Analyst (M1351H), Burlington, Docket No. A-4347-87T3 (App. Div. 1989).* Therefore, Stanhope is ordered to pay Montella \$34,862.21 in gross back pay and \$2,825.82 for maintaining his health insurance within 30 days of issuance of this decision. If Stanhope does not so, it shall be assessed fines of \$100 per day for each day of continued violation up to a maximum of \$10,000.

ORDER

Therefore, it is ordered that this request for a stay be denied. The Commission also orders that the Borough of Stanhope pay Fortunato Montella \$34,862.21 in gross back pay and \$2,825.82 for maintaining his health insurance within 30 days of issuance of this decision. If the Borough of Stanhope does not so, it shall be assessed fines of \$100 per day for each day of continued violation up to a maximum of \$10,000.

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 18TH DAY OF APRIL, 2018

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

Attachments

c: Deborah J. Bracaglia, Esq.
Peter B. Paris, Esq.
Fortunato Montella
Kelly Glenn
Records Center

B-40



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Fortunato Montella

CSC Docket No. 2016-2558

Request for Back Pay

ISSUED **MAR 24 2017** (EG)

The Borough of Stanhope (Borough), represented by Robert J. Merryman, Esq., seeks enforcement of the Civil Service Commission (Commission) decision rendered on June 26, 2013, granting Fortunato Montella, a Police Officer, mitigated back pay, benefits and seniority.

As background, Montella was removed effective February 25, 2015 on charges of conduct unbecoming a public employee and other sufficient cause. Montella appealed his removal to the Commission and the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case. Following a hearing and the Commission's *de novo* review, Montella's removal was modified to a 120 working day suspension. Further, the Commission ordered that Montella be immediately reinstated and awarded mitigated back pay, benefits and seniority after the imposition of the 120 working day suspension up to his date of reinstatement. The record reflects that the appellant was suspended without pay effective September 10, 2014 and reinstated to the payroll on October 17, 2015. However, the parties have been unable to agree on the amount of back pay due to the appellant, and the appointing authority has requested Commission review.

In the instant matter, the Borough indicates that Montella's base pay for 2015 was \$3,415.46 per pay period on a bi-monthly basis and he was entitled to a shift differential of \$170.77 per pay period. Further, his healthcare contribution was \$250.29 per pay period. The Borough argues that its Police Officers work the "Pitman Schedule," meaning that Montella would work (14) twelve-hour shifts

every twenty-eight (28) days. As such, it argues that a 120 working day suspension would last from September 10, 2014 through May 6, 2015. The Borough states that Montella's salary for the period from May 7, 2015 to October 17, 2015, would have been \$39,078.20.

In addition, the Borough argues that Montella failed to mitigate his loss of pay. It asserts that he only provided a listing six positions that he applied for in construction and security work from March 22, 2015 through April 3, 2015, which is only two weeks out of the 13 months he was unemployed. In support of its position, the Borough presents a listing of over 30 construction and security openings listed in the New Jersey Herald from March 6, 2015, through August 28, 2015 and argues that Montella could have earned \$13,261 during that time period. Additionally, it states that he received \$10,321.04 in unemployment benefits and earned \$2,372.54 from his business. Thus, it contends that Montella's back pay should be no more than \$13,123.62. With regard to medical expenses, the Borough argues that any medical expenses or payments for COBRA coverage before May 7, 2015 should not be recoverable.

In response, Montella, represented by Peter B. Paris, Esq., asserts that the 120 working day suspension should be determined based on eight hour days, as opposed to the 12-hour days. In this regard, he asserts that his 120 working day suspension should be calculated in eight hour days for a total of 960 work hours. Thus, when the 960 hours are applied to his 12-hour shift work days, it equals 80 working days. Therefore, Montella contends that the period of suspension would have ended February 16, 2015 entitling him to 1,464 hours of back pay. Based on the fact that the Borough indicated that his hourly rate was \$46.80, he claims that he is owed \$68,515.20 (1,464hours x \$46.80) in back pay.

