STATE OF NEW JERSEY

In the Matter of Christopher Stoner
Ancora Psychiatric Hospital,
Department of Health

CSC DKT. NO. 2014-92
OAL DKT. NO. CSV 09806-13

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: APRIL 17, 2020 BW

The appeal of Christopher Stoner, Human Services Assistant, Ancora Psychiatric Hospital, Department of Health, removal effective March 14, 2013, on charges, was heard by Administrative Law Judge Elia A. Pelios, who rendered his initial decision on February 28, 2020. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of April 15, 2020, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

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

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 15TH DAY OF APRIL, 2020

Deirdré L. Webster Cobb
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
OAL DKT. NO. CSV 09806-13
AGENCY DKT. NO. 2014-92

IN THE MATTER OF CHRISTOPHER STONER,
DEPARTMENT OF HUMAN SERVICES,
ANCORA PSYCHIATRIC HOSPITAL.

William A. Nash, Esq., for appellant (Nash Law Firm LLC, attorneys)

Elizabeth A. Davies and **Arupa Barua,** Deputy Attorneys General, for respondent (Gurbir S. Grewal, Acting Attorney General of New Jersey, attorney)

Record Closed: November 26, 2018 Decided: February 28, 2020

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE

This initial decision fully concludes an appeal in the above-captioned matter. The case has already been decided on the merits through an order granting partial summary decision, pursuant to N.J.A.C. 1:1-12.5.[1] Appellant was found to have violated civil service

[1] Order Granting Partial Summary Decision, Hon. Elia Pelios, ALJ, dated October 11, 2018

as well as agency rules and policy, as charged. What remains today for disposition is the question of penalty.

Respondent, Department of Human Services, Ancora Psychiatric Hospital, contends that removal is the only appropriate penalty, given the serious nature of his violations. It is also mandated by departmental policy.

Appellant, Christopher Stoner replies that termination of employment is too severe and fails to weigh the circumstances surrounding his offenses.

After plenary hearing and subsequent briefing on the penalty issue only, this final question of penalty is answered in today's Initial Decision: appellant's termination from employment by the Department of Human Services, Ancora Psychiatric Hospital, is **AFFIRMED**.

PROCEDURAL HISTORY

Appellant brought an appeal to the Agency head, the Civil Service Commission, following his removal pursuant to an FNDA dated June 24, 2013. The Commission then transmitted the case for hearing by an administrative law judge, pursuant to N.J.S.A. 52:14B-1 through -15 and N.J.S.A. 52:14F-1 through-15. The matter was transmitted to the Office of Administrative Law (OAL) on July 16, 2013.

On August 19, 2015, the appointing authority filed a motion for summary decision. Responsive papers were filed on September 27, 2015. Oral Argument was held on February 3, 2016. After an order granting partial summary decision was promulgated on October 11, 2018, the case was scheduled for plenary hearing on the sole issue of penalty. That hearing convened and concluded on October 17, 2018. Briefs followed, the last of which was filed in the OAL on November 26, 2018. On that date the record closed.

FACTUAL DISCUSSION

Appellant, Christopher Stoner (Stoner) had originally been terminated as a Human Services Assistant in the Department of Human Services, Ancora Psychiatric Hospital (appointing authority, DHS) for violations of N.J.A.C. 4A:2-2.3(a)6 (conduct unbecoming a public employee) and N.J.A.C. 4A:2-2.3(a)12 (other sufficient cause), specifically, violation of DHS Administrative Order 4:08 E1.1 which proscribes the violation of a rule, regulation, policy, procedure order or administrative decision.

It will be helpful to an assessment of penalty to reiterate the pertinent language addressing those substantive issues already decided in the partial summary decision order of October 11, 2018:

> As to the underlying conduct and the charges brought against appellant, the essential facts involving this motion are not in dispute. There is no dispute that on separate occasions appellant tested positive for marijuana and for cocaine. Appellant relies on the argument that there is no evidence that appellant was impaired in his work performance or that he was under the influence while at work. This reliance is misplaced. The plain language of the policy clearly ascribes consideration of impairment to situations where legal drug use is implicated. With regard to illegal drugs, which marijuana and cocaine were at the time of infraction and still are, the policy clearly prohibits possession or use of such drugs and does not limit its proscription of being under the influence to situations where the influence adversely affects the employee's work, as it does for legal drugs.
>
> Therefore, pursuant to N.J.A.C. 1:12.5(b) and Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1995), I **FIND** that there are no genuine issues of material fact as to liability and that this matter is ripe for summary decision with regard to the charges. I further **FIND** that appellant tested positive for illegal drugs on two occasions, and did so in violation of DHS Administrative

