



**STATE OF NEW JERSEY**

In the Matter of Michael J. Flynn  
Monmouth County, Department of  
Transportation

**FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION**

CSC DKT. NO. 2016-893  
OAL DKT. NO. CSV 13685-15

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**ISSUED: JUNE 26, 2019      BW/NFA**

The appeal of Michael J. Flynn, Motor Vehicle Operator Elderly and Handicapped Persons, Monmouth County, Department of Transportation, removal effective July 9, 2015, on charges, was heard by Administrative Law Judge Patricia M. Kerins, who rendered her initial decision on May 20, 2019. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was 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 June 26, 2019, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision as well as her recommendation to modify the removal to a 120 working day suspension with return to duty testing. However, the Commission does not agree with the ALJ's determination to award back pay.

**DISCUSSION**

Since the Commission substantially agrees with the ALJ's Findings of Facts and Conclusions, no extended discussion is necessary. However, the Commission will briefly address the exceptions filed by the appointing authority and address the ALJ's award of back pay.

In its exceptions, the appointing authority presents several prior Commission decisions where it argues the Commission upheld the removal of non-law enforcement employees for failed drug tests. It contends that those cases are similar to the current matter, and, therefore, the appellant's removal should be

upheld. It also argues, alternatively, that if the appellant is to be reinstated, the ALJ's order of a return to duty drug test is insufficient. In reply, the appellant argues that the ALJ's determination was proper. Further, he presents alternate Commission cases where the Commission modified the removals of non-law enforcement employees for failed drug tests.

The Commission is not persuaded by the cases cited by the appointing authority. 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. Additionally, all the cases cited by the appointing authority have significant differences as compared to the current matter. Rather, the Commission finds this matter more in line with such matters as *In the Matter of John Simpson* (MSB, decided March 26, 2008) (Removal modified to a four-month suspension of a non-public safety employee); *In the Matter of John Daraklis* (MSB, decided June 11, 2008); *In the Matter of Glenn Steiger* (MSB, decided July 11, 2007) (Removal modified to four-month suspension and required testing before reinstatement where Truck Driver failed random alcohol test); and *In the Matter of Richard Wilkins, Jr.* (MSB, decided September 21, 2005) (Removal modified to six-month suspension and required referral to Township's Employee Assistance Program and random testing after reinstatement for Police Aide who tested positive for marijuana and PCP). Most closely related is *In the Matter of Brian Huntley* (CSC, decided February 12, 2014). In that matter, the Commission modified the removal of a Heavy Equipment Operator who tested positive for cocaine to a six-month suspension. The Commission also rejected back pay in that matter. Finally, the Commission rejects the appointing authority's contention that the return to duty drug test is insufficient. Clearly, if the appellant passes that screening, there is no reason he should not be reinstated. Further, if ultimately reinstated, he will be required to undergo random drug testing pursuant to United States Department of Transportation regulations and is always potentially subject to non-random drug testing should the appointing authority believe he is impaired on the job.

Since the removal has been modified, the appellant would normally be entitled to back pay, benefits and seniority following his suspension until the date of his reinstatement. However, and as per *Huntley, supra*, the Commission does not award the appellant back pay from the date following his suspension. In this regard, as it is unknown if the appellant would have tested positive from the period after the 120 working day suspension until such time he undergoes the return to work drug test, it cannot be determined if the appellant would have been able to work during that timeframe. Accordingly, he is not entitled to back pay for that period of time. See *N.J.A.C. 4A:2-2.10(d)9*; See also, *In the Matter of Christine Locke* (MSB, decided April 25, 2007).

*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 the disciplinary appeal is the

merits of the charges. 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 this matter, while the penalty was modified, charges were sustained and major discipline was imposed. Therefore, the appellant has prevailed on all or substantially all of the primary issues of the appeal. Consequently, as appellant has failed to meet the standard set forth at N.J.A.C. 4A:2-2.12, counsel fees must be denied.

### ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. Accordingly, the Commission modifies the removal to a 120 working day suspension with a return to duty drug test. The Commission further orders that the appellant shall not be granted back pay, benefits and seniority for the period following the conclusion of the 120 working day suspension.

Counsel fees are denied pursuant to N.J.A.C. 4A:2-2.12.

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 26TH DAY OF JUNE, 2019



Deirdre L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Christopher S. Myers  
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 13685-15  
AGENCY DKT. 2016-893

**IN THE MATTER OF MICHAEL J. FLYNN,  
MONMOUTH COUNTY, DEPARTMENT OF  
TRANSPORTATION.**

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**Barry D. Isanuk, Esq., for appellant, Michael J. Flynn**

**Steven W. Kleinman, Esq., for respondent, Monmouth County Department of  
Transportation**

Record Closed: August 21, 2017

Decided: May 20, 2019

**BEFORE PATRICIA M. KERINS, ALJ:**

**STATEMENT OF THE CASE**

Appellant Michael J. Flynn (Flynn) appeals the decision of respondent Monmouth County Department of Transportation (Monmouth) removing him from his position as a Motor Vehicle Operator based on the results of random drug screening.

## **PROCEDURAL HISTORY**

On July 30, 2015, Monmouth issued a Final Notice of Disciplinary Action (FNDA) removing Flynn from his position as a Motor Vehicle Operator Elderly/Handicapped. On August 7, 2015, Flynn appealed that decision and on September 3, 2015, the matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case. A number of prehearing conferences were held, and after discovery and motion practice testimony was taken on January 20, 2017, and February 28, 2017. The record closed on August 21, 2017, after the submission of post hearing briefs by the parties. Extensions of time were granted for the filing of the initial decision.

## **FACTUAL DISCUSSION**

### **Undisputed Facts**

Many of the material facts in this matter are not in dispute. Appellant Flynn was employed by Monmouth's Division of Transportation as a motor vehicle operator for its Special Citizens Area Transportation (SCAT), a program providing transport for the elderly and the physically and mentally disabled. Employed by Monmouth since 1997, he was sent for a random drug test on June 30, 2015. All SCAT vehicle operators are tested for drugs and alcohol pursuant to United States Department of Transportation (USDOT) regulations. A SCAT employee performs the function of drug and alcohol coordinator and at the time of Flynn's testing, the coordinator was Kevin Kelly. The testing was done by Prevention Specialists, Inc. (PSI) under contract with Monmouth. On June 25, 2015, Flynn was selected for random testing, which took place on June 30, 2015.

Flynn reported for work that day and was advised he was to be tested. The drug and alcohol testing took place at PSI's mobile testing unit. A PSI representative administered the test and Flynn was advised that he had successfully completed the alcohol testing. His drug test was sent to University Services, a medical review officer (MRO) group which processes drug test results. On July 8, 2015, Kelly was notified that Flynn had tested positive for cocaine metabolites. Kelly then notified Kathleen Lodato (Lodato), Flynn's supervisor and the Director of SCAT. Upon receiving the results, she

called Flynn into her office and suspended him effective July 9, 2015. Disciplinary charges were filed against him, and after a departmental hearing he was removed from his position. At the hearing petitioner did not contest the results of the testing and did not contest the fact that his position was safety sensitive.

### Testimony

At the hearing in this matter respondent presented the testimony of Kelly, Lodato, Gunner Sjolander of PSI and Dr. Randy Barnett of University Services. Appellant testified on his own behalf and presented the testimony of Michael O'Connor, a fellow driver and union shop steward and Kevin Tauro, a representative of the CWA union local.