Further, Montella argues that he spent \$18,611.67 in out-of-pocket health care costs during his separation from employment. He states that he paid \$4,934.37 for COBRA coverage for December 2014 and January 2015; \$3,600.15 for private insurance from February 2015 through April 2015; \$7,339.28 for health coverage through his wife's employer from May 2015 through November 2015, and \$486.67 (\$60.81 per month) for COBRA dental coverage from December 2014 through October 2015. Furthermore, Montella indicates that he paid \$278 for a medical bill on October 6, 2015 and another \$1,973.49 on October 8, 2015.

With regard to mitigation, Montella indicates that he received unemployment benefits in 2015 totaling \$16,796. These benefits were last paid for the week ending September 5, 2015. Montella argues that he sought employment and provides a list of employers he contacted from March 22, 2015 to April 5, 2015, which includes four separate employers. Further, he earned \$2,372.54 from his private business from March 2015 through October 2015 and \$2,772 working for his parent's business. As such, he states that his mitigation income totaled \$21,940.54. Therefore, Montella

claims that he is owed \$65,186.33 in back pay and benefits.

CONCLUSION

Pursuant to *N.J.A.C.* 4A:2-2.10(d), an award of back pay shall include unpaid salary, including regular wages, overlap shift time, increments and across-the-board adjustments. Additionally, *N.J.A.C.* 4A:2-2.10(d)1 states that back pay shall not include items such as overtime pay, holiday premium pay and retroactive clothing, uniform or equipment allowances for periods in which the employee is not working. *N.J.A.C.* 4A:2-2.10(d)3 provides that an award of back pay shall be reduced by the amount of money that was actually earned during the period of separation, including any unemployment insurance benefits received, subject to any applicable limitations set forth in (d)4. Further, *N.J.A.C.* 4A:2-2.10(d)4 states that where a removal or a suspension for more than 30 working days has been reversed or modified and the employee has been unemployed or underemployed for all or a part of the period of separation, and the employee has failed to make reasonable efforts to find suitable employment during the period of separation, the employee shall not be eligible for back pay for any period during which the employee failed to make such reasonable efforts. "Reasonable efforts" may include, but not be limited to, reviewing classified advertisements in newspapers or trade publications; reviewing Internet or on-line job listings or services; applying for suitable positions; attending job fairs; visiting employment agencies; networking with other people; and distributing resumes. The determination as to whether the employee has made reasonable efforts to find suitable employment shall be based upon the totality of the circumstances, including, but not limited to, the nature of the disciplinary action taken against the employee; the nature of the employee's public employment; the employee's skills, education, and experience; the job market; the existence of advertised, suitable employment opportunities; the manner in which the type of employment involved is commonly sought; and any other circumstances deemed relevant based upon the particular facts of the matter. The burden of proof shall be on the employer to establish that the employee has not made reasonable efforts to find suitable employment. See *N.J.A.C.* 4A:2-2.10(d)4v. Finally, *N.J.A.C.* 4A:2-2.10(d)7 states that earnings from other employment held at the time of the adverse action shall not be deducted unless the employee increased his or her hours at that employment during the period of separation.

Under the above standard, the Commission finds that Montella made a reasonable effort to secure employment. The petitioner provided documentation that he received the maximum allowable amount of unemployment in 2015. In this regard, there is a presumption that the receipt of unemployment benefits evidences that an employee sufficiently mitigated during the period of separation, since searching for employment is a condition to receiving such benefits. See, *In the Matter of Donald Hicks*, Docket No. A-3568-03T5 (App. Div. September 6, 2005). Further, he applied for several jobs, re-started his own business, and did some work for his

parents' business. While the Borough has provided a listing of over 30 possible positions and argues that he would have presumably earned between \$13,261.00 and \$23,076.00 had he diligently sought employment, it does not provide any evidence that he did not actually seek employment while receiving unemployment compensation after April 5, 2015. Further, it does not address the fact that he re-started his own business or the work performed for his parent's business. Therefore, the Borough has not sustained its burden of proof to demonstrate that Montella failed to make reasonable efforts to find suitable employment. See *N.J.A.C. 4A:2-2.10(d)4v*