> Order 4:23. I further **FIND** that illegal drug use by government employees charged with the care and well-being of a significantly vulnerable population could well serve to destroy public respect for the delivery of government services in providing that care. Accordingly, I **CONCLUDE** that the charges of violations of N.J.A.C. 4A:2-2.3(a)6 (conduct unbecoming a public employee) and N.J.A.C. 4A:2-2.3(a)12 (other sufficient cause) must be **SUSTAINED,** and summary decision is hereby **GRANTED** in part to DHS.
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> [Order Granting Partial Summary Decision, decided October 11, 2018, at p. 3-4]

Mindful of the earlier foregoing disposition of the charges in the summary decision motion, the parties bring their respective factual and legal arguments following a later, separate full hearing on the issue of penalty, which included the testimony of witnesses.

Appellant offered the testimony of supportive witnesses, as well as his own legal argument and testimony to persuade that he should be returned to employment as a Human Services Assistant:

> Testifying on his own behalf, appellant did not deny that the charges upheld were leveled and removal followed after he had on two separate occasions been found to have the presence of illicit drugs in his system: marijuana and, later, cocaine. This was confirmed by outside agency testing. Now, appellant, relying on the full record, asks that the penalty to be imposed amount to less than permanent removal from his position. He contends this penalty would be too severe. His after-work drug usage did not impair his during-work performance. Further, nothing in rule or policy in the record has been shown by the appointing authority to compel dismissal.

Appellant disclosed that he is married with four children, two of whom are minors that he still supports. He stressed that his family completely relies on him. He described himself as a family man and churchgoer. He had worked as an HSA starting in 2001.

Appellant recounted the details of the 2011 motorcycle accident in which he had broken his wrist and fractured his elbow. He stated that his doctors had at first prescribed Percocet but ended the prescription a month before he returned to work at Ancora, despite his continuing pain. This caused him to rely on drugs, appellant explained. He tested positive for marijuana about eight months after the accident.

Appellant added that he remained on leave because he could not return to work before full recovery. Tasks in the unit from which he was absent demanded full physical ability. He portrayed his duties as being day-to-day interaction with patients, including taking them to lunch, escorting them to the treatment mall and assuring their safety. Appellant stated that he had performed well enough for an award as employee-of-the-month in his building. He had no history of crime or administrative discipline, had never been absent without explanation or been found asleep on the job, and had not received unemployment benefits. Further, he had never been impaired to a point where his condition interfered with patient care, and he had no knowledge of not being in compliance with the Employee Advisory Service program, of which he had been part.

Appellant recalled that he had been tested for drugs on many occasions, failing on the fourth. His first test had been some two weeks prior to his return to duty, when he was not involved with patients. He said he had never experienced drug-testing on return from leave, but did experience it while in training, once he was back. His return to drugs was prompted by the post-accident pain. After cocaine was detected, he enrolled in an insurance-supported drug rehabilitation program to improve himself. Now, he was abstaining. He could be tested without problems.

To buttress his claim of never having had drugs interfere with his work, appellant introduced the testimony of **David Price**, a patient care manager (PCM). Mr. Price, a registered nurse with a Bachelor of Science degree in nursing has worked at Ancora for

eighteen years, the last seven of which have been as supervisor of nursing. For the prior eleven years he served as a charge nurse. He supervises a unit, though not appellant's.

Mr. Price conceded that he did not directly supervise appellant. However, the two worked in the same building. Mr. Price was especially impressed with appellant's responses to "codes." These are incidents of a serious nature, of necessity pulling in employees from all other units to help with patients. These incidents occur possibly two to four times a day, giving him opportunities to observe appellant. Mr. Price thought that appellant handled these situations well. From his vantage point, Mr. Price would grade appellant's performance as meriting a B+/A- mark.

Mr. Price had never observed behavior by appellant suggesting he was under the influence of drugs. Neither did he observe appellant being involved in any wrongdoing. Mr. Price saw appellant as a compassionate person. If it were his choice, Mr. Price said, he would rehire him.