Respondent first presented the testimony of Kelly. He reviewed the procedures in place for SCAT's random drug testing and reviewed Flynn's testing on June 30, 2015. As Flynn was driving that day, once he was tested he returned to his duties. Kelly also reviewed and identified various forms, handbooks and policies in place by Monmouth regarding drug and alcohol testing. Once he received the test results on July 8, 2015, he notified Lodato and was present at her meeting that day with Flynn. He testified that at the meeting she told Flynn he was terminated. Kelly also stated that at some point Flynn was given a referral to the Employee Assistance Program (EAP) but was unsure when that occurred. Gunner Sjolander, a twenty-year employee of PSI then testified regarding the collection and processing of random drug tests at SCAT.

Respondent next presented the testimony of Kathleen Lodato, the Director of SCAT. She described its operations and the vulnerable nature of its clients, along with the absolute necessity that they be transported safely. When notified of Flynn's positive test result she said she had him return from the road and after consultation with the County's Human Resources office, immediately suspended him. She admitted that she told him he was terminated at that meeting on July 8, 2015, and that she had used the wrong term. Lodato explained that she was upset over his test results and concerned over any danger to his clients while he was driving. When questioned regarding his overall job performance, she did not cite any problems with his driving. She did admit

that she thought he was unhappy with some of her managerial decisions and exhibited an attitude close to insubordination on one occasion.

Under cross-examination she appeared unsure of which policies regarding substance abuse and testing were in place at that time, as well as the contents of those policies. Lodato was questioned regarding the penalty imposed on Flynn and asserted that removal was a decision reached not just by herself but by her superior as well. She also stated that New Jersey Transit, whose training she had received, had zero tolerance for positive drug results and removal was in line with their policy. Yet under cross-examination she asserted that SCAT's drug and alcohol policy followed that of the county, with neither policy specifically mandating dismissal or zero tolerance for a positive drug result.

The final witness for respondent during its case in chief was Dr. Randy Barnett, a medical review officer for University Services. He reviewed the standards for USDOT testing and opined that the standard procedures were followed in Flynn's sample. He stated that upon the positive results, Flynn could have requested the testing of a split sample and did not. Under cross-examination he testified that cocaine metabolites can stay in the system for three to five days after use. He further testified that a positive test result for cocaine does not mean the individual was impaired at the time of the testing.

Appellant Flynn then testified in his own behalf. He described his eighteen years on the job at SCAT and said he had not been disciplined and was not aware of any client complaints regarding his performance. He said he was aware of Monmouth's substance abuse policy (R-11), dated October 2000, but said he was never given an opportunity for return to duty testing after his positive test result. Nor was he advised of the Employee Assistance Plan. He also reviewed R-14, the SCAT procedures handbook dated October 2007, and noted it had the same language as R-11, the county policy. He also cited R-18, Monmouth's employee handbook dated September 2015, which provided for return to duty testing for holders of Commercial Drivers Licenses (CDLs).

He was questioned further about Monmouth and SCAT policies, including P-6, Monmouth's policy on progressive discipline, USDOT guidance documents on return to

work after a positive test, R-19 and P-7, and P-9, the SCAT drug and alcohol policy dated October 2009. The SCAT policy does provide for the possibility of return to work for an employee after a positive drug test. Similar language is present in the July 27, 2012 version of the policy (P-10).

Flynn admitted that he used cocaine the weekend before the testing and had used it on occasion years ago. After his removal he sought substance abuse treatment, including for alcohol use.<sup>1</sup> He said his personal life was "out of control" and he was now in a better place with his marriage and other aspects of his life. He admitted he had not asked for help prior to his positive test result but did seek it afterwards.

Appellant's final witnesses were Michael O'Connor, a SCAT driver and union shop steward and Kevin Tauro, a CWA union representative. O'Connor testified regarding the disciplinary actions previously taken in substance abuse matters and he identified the updated SCAT policy of January 2017, which set forth a "zero tolerance" policy (P-16 and 17). Tauro stated that over the past twenty-five years rehabilitation programs had been available to CDL drivers employed by Monmouth, recalling that in the past SCAT drivers and other Monmouth CDL holders had received a second chance in conformance with policies toward rehabilitation.