With regard to the back pay dates, the Borough and Montella propose different dates as to when the 120 working day suspension ended and the period for which back pay would start. The Commission notes that *N.J.S.A. 11A:2-20* provides, in pertinent part, that an appointing authority may not impose a suspension or fine greater than six months. Therefore, regardless of the schedule Montella worked, his suspension cannot exceed six months.¹ Thus, as Montella's suspension started on September 10, 2014, the end date is March 9, 2015. As such, the period of back is from March 10, 2015 through October 16, 2015. Regarding the back pay amount, the record indicates that Montella would have received \$3,586.23 (\$3,415.46 base + \$170.77 shift differential) per pay period. Based on the 26 pay periods utilized by the Borough, he would have earned \$93,241.98 in 2015. In 2015 there were 261 working days.² Accordingly, Montella's daily rate of pay was \$357.25 (\$93,241.98 / 261). From March 10, 2015 through October 16, 2015 there are 159 working days. Therefore, the petitioner would have earned \$56,802.75 during the period after his suspension concluded and his return to the payroll, minus the mitigated amount of \$21,940.54 for a total of \$34,862.21. Based on the foregoing, the Commission finds that the petitioner is entitled to an award of back pay of \$34,862.21.

With regard to the reimbursement of medical expenses, *N.J.A.C. 4A:2-2.10(d)*, provides, in pertinent part, benefits shall include additional amounts expended by the employee to maintain his or her health insurance coverage during the period of improper suspension or removal. In the instant matter, Montella claims that he is entitled to all of his out-of-pocket medical expenses, COBRA and private medical insurance costs, and the cost of the medical insurance obtained through his wife's employment. The Commission does not agree. Montella is not entitled to any costs incurred during the period of the 120 working day suspension. However, he would be entitled to \$2,400.15 in private insurance premiums paid for

¹ In this regard, when the Commission imposes a working day suspension, it is presumed that those days will be calculated based on an ordinary five day a week work schedule, regardless of the actual schedule worked by the employee. Thus, a 120 working day suspension, which is in essence, equivalent to six months, is the maximum allowable suspension.

² Information provided in Department of the Treasury Circular No. 15-09-OMB.

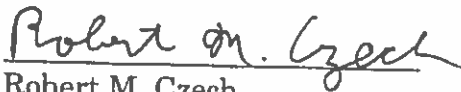
March 2015 and April 2015, and \$425.67 (\$304.05 [\$60.81 x 5 months] + \$121.62) for COBRA dental coverage for a total of \$2,825.82. However, *N.J.A.C. 4A:2-2.10(d)* only provides for reimbursement of payments made to *maintain* health insurance coverage. Montella's entitlement to reimbursement for maintaining health insurance coverage does not apply to any medical expenses incurred during the period of his separation from employment from the appointing authority. *See e.g., In the Matter of Shannon Stoneham-Gaetano and Maria Ciuffo* (MSB, decided April 24, 2001). Thus, Montella is not entitled to reimbursement for the monies he paid to doctors, hospitals, or for other services. With regard to Montella's request to be reimbursed for premiums paid to subscribe to and maintain his health coverage through his wife's health insurance, the Commission has previously determined that reimbursement of premiums paid to an employee's spouse's health insurance plan to maintain his or her health insurance is not authorized under *N.J.A.C. 4A:2-2.10(d)*. *See In the Matter of Frank Taylor* (CSC, decided April 17, 2013). Therefore, the petitioner would not be entitled to reimbursement for any monies that were paid to maintain his health insurance from his wife's coverage. Accordingly, Montella is entitled to \$2,825.82 for maintaining his health insurance.

