



the appellant did not dispute the test result, but she argued that her removal was unjust. The appointing authority moved for summary decision, asserting that no material facts were in dispute and a decision could be rendered without further hearing. The appellant also agreed that there were no material facts in dispute. Upon a review of the parties' submissions, the ALJ found that on June 6, 2016, the appointing authority received an anonymous tip that the appellant had been engaged in the illegal use of marijuana. An investigation commenced, and on August 30, 2016, the appellant submitted a urine sample, which tested positive for marijuana. Subsequent to the drug test, the appellant voluntarily entered into a drug rehabilitation facility. Considering the positive drug test and the appellant's admission of using an illegal substance, the ALJ granted the appointing authority's motion for summary decision and upheld the charges against the appellant. Regarding the penalty, the ALJ indicated that the appellant is employed in a public safety department and is in charge of receiving emergency communications from the public. As such, the ALJ determined that the appellant's position "directly and explicitly involve[s] public safety." Thus, the ALJ found that the appellant's misconduct causes risk of harm to persons or property. Accordingly, the ALJ concluded that progressive discipline principles need not be followed in this instance, and removal of the appellant was warranted. The ALJ noted that the appointing authority was under no obligation to consider the appellant's subsequent rehabilitation efforts.

In her exceptions, the appellant argues that the ALJ failed to analyze whether the appointing authority had a sufficient basis to subject her to a "reasonable suspicion" drug test. She contends that the appointing authority "acted off" an anonymous tip and did not visit her home during the investigation. Further, the appellant indicates that the appointing authority was suspicious of her weight, but she attributes her thin frame to a documented medical treatment that she underwent. Moreover, the appellant maintains that the ALJ incorrectly concluded that the appointing authority was not obligated to apply progressive discipline principles. She states that "[j]umping immediately to termination should be reserved for only the most severe misconduct." In addition, the appellant takes exception with the ALJ's disregard of her rehabilitation efforts when determining the appropriate penalty. She maintains that treatment and rehabilitation are mitigating factors and the Commission has afforded employees who seek such drug rehabilitation treatment a "second chance." The appellant indicates that the ALJ could have recommended that she undergo a drug test as a condition of her return to work.

In its reply, the appointing authority maintains that it has a "legal and contractual right" to remove the appellant. It indicates that despite the appellant's arguments regarding a "reasonable suspicion" drug test, the parties agreed that the arguments did not raise factual issues. In other words, the appellant did not dispute any of the underlying facts. Nonetheless, in response to these arguments,

the appointing authority sets forth that its Drug Screening Policy lists objective factors in making a determination as to what constitutes "reasonable suspicion" to test an employee for drugs. For instance, the appellant was under investigation, had "exorbitant absenteeism," and "bizarre behavior patterns." With regard to the latter, the appointing authority indicates that the appellant had "lied about reasons for being booked off" and had been absent from work with no reason. Additionally, the Police Lieutenant who conducted the appellant's investigation observed the appellant in an interview of an unrelated investigation and she "had an extremely thin frame and her mannerisms suggested potential drug use." Thus, the appointing authority maintains that there was a reasonable basis to subject the appellant to a drug test. Furthermore, it contends that, as determined by the ALJ, it had no obligation to consider the appellant's alleged rehabilitation. Therefore, the appointing authority submits that her removal was warranted for the safety and well-being of its citizens.

Upon its *de novo* review of the record, the Commission agrees with the ALJ's assessment of the charges but does not adopt the ALJ's recommendation to uphold the removal. Rather, the Commission modifies the removal to a 45 working day suspension. Initially, it is clear from the record that the matter was ripe for summary decision. It was undisputed that the appellant tested positive for marijuana and admitted to having used an illegal substance. In reviewing these facts, the ALJ properly determined that the charges against the appellant were sustained. Moreover, regardless of the ALJ's lack of analysis on the propriety of subjecting the appellant to a drug test, as noted, the appellant admits to illegal drug use. She voluntarily admitted herself to a drug rehabilitation facility. Thus, there is no question that the charges against her have been sustained.

However, in determining the proper penalty, in addition to its consideration of the seriousness of the underlying incident, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). 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 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. Upon an independent review of the record and in consideration of the appellant's prior record of service, the Commission concludes that removal is too harsh a penalty. The Commission is guided by the principles of progressive discipline in this case. The appellant's disciplinary history does not evidence any discipline related to drug use in her approximately eight years of