Flynn was credible in his testimony and admitted to occasional off duty cocaine use over the years. I **FIND** that the cocaine metabolites found in his system in the June 30, 2015, random drug test were a result of his off-duty usage the Saturday night prior to the test. I further **FIND** that he voluntarily entered a substance abuse rehabilitation program and successfully completed it after his July 2015 suspension. I further **FIND** that there is no evidence in the record that he was impaired in his driving on June 30, 2015, or on any other date during his performance of his duties as a motor vehicle operator for respondent. I further **FIND** that Flynn has no formal disciplinary infractions in his record

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<sup>1</sup> Although respondent references alcohol issues in its post hearing brief, the disciplinary charges only cite the positive test results for cocaine and there is nothing in the record to show he was ever impaired by alcohol at work or used alcohol at work.



aside from a written letter of censure regarding the failure to produce a doctor's note for an absence.

### LEGAL ANALYSIS AND CONCLUSION

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

In this matter Flynn has been charged with various violations regarding positive results for cocaine metabolites in his random drug test of June 30, 2015. As set forth in the FNDA, he was charged with violations of Monmouth County policies, as well as N.J.A.C. 4A:2-2.3(a) as follows:

3. Inability to perform duties;

6. Conduct unbecoming a public employee:

10. Violation of Federal Regulations concerning drug and alcohol use by and testing of employees who perform functions and related to operation of commercial motor vehicles, State and local policies issued hereunder;

12. Other sufficient cause.

There is no question in this matter that Flynn used cocaine off duty and tested positive several days later as its metabolites remained in his system. As such I **CONCLUDE** that respondent has proven by a preponderance of the evidence that Flynn

violated the above provisions of N.J.A.C. 4A:2-2.3(a).<sup>2</sup> His job was safety sensitive and subject to USDOT regulations regarding drug and alcohol testing, as well as Monmouth County and SCAT policies on drug and alcohol testing and use.

The appropriate penalty for such a violation must therefore be determined. While Monmouth and SCAT policies in place at the time of the infraction clearly recognize that disciplinary action, up to and including dismissal, may be warranted, those same policies provide for an employee's referral to the EAP and a substance abuse professional with a return to duty regimen of testing. It is important to note that neither Monmouth's policy nor the SCAT policies in place at the time of Flynn's infraction mandated a zero-tolerance sanction of removal. Each policy evinces a balancing of rehabilitation and return to duty testing safeguards with the need for disciplinary action in appropriate cases.

According, I further **CONCLUDE** that the penalty of removal imposed by respondent was not appropriate. When dealing with the question of penalty in a de novo review of a disciplinary action against a civil service employee, the Civil Service Commission is required to reevaluate the proofs and penalty on appeal, based on the charges presented. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Brock, 38 N.J. 500 (1962). Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Bock, 38 N.J. at 522-24. Major discipline may include removal, disciplinary demotion, a suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

Further, 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. That policy is referenced by Monmouth itself in its policies placed in the record in this matter. 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

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<sup>2</sup> Respondent also charged petitioner with numerous and duplicative violations of Monmouth County policies as set forth in the FDNA. As those charges are duplicative of those under the above cited regulation, they are not determinative of the finding or penalty herein.

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. Termination of employment is the penalty of last resort reserved for the most severe infractions or habitual negative conduct unresponsive to intervention.

In this matter it is clear that Flynn has committed a serious offense. His job was safety sensitive and required that he comply with drug and alcohol policies in place by Monmouth and SCAT. Accordingly, a substantial penalty is dictated. Yet as dictated by New Jersey case law and Monmouth's own policy, progressive discipline requires an evaluation not only of the offense but the disciplinary history of appellant. Here Flynn's use of cocaine was off duty and there was no evidence that he was impaired while performing his duties days later. He voluntarily entered rehabilitation and successfully completed his program. Importantly, his record shows no formal discipline over his eighteen-year employment with Monmouth and no other violations of the alcohol and drug policies in place by respondent. It is also important to note that Monmouth's own policies envisioned the possibility of rehabilitation and a return to duty in cases where violations of its drug and alcohol testing policies have occurred.