ORDER

Therefore, it is ordered that the appointing authority pay Fortunato Montella \$34,862.21 in gross back pay and \$2,825.82 for maintaining his health insurance within 30 days of issuance of this decision.

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 22ND DAY OF MARCH, 2017



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Director
Division of Appeals and Regulatory Affairs
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Attachments

c: **Robert J. Merryman, Esq.**
Peter B. Paris, Esq.
Fortunato Montella
Records Center

appellant noticed that he had missed some calls from his sister. Upon calling her back, the appellant learned that she had been in a car accident near Muldoon's Bar in Roxbury, a town within close proximity to Stanhope. Thereafter, the appellant traveled to Roxbury and while doing so activated his vehicle's emergency lights on three occasions. As he was traveling, the appellant reported to Stanhope dispatch that he was taking his vehicle to the car wash. The car wash was located next to Muldoon's Bar. When he arrived at the accident scene, the appellant called dispatch for Morris County and advised that he was at the scene of his sister's accident. After the incident, the appellant filed his report which indicated:

I, Ofc F. Montella was near the Roxbury car wash when I was notified that there was a motor vehicle accident with the vehicles parked at Muldoon's Bar. Both parties were out of their vehicles and stated that they were okay. I called Roxbury Police via cell phone and waited on the scene until Roxbury Patrol arrived. Upon their arrival I cleared. No further action taken.

The ALJ found that based on the preponderance of the credible evidence and testimony, the appellant did not try or intend to deceive anyone in his or any other police department with his report. The ALJ indicated that prior to writing the report, the appellant had indicated to his Police Chief and the Netcong Police Chief that he had been at the scene of a minor accident in Roxbury involving his sister. Therefore, the ALJ found that the appellant did not falsify his report. Additionally, the ALJ found that the appellant made the decision to stop at the accident only after he saw that Roxbury Police had not yet arrived at the scene. Further, the ALJ found that the appellant's use of emergency lights on his patrol car on three occasions was contrary to departmental policy and proper police protocol. Based on the foregoing, the ALJ recommended that the charges be dismissed except with respect to the appellant's minor violations of departmental policies regarding use of his vehicle's emergency lights. Accordingly, the ALJ recommended modifying the removal to a 60 working day suspension. The ALJ also indicated that the appellant was entitled to 80% of reasonable counsel fees.

In his exceptions, the appellant contends that the 60 working day suspension is excessive and inconsistent with the principles of progressive discipline. The appellant contends that his disciplinary record consists of three suspensions over the course of 12 years, which does not make him a discipline problem or chronic offender.

In its exceptions, the appointing authority argues that the ALJ's findings are contradicted by the evidence in this matter. It contends that the ALJ ignored testimony that the appellant admittedly lied on three occasions in his communications with dispatch when he stated that he was stepping out at the car

wash, that he was clear at the car wash and that his sister's accident occurred right next to where he was at the car wash. Further, the appointing authority asserts that the ALJ completely ignored the appellant's history of dishonesty as indicated in his disciplinary record. In this regard, it states that the appellant was suspended for seven days for falsely indicating he was sick while he was actually on vacation and for four days for providing false information to other officers with respect to a domestic violence incident he witnessed. Finally, it contends that there was no basis for the ALJ to award counsel fees.

In his reply to the appointing authority's exceptions, the appellant argues that if the transcripts of the administrative hearing are reviewed, it would clearly show that he was confused by which call the appointing authority was referencing during the cross examination. He adds that this confusion does not alter the facts as stated multiple times nor does it alter the ALJ's findings.