Sandra Dean, RN and BSN, a nursing supervisor and staff manager also stood behind appellant's return. She had knowledge of appellant from joint work with him at the Treatment Mall over a period of six months to a year some six years ago. He was one of ten staff and forty patients under her charge. Patients come to the Mall for treatment of mental and physical issues. She believed she had sufficient time with him to form a professional opinion, pointing out that she was a critical and demanding supervisor. Nevertheless, in her view, appellant was in the upper echelon of employees. She found him responsible and committed to safety, which is one of her primary focuses, adding that the unit of which he was part won an award for their handling of Mall patients. He was one of the three main employees involved. She also knew that other supervisors thought highly of appellant. Ms. Dean had never seen appellant make a mistake and would have written him up if she had.

As to drug use, Ms. Dean noted that she had been trained to identify persons under the influence of drugs. Under all her observations, she had never found that appellant exhibited that symptomology.

Teresa Brown, called to testify on behalf of appellant, was a Human Services Technician (HST) who had worked with appellant in the same unit over a five-year period. She found his presence reassuring, since the unit was populated with somewhat unruly male patients. Even in this setting, Ms. Brown noted, she observed that he was a nurturing influence. She acknowledged that she and appellant were often both engaged with separate one-on-one patients. Nevertheless, she believed she had sufficient experience to form a judgment about his work performance. She would rate it at ninety-five percent, only because she believed no one was one-hundred percent perfect. Ms. Brown was certain that at no time had she ever detected appellant showing signs of being under the influence of drugs.

To buttress its insistence on removal, respondent introduced the testimony of **Rose McGuigan.** She stated that she has worked in the Human Resources Department of Ancora for three years and was recently promoted to Personnel Assistant 2. Currently, her various duties in that title include managing drug testing. Ms. McGuigan described the testing process: Those employees who have been on a leave of absence for more than six months are drug-tested before going back to work. Also, there is department-wide, random drug testing program performed by a third-party company on a quarterly basis. Ms. McGuigan noted that Ancora seeks to provide a safe environment, because the type of patients which it treats involve geriatrics, those with neurological disorders, and other various vulnerable adult populations. McGuigan emphasized the risks to such groups.

Ms. McGuigan stated that the program is conducted pursuant to departmental policy under Administrative Order 4:23 (AO 4:23)[2]. After a urine sample shows positive, the offending employee is referred to the Employee Advisory Service (EAS) to undergo a

[2] Department of Human Services Administrative Order 4:23, Exhs. J-1.

rehabilitative program. Once this course of treatment concludes, another urine sample is taken, and the employee is returned to work if the sample is clean. Thereafter, they submit to random sampling for a year. Every employee knows the procedure.

In the instance of appellant, Ms. McGuigan testified, after returning from a six-month leave, he was tested positive for marijuana. This compelled his participation in the EAS program. While in it, he was non-compliant at some point, but returned to participation thereafter. It was in a later random test that appellant was found to be positive for cocaine. This triggered his termination. Ms. McGuigan observed that, should appellant be reinstated, he would again be subject to the random testing which already had found him drug positive.

Ms. McGuigan agreed drug offenses are normally recognized through observations of staff and that there is no record of this in appellant's file. Neither is there mention of the motorcycle accident. She acknowledged that AO 4:23 does not specifically require removal as a penalty, though a departmental bulletin not of record does. In any event, she testified that, in practice, once an employee tests positive after completion of an EAS program, dismissal is automatic. Drug use implicates safety, Ms. McGuigan repeated, a primary concern at Ancora.

LEGAL ANALYSIS AND CONCLUSIONS

In opposition to the appointing authority, appellant argues that DHS has not shown that appellant was impaired in the performance of his job or that he was under the influence of drugs while on the premises of his employer. Consequently, he contends, removal is too severe a penalty for the conduct alleged. While he agrees that statute, rule and case confirm that consideration of penalty is de novo, that evaluation of proofs should be accompanied by an evaluation of whether progressive discipline or modification of penalty is appropriate. Here, both are. Appellant adds that policies under AO 4:08[3] are meant to be corrective, not punitive. The

[3] Exh. J-1

rule citations which are charged as being transgressed carry a range extending from counseling through to suspension. Nothing in the appointing authority's written policies demand removal. Its reference to a bulletin which purportedly does make removal automatic has not been supported in the record by that document.

Appellant insists his case is ripe for mitigation, not removal. His aberrant behavior arose from pain incurred by a near-fatal accident. He was unaware of any DHS policy on drugs, and he had voluntarily entered a drug program to achieve personal betterment. His employment record is unblemished. Credible witnesses testified to his compassion and competence at work. For these reasons, appellant urges the view that a penalty of removal would be harsh and excessive, considering all the circumstances.

DHS counters that appellant's twice-discovered drug usage violates, as a matter of law, the appointing authority departmental policy prohibiting such behavior. This alone demands removal. His behavior also violates the civil service rules adverted to in the Final Notice of Disciplinary Action (FNDA).[4] DHS had already urged in its motion for summary decision that the sensitive nature of his employment was sufficient reason to prevent his return to Ancora Psychiatric Hospital, which administers an automatic removal policy after proofs of drug use. In support of this point, DHS specifies the misconduct warranting appellant's removal from employment.: First, he tested positive for marijuana on January 30, 2012. Next, appellant was placed out of work and referred to the Employee Advisory Services (EAS). Appellant returned to work on April 4, 2012 and signed an acknowledgement that he would be subject to three unannounced follow-up drug tests. On March 8, 2013, appellant tested positive for cocaine. These repeated offenses fall with the mandatory policy of removal, after the rules cited as having been violated. Appellant, as are all employees, was well aware of the policy. Our courts have ruled that progressive discipline cannot successfully be invoked when the offenses are of an egregious nature, regardless of past history. The undisputed facts suggest that appellant's drug use was more recreational than palliative. For these reasons, the appointing authority insists, appellant should be permanently terminated.

[4] Final Notice of Disciplinary Action dated June 24, 2013 (Exh. R-1).

The law of the case which must prevail when deciding the sole issue of penalty is that found in the Order Granting Partial Summary Decision (the order).[5] This controlling law will be followed and applied to the facts found and conclusions drawn below. For convenience, the pertinent paragraphs and citations in the order are quoted below, at length:

> In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:-2.21; N.J.A.C. 4A:2-1.4(a). The authority must show by a preponderance of the competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal, based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).
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> . . .
>
> The Civil Service Commission's review of penalty is de novo. N.J.S.A. 11A:2-19 and N.J.A.C. 4A:2-2.9(d) specifically grant the Commission authority to increase or decrease the penalty imposed by the appointing authority.
>
> General principles of progressive discipline apply. Town of W. New York v. Bock, 38 N.J. 500, 523 (1962). Typically, the Board considers numerous factors, including the nature of the offense, the concept of progressive discipline and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463.

[5] Order Granting Partial Summary Decision, Hon. Elia Pelios, ALJ, dated October 11, 2018

"Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Bock, 38 N.J. 500, 523 (1962), that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990).

Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

Some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007), citing Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197–98 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense); see also, In re Herrmann, 192 N.J. 19, 33 (2007) (DYFS worker who snapped lighter in front of five-year-old):

> . . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> Thus, 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. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

The Commission has authority to increase the penalty beyond that established by the appointing authority's Final Notice of Disciplinary Action, but not to removal from suspension. N.J.S.A. 11A:2-19. The Civil Service Commission may increase or decrease the penalty imposed by the appointing authority, but removal shall not be substituted for a lesser penalty. See, Sabia

v. City of Elizabeth, 132 N.J. Super. 6, 15–16 (App. Div. 1974), certif. denied, Elizabeth v. Sabia, 67 N.J. 97 (1975).

In the present matter, DHS argues that the conduct by appellant is egregious enough that removal is warranted. Appellant argues that the penalty is too severe.

The New Jersey Department of Human Affairs has promulgated a "Disciplinary Action Program," Administrative Order 4:08, which applies to employees under its jurisdiction, including those working for the Ancora Psychiatric Hospital. Section E1 of its table of offenses and penalties provides for a range of penalties for a first offense of "Violation of a rule, regulation, policy, procedure, order or administrative decision, from counseling to removal." D11, recommends a penalty range for a first offense of improper conduct which violates common decency, a reasonable analogue to "conduct unbecoming" from a three-working-day suspension to removal. While my recommendation is not bound by that document, it can serve as a useful tool in assisting determination of appropriate penalty.

The language cited above from the DHS Drug Testing policy certainly uses strong language, such as "condition of employment" and "strictly prohibited" that can and do support the notion that removal may well be an appropriate consequence for its violation. Furthermore, it is well settled that a single sustained charge of "Conduct Unbecoming" can be sufficient to sustain a penalty of removal.

Administrative Order 4:23, the DHS Drug Testing Policy, provides at Section VA2 that "Employees who test positive for unlawful use of a controlled dangerous substance may be suspended from duty, referred to employee advisory service (EAS) or terminated from employment, as applicable." While termination is certainly available as an option, it appears an appointing authority

> is provided again with a range of penalties which may be appropriate, given the circumstances. Clearly the argument for termination is stronger given that a lighter penalty was imposed for the first positive test, but the existence of recommended ranges give rise to the notion that the determination of penalty is fact sensitive, requiring consideration of factors and circumstances which may well be questions of material fact. Accordingly, I **CONCLUDE** that DHS' motion for summary decision must be **DENIED** as to penalty.
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> [Order Granting Partial Summary Decision, Hon. Elia Pelios, ALJ, dated October 11, 2018, at 2, 4-12]

Guided by the foregoing, it must be **CONCLUDED** that the facts of record, considered de novo, do not warrant consideration of progressive discipline. The offenses are too serious. The nature of these facts must be accorded supervening weight when evaluating the fitness of progressive discipline. They loom as prohibitively egregious when compared with the necessity to guard the welfare of that population to which appellant would again be exposed, should he return to work. The core of an HSA duty is care of geriatrics, those with neurological disorders, and other various vulnerable adult populations, who are unpredictably at risk to themselves and/or others. The responsibility imposed on the caregiver is patently demanding. It calls for trust by hospital supervisors and trustworthiness in the employee. In instances where that trust is shown by an employee's actions to have been misplaced, under such circumstances, removal as a penalty may be defended.

Mindful of the foregoing, I **FIND** that appellant had to have known of DHS drug policy, because the credible testimony of the State's witness made clear that all employees are provided written copies. It is information disbursed as part of normal administrative practice. Despite that knowledge, and despite being aware through official forewarning of the potential for discovery through random testing, appellant continued to engage in the strictly prohibited use of drugs outside the workplace, as charged. As noted in the October 18th order, case law clearly validates any rule forbidding non-prescription drug consumption beyond the work environment. In the demanding ambience of Ancora, this would seem an obvious imperative. Transgression of that policy would be a grave offense worthy of termination.

I CONCLUDE that the testimony of witnesses supporting appellant does not nullify the appointing authority's believable testimony describing the need for its drug policy and for its use here. The witnesses' evaluation of appellant was not persuasive in that respect. Therefore, as pertinent to this point, **I FIND** that: none of the witnesses suggested appellant's drug use did not occur. None had long-term, day-in, day-out close proximity to appellant accompanied by authority to evaluate his behavior. None offered data sufficiently complete to override execution of a sound DHS drug use policy, as applied to the specific facts of this case. Therefore, after a de novo review assessing the full presentation of facts in this record, **I CONCLUDE FINALLY** that the penalty of removal, arrived at de novo as well, is appropriate.

I ORDER, therefore that appellant's removal from employment in the Department of Human Services, Ancora Psychiatric Hospital, be, and hereby is **AFFIRMED**.

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, 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.

February 28, 2020
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: February 28, 2020 (emailed)

Date Mailed to Parties: February 28, 2020 (emailed)

EAP/mel

APPENDIX

Witnesses:

For Appellant:

Sandra Dean
David Price
Teresa Brown

For Respondent:

Rose McGuigan

Exhibits:

Joint Exhibits:

J-1 DHS Administrative Order 4:23
J-2 DHS Disciplinary Action Program; Administrative Order 4:08

For Appellant:

None

For Respondent:

R-1 PNDA dated March 11, 2013; Amended PNDA dated March 14, 2013; FNDA dated June 24, 2013

R-2 Hearing Officer report

R-3 Letter to appellant from DHS, dated February 8, 2012

R-4 Drug testing receipt, dated January 30, 2012

R-5 Appellant's drug testing results, dated January 30, 2012

R-6 EAS return to work approval, dated April 4, 2012

R-7 April 5, 2012 correspondence between appellant and DHS

R-8 Appellant's drug test results, dated March 8, 2013

R-9 AO 4:23

R-10 Official Reprimand: 9-26-05, 7-11-05, 6-13-07

R-11 Certification: Rita M. Lebo

R-12 Curriculum Vitae: Rita M. Lebo

R-13 WORKNET's Urine Specimen Collection Guidelines.

10.11.2018

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING PARTIAL SUMMARY DECISION
OAL DKT. NO. CSV 09806-13
AGENCY DKT. NO. 2014-92

IN THE MATTER OF CHRISTOPHER STONER, DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATRIC HOSPITAL.

William A. Nash, Esq., for appellant (Nash Law Firm LLC, attorneys)

Elizabeth A. Davies and **Arupa Barua,** Deputy Attorneys General, for respondent (Gurbir S. Grewal, Acting Attorney General of New Jersey, attorney)

Appellant Christopher Stoner (Stoner) appeals the termination from his job as a Human Services Assistant by the Department of Human Services, Ancora Psychiatric Hospital (appointing authority, DHS) for violations of N.J.A.C. 4A:2-2.3(a)6 (conduct unbecoming a public employee) and N.J.A.C. 4A:2-2.3(a)12 (other sufficient cause), specifically, violation of DHS Administrative Order 4:08 E1.1 which proscribes the violation a rule, regulation, policy, procedure order or administrative decision. The charges arise from appellant's alleged testing positive for illicit drugs twice, in violation of DHS Administrative Order 4:23.

The matter was transmitted to the OAL on July 16, 2013. On August 19, 2015, the appointing authority filed the herein motion for summary decision. Responsive papers were filed on September 27, 2015. Oral Argument was held on February 3, 2016.

DHS argues that it is entitled to summary decision because appellant's testing positive for drug use twice is a violation of policy and is conduct sufficient to sustain the charges against appellant. Furthermore, DHS argues the conduct is egregious enough to warrant appellant's removal from employment. DHS' argument relies on its asserted facts. Appellant tested positive for marijuana on January 30, 2012. Appellant was placed out of work and referred to the Employee Advisory Services (EAS). Appellant returned to work on April 4, 2012, and signed an acknowledgement that he would be subject to three unannounced follow-up drug tests. On March 8, 2013, appellant tested positive for cocaine. He was served with a Preliminary Notice of Disciplinary Action on March 11, 2013. A departmental hearing was held, and a Final Notice of Disciplinary Action was issued on June 24, 2013 sustaining the charges and removing appellant from his employment.

In opposing the motion, appellant argues that summary decision should not be granted because DHS has not met its burden demonstrating that appellant was impaired in the performance of his job or that he was under the influence of drugs while on the premises of his employer. Appellant also argues that removal is too severe a penalty for the conduct alleged.

In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:-2.21; N.J.A.C. 4A:2-1.4(a). The authority must show by a preponderance of the competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal, based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

Appellant was charged with "[c]onduct unbecoming a public employee." N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit

or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also, In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 [quoting In re Zeber, 156 A.2d 821, 825 (1959)]. Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) [quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)]. Suspension or removal may be justified where the misconduct occurred while the employee was off duty. Emmons, 63 N.J. Super. at 140.

Appellant has also been charged with a violation of N.J.A.C. 4A:2-2.3(a)(12) (other sufficient cause). Specifically, appellant is charged with a violation of DHS Administrative Order 4:08 E1.1 which proscribes the violation a rule, regulation, policy, procedure order or administrative decision. The charges arise from appellant's alleged testing positive for illicit drugs twice, in violation of DHS Administrative Order 4:23.

DHS Administrative Order 4:23 provides, in pertinent part, that:

> As a condition of employment with DHS, employees are prohibited from being impaired or under the influence of legal drugs, if such impairment or influence adversely affects the employee's work performance, the safety of our consumers, the employee or others. Additionally, as a condition of employment with DHS, employees are prohibited from being under the influence of illegal drugs. The unlawful use, possession, solicitation for or sale of controlled dangerous substances including prescription drugs is strictly prohibited.

A motion for summary decision is proper when "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." N.J.A.C. 1:1-12.5(b).

As to the underlying conduct and the charges brought against appellant, the essential facts involving this motion are not in dispute. There is no dispute that on separate occasions appellant tested positive for marijuana and for cocaine. Appellant relies on the argument that there is no evidence that appellant was impaired in his work performance or that he was under the influence while at work. This reliance is misplaced. The plain language of the policy clearly ascribes consideration of impairment to situations where legal drug use is implicated. With regard to illegal drugs, which marijuana and cocaine were at the time of infraction and still are, the policy clearly prohibits possession or use of such drugs and does not limit its proscription of being under the influence to situations where the influence adversely affects the employee's work, as it does for legal drugs.

Therefore, pursuant to N.J.A.C. 1:12.5(b) and Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1995), I **FIND** that there are no genuine issues of material fact as to liability and that this matter is ripe for summary decision with regard to the charges. I further **FIND** that appellant tested positive for illegal drugs on two occasions, and did so in violation of DHS Administrative Order 4:23. I further **FIND** that illegal drug use by government employees charged with the care and well-being of a significantly vulnerable population could well serve to destroy public respect for the delivery of government services in providing that care. Accordingly, I **CONCLUDE** that the charges of violations of N.J.A.C. 4A:2-2.3(a)6 (conduct unbecoming a public employee) and N.J.A.C. 4A:2-2.3(a)12 (other sufficient cause) must be **SUSTAINED,** and summary decision is hereby **GRANTED** in part to DHS.

The Civil Service Commission's review of penalty is de novo. N.J.S.A. 11A:2-19 and N.J.A.C. 4A:2-2.9(d) specifically grant the Commission authority to increase or decrease the penalty imposed by the appointing authority.

General principles of progressive discipline apply. Town of W. New York v. Bock, 38 N.J. 500, 523 (1962). Typically, the Board considers numerous factors, including the nature

of the offense, the concept of progressive discipline and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463.

"Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Bock, 38 N.J. 500, 523 (1962), that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990).

Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

Some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007), citing Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197–98 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense); see also, In re Herrmann, 192 N.J. 19, 33 (2007) (DYFS worker who snapped lighter in front of five-year-old):

> . . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> Thus, 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. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

The Commission has authority to increase the penalty beyond that established by the appointing authority's Final Notice of Disciplinary Action, but not to removal from suspension. N.J.S.A. 11A:2-19. The Civil Service Commission may increase or decrease

the penalty imposed by the appointing authority, but removal shall not be substituted for a lesser penalty. See, Sabia v. City of Elizabeth, 132 N.J. Super. 6, 15–16 (App. Div. 1974), certif. denied, Elizabeth v. Sabia, 67 N.J. 97 (1975).

In the present matter, DHS argues that the conduct by appellant is egregious enough that removal is warranted. Appellant argues that the penalty is too severe.

The New Jersey Department of Human Affairs has promulgated a "Disciplinary Action Program," Administrative Order 4:08, which applies to employees under its jurisdiction, including those working for the Ancora Psychiatric Hospital. Section E1 of its table of offenses and penalties provides for a range of penalties for a first offense of "Violation of a rule, regulation, policy, procedure, order or administrative decision, from counseling to removal." D11, recommends a penalty range for a first offense of improper conduct which violates common decency, a reasonable analogue to "conduct unbecoming" from a three-working-day suspension to removal. While my recommendation is not bound by that document, it can serve as a useful tool in assisting determination of appropriate penalty.

The language cited above from the DHS Drug Testing policy certainly uses strong language, such as "condition of employment" and "strictly prohibited" that can and do support the notion that removal may well be an appropriate consequence for its violation. Furthermore, it is well settled that a single sustained charge of "Conduct Unbecoming" can be sufficient to sustain a penalty of removal.

Administrative Order 4:23, the DHS Drug Testing Policy, provides at Section VA2 that "Employees who test positive for unlawful use of a controlled dangerous substance may be suspended from duty, referred to employee advisory service (EAS) or terminated from employment, as applicable." While termination is certainly available as an option, it appears an appointing authority is provided again with a range of penalties which may be appropriate, given the circumstances. Clearly the argument for termination is stronger given that a lighter penalty was imposed for the first positive test, but the existence of recommended ranges give rise to the notion that the determination of penalty is fact sensitive, requiring consideration of

factors and circumstances which may well be questions of material fact. Accordingly, I **CONCLUDE** that DHS' motion for summary decision must be **DENIED** as to penalty.

It is **ORDERED** that DHS' motion for summary decision is **GRANTED** in part, insofar as the charges have been **SUSTAINED.** It is further **ORDERED** that DHS' motion for summary decision is **DENIED** in part, specifically as to penalty.

It is hereby further **ORDERED** that this matter proceed to hearing with regard to the imposition of an appropriate penalty. Such hearing is currently scheduled for October 17, 2018.

This Order of Partial Summary Decision may be reviewed by the **CIVIL SERVICE COMMISSION** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

October 11, 2018
DATE

ELIA A. PELIOS, ALJ

EAP/nd