employment prior to her removal.<sup>1</sup> Further, while the Commission is mindful of the seriousness of the appellant's conduct, the Commission notes that for non-law enforcement employees, who are not held to the stricter standard of conduct expected of law enforcement officers, a "second chance" is generally provided by appointing authorities for drug-related infractions. See e.g., *In the Matter of Brian Huntley* (CSC, decided February 12, 2014) (Removal modified to a six-month suspension and the appellant, a Heavy Equipment Operator, was ordered to undergo a return to work drug and alcohol test prior to reinstatement and random monthly testing for a period of 24 months upon reinstatement); *In the Matter of John Daraklis* (MSB, decided June 11, 2008) and *In the Matter of John Simpson* (MSB, decided March 26, 2008) (Removals modified to four-month suspensions and the appellants, a Laborer Heavy and Truck Driver, respectively, were ordered to undergo a return to work drug test prior to reinstatement, referral to the Township's Employee Assistance Program, and monthly random drug testing for a period of one year upon reinstatement); *In the Matter of Glenn Steiger* (MSB, decided July 11, 2007) (Removal modified to a four-month suspension and required testing before reinstatement and random drug testing thereafter, where Truck Driver failed random alcohol test); *In the Matter of Richard Wilkins, Jr.* (MSB, decided September 21, 2005) (Removal modified to a six-month suspension and required referral to Township's Employee Assistance Program and random testing after reinstatement, where Police Aide tested positive for marijuana and PCP). While the appellant is employed as a Police Communications Clerk in the City of Newark's Department of Public Safety, she is not in a law enforcement position. Further, the appellant sought treatment and voluntarily entered into a drug rehabilitation facility. Such efforts are certainly considerations to afford her a "second chance."

Accordingly, contrary to the arguments of the appointing authority, the Commission does not find the appellant's conduct so egregious as to warrant removal without following the tenets of progressive discipline. Therefore, the Commission determines that the appropriate penalty is a 45 working day suspension. This significant major discipline should serve as a warning to the appellant that any future infraction may result in her removal. The Commission further notes that its decision reducing the penalty in this case is not meant to minimize the seriousness of the appellant's infraction. In addition to the 45 working day suspension, the Commission orders that the appellant undergo a pre-reinstatement drug test to be administered by the appointing authority. Should the appellant pass this drug test, the appellant is to be immediately reinstated to her position. If the appellant fails this drug test, the Commission orders that the appointing authority issue a new Final Notice of Disciplinary Action (FNDA) removing the appellant with a current date of removal. Upon receipt of the FNDA, the appellant may appeal that matter to the Commission in accordance with

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<sup>1</sup> Agency records indicate that the appellant was appointed as a Police Communications Clerk effective June 17, 2008.

*N.J.A.C.* 4A:2-2.8. Upon timely submission of any such appeal, the appellant would be entitled to a hearing regarding the current drug test only. In either case, pursuant to *N.J.A.C.* 4A:2-2.10, the appellant would be entitled to mitigated back pay, benefits, and seniority from the end of the 45 working day suspension until the time she is either reinstated or removed.

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

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the decision of the Superior Court of New Jersey, Appellate Division, *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*, should the appellant pass the pre-reinstatement drug test ordered herein, the appointing authority shall immediately reinstate the appellant to her permanent position.

### ORDER

The Civil Service Commission finds that the appointing authority's action in imposing a removal was not justified. Therefore, the Commission modifies the removal to a 45 working day suspension. The Commission also orders, prior to reinstatement, that the appellant undergo a drug test to be administered by the appointing authority. The outcome of that examination shall determine whether the appellant is entitled to be reinstated or removed, as outlined previously. In either case, the appellant is entitled to back pay, benefits and seniority for the period after the imposition of the 45 working day suspension through the date of her actual reinstatement or removal. 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 and an affidavit of mitigation 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, if applicable, be delayed pending the 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 the appellant's reinstatement or removal. 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). 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 4<sup>TH</sup> DAY OF APRIL, 2018



Deirdre L. Webster Cobb  
Acting Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Christopher S. Myers  
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**

**SUMMARY DECISION**

OAL DKT. NO. CSV 01510-17

AGENCY DKT. NO. 2017-2286

**TONYA HOWARD,**

Petitioner,

v.

**CITY OF NEWARK, DEPARTMENT  
OF PUBLIC SAFETY,**

Respondent.

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**John Branigan IV, Esq.,** (Oxford Cohen, attorneys) for petitioner

**France Casseus,** Assistant Corporation Counsel, for respondent

Record Closed: December 11, 2017

Decided: January 17, 2018

BEFORE **JUDE-ANTHONY TISCORNIA, ALJ:**

**STATEMENT OF THE CASE**

Tonya Howard (petitioner) appeals removal from her position as a communications clerk for the City of Newark, Division of Public Safety, because she tested positive for marijuana, a Controlled Dangerous Substance (CDS). Petitioner does not dispute the test results or her past use of CDS but asserts that removal is unjust and unwarranted under the circumstances.

**ISSUE**

May respondent City of Newark remove petitioner based on her testing positive for CDS?