Upon its *de novo* review of the record, the Commission does not agree with the ALJ's determination regarding the charges or with the ALJ's recommendation to modify the removal to a 60 working day suspension and award counsel fees. Rather, the Commission imposes a 120 working day suspension. Regarding the charges, the Commission finds that the appellant did falsify the report in question. The appellant's own testimony clearly contradicted the information the appellant indicated in his report. Further, the ALJ's findings of fact indicate the same. Specifically, the appellant indicated in his report that he was near the Roxbury car wash when he was notified that there was a motor vehicle accident with the vehicles parked at Muldoon's Bar. The evidence in the record shows that this statement was not accurate. The testimony and evidence presented clearly indicate that the appellant knew of the accident when he was still in Stanhope, well prior to his arrival at the Roxbury car wash. Falsification of a record by a Civil Service employee is a very serious offense. Employees of the State and local government have access to information and documents which must be properly maintained and kept as accurate as possible. When a public employee falsifies a record, he or she erodes the trust that the general public places on the government to maintain accurate records. See *In the Matter of Frank Gilfone* (MSB, decided September 7, 2005). Moreover, the importance of providing full, accurate and detailed reports in a public safety setting cannot be overstated. See e.g., *In the Matters of Kenneth Bolton, Robert Knoblock and Michael Lubrano, Mercer County*, Docket No. A1457-10 (App. Div. February 4, 2013) affirming (CSC, decided September 15, 2010); *In the Matter of Quadir Lewis* (CSC, decided February 8, 2012) and *In the Matter of Ronald Jamison* (CSC, decided December 19, 2012) (Although appellant may not have intentionally falsified his report, he inappropriately documented the incident which warranted a suspension, but not removal).

In determining the proper penalty, the Commission's review is *de novo*, and the Commission, in addition to its consideration of the seriousness of the underlying

incident, utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). Further, 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 principle 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). Further, even when a law enforcement officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense may nevertheless warrant the penalty of removal where it is likely to undermine the public trust. See *Henry v. Rahway State Prison*, *supra*, 81 N.J. at 579-80. In this regard, the Commission emphasizes that a Police Officer is a law enforcement officer who, by the very nature of his job duties, is held to a higher standard of conduct than other public employees. See *Moorestown v. Armstrong*, 89 N.J. Super. 560 (App. Div. 1965), *cert. denied*, 47 N.J. 80 (1966). See also, *In re Phillips*, 117 N.J. 567 (1990). In the instant matter, the appellant's disciplinary record evidences two major disciplinary actions that involved dishonesty in the false reporting of sick time and falsely reporting an incident to other law enforcement officers. The record also reveals minor disciplinary actions including a four day suspension and four reprimands. Moreover, the Commission finds the appellant's falsification of the report to be a serious matter. The appellant, as a Police Officer, is required to submit accurate reports. His failure to do so serves to undermine the public trust in this highly visible law enforcement position. Further, the appellant's inappropriate use of the safety lights in his patrol vehicle was an easily observable act by the public. However, given the actual incident in question, which involved a family member, the Commission does not find removal to be appropriate under these circumstances. Accordingly, the Commission imposes a 120 working day suspension, which will serve as an indication that any further infractions committed by the appellant will potentially subject him to removal from employment.

Accordingly, the appellant is entitled to back pay, benefits and seniority after the imposition of the 120 working day suspension up to his date of reinstatement. With regard to counsel fees, the ALJ improperly awarded such fees in this matter. Since the appellant has not prevailed on the primary issues on appeal he is not entitled to an award of counsel fees. See N.J.A.C. 4A:2-2.12. 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, while the penalty was modified, charges

were upheld and major discipline imposed. Consequently, as the appellant has failed to meet the standard set forth in *N.J.A.C. 4A:2-2.12*, counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 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*, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Civil Service Commission finds that the appointing authority's action in removing the appellant was not justified. Therefore, the Commission modifies the removal to a 120 working day suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority for the period after the imposition of the 120 working day suspension through 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*.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 7TH DAY OF OCTOBER, 2015



Robert M. Czech

Chairperson

Civil Service Commission

**Inquiries
and
Correspondence**

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Attachment