Based on the above I **CONCLUDE** that Flynn should be suspended for a period of one-hundred-twenty days and reinstated to his position of Motor Vehicle Operator with return to duty testing as set forth in Monmouth and SCAT policies.

### **ORDER**

It is **ORDERED** that the penalty of removal by the appointment authority is hereby **MODIFIED** and that Michael J. Flynn be reinstated to his position of Motor Vehicle Operator following a suspension of one-hundred-twenty days and be awarded back pay in accordance with the guidelines set forth in N.J.A.C. 4A:2-2.10.

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

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

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

5/20/19  
DATE

Patricia M. Kerins  
PATRICIA M. KERINS, ALJ

Date Received at Agency:

May 20, 2019 (emailed)

Date Mailed to Parties:

May 20, 2019 (emailed)

/mel

**WITNESSES**

**For Petitioner:**

Michael Flynn  
Michael O'Connor  
Kevin Tauro

**For Respondent:**

Kevin Kelly  
Gunner Sjolander  
Kathleen Lodato  
Robert Barnett

**EXHIBITS**

**For Petitioner:**

- P-1 Master List for Testing Notification, dated July 6, 2006
- P-2 E-Mail re: Testing Notification, dated August 21, 2013
- P-3 Testing Notification for M. Flynn, dated June 25, 2014
- P-4 E-Mail from PSI indicating MRO Results to be Sent
- P-5 E-Mail Regarding MRO Report
- P-6 Progressive Discipline Policy 716
- P-7 Employee Drug and Alcohol Test Handbook
- P-8 Alcohol and Drug Testing Handout
- P-9 Safety Sensitive Employees in Transit and SCAT Policy – 2009
- P-10 Safety Sensitive Employees in Transit and SCAT Policy – 2012
- P-11 Dr. Murray Reports – August 31, 2015 and July 20, 2016 and High Focus Report – August 28, 2015
- P-12 Alert Ambulance Drug Test

P-16 Safety Sensitive Employee Policy Revised January 25, 2017

P-17 Copy of Signature of Policy 34 for Monmouth County Division of  
Transportation Michael O'Connor

**For Respondent:**

R-1 Preliminary Notice of Disciplinary Action

R-2 Final Notice of Disciplinary Action

R-3 Notice of Immediate Suspension

R-4 Signed Acknowledgement of Random Testing

R-5 Chain of Custody Form, Drug Test

R-6 Chain of Custody Form, Drug Test

R-7 University Service Interview Form

R-8 University Services Test Results

R-9 Controlled Substance Test Results DOT DRUG PANEL

R-10 Job Description

R-11 Substance Abuse Policy

R-12 Confirmation of Receipt of County Substance Abuse Policy

R-13 Signed Receipt of Monmouth County Drug and Alcohol Regulations

R-14 SCAT Operations Procedures Book

R-15 SCAT Safety-Sensitive Drug/Alcohol Training Sign-In Sheet, dated April 25,  
2013

R-16 Monmouth County Vehicle Policy

R-17 Acknowledge of Receipt of policy and procedure book, dated December 12,  
2012

R-18 Monmouth County Policy Book

R-19 U.S. Department of Transportation, Office of the Secretary, What  
Employers Need to Know about DOT Drug and Alcohol Testing

R-20 New Jersey CDL License Manual

R-21 Response to Requests for Admissions to Michael Flynn

R-22 High Focus Centers Discharges Summary – Michael Flynn

R-23 Barnett Curriculum Vitae

R-24 Performance Notice – Michael Flynn

R-25 NHTSA Drug and Performance Fact Sheet - Cocaine

R-26 LabCorp Test Report. Chain of Custody with Handwritten Changes

R-27 LabCorp Electronic Test Results