**PROCEDURAL HISTORY**

On January 9, 2017, petitioner was served with a Final Notice of Disciplinary Action (FNDA), removal effective September 22, 2016. (R-1.) Petitioner was charged with violating the following Department Rules and Regulations, in addition to the New Jersey Administrative Code:

1. Obedience to Orders – Civilian  
(Newark Police Dept. Rules and Regulations, Ch. 5:4-1)
2. Drug Screening Policy  
(Newark Police Dept. Rules and Regulations, General Order 89-2)
3. Intoxication or Illegal Use of Drugs  
(Newark Police Dept. Rules and Regulations, Ch. 18:9.6)
4. Drug and Alcohol Use/Testing  
(N.J.A.C. 4A:2-2.3(a)(10))

Petitioner filed the instant appeal at the Office of Administrative Law on February 1, 2017 (N.J.S.A. 40A:14-202d).

A hearing was scheduled for October 25, 2017, at which time it was determined by counsel that there were no material facts in dispute and a motion was made on the record by respondent for summary decision. Respondent filed a supporting brief with attachments which were received on November 20, 2017. Opposition to the motion was filed and received on December 11, 2017, at which time the record was closed.



The parties had not requested oral argument and I determine that the written submissions are sufficient to dispose of the matter.

### **FINDINGS OF FACT**

The following facts are undisputed and I therefore **FIND** them to be the **FACTS** of the case.

Tonya Howard had been employed as a police communications clerk by respondent City of Newark, Department of Public Safety. Her job duties included receiving and responding to emergency 911 calls from the general public.

On June 6, 2016, respondent received an anonymous tip alleging that petitioner had been engaged in the illegal use of CDS marijuana. An internal investigation ensued as a result of the tip and on August 30, 2016, petitioner submitted a urine sample which ultimately tested positive for CDS marijuana.

As a result of the positive drug test, petitioner was issued a Preliminary Notice of Disciplinary Action on December 1, 2016, and a Final Notice of Disciplinary Action on December 27, 2016, with termination effective September 22, 2016. (See R-1.)

Subsequent to the positive drug test, petitioner entered a drug rehabilitation facility of her own volition.

### **LEGAL ANALYSIS AND CONCLUSION**

#### **1. Summary Decision Standard**

A "motion for summary decision shall be served with briefs and with or without supporting affidavits." N.J.A.C. 1:1-12.5(b). A summary decision may be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Ibid. A court should grant

summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29 (1995).

Here, both parties agree that there is no material fact in dispute. Petitioner merely argues that 1) the tenants of progressive discipline would preclude removal of petitioner and 2) respondent should consider other mitigating circumstances, such as her voluntary rehabilitation, in making a final determination.

**2. The law does not require strict application of progressive discipline.**

Petitioner argues that since she has never been disciplined for illicit drug use in the past, her removal is precluded by the principle of progressive discipline, which allows for an employee's past disciplinary record to be used as "guidance in determining the appropriate penalty for the current specific offense. See W. New York v. Bock, 38 N.J. 500 (1962).

The concept of progressive discipline is often used as a guiding principle when determining the degree of severity and overall fairness of an agency's disciplinary action against its own employee. However, a state agency is not bound by progressive discipline, especially in instances regarding a risk to public safety: "progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property." In re Hermann, 192 N.J. 19 (2007)

In the case at bar the petitioner tested positive for CDS marijuana and admitted to using the illegal narcotic. I **FIND** an employee's use of illegal narcotics constitutes severe misconduct. Petitioner is employed by the public safety department for the City of Newark and she is charged with receiving emergency communications from the general public. I **FIND** that the petitioner's position does directly and explicitly involve public safety and I therefore **FIND** that petitioner's misconduct causes risk of harm to persons or property. Under the standard set forth in Hermann as cited above I **FIND**

respondent rightfully bypassed progressive discipline in this instance and I **CONCLUDE** petitioner's removal was warranted under Hermann.

**3. Respondent is not obliged to consider petitioner's subsequent rehabilitation.**

Petitioner voluntarily entered into a drug rehabilitation facility subsequent to her positive drug test. Petitioner argues that her openness to rehabilitation coupled with her assertion that marijuana is not "the most serious of narcotics" should afford her the "opportunity to rehabilitate and return to work." (See Pet'r's Response Br. at p. 5.) While her pursuit of rehabilitation is commendable, petitioner fails to demonstrate how this attempt at self-amelioration precludes respondent from removing petitioner due to her admitted drug use while employed as a communications clerk for the department of public safety.

### **ORDER**

Based upon the foregoing, it is **ORDERED** that respondent's motion for summary decision is **GRANTED** as there are no issues of material fact in dispute and the moving party is entitled to prevail as a matter of law.

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.

1/17/18  
DATE

*Jude Anthony Tiscornia*  
JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency:

1/17/18

JAN 18 2018

Date Mailed to Parties:

*Debra Sanders*  
DIRECTOR AND  
CHIEF ADMINISTRATIVE LAW JUDGE

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