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STATE OF NEW JERSEY

In the Matter of B.O.,
North Bergen

CSC Docket Nos. 2014-1801 and 2015-2654

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

Request for
Reconsideration and Back Pay

ISSUED: JUL 17 2015 (CSM)

North Bergen, represented by Mollie F. Hartman, requests reconsideration of the attached final administrative decision, *In the Matter of B.O.* (CSC, decided December 4, 2013),[1] which imposed a 30 working day suspension. North Bergen also requests resolution of a dispute regarding the calculation of B.O.'s back pay.

In the prior decision, the appointing authority removed B.O. effective June 8, 2012 on charges of insubordination, conduct unbecoming a public employee and other sufficient cause. Specifically, the appointing authority asserted that B.O. failed to comply with two direct orders in a timely manner and was disrespectful to a superior officer. Upon B.O.'s appeal, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case. In the initial decision, the Administrative Law Judge (ALJ) concluded that B.O. did not comply with an order to remove a street sign. However, the ALJ found that the penalty of removal was not justified and recommended a 10 working day suspension. Upon its *de novo* review, the Civil Service Commission (Commission) modified the removal to a 30 working day suspension. However, the Commission noted that in its exceptions, the appointing authority indicated that the parties agreed that back pay would be tolled while a separate, but related, appeal to the Appellate Division was pending. Therefore, as B.O. did not rebut that he agreed to toll his back pay, the Commission

[1] B.O.'s name has been redacted in light of a subsequent decision on a related Appellate Division matter. *In the Matter of B.O., Police Sergeant, North Bergen,* Docket No. A-4660-12T2 (App. Div. February 3, 2015).

found that should he prevail in the matter before the Appellate Division, he was to be awarded back pay from 30 working days after the time of his removal, less any time the parties agreed to toll back pay awaiting the resolution of the Appellate Division matter and while the matter was on the inactive list at OAL.

In its request for reconsideration, the appointing authority asserts that B.O. agreed that he would not be reinstated to his position and that the award of back pay would be tolled pending the outcome of the Appellate Division matter. In this regard, B.O. was removed from the eligible list for Police Sergeant on the basis that he failed a fitness for duty evaluation and had appealed that matter to the Commission. The Commission restored B.O.'s name to the Police Sergeant eligible list and the appointing authority appealed that determination to the Appellate Division. *See In the Matter of B.O., Police Sergeant (PM2714L), North Bergen Police Department* (CSC, decided May 1, 2013). During the pendency of this list removal appeal before the Commission, the parties jointly requested that the ALJ place B.O.'s disciplinary appeal on the inactive list at the OAL from October 19, 2012 to April 23, 2013, and B.O. agreed to toll the accumulation of back pay that may have otherwise accrued during that period. Subsequently, although the appointing authority requested that B.O.'s disciplinary appeal remain on the inactive list pending review by the Appellate Division of the list removal matter, the ALJ determined that it was appropriate to continue with the disciplinary hearing.

With respect to the merits of its petition, the appointing authority states that it discussed the matter with B.O.'s attorney during a telephone conference call on July 10, 2013 and it was agreed that he would be precluded from returning to employment or receiving back pay until the Appellate Division matter was concluded. It asserts that a letter prepared by B.O.'s attorney dated July 10, 2013 confirms the understanding of the parties made during the telephone conference that back pay would be tolled. Thus, the appointing authority maintains that a complete understanding was reached by the parties and placed on the record. The appointing authority adds that the ALJ acknowledged this agreement during the hearing and that the Commission acknowledged it in the Discussion portion of its decision that B.O. would not be returned to work and his back pay would be tolled pending a decision by the Appellate Division. Notwithstanding what was stated in the Commission's decision, the appointing authority contends that the prior decision's order provides a conflicting directive. Specifically, the Commission's order directs, in pertinent part, that:

> However, under no circumstances should the appellant's reinstatement be delayed pending resolution of this issue.

In compliance with the Commission's order, the appointing authority states that it reinstated B.O. to his position on January 13, 2014. However, it maintains that B.O. should not be permitted to renege on the agreement and requests that the

Commission amend its order to reflect that B.O.'s reinstatement be contingent upon being successful before the Appellate Division and that back pay be tolled until that time (less mitigation and the 30 working day suspension).

In response, B.O., represented by Patrick P. Toscano, Esq., asserts that the order of the prior decision is proper and the appointing authority's objection is without merit. B.O. adds that the letter dated July 10, 2013 was not meant to be included as part of the prior order that reinstated him to his position. Moreover, he asserts that it would be inappropriate to amend the prior order since he has already returned to work.

Subsequent to the appointing authority's petition for reconsideration, the Appellate Division affirmed the Commission's decision to restore B.O.'s name to the eligible list for Police Sergeant. *See In the Matter of B.O., Police Sergeant, North Bergen,* Docket No. A-4660-12T2 (App. Div. February 3, 2015). Thereafter, the appointing authority requested that the Commission determine whether B.O. is entitled to back pay, and, if so, the specific time period during which he is entitled given that it received a demand for back pay from B.O. that ignored the tolling agreement.

In its request to calculate the amount of back pay due, the appointing authority presents that after the Appellate Division issued its decision, B.O. requested back pay and benefits in the amount of $221,700 from July 8, 2012 to his reinstatement on January 13, 2014. Additionally, this figure included asserted medical and pension contributions to be paid up through March 2015. However, the appointing authority states that B.O.'s demand does not acknowledge the tolling agreement or provide any evidence of his mitigation efforts during his period of separation. The appointing authority reiterates its argument that B.O. agreed to toll his back pay pending a determination by the Appellate Division and that it restored him to employment more than one year prior to the court issuing its decision.

In support of its request, the appointing authority states that B.O. was suspended without pay on June 8, 2012. However, on July 10, 2013, the tolling agreement between the parties was placed on the record where the parties acknowledged that back pay would be tolled pending the decision of the Appellate Division. Therefore, it states that back pay should be calculated from June 8, 2012 through July 10, 2013 (less the 30 working day suspension and mitigation) for the total amount of $59,836.50. The appointing provides a monthly breakdown of the wages B.O. would have received, including any across the board increases, from July 21, 2012, the date he would have returned to work after his 30 working day suspension. However, it maintains that no back pay should accrue after July 10, 2013 due to the tolling agreement. It also asserts that there is no merit to B.O.'s argument that he is entitled to Police Sergeant's pay from 2011. Additionally, the

appointing authority notes that B.O. received his full salary of $95,006.00 per year and benefits when it restored him to his position in January 2014. With respect to health benefits, although advised on June 22, 2012 that he could continue to receive health benefits during the time of his separation through COBRA at a cost of $1,724.87 per month, B.O. did not avail himself of these benefits. Further, despite being entitled to full health benefits when he was returned to work on January 13, 2014, the appointing states that B.O. only recently re-enrolled for coverage in April 2015. Therefore, it argues that he is not entitled to any compensation for these costs since he did not expend any monies to maintain his health coverage. Moreover, it states that B.O. was not required to utilize his accrued vacation in connection with his separation and that he utilized sick leave prior to his removal from September 19, 2011 through June 21, 2012, where he received his full pay and benefits. The appointing authority also maintains that B.O. is not entitled to any type of clothing or uniform allowance during the time period from June 21, 2012 to his return to work.

With respect to mitigation, the appointing authority initially contends that B.O. was underemployed during his period of separation as his scant employment was not suitable considering his qualifications. As such, it argues that he should not be entitled to any back pay during the period he was separated from employment. In this regard, it contends that he was employed with Country Club Transportation Services in 2012 and 2013 and earned $618.10; Fedex Ground Packaging System, Inc., in 2012 and earned $151.89; Raymours Furniture Company from July 28, 2012 to January 1, 2013 and in 2013 and earned $17,410.00; and Federal Express in 2013 and earned $3,465.39. If any back pay is due, however, the appointing authority argues that B.O. would only be entitled to $59,836.50.

In response, B.O. states that the parties agreed as to the dates when back pay began and ended and all the appointing authority is now required to do is compute the exact amount of back pay. Additionally, he contends that he was "supposed to be" promoted to Police Sergeant in December 2011 but he has not received that position even though the Commission restored him to the eligible list. B.O. maintains that he did an extensive job search from January 2013 to October 2013 and applied for positions with Creative Financial Group of New Jersey, New England Financial Service, Cablevision, Edward Jones Financial, Chubb Personal Casualty Group, Aflac Insurance and submitted resumes to 19 other employers. B.O. argues that he is entitled to $237,000 in back pay and benefits. In support of his request, B.O. provides copies of his tax returns and W-2's from Country Club Transportation, Fedex Ground Packaging Systems, and Raymours Furniture which all indicate the amounts earned as specified in the appointing authority's submission. B.O. also claims that he is entitled to a total of $81,000 for "medical", $16,100 for pension contributions, $2,800 for education and clothing as well as his back pay of approximately $126,000 and personal and sick days for a total of $237,000.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which the Commission may reconsider a prior decision. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

Initially, the request for reconsideration is essentially moot as the appointing authority was not successful in its appeal to the Appellate Division. Thus, B.O.'s restoration to employment effective January 13, 2014, one year prior to the issuance of the Appellate Division's decision, would have no impact on the Commission's prior determination. Nevertheless, the Commission's order, while not contradictory, was not absolutely clear. In this regard, the order specifically stated that should B.O. prevail in the matter pending before the Appellate Division or if that matter was withdrawn or dismissed, he was to be granted back pay, benefits and seniority for the period following his 30 working day suspension until his reinstatement. The portion of the order indicating "under no circumstances should the appellant's reinstatement be delayed pending resolution of this issue" did *not* mean resolution of the Appellate Division appeal. Rather, it meant that, regardless of whether B.O. prevailed in the matter pending before the Appellate Division or if that matter was withdrawn or dismissed, his reinstatement should not be delayed pending resolution of any potential back pay dispute.

With respect to back pay, pursuant to *N.J.A.C.* 4A:2-2.10(d), an award of back pay shall include unpaid salary, including regular wages, overlap shift time, increments and across-the-board adjustments. *N.J.A.C.* 4A:2-2.10(d)3 provides that an award of back pay shall be reduced by the amount of money that was actually earned during the period of separation, including any unemployment insurance benefits received, subject to any applicable limitations set forth in (d)4. Further, *N.J.A.C.* 4A:2-2.10(d)4 states that where a removal or a suspension for more than 30 working days has been reversed or modified and the employee has been unemployed or underemployed for all or a part of the period of separation, and the employee has failed to make reasonable efforts to find suitable employment during the period of separation, the employee shall not be eligible for back pay for any period during which the employee failed to make such reasonable efforts. "Reasonable efforts" may include, but not be limited to, reviewing classified advertisements in newspapers or trade publications; reviewing Internet or on-line job listings or services; applying for suitable positions; attending job fairs; visiting employment agencies; networking with other people; and distributing resumes. The determination as to whether the employee has made reasonable efforts to find suitable employment shall be based upon the totality of the circumstances, including, but not limited to, the nature of the disciplinary action taken against the

employee; the nature of the employee's public employment; the employee's skills, education, and experience; the job market; the existence of advertised, suitable employment opportunities; the manner in which the type of employment involved is commonly sought; and any other circumstances deemed relevant based upon the particular facts of the matter. The burden of proof shall be on the employer to establish that the employee has not made reasonable efforts to find suitable employment. *See N.J.A.C.* 4A:2-2.10(d)4, *et seq.*

Additionally, *N.J.A.C.* 4A:2-2.10(d)8 provides that back pay is subject to reduction by any period of unreasonable delay of the appeal proceedings directly attributable to the employee. Delays caused by an employee's representative may not be considered in reducing the award of back pay.

B.O. provided no rebuttal to the appointing authority's exceptions in the prior decision that the ALJ's order of October 24, 2013 was issued in error because it failed to comport with an agreement reached during a telephone conference on July 10, 2013 to toll the appellant's back pay pending resolution of the Appellate Division matter. Therefore, the Commission finds that B.O. is not entitled to back pay after July 10, 2013. In this regard, while the July 10, 2013 letter does not explicitly indicate that B.O. was waiving his back pay pending the Appellate Division decision, it states that if the Commission ruled that he was to be reinstated to employment, that he "agrees that he will await a decision from the Appellate Division . . . before he is reinstated." Clearly, this statement serves as a tacit waiver of back pay if the Commission ordered B.O.'s reinstatement prior to the Appellate Division's decision, since B.O. agreed to delay his reinstatement under those circumstances. As such, he would not be entitled to any back pay for any period in which he delayed his own reinstatement to employment. The record also indicates that during the pendency of the list removal appeal before the Commission, the parties jointly requested that the ALJ place the appellant's disciplinary appeal on the inactive list at the OAL from October 19, 2012 to April 23, 2013, and B.O. agreed to toll the accumulation of back pay that may have otherwise accrued during that period. As such, B.O. is also not entitled to back pay from October 19, 2012 to April 23, 2013.

With respect to the assertion that B.O. was underemployed based on the number of employers he contacted during his period of separation, the Commission finds that the appointing authority has not sustained its burden of proof. B.O. provided a certified statement that he contacted approximately 26 different employers for various positions during his period of separation. In this regard, it cannot be ignored that the definition of "reasonable efforts" in *N.J.A.C.* 4A:2-2.10(d)4ii does not require a specific number of contacts or attempts to be made during the period of separation. Rather, *N.J.A.C.* 4A:2-2.10(d)4iv states that the determination as to whether the employee has made reasonable efforts to find suitable employment shall be based on the *totality of the circumstances,* including,

but not limited to, the nature of the disciplinary action taken against the employee and the nature of the employee's public employment. The Commission notes that an individual is not required to **obtain** employment while attempting to mitigate damages, but merely required to make a good faith effort to seek employment. *See In the Matter of Robert Jordan* (MSB, decided June 11, 2008). In this case, particularly given that B.O. was employed in several different positions during his period of separation, the totality of the record indicates that B.O. made reasonable efforts to find suitable employment.

The appointing authority indicated that B.O. would have earned $6,895.12 per month from July 21, 2012 to January 21, 2013; $7,030.80 per month from January 21, 2013 to June 21, 2013; and $4,452.84 from June 21, 2013 to July 10, 2013. As such, he would have earned a total of $80,977.56 from July 21, 2012 to July 10, 2013. However, the parties also agreed not to have back pay accrue from October 19, 2012 to April 23, 2013, the period of time the matter was on the inactive list at OAL. The parties also agreed that the appellant earned a total of $21,645.38 from various employers during the period of his separation and that he did not collect unemployment benefits. Therefore, B.O. is entitled to mitigated back pay from July 21, 2012 to October 19, 2012 and from April 23, 2013 to July 10, 2013.

Based on the above information, the Commission finds that B.O. shall receive:

From July 21, 2012 through October 18, 2012 (64 work days @ $318.24 per day)	$20,367.36
From October 19, 2012 through April 22, 2013	$0.00
From April 23, 2013 through July 9, 3013 (56 work days @ $322.01 per day)	$18,180.40
From July 10, 2013 through January 12, 2014	$0.00
Less Wages from other employment	$21,645.38
Less Unemployment Benefits	$0.00
TOTAL	$16,902.38

B.O. maintains that he is entitled to $81,000 for "medical." However, *N.J.A.C.* 4A:2-2.10(d) provides for reimbursement of payments made to *maintain* health insurance coverage. B.O. does not rebut that he was offered the option to enroll in COBRA when he was initially removed or that he was permitted to re-

enroll for health coverage when he was reinstated in January 2014, but did not avail himself of these opportunities. Additionally, B.O. has provided no documentation demonstrating that he made any payments to maintain his health insurance coverage in this appeal. Therefore, he is not entitled to reimbursement for health insurance coverage. Regarding his pension contribution, *N.J.A.C.* 4A:2-2.10(d)2 provides that the award of back pay shall be reduced by the amount of taxes, social security payments, dues, pension payments, and any other sums normally withheld. Thus, the appointing authority, by rule, should reduce B.O.'s back pay award consistent with this provision and provide B.O. with a full accounting of its deductions and pension contributions when it makes its payment to the appellant. *See In the Matter of Ronald Dorn* (MSB, decided December 21, 2005). Similarly, B.O. also requests payment for a clothing allowance. *N.J.A.C.* 4A:2-2.10(d)1 states that back pay shall not include retroactive clothing, uniform, or equipment allowances for periods in which the employee was not working. The purpose of a clothing allowance is for the maintenance of uniform components.

With respect to his request for sick time used prior to his removal, B.O. was removed effective July 8, 2012. However, the sick leave he requests was utilized prior to that date. Therefore, since the use of that time occurred prior to the imposition of the disciplinary penalty that the Commission modified, it cannot be considered as part of a back pay and benefits award. Additionally, the appointing authority has presented that B.O.'s vacation leave has been unaltered. Finally, although B.O. appears to be requesting back pay at a Police Sergeant's rate from December 2011, in neither the Commission's nor the Appellate Division's decisions was he granted such as an appointment with back pay.[2]

ORDER

Therefore, it is ordered that this request for reconsideration be denied and B.O. be awarded back pay in the amount of $16,902.38.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

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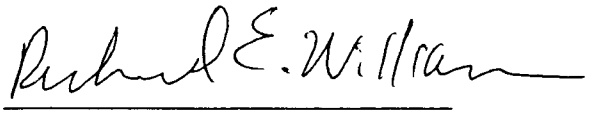
[2] The Commission notes that in *In the Matter of B.O.* (CSC, decided May 1, 2013) it ordered that B.O. should not be considered for an appointment as a Police Sergeant unless he was reinstated as a Police Officer. While that circumstance subsequently came to pass, it is clear that the appointing authority is not required to appoint him as a Police Sergeant given that he received a 30 working day suspension, which would be sufficient to sustain his removal from the promotional list.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF JULY, 2015



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Attachment

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STATE OF NEW JERSEY

In the Matter of B[redacted] O[redacted]

CSC Docket No. 2012-3621
OAL Docket No. CSR 8216-12

DECISION OF THE
CIVIL SERVICE COMMISSION

ISSUED: DEC 18 2013 (JET)

The appeal of B[redacted] O[redacted], a Police Officer with the North Bergen Police Department, of his removal effective June 8, 2012, on charges, was heard by Administrative Law Judge Tiffany M. Williams (ALJ), who rendered her initial decision on October 24, 2013. Exceptions were filed on behalf of the appointing authority and cross exceptions were filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on December 4, 2013, accepted and adopted the Findings of Facts as contained in the attached ALJ's initial decision, but did not adopt the ALJ's recommendation to modify the removal to a 10 working day suspension. Rather, the Commission imposed a 30 working day suspension.

DISCUSSION

The appellant was charged with insubordination, conduct unbecoming a public employee and other sufficient cause. Specifically, the appointing authority asserted that the appellant failed to comply with two direct orders in a timely manner and disrespected his superior officer. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case. [1]

[1] It is noted that the appellant's name was removed from the Police Sergeant (PM2714L) eligible list on the basis of psychological unfitness. The appellant appealed that matter and the Commission restored his name to the eligible list. *See In the Matter of B[redacted] O[redacted] (PM2714L), North*

In her initial decision, the ALJ found that on September 8, 2011, Chief of Police Robert Dowd ordered the appellant to remove a large highway sign from storage by no later than September 12, 2011. Since the sign had been in storage for longer than six months, Chief Dowd understood that arrangements could be made for the Department of Public Words to pick up the item for destruction. The appellant made an inquiry with the New Jersey Department of Transportation (DOT) because the sign was a State highway sign and he wanted to avoid destroying the sign since it was State property. Thus, when Dowd subsequently asked on September 13, 2011 why he failed to dispose of the sign, the appellant indicated that he was waiting for DOT's response. Dowd reiterated that he had ordered the sign to be removed and the appellant became upset and loud during the exchange that ensued. Dowd ordered the appellant to file a report regarding his failure to remove the sign and the appellant later apologized to Dowd. Subsequently, Dowd and Police Captain Robert Hovan met with the appellant regarding the report and the appellant indicated during this meeting that Dowd was harassing him and he accused him of having problems with Spanish Police Officers. In response, Hovan directed the appellant to leave the office and Dowd advised him that he was suspended for the rest of the day. The ALJ noted that Dowd observed the appellant's demeanor "as agitated and sweaty" and his eyes were red. Dowd also indicated that he decided to suspend the appellant after observing him laugh in a disrespectful manner at the time of the incident. Thereafter, the appellant was directed to submit to a drug test, which came back negative, and to report to Internal Affairs.

Additionally, the ALJ indicated that Hovan ordered the appellant to contact the Hudson County Prosecutor's Office on September 9, 2011 regarding anniversary activities for the September 11, 2001 attacks. Dowd followed up with the appellant and determined that he did not comply with the order. Therefore, on that same day, in the presence of Dowd, the appellant telephoned the Prosecutor's Office.

The ALJ concluded that the evidence demonstrated that the appellant did not comply with the September 8, 2011 order to remove the street sign by September 12, 2011. However, she found that while technically insubordinate, his failure to remove the sign was more an act of incompetence than willful disobedience. The ALJ also found that the manner in which the appellant conducted himself toward Dowd on September 13, 2011 was insubordinate. However, the ALJ determined the appointing authority did not sustain the charges surrounding the September 9, 2011 incident since no time frames were established for the order and the appellant in fact complied with that order before the end of the day. Under these circumstances, the ALJ determined that the penalty of removal was not justified and she recommended a 10 working day suspension.

Bergen Police Department (CSC, decided May 1, 2013). The appointing authority appealed and the matter is pending in the Appellate Division.

In its exceptions, the appointing authority asserts that the ALJ's recommendation to reverse the appellant's removal is inimical to the proper function of the Police Department since the chain of command would be compromised if the appellant returned to work. Further, it underscores that the appellant disregarded orders from his superior officers and it was the appellant's lack of self-control that resulted in his termination. Moreover, the appointing authority contends that the finding that the appellant took reasonable steps to remove the sign from storage is not supported by the evidence and reiterates that the appellant became agitated, yelled, and pointed his finger at Dowd during the incident. Additionally, the appointing authority disagrees with the ALJ's determination that the appellant complied with Hovan's order regarding contacting the Prosecutor's Office. Moreover, it emphasizes that the appellant's level of insubordination is greater than just a technical failure to comply with orders, and notes that the appellant failed a psychological evaluation as a result of these incidents. It also argues that the ALJ inappropriately disregarded the testimony of the appointing authority's witnesses and the appellant's gross distortion of events was misleading. Based on the totality of the situation, the appointing authority maintains that it is impossible to continue to employ the appellant as a Police Officer.

Additionally, the appointing authority argues that the ALJ's Order of Salary Payment should not be adopted. In this regard, the appointing authority indicates that the parties agreed in July 2013 that the issue of the appellant's back pay should be tolled while its separate, but related Appellate Division appeal concerning the Commission's determination finding the appellant psychologically fit and restoring his name to the eligible list for Police Sergeant matter was pending. Thus, the appointing authority contends that the ALJ incorrectly ordered the payment of salary effective October 24, 2013.

In response, the appellant argues that the ALJ's decision should be upheld. The appellant adds that the ALJ's reasoning was correct based on the facts presented. Further, the appellant contends that a reprimand should have been sufficient disciplinary action as a result of the incidents. Moreover, the appellant avers that he did not have any previous disciplinary history prior to this matter and the facts support that he should be returned to employment. The appellant did not address the appointing authority's contentions regarding the tolling of his back pay.

Upon independent review of the entire record, including the exceptions and the cross exceptions filed by the parties, the Commission agrees with the ALJ's determination regarding the charges. However, the Commission does not agree with the ALJ's determination to modify the removal to a 10 working day suspension. Rather, for the reasons discussed below, the Commission modifies the removal to a 30 working day suspension.

The appellant's action of failing to follow orders on more than one occasion and acting disrespectfully toward his supervisors was clearly inappropriate. In this regard, the Commission utilizes a more expansive definition of insubordination. Specifically, the Commission is not bound or constrained by a black letter legal definition of "insubordination." *See In the Matter of Fulvio Stanziale*, Docket No. A-3492-00T5 (App. Div. April 11, 2002) (Appellant's conduct in which he refused to provide complete and accurate information when requested by a superior constituted insubordination); *See also, In the Matter of Jane Lyons* (Merit System Board, decided May 9, 2007), aff'd, Docket No. A-2488-07T2 (App. Div. April 26, 2010). Additionally, the Commission has found that disrespect of a supervisor, including the use of inappropriate language, is insubordination. *See In the Matter of Loukeeler Bell* (CSC, decided June 23, 2010); *In the Matter of Tahisha Collins* (MSB, decided June 11, 2008); *In the Matter of Kenneth Pettiford* (MSB, decided May 21, 2008). The appellant's action of failing to follow orders, yelling, and pointing his finger at his superior officer was inappropriate and cannot be minimized. Such behavior upsets the work environment and is unacceptable. Accordingly, based on this standard, the appellant's conduct was both inappropriate and insubordinate since he was clearly disrespectful to his supervisor.

Nevertheless, the Commission rejects the appointing authority's contentions that the ALJ's decision was factually deficient. In this regard, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings ... are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See also, In re Taylor*, 158 *N.J.* 644 (1999) (quoting *State v. Locurto*, 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. Id. at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its de novo review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). In the instant matter, the ALJ amply supported her credibility determinations. Specifically, the ALJ found that the appellant admitted that he failed to follow orders and acted disrespectfully towards his supervisors, which was supported by the witnesses.

In determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered,

including the nature of the offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. Moreover, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not "a fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 *N.J.* 474 (2007).

A review of the appellant's disciplinary history reveals that he has no prior major discipline since his employment in July 2000. However, even disregarding the appellant's prior disciplinary history, the appellant's conduct, particularly his inappropriate behavior and failure to follow orders from his supervisor, merits a 30 working day suspension. The Commission emphasizes that a Police Officer is a law enforcement officer who, by the very nature of his or her job duties, is held to a higher standard of conduct than other public employees. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), cert. denied, 47 N.J. 80 (1966). *See also, In re Phillips*, 117 N.J. 567 (1990). Accordingly, the Commission finds that the foregoing circumstances provide a sufficient basis to impose a 30 working day suspension.

Normally, since the removal has been modified to a 30 working day suspension, along with reinstatement to his position, the appellant would be entitled to mitigated back pay, benefits and seniority for the period following the 30 working day suspension pursuant to *N.J.A.C.* 4A:2-2.10. In this case, it is unrebutted by the appellant that the parties agreed to toll the issue of his back pay pending the appointing authority's Appellate Division appeal of the Commission's determination regarding the appellant's removal from the promotional list for Police Sergeant. Therefore, the award of back pay shall be tolled while that matter is pending in the Appellate Division. However, should the appellant prevail in the matter pending before the Appellate Division, the appointing authority is directed to immediately provide the appellant with the required back pay from the time of his removal, less anytime that the parties agreed that back pay should not accrue, while the matter was on the inactive list at OAL.

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 this case, the Commission modified the appellant's removal but imposed major discipline. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. *See Bazyt Bergus v. City of Newark*, Docket No. A-3382-00T5 (App. Div. June 3, 2002); *In the Matter of Mario Simmons* (MSB, decided October 26, 1999). See also, *In the Matter of Kathleen Rhoads* (MSB, decided September 10, 2002) (Counsel fees denied where removal on charges of insubordination, inability to perform duties, conduct unbecoming a public employee and neglect of duty was modified to a 15-day suspension on the charges of neglect of duty).

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. 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*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Civil Service Commission finds that the appointing authority's action in imposing a removal was not justified. Therefore, the Commission modifies the removal to a 30 working day suspension. The Commission further orders that should the appellant prevail in the matter pending before the Appellate Division or if that matter is withdrawn or dismissed, he is to be granted back pay, benefits and seniority for the period following his 30 working day suspension until his reinstatement. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of this issue.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4th DAY OF DECEMBER, 2013

Robert E. Brenner
Member
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals
& 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. CSR 8216-12
AGENCY DKT. NO. n/a 2012-3621

IN THE MATTER OF B[redacted] O[redacted]
TOWNSHIP OF NORTH BERGEN

Patrick P. Toscano, Jr., Esq., for appellant (The Toscano Law Firm, attorney)

Margaret Miller, Esq., for respondent (Bernstein & Associates, attorneys)

Record Closed: September 9, 2013 Decided: October 24, 2013

BEFORE **TIFFANY M. WILLIAMS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, B[redacted] O[redacted] appeals the decision of the North Bergen Police Department to terminate his employment on June 8, 2012, in connection with an incident occurring on September 13, 2011. The matter was filed simultaneously with the Civil Service Commission and with the Office of Administrative Law (OAL) on June 19, 2012. A telephone conference was conducted on July 12, 2012, where a hearing date of October 19, 2012 was set. By letter dated July 12, 2012, the respondent did not contest the accumulation of back pay that may accrue pending the October 19, 2012 hearing date.

On October 19, 2012, the parties jointly requested to place the matter on the inactive list for ninety days as a result of concurrent pending issues regarding the parallel medical review board appeal. The appellant agreed to toll the accumulation of back pay that may have otherwise accrued during the period of inactivity. On January 24, 2013, the parties' request for an additional ninety days on the inactive list was granted. On May 23, 2013, the respondent requested that the matter be continued on the inactive list, however the appellant objected. Accordingly, the matter was scheduled for hearing at the earliest mutually convenient time for the parties—July 30, 2013. On July 19, 2013, the respondent requested an adjournment due to witness unavailability, which was denied. A hearing was conducted on July 30, 2013. The record closed on September 9, 2013, after the receipt of post-hearing briefs.

FINDINGS OF FACT

Having observed the demeanor of the witnesses and evaluated the evidence, I **FIND** the following as **FACT**:

Officer B[redacted] O[redacted] was employed by the police department of the Town of North Bergen until he was terminated on April 6, 2012. O[redacted] reported to Captain Robert Hovan and Chief Robert Dowd. On September 8, 2011, Chief Dowd ordered O[redacted] to remove a large highway sign that had been knocked down earlier in the year and had remained in storage for approximately 6-7 months. Dowd ordered O[redacted] to remove the sign by no later than September 12, 2011. Chief Dowd understood that the guidelines allowed for any item that remained in the garage could be destroyed after 6 months and that arrangements could be made for the Department of Public Works to pick up the item for destruction. O[redacted] initially made an inquiry with a representative at the New Jersey Department of Transportation (DOT) because the sign was a state highway sign that had fallen over during a storm.

O[redacted] wanted to avoid destroying the sign because it was the property of the state and decided to await a response as to when the DOT could send someone to pick up the sign. By September 13, 2013, O[redacted] had not heard back from the DOT

and had not contacted the DPW to destroy the sign. The same day, Dowd noticed that the sign was still in the garage and asked O[redacted] why he had not disposed of it in the timing that he had initially requested. O[redacted] indicated that he was awaiting contact back from the DOT regarding an action plan for removing the sign. Dowd reiterated that he had ordered the sign removed. O[redacted] became upset and loud during the exchange that ensued and Dowd ordered him to write a report about the fact that he had not completed the sign removal. O[redacted] completed the report and later apologized to Dowd. Captain Hovan, who had reviewed O[redacted]s report, indicated that the report was incomplete. O[redacted] drafted a final report explaining his steps in attempting to dispose of the sign.

Dowd met with O[redacted] again after he completed his report, with Hovan present. During the conversation, O[redacted] indicated that he believed that Dowd was harassing him and accused Dowd of having had a problem with Spanish officers for most his career. Hovan directed O[redacted] to leave the office. Before O[redacted] left, Dowd advised him that he was suspended and should go home for the rest of the day. Dowd observed O[redacted] to be very agitated and sweaty with his eyes turning red. Dowd acknowledged raising his voice at the end of the conversation. Prior to suspending O[redacted] Dowd offered to assign him to the field for the remainder of the day but changed his mind to suspend him after observing O[redacted] to laugh at him in a disrespectful manner in response to his order.

After O[redacted] was suspended, he was directed to submit to an Internal Affairs interview and a spontaneous drug test. The drug test was administered by Dowd's brother, who O[redacted] was aware was another officer in line after O[redacted] on the sergeant promotional list. O[redacted] testified that the drug test later came back negative for the presence of drugs. Captain Chris Brignola encountered O[redacted] after he had been suspended and observed him to be visibly shaken, his eyes to be bloodshot and sweating profusely. He asked O[redacted] whether he needed medical attention to which O[redacted] responded, "how would you feel if you had just gotten suspended." As the Commander of Internal Affairs, Brignola interviewed O[redacted] regarding the incident. Brignola described O[redacted] conduct as agitated and nervous. At the conclusion of the drug test and the interview, O[redacted] surrender his firearm and was escorted home

to surrender his weapons that were kept in his gun locker. Deputy Chief Peter Fasilis retrieved O[redacted]s weapons and testified that he observed O[redacted]'s speech to be convoluted or mumbling at one point as he was searching through his bag. Fasilis also observed O[redacted] to say, "I know it is promotion time."

Additionally, on September 9, 2011, at approximately 9:00 am, Hovan had ordered O[redacted] to contact the Hudson County Prosecutor's Office regarding the joint task force's activities surrounding the anniversary of the September 11th attacks. At approximately 2:00 pm, at Hovan's direction, Dowd followed up with O[redacted] to determine whether he had complied with the order. O[redacted] admitted that he had not yet placed the call because earlier he had to secure evidence at the drug lab. Dowd responded that his explanation was a poor excuse and that O[redacted] should sit down immediately and call Captain Cooney at the Hudson County's Prosecutor's Office. O[redacted] called Cooney in the presence of Dowd.

LEGAL ANALYSIS AND CONCLUSIONS

The Civil Service Act recognizes that the public policy of this state is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). In order to carry out this policy, the Act also includes provisions authorizing the discipline and termination of public employees. A public employee who is protected by the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2-2.3(a), and include the present charges of unbecoming conduct, neglect of duty and other sufficient cause for discipline.

The burden of proof in this matter is on the appointing authority to show by a preponderance of the competent, relevant and credible evidence that the appellant is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962). The evidence must be

such as to lead a reasonably cautious mind to the given conclusion and is determined on a case-by-case basis. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958).

Conduct unbecoming may refer to "any conduct which adversely affects the morale or efficiency of the bureau . . . [or] which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (citing Zeber Appeal, 156 A.2d 821, 825 (Sup. Ct. 1959)). "The inherent duties of a public employee include compliance with all reasonable rules and regulations, and duties arising from a fiduciary relationship to the public and from such duties as arise by the nature of the office held." West v. Cnty. of Hudson, CSV 03929-01, Initial Decision (Dec. 18, 2003), adopted, Merit Sys. Bd. (March 28, 2004), <http://njlaw.rutgers.edu/collections/oal/> (citing, e.g., Hartmann v. Ridgewood, 258 N.J. Super. 32 (App. Div. 1992)).

In determining if the penalty the appointing authority selected was unreasonable, arbitrary or offensively excessive under all the circumstances, appellant's record of performance must be considered. See West New York v. Block, 38 N.J. 500 (1962). The New Jersey Supreme Court found that

> a reviewing court should alter a sanction imposed by an administrative agency only "when necessary to bring the agency's action into conformity with its delegated authority. The Court has no power to act independently as an administrative tribunal or to substitute its judgment for that of the agency." In light of the deference owed to such determinations, when reviewing administrative sanctions, "the test . . . is 'whether such punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness.'" The threshold of "shocking" the court's sense of fairness is a difficult one, not met whenever the court would have reached a different result.
>
> [In re Herrmann, 192 N.J. 19, 28–29, (2007) (citations omitted.]

Although the principles of progressive discipline typically apply in the determination of a disciplinary penalty for New Jersey civil service employees, if the actions of the employee are egregious, notwithstanding the lack of prior workplace infractions, removal by the appointing authority can be appropriate. See id. at 26–27 (finding that a relatively new employee that did not have prior violations could be terminated where she waived a lighter in the face of a child in the proximity of highly explosive oxygen tanks).

As an initial matter, the disciplinary action specifications described by the appointing authority constitute a multi-page narrative that spans over the course of three days. The specifications are vague in identifying precisely which aspect of this narrative is alleged to have been the conduct that was insubordinate or unbecoming. Moreover, while other sufficient cause for discipline is also cited, there is no detail provided in the specifications to support any additional other sufficient cause for discipline, i.e. a violation of internal rules and regulations. Distilling the narrative, in light of the evidence presented at the hearing by the appointing authority, it is evident that the appointing authority intended to convey that O[redacted]s response to the direct orders issued to him on September 8, 2011 and September 9, 2011 constituted insubordinate and unbecoming conduct. As further evidence, the appointing authority cited in its closing brief that "the preponderance of the credible evidence firmly establishes that the charges of insubordination, conduct unbecoming and other just cause should be sustained based on Officer O[redacted]'s failure to follow two direct orders."

Considering each incident separately, I **CONCLUDE** that the undisputed evidence demonstrated that O[redacted] did not comply with the September 8, 2011 order to remove the street sign by September 12, 2011. O[redacted] does not dispute this fact but offers several justifications in his defense. However, I am not convinced that any of these justifications, even if valid, removed his obligation to obey the lawful order of his superior officer. However, based on O[redacted] justifications, I view his failure to complete the order to be one of competence rather than willful disobedience. Essentially, the preponderance of the credible evidence demonstrates that O[redacted] took meaningful steps to have the sign removed, but failed to complete these steps in

the timing which he was given. Technically, by failing to timely complete the assignment, despite his meaningful steps, O[redacted] was insubordinate, which also constitutes conduct unbecoming of a public employee because he should have taken every available step to comply with a lawful and reasonable order.

Further, I **CONCLUDE** that the preponderance of the credible evidence demonstrates that O[redacted] complied with the September 9, 2011 order to contact the Hudson County Prosecutor's Counter Terrorism Unit, when he placed the call on the same day in Chief Dowd's office, at Chief Dowd's direction. Admittedly, O[redacted] had not yet complied with the order that he received at 9:00 am as of approximately 2:00 pm. Nonetheless, the original order did not indicate a specific time frame or deadline and therefore, it would be patently unfair to discipline O[redacted] where there was no further direction. Even considering an unstated implication that Captain Hovan intended that the order be completed before O[redacted]'s shift ended, the record clearly indicates that O[redacted] completed the order in that timing. The appointing authority cannot ignore the fact that O[redacted] complied with the order upon Chief Dowd's guiding hand. Unlike the September 8, 2011 order to which Chief Dowd gave a specific and measurable deadline, Captain Hovan's order was not time bound and was actually completed by O[redacted] with Chief Dowd as a witness.

In addition to the allegations of failure to comply with two direct orders, the appointing authority's narrative of specifications describes events on September 13, 2011 which led to the imposition of a one-day suspension by Chief Dowd. I am not convinced that the manner in which the appointing authority penned its specifications sufficiently advised O[redacted] that his conduct on September 13, 2011 was the subject of the instant discipline. Nonetheless, considering the specifications in the light most favorable to the appointing authority, I **CONCLUDE** that the preponderance of the evidence demonstrated that O[redacted] was insubordinate and conducted himself in a manner that was unbecoming of a public employee in his interaction with Chief Dowd on September 13, 2011. Chief Dowd credibly testified that during his conversation with O[redacted] about the disposal of the sign, O[redacted] was loud, visibly upset and at a later point laughed when Chief Dowd reassigned him to the field for the duration of his shift, which resulted in Chief Dowd suspending him for a day. While I find Chief

Dowd's characterization of this moment credible and relevant to a determination of the instant charges, I am not persuaded that the testimony by the other witnesses about his demeanor buttresses this charge nor provides an independent basis for discipline when liberally reading the specifications. Nonetheless, O[redacted] inappropriately conducted himself in a manner that was less than respectful to Chief Dowd during their meeting.

Accordingly, I **CONCLUDE** that O[redacted] was insubordinate and conducted himself in an unbecoming manner when he failed to follow the September 8, 2011 order in the timing that he was directed and when he demonstrated frustration at Chief Dowd and ultimately laughed at him.

In evaluating the potential penalty, I **CONCLUDE** that a penalty of termination was wholly inappropriate and disproportionate with notions of justice and fairness. In evaluating the gravity of the offense, O[redacted] must be held to a higher standard as a law enforcement officer in a paramilitary environment whose success depends on strict compliance with orders. His conduct—failure to dispose of a sign and disrespecting his superior officer—cannot be taken lightly. Nonetheless, the penalty of termination dispenses with the well settled legal principle of progressive discipline. The evidence failed to establish any attendant circumstances that would justify terminating an officer with an unblemished record based on the record. To the contrary, I am not persuaded that the characterizations of his conduct that purported to form the basis of a drug test—which ultimately resulted in a negative finding—were credible. In fact, it appeared that the characterizations were misplaced and exaggerated. I also cannot ignore the fact that Chief Dowd testified that he initially ordered a one day suspension for O[redacted] based on his knowledge of the failure to dispose of the sign and O[redacted] emotional interaction with him. I accept this testimony as a permissible inference of his perception of the gravity of O[redacted]s conduct. Nonetheless, I find that the conduct warranted a suspension in excess of one day. Accordingly, I determine that the appropriate penalty in this matter is a suspension of ten days, due to the gravity of the fact that O[redacted] disrespected his superior officer.

ORDER

Accordingly, I **ORDER** that the appellant be suspended for ten (10) days for insubordination and unbecoming conduct.

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. 40A:14-204.

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.

10-24-13
DATE

Tiffany M. Williams
TIFFANY M. WILLIAMS, ALJ

Date Received at Agency:

Date Mailed to Parties: OCT 28 2013

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

LIST OF WITNESSES

For Appellant:

B[redacted] O[redacted]

For Respondent:

Captain Chris Brignola

Deputy Chief Peter Fasilis

Chief Robert Dowd

LIST OF EXHIBITS

For Appellant:

None

For Respondent:

R-1 Memorandum to Chief Gavin, Jr. from Lieutenant Brignola dated 9/13/11

R-2 Memorandum to Chief Gavin, Jr. from Captain Dowd dated 9/13/11

R-3 Memorandum to Chief Gavin, Jr. from Captain Hovan dated 9/13/11

R-4 Adm. Advisement Form, of North Bergen Police Dept., I.A., dated 9/13/11

R-9 Operation Report of P.O. B. O[redacted] dated 9/13/11

R-10 Memorandum of Chief Galvin, Jr. from Captain Dowd dated 9/13/11

R-11 Memorandum of Chief Galvin, Jr. from Captain Dowd dated 9/9/11

R-12 Memorandum of Chief Galvin, Jr. from Captain Dowd dated 9/8/11

R-13 Operation Report of P.O.B. O[redacted]re: Sign dated 9/13/11

Joint:

J-1 Preliminary Notice of Disciplinary Action dated 04/05/12

J-2 Certification of Michael Derin

J-3 Certification of B[redacted] O[redacted]

J-4 Certification of Robert Hovan

RECORD IMPOUNDED

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4660-12T2

IN THE MATTER OF B.O.,
POLICE SERGEANT, NORTH BERGEN
POLICE DEPARTMENT.

Argued September 8, 2014 – Decided February 3, 2015

Before Judges Sabatino and Simonelli.

On appeal from the New Jersey Civil Service Commission, Docket No. 2012-3205.

Mark A. Tabakin argued the cause for appellant Township of North Bergen (Weiner Lesniak LLP, attorneys; Mr. Tabakin, of counsel and on the briefs; Bryant Gonzalez, on the briefs).

Todd A. Wigder, Deputy Attorney General, argued the cause for respondent New Jersey Civil Service Commission (John J. Hoffman, Acting Attorney General, attorney; Lewis A. Scheindlin, Assistant Attorney General, of counsel; Mr. Widger, on the brief).

The Toscano Law Firm, LLC, attorneys for respondent B.O., join in the brief of respondent New Jersey Civil Service Commission.

PER CURIAM

Appellant Township of North Bergen (Township) appeals from the May 3, 2013 final administrative decision of the Civil Service Commission (Commission) that the Township failed to

prove respondent B.O.[1] was psychologically unfit to perform the duties of police sergeant and must return his name to the list of police officers who were eligible for appointment to that position (the eligible list). Because we conclude the record amply supports the Commission's decision, we affirm.

Undisputed Facts

B.O. began his employment with the Township in 2000.[2] His employment record was exemplary and unblemished until the workplace events that occurred in September 2011. B.O.'s name was fifth on the eligible list as of June 3, 2010.

Following a domestic violence incident between B.O. and his ex-wife in January 2011, the Township placed him on modified duty and relieved him of his service firearm pending the results of a fitness for duty psychological examination. On February 9, 2011, the Township's psychologist, Dr. G, examined B.O. and administered psychological tests. The test results did not reveal B.O. had any personality traits that rendered him a

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[1] Consistent with the current practices of the Commission in matters involving mental health issues, and also because of our necessary discussion of the officer's domestic violence incident, we use initials to identify the individuals mentioned in this opinion in order to protect their identities.

[2] Prior to his employment with the Township, B.O. was employed for three years as a police officer with the New York Police Department. The record does not reveal he was subject to any disciplinary actions during that employment.

danger to self or others. In a February 25, 2011 report, Dr. G opined as follows:

> Overall, results of this examination suggest that [B.O.] is free from psychopathology and that he is essentially a well-functioning individual. A review of his background history reveals someone who is well[-]adjusted and productive. He has never been in legal difficulties, prior to the current [domestic violence matter], and has reportedly been an effective police officer.
>
> There are no indications in our results that [B.O.] poses a danger to himself or to others, including his ex[-]wife[.]

Dr. G concluded that B.O. was fit for duty, was not a danger to self or others, and had no psychological contraindications preventing the return of his service firearm and his return to work full-time with no restrictions. The Township returned B.O. to regular duty.

The Township's Version of Events in September 2011

On September 8, 2011, B.O. did not comply with a Captain's order to contact the New Jersey Department of Transportation (NJDOT) by September 12, 2011 about retrieving a fallen NJDOT street sign and on September 9, 2011, he did not comply with an order to contact the Counter Terrorism Unit of the Hudson County Prosecutor's Office about certain security matters for the anniversary of September 11. On September 13, 2011, Captain D and Captain H met with B.O. and confronted him about his non-

compliance. B.O. explained he had contacted the NJDOT and was awaiting a response. When asked why he had recently disregarded several orders, B.O. rolled his eyes, turned away from the Captains, and then turned back to them and pointed his finger at Captain D yelling, "Captain, I am telling you right now! Stop it Captain! Stop it!" Captain H immediately dismissed B.O. from the meeting and ordered him to file a report explaining his non-compliance.

B.O. completed the report, met again with the two Captains, indicated he intended to apologize for his demeanor and behavior on September 13, 2011, and acknowledged he had been acting irrationally and his behavior was inappropriate and unprofessional. His demeanor then unexpectedly changed and he rose from his chair in an aggressive manner and yelled at Captain D, "Stop it! Stop it right now! You have had it out for me!" Captain H ended the meeting and ordered B.O. to leave immediately and report to a patrol supervisor. When B.O. laughed at the order, Captain D immediately suspended him because of his "disrespectful behavior, insubordination, unbecoming conduct and disregard for the chain of command." In addition to B.O.'s irrational behavior and refusal to follow directives, he also exhibited bloodshot eyes, profuse sweating and a nervous and excitable demeanor. As such, he was ordered

to undergo a drug/alcohol test and a fitness for duty examination and surrender his service firearm. As B.O. relinquished the firearm he said to Captain H, "Thanks Captain, I know you partook in this. I know how it is. Promotions are coming up. You guys have been after me for years. I've been expecting this." B.O. continued making strange noises, laughed quietly, "and otherwise display[ed] atypical and abnormal and anomalous behavior."

On September 19, 2011, the Township issued a preliminary notice of disciplinary action (PNDA), which recited the above version of events in detail. The Township suspended B.O. without pay pending the results of the drug/alcohol test and fitness for duty examination.

The Township's Expert Evidence

On September 22, 2012, approximately seven months after he examined B.O., Dr. G re-examined B.O., administered psychological tests, and came to a wholly different conclusion about B.O.'s danger to self and others. Dr. G rejected B.O.'s explanation of events and found B.O. had "distorted the truth," was "experiencing a good deal of tension and repressed anger or frustration," and was "apparently unwilling to disclose the source, or even the existence, of his anger." Although none of the psychological tests revealed that B.O. had any negative

psychological traits, Dr. G. nevertheless concluded he was a danger to self and others and in need of psychotherapy. The doctor did not correlate his findings to the job requirements for police sergeant.

B.O.'s Expert Evidence

B.O.'s psychologist, Dr. R, examined him on two occasions and reviewed numerous documents, which she listed in her March 23, 2013 report.[3] In her report, the doctor set forth, in extensive detail, B.O.'s version of events, which differed significantly from the Township's version. Among other things, B.O. admitted he pointed his finger at Captain D, but explained he did so due to years of workplace harassment, abuse, retaliation and discrimination he suffered because of his ethnicity, the activities and recognitions he received as a police officer, and his high ranking on the sergeant promotional list. B.O. explained that his supervisors "had it out for him,"

[3] These documents include investigation material such as a December 31, 2009 memorandum from a Lieutenant to Captain D about B.O.'s claim of workplace harassment and discrimination; September 8 and 9, 2011 correspondence from Captain D. to the Police Chief about the orders given to B.O.; B.O's two September 13, 2011 reports; a September 13, 2011 memorandum from Captain D to the Police Chief about B.O.'s suspension; a September 13, 2011 memorandum from Captain H to the Police Chief about B.O.'s suspension; a September 13, 2011 memorandum from a Lieutenant to the Police Chief about an internal affairs investigation regarding B.O.; B.O.'s October 11, 2011 notice of tort claim; and reports of interviews with three other police officers about the events on September 13, 2011.

and he rose aggressively toward Captain D because the events on September 13, 2011 were the "final straw." He also explained he felt "provoked" at work and described the negative management relationship and/or management practices to which he was subjected. B.O. also said that in October 2011, he had filed a notice of tort claim with the Township, alleging workplace harassment and civil rights violations, among other claims.

Dr. R found that B.O. had no history of violence and there was no evidence he would resort to violence as a means to resolve grievances. The doctor also found B.O. had no aggressive or homicidal ideations or prior episodes of explosive outbursts at work, nor did he make threats to anyone or express any plan or intent to harm anyone on the workforce. Dr. R determined that the incident on September 13, 2011 was an isolated incident to which B.O. reacted based on perceived years of harassment. The doctor concluded that B.O. was at a low risk for workplace or other violence, did not pose a danger to self or others, and was not unfit for duty. She recommended that B.O. receive certain monitoring and training, but did not recommend psychological treatment.

B.O.'s Appeal From The Removal Of His Name From the Promotional List

The Township relied on Dr. G's report and B.O.'s failure to obtain psychological treatment to issue a second PNDA, seeking

his removal from employment based on his unfitness for duty and danger to self and others, as well as insubordination, conduct unbecoming a public employee, and "other sufficient cause" stemming from the September 2011 incidents. In the PNDA, the Township recited its version of events in detail and stated its concerns for B.O.'s fitness for duty.

In addition to the second PNDA, the Township submitted a request to the Commission to remove B.O.'s name from the eligible list. The Township later removed B.O. from employment, effective June 8, 2012.

B.O. appealed to the Commission from the removal of his name from the eligible list.[4] The Commission notified the Township of B.O.'s appeal and that N.J.A.C. 4A:4-6.5 required the Township to submit "the complete psychological and/or psychiatric report which was the basis for disqualification, as well as all tests, raw data, protocols, printouts, and

[4] B.O. also appealed to the Commission from his removal from employment. That appeal was transmitted to the Office of Administrative Law for a hearing as a contested case. In an October 24, 2013 initial decision, an Administrative Law Judge (ALJ) found the Township had sustained the charges only as to NJDOT matter and that B.O. was insubordinate solely with respect to that matter. The ALJ concluded that removal was not justified and recommended a ten-day suspension. In a December 18, 2013 final decision, the Commission adopted the ALJ's factual findings and conclusions, but modified the suspension to thirty days. We conclude the insubordination finding is irrelevant to the issue in this appeal—whether B.O. was psychologically unfit for duty.

profiles." The Commission also advised the Township it could submit "[a]ny additional information [the Township wished] to provide." In addition, N.J.A.C. 4A:4-6.5(d) required the Township to submit "all background information, including any investigations." The Township only submitted the two psychological reports, B.O.'s psychological test results, and the two PNDAs.

The Commission submitted the appeal to the Medical Review Panel (Panel) pursuant to N.J.A.C. 4A:4-6.5(g), which authorizes the Commission to either conduct a written record review of the appeal or submit an appeal to the Panel. The Panel is authorized to review "additional psychological or medical reports, examinations or other materials." N.J.A.C. 4A:4-6.5(g) (emphasis added). Further, as the Township concedes, the Commission's website advises the public that the Panel may ask an appellant questions at the review. See Appeals FAQs, N.J. Civ. Serv. Comm'n, http://www.nj.gov/csc/authorities/faq/appeals (last visited Jan. 14, 2015).

The Panel notified the parties to appear for the review on July 27, 2012, and instructed them to provide copies of any supplemental argument or documentation they intended to present. The record does not reveal that the Township submitted supplemental materials. During the review, the Panel considered

all of the information provided and asked B.O. questions. The record does not indicate that the Township's attorney objected to the procedures the Panel employed, including questioning B.O., or that counsel asked to cross-examine B.O., present witnesses, or provide post-review information, including information rebutting B.O.'s responses to the Panel's questions.

The Panel's Report and Recommendation

In a July 27, 2012 report, the Panel found there was no evidence of an ongoing pattern of insubordination or that B.O. ever presented with a significantly elevated risk of danger to self or others. The Panel noted that B.O.'s long history of employment as a police officer with no prior disciplinary actions prior to September 13, 2011 confirmed he had a solid work background. The Panel was satisfied that B.O. provided a rational explanation for his actions, and that although he did not follow his supervisor's orders, his conduct only warranted disciplinary action.

The Panel emphasized that, although "extremely agitated and in a highly emotional confrontation" with his supervisors, B.O. never engaged in any violent acts and complied with orders to submit a urine sample, return his service firearm, and attend a fitness for duty examination. The Panel found it significant that when accused of an act of domestic violence, Dr. G found

B.O. was not a danger to self or others and was fit for duty. The Panel concluded that B.O. was not mentally unfit to perform effectively the duties of police sergeant, and recommended reversal of the Township's decision to remove his name from the eligible list.

An attorney for the Township, who was not present at the Panel's review, submitted exceptions to the Panel's report. The attorney argued that the Panel exceeded its authority by engaging in a fact-finding investigation rather than limiting its review to the conflicting psychological reports. The attorney accused the Panel of: affording B.O. an "unfettered opportunity" to present his version of events; denying the Township the opportunity to present its version, cross-examine B.O., or present witnesses; and basing its decision entirely on B.O.'s version. The attorney challenged the Panel's findings and argued the Panel failed to undertake a meaningful review of the psychological reports, which revealed the concerns of both Dr. G and Dr. R about B.O.'s ability to comply with orders.

The Commission's Decision

The Commission independently evaluated the record and issued a final administrative decision on May 3, 2013, adopting and accepting the Panel's report and recommendation. The Commission noted that the Panel conducted an independent review

of the information both parties presented as well as the psychological evaluations, and the Panel's conclusions and recommendations were "based firmly on the totality of the record presented to it." The Commission found that the Township's exceptions did not persuasively dispute the Panel's findings, "which [were] based on the Panel's own review of the results of the tests administered to [B.O.], as well as the Panel's experience in evaluating hundreds of appellants."

The Commission determined that the Panel did not engage in a fact-finding investigation, but rather, conducted "a behavioral observation of [B.O.'s] presentation of his version of the events as a psychological assessment tool," and this observation was "based [the Panel's] expertise in the fields of psychology and psychiatry, as well as its experience in evaluating hundreds of appellants." The Commission concluded the Township failed to meet its burden to prove B.O. was psychologically unfit to perform effectively the duties of police sergeant. Accordingly, the Commission ordered the Township to return B.O.'s name to the eligible list. Because B.O.'s appeal of his removal from employment was pending, the Commission ordered that he could not be considered for promotion unless he was reinstated to his job. This appeal followed. B.O. had not corss-appealed.

The Township's Appeal

On appeal, the Township contends the Panel's recommendation was against the weight of the evidence. Relying on In re Vey, 135 N.J. 306 (1994), the Township argues that the Panel failed to explain why it rejected evidence of B.O.'s anger issues identified by both doctors, and failed to reconcile B.O.'s anger issues with the job requirement for police sergeant. Instead, the Township asserts that the Panel improperly engaged in fact-finding and relied solely on B.O's version of events without affording the Township the opportunity to provide its version or rebuttal evidence.

The Township also contends the Commission's decision was arbitrary and capricious because it failed to independently review the record, as required by N.J.A.C. 4A:4-6.5(h), and improperly deferred in a wholesale manner to the Panel's "one-sided" fact-finding and faulty recommendation. Alternatively, the Township requests a remand for the Commission to articulate a basis for its decision. We reject all of the Township's contentions.

Civil service appointments must be made "according to merit and fitness." N.J. Const. art. VII, § 1, ¶ 2. The Legislature has granted the Commission broad authority to adopt rules and regulations to implement this mandate. N.J.S.A. 11A:2-1, -6(d).

To ensure that appointments are made on merit and fitness, the Commission has adopted regulations that permit the removal of a name from an eligible list when the candidate is not qualified for appointment. N.J.A.C. 4A:4-4.7(a), -6.1(a). Among other reasons, a candidate's name may be removed from an eligible list if he or she is found to be psychologically unfit to perform effectively the duties of the title. N.J.A.C. 4A:4-6.1(a)(3). In order to remove a name for an eligible list, the appointing authority must prove that the candidate is psychologically unfit for the job. N.J.A.C. 4A:4-6.3(b); In re Vey, supra, 124 N.J. at 540.

Our role in reviewing the Commission's decision is limited. In re Stallworth, 208 N.J. 182, 194 (2011). "[A] strong presumption of reasonableness attaches to [an agency decision]." In re Carroll, 339 N.J. Super. 429, 437 (App. Div.), certif. denied, 170 N.J. 85 (2001). "In order to reverse an agency's judgment, [we] must find the agency's decision to be 'arbitrary, capricious, or unreasonable, or [] not supported by substantial credible evidence in the record as a whole.'" Stallworth, supra, 208 N.J. at 194 (quoting Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980)).

To determine whether an agency action is arbitrary, capricious, or unreasonable, we must examine

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
>
> [Ibid. (quoting In re Carter, 191 N.J. 474, 482-83 (2007)).]

We "'may not substitute [our] own judgment for the agency's, even though [we] might have reached a different result.'" Ibid. (quoting Carter, supra, 191 N.J. at 483). "This is particularly true when the issue under review is directed to the agency's special 'expertise and superior knowledge of a particular field.'" Id. at 195 (quoting In re Herrmann, 192 N.J. 19, 28 (2007)). Furthermore, "[i]t is settled that '[a]n administrative agency's interpretation of statutes and regulations within its implementing and enforcing responsibility is ordinarily entitled to our deference.'" E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 355 (App. Div. 2010) (second alteration in original) (quoting Wnuck v. N.J. Div. of Motor Vehicles, 337 N.J. Super. 52, 56 (App. Div. 2001)). "Nevertheless, 'we are not bound by the agency's legal opinions.'" A.B. v. Div. of Med. Assistance & Health Servs., 407 N.J. Super. 330, 340 (App. Div.) (quoting

Levine v. State Dep't of Transp., 338 N.J. Super. 28, 32 (App. Div. 2001)), certif. denied, 200 N.J. 210 (2009). "Statutory and regulatory construction is a purely legal issue subject to de novo review." Ibid.

Applying these standards, we discern no reason to disturb the Commission's decision. The record confirms that the Commission independently reviewed the record and amply supports the Commission's conclusion that the Township failed to sustain its burden to prove that B.O. is psychologically unfit for the job of police sergeant. The Township's reliance on Vey to argue the contrary is misplaced. In Vey, a seasonal police officer was removed from the list of eligible candidates for full-time employment as a police officer with the North Wildwood Police Department. Vey, supra, 124 N.J. at 536-37. The officer had negative psychological test results, a history of negative behavior, and a negative work history, which, viewed in the light of the job specification for police officer, indicated the officer was mentally unfit for the position. See In re Vey, 272 N.J. Super. 199, 202-204 (App. Div. 1993), aff'd, 135 N.J. 306 (1994).

Here, B.O. had no negative psychological test results, no history of anger issues, no negative work history, and he had only one atypical incident over an unblemished eleven-year

employment history with the Township. Given these facts, the Panel was correct to question Dr. G's conclusion that B.O. was a danger to self and others, and to query B.O. about his behavior in September 2011. The Panel properly concluded from all the information presented that B.O. was not psychologically unfit to perform effectively the duties of police sergeant.

We find no merit whatsoever in the Township's argument that the Panel impermissibly engaged in fact-finding by considering materials other than the psychological reports. The Panel's review was not restricted to the psychological reports. Rather, N.J.A.C. 4A:4-6.5(g) permitted the Panel to rely on "other materials" as well. The Panel was also authorized to ask B.O. questions at the review. See N.J.A.C. 4A:4-6.5(g)(1); see also Appeals FAQs, supra.

Nor is there any merit in the Township's argument that the Panel improperly relied only on B.O.'s version of events and deprived the Township of an opportunity to present its version or rebut B.O.'s version. The Township presented its detailed version of events to the Panel via the PNDAs and it knew or should have known from the contents of Dr.R's report that B.O. would present a significantly different version and an explanation for his behavior. The Township was afforded the

opportunity to submit additional information supporting its version and rebutting B.O.'s version.

In sum, we are satisfied there is sufficient credible evidence in the record as a whole supporting the Commission's decision. R. 2:11-3(e)(1)(D). The Township's arguments to the contrary are without sufficient merit to warrant further discussion. R. 2:11-3(e)(1)(E).

Affirmed.