B-54

STATE OF NEW JERSEY

In the Matter of Paul Williams, Township of Lakewood

CSC Docket No. 2016-2661

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

Court Remand

ISSUED: JAN 24 2017 (CSM)

The Appellate Division, New Jersey Superior Court, reversed the removal of Paul Williams, a Truck Driver, Heavy, with the Township of Lakewood and remanded to the Civil Service Commission (Commission) the matter of the calculation of back pay and counsel fees. A copy of that decision is attached.

As background, the appellant was removed effective January 7, 2014 on charges of incompetency, inefficiency or failure to perform duties, inability to perform duties, conduct unbecoming a public employee and other sufficient cause. Specifically, the appointing authority asserted that the appellant failed to report to a fitness for duty examination. Upon his appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing. Following a hearing and the Commission's *de novo* review, the appellant's removal was reversed, but the Commission imposed a six-month suspension and ordered that the appellant undergo a psychological fitness-for-duty examination prior to returning to work. In this regard, the Commission determined that the Administrative Law Judge (ALJ) interpreted the charges against the appellant narrowly and the charges could have been amended to include insubordination. The Commission explained that this would not have prejudiced the appellant since the specifications on his disciplinary notices clearly indicated that he was told orally and in writing by his supervisors to attend fitness-for-duty examinations and he refused to attend them. The appellant appealed the Commission's determination to the Appellate Division, which found that the appointing authority failed to demonstrate that its order to attend the fitness-for-duty examination was job-related and consistent with business necessity. Therefore, the court determined that the Commission's conclusion that the

appellant was insubordinate was erroneous as a matter of law. As such, it reversed the penalty imposed by the Commission and remanded the matter for calculation of back pay and counsel fees. *See In the Matter of Paul Williams, Township of Lakewood,* Docket No. A-0341-15T2 (App. Div. January 26, 2016).

In accordance with the court's directive, the appellant was asked to provide an affidavit of income earned during his period of separation and a detailed description of mitigation efforts he made. The appointing was also asked to provide the yearly breakdown of the amount of pay the appellant would have earned had he not been separated from employment. Additionally, the appellant's counsel was requested to provide a detailed breakdown of the services provide, the rate charged, and the description of the credentials of the attorney(s) who worked on the case.

BACK PAY

In response, the appointing authority, represented by Steven Secare, Esq., presents that the appellant's pay would have been $40,675.87 for 2014, $32,641.13 for 2015, and $4,184.76 until his reinstatement on February 1, 2016. Additionally, unemployment records received by the appointing authority indicate that the appellant was paid $18,441.00 in unemployment. However, despite several requests by the appointing authority and by the appellant's union representatives, he has not provided any other information regarding other employment. It also notes that unemployment records indicate compensation was suspended for a few periods of time and it assumes that the appellant was working during those periods. In support, the appointing authority provides records of the appellant's unemployment compensation payments that indicate he received cash benefits for the weeks ending January 11, 2014 to March 22, 2014, March 29, 2014 to June 21, 2014, and April 4, 2015 to June 20, 2015.

The appellant, in a submission postmarked June 17, 2016, states that he received a call in April 2016 from his attorney asking if he had received the correct back pay and that he did not receive any correspondence regarding the matter of enforcing his back pay award. Thereafter, on June 10, 2016, he states that his attorney, David M. Bander, Esq., contacted him about the matter and requested documents and that he sign an affidavit. The appellant states that some certain documents are "virtually two years old and would reasonably take time to sort." As he intends to be "made whole," the appellant requested up to 45 days to contact the Commission. It is noted that the appellant never contacted or provided any additional information for the Commission to review.

Bander provides a certification dated August 4, 2016, indicating that he has continually contacted the appellant in an attempt to obtain information about his mitigation efforts during the period he was terminated, but he has not responded. Bander explains that his efforts included several conversations with the appellant

in June 2016, in which he represented that he would obtain such information. However, when Bander attempted to follow up with the appellant by telephone on six different occasions in July and August 2016, the appellant never returned his calls. Further, Bander certifies that he left a message with Patrick Donnelly, the appointing authority's Director of Public Works on August 1, 2016 and asked him to have the appellant call him immediately, but the appellant never returned his call. Thus, Bander requests that the appellant be able to supplement the record with his mitigation efforts if he produces such documentation. Nevertheless, the appellant does not dispute that he would have earned a total of 77,501.76 during the period of his separation or that he was paid $18,441.00 in unemployment compensation. Therefore, based on the existing record, Bander requests back-pay in the amount of $59,060.76, a portion to be held in escrow until the appellant produces documents detailing his mitigation, which represents his back pay minus the amount of mitigation through unemployment compensation.

COUNSEL FEES

In the request for counsel fees, the appellant's counsel states that 125.2 hours of legal services were provided between December 20, 2013 (to discuss appellant's case with union representative) and April 14, 2015 (the point when the appellant initiated his appeal to the Appellate Division). During that time frame, Kevin P. McGovern, Esq., billed 33.4 hours of legal services and Bander billed 91.8 hours. Between January 25, 2016 (the date of the Appellate Division's decision) through the present time, the appellant's counsel states that 22.6 hours of legal services were provided. In this period, McGovern billed 3.5 hours and Bander billed 19.1 hours. Thus, a total of 147.8 of legal services have been provided in this matter. McGovern certifies that he is a partner with 22 years of experience in the field of labor and employment law and has been a member of the Bar since 1994. Bander has been an associate since 2014 and has been a member of the Bar since 2007. As the firm has a retainer agreement instead of charging an hourly rate, counsel requests a blended rate of $162.50 for a total of $24,015.00 in counsel fees. Additionally, counsel requests $60.04 in costs for shipping. Counsel provides a itemized statements of the legal services provided between December 20, 2013 through July 29, 2016.

In response, the appointing authority challenges as redundant requested fees for calls made to the appellant seeking to contact him on June 7, 8, 9, 10, 13, and July 27, 28, and 29, 2016 for a total of 3.6 hours ($540.00) concerning back pay issues.

CONCLUSION

BACK PAY

N.J.A.C. 4A:2-2.10(d) provides, in pertinent part, that:

Back pay shall include unpaid salary, including regular wages, overlap shift time, increments and across-the-board adjustments. Benefits shall include vacation and sick leave credits and additional amounts expended by the employee to maintain his or her health insurance coverage during the period of improper suspension or removal.

* * *

3) Where a removal or suspension has been reversed or modified, an indefinite suspension pending the disposition of criminal charges has been reversed, the 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 below.

4) Where a removal or a suspension for more than 30 working days has been reversed or modified or an indefinite suspension pending the disposition of criminal charges has been reversed, 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.

i. "Underemployed" shall mean employment during a period of separation from the employee's public employment that does not constitute suitable employment.

ii. "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.

iii. "Suitable employment" or "suitable position" shall mean employment that is comparable to the employee's permanent career service position with respect to job duties, responsibilities, functions, location, and salary.

iv. 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.

v. The burden of proof shall be on the employer to establish that the employee has not made reasonable efforts to find suitable employment.

In the matter at hand, the appellant was removed effective January 7, 2014 and returned to work on February 1, 2016. There is a presumption that the receipt of unemployment insurance benefits evidences that an employee sufficiently mitigated during the period of separation, since searching for employment is a condition to receiving such benefits. However, this presumption may be rebutted where the appellant did not make a diligent effort to seek employment. *See In the Matter of Donald Hicks*, Docket No. A-3568-03T5 (App. Div. September 6, 2005). *See also, In the Matter of Alphonso Hunt* (MSB, decided September 21, 2005); *In the Matter of Philip Martone* (MSB, decided February 9, 2005). *N.J.S.A.* 43:21-4(c)1 states that "an unemployed individual shall be eligible to receive [unemployment] benefits with respect to any week only if . . . The individual is able to work, and is available for work, and has demonstrated to be actively seeking work." In the present matter, the appointing authority has not presented any evidence that the appellant did not make diligent efforts to seek employment when he received unemployment insurance benefits. Accordingly, his receipt of unemployment insurance benefits is considered evidence of sufficient mitigation for the time period he received those benefits. Records provided by the appointing authority evidence

that the appellant received unemployment compensation from January 11, 2014 to June 21, 2014 and from April 4, 2015 to June 20, 2015. Therefore, he would be entitled to mitigated back pay for those periods of time.

However, there is no evidence that the appellant made ***any*** attempts at mitigation for the periods that he was not receiving unemployment benefits from June 22, 2014 to April 3, 2015 and from June 21, 2015 to when he was returned to work on February 1, 2016. Therefore, the Commission finds that the appointing authority has sustained its burden of proof and established that the appellant failed to make "reasonable efforts" to find suitable employment during these time periods. In this regard, despite being contacted by his counsel on multiple occasions regarding mitigation and indicating himself that he would contact the Commission, the appellant, despite these numerous opportunities and ample time, has not provided any information or evidence of his mitigation during the period he was not collecting unemployment compensation. Where, as here, there is absolutely no evidence to show that the appellant made reasonable efforts to obtain substitute employment, the appellant shall not be eligible for back pay for any period during which he failed to make such reasonable efforts. *See N.J.A.C.* 4A:2-2.10(d)4. In this regard, the Commission rejects the appellant's attorney's request to allow the appellant to present further evidence of mitigation in the future.[1] Consequently, since the appellant has not provided any evidence that he was employed or made reasonable efforts to obtain suitable employment, he is not entitled to any back pay from June 22, 2014 to April 3, 2015 and from June 21, 2015 to when he was returned to work on February 1, 2016. Therefore, the calculation of the appellant's mitigated back pay award is as follows:

Time Period	**Gross Amount Owed**
January 7, 2014 through June 21, 2014	(119 work days at per diem rate of 156.45 = 18,617.55) – (24 weeks unemployment compensation at $516.00 per week = $12,384.00) = $6,233.55
June 22, 2014 through April 3, 2015	$0
April 4, 2015 through June 20, 2015	(55 work days at per diem rate of $125.54 = $6,904.00) – (12 weeks unemployment compensation = $6,057.00) = $847.00
June 21, 2015 through January 31, 2016	$0
Total Mitigated Back Pay Award	**$7,080.55**

[1] The Commission also notes that if the appellant was actually working during the period he did not collect unemployment benefits and has failed to report those earning in this matter, he may be subject to a future reduction of his back pay award should that evidence be produced and/or disciplinary charges based on his failure to be forthcoming in this proceeding.

COUNSEL FEES

N.J.A.C. 4A:2-2.12(c) provides as follows: an associate in a law firm is to be awarded an hourly rate between $100 and $150; a partner in a law firm with fewer than 15 years of experience in the practice of law is to be awarded an hourly rate between $150 and $175; and a partner in a law firm with 15 or more years of experience practicing law, or notwithstanding the number of years of experience, with practice concentrated in employment or labor law, is to be awarded an hourly rate between $175 and $200. *N.J.A.C.* 4A:2-2.12(e) provides a fee amount may also be determined or the fee ranges in (c) above adjusted based on the circumstances of a particular matter, in which case the following factors (see the Rules of Professional Conduct of the New Jersey Court Rules, at RPC 1.5(a)) shall be considered: the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; the fee customarily charged in the locality for similar legal services, applicable at the time the fee is calculated; the nature and length of the professional relationship with the employee; and the experience, reputation and ability of the attorney performing the services. *N.J.A.C.* 4A:2-2.12(g) provides that reasonable out-of-pocket costs, such as costs associated with expert witnesses, subpoena fees and out-of-state travel, shall be awarded. However, costs associated with normal office overhead shall not be awarded. *N.J.A.C.* 4A:2-2.12(d) provides that, if an attorney has signed a specific fee agreement with the employee or the employee's negotiations representative, the fee ranges set forth above may be adjusted. *N.J.A.C.* 4A:2-2.12(e) provides that the fee amount or fee ranges may be adjusted based on the circumstances of the particular matter, and in consideration of the time and labor required, the customary fee in the locality for similar services, the nature of length of the relationship between the attorney and client and the experience, reputation and ability of the attorney.

In this matter, the Commission finds nothing improper regarding the service entries provided in the appellant's counsel's itemized statement of services. Counsel request a blended rate of $162.50 for the combined services of McGovern and Bender. However, the rules on counsel fees do not provide for such rates. Rather, McGovern, who is a partner and has practiced law for 22 years, is entitled to $200 an hour. Bander, an associate since 2014, is entitled to a rate of $150 an hour. However, it is noted that while the appellant is entitled to counsel fees regarding his enforcement request for his counsel fee award since New Jersey courts have recognized that attorneys should be reimbursed for the work performed in support of any fee application *See H.I.P. (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc.*, 291 *N.J. Super.* 144, 163 (Law Div. 1996) [quoting *Robb v. Ridgewood Board of Education*, 269 *N.J. Super.* 394, 411 (Ch. Div. 1993)], he is not entitled to counsel fees for any work performed pursuing his claim for back pay. In that regard, *N.J.A.C.* 4A:2-1.5(b) provides, in pertinent part, that

counsel fees may be awarded where the appointing authority has unreasonably failed or delayed to carry out an order of the Commission where the Commission finds sufficient cause based on the particular case. In the instant matter, the record does not evidence that the appointing authority unreasonably delayed implementing the court's order. The record also fails to indicate that the appointing authority's actions were based on any improper motivation. Rather, it promptly reinstated the appellant upon receipt of the Appellate Division's determination. Thus, the record does not reflect a sufficient basis for an award of counsel fees for time spent on back pay issues. *See In the Matter of Lawrence Davis* (MSB, decided December 17, 2003); *In the Matter of William Carroll* (MSB, decided November 8, 2001).

Therefore, counsel fee shall be paid as follows:

McGovern 36.9 hours @ $200 =	$7,380.00
Bander 110.9 hours @ $150 =	$16,635.00
(Less 3.6 hours @ $150 for back pay issues) =	($540.00)
Total:	$23,475.00

In addition, as indicated above, the costs that represent normal office overhead will not be awarded. *See N.J.A.C.* 4A:2-2.12(g). These costs include photocopying expenses and expenses associated with the transmittal of documents through use of Federal Express or a messenger service. In the itemized statement of services, it is indicated that $53.58 was expended for UPS shipping and $6.46 was expended for certified mail. Since transmittal of documents is considered normal office overhead, counsel for petitioner is not entitled to the amount requested in costs.

ORDER

Therefore, it is ordered that the appointing authority pay Paul Williams the gross amount of $7,080.55 for back pay within 30 days of issuance of this decision. that the appointing authority pay counsel fees in the amount of $23,475.00 within 30 days of receipt of this decision.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JANUARY, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

c: Paul Williams
David Bander, Esq.
Steven Secare, Esq.
Record Center

IN THE MATTER OF PAUL WILLIAMS, TOWNSHIP OF LAKEWOOD.

DOCKET NO. A-0341-15T2

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

443 N.J. Super. 532*; *129 A.3d 393*; *2016 N.J. Super. LEXIS 15

January 13, 2016, Submitted
January 25, 2016, Decided

SUBSEQUENT HISTORY: [***1] Approved for Publication January 25, 2016.

PRIOR HISTORY: On appeal from the New Jersey Civil Service Commission, Docket No. 2014-1750.

COUNSEL: *Mets Schiro & McGovern, LLP*, attorneys for appellant Paul Williams (*Kevin P. McGovern*, of counsel and on the briefs; *David M. Bander*, on the briefs).

Secare & Hensel, attorneys for respondent Township of Lakewood (*Steven Secare*, on the brief).

John J. Hoffman, Acting Attorney General, attorney for respondent New Jersey Civil Service Commission (*Pamela N. Ullman*, Deputy Attorney General, on the statement in lieu of brief).

JUDGES: Before Judges OSTRER, HAAS and MANAHAN. The opinion of the court was delivered by HAAS, J.A.D.

OPINION BY: HAAS

OPINION

[*535] [**395] The opinion of the court was delivered by

HAAS, J.A.D.

[*536] In this case of first impression in New Jersey, appellant Paul Williams appeals, by leave granted, from the March 5, 2015 administrative decision of the Civil Service Commission (the Commission) finding him guilty of insubordination for refusing to comply with his employer's demand that he undergo a psychological fitness-for-duty examination. Because we conclude that the employer's order was not reasonably justified under the Americans with Disabilities Act (ADA), *42 U.S.C.A. §§ 12101-12213*, we reverse and remand for further proceedings. [***2]

I.

We derive the following facts from the testimony and documents presented at the hearing conducted in the Office of Administrative Law (OAL). On November 3, 2004, appellant began working as a truck driver for the Department of Public Works (the DPW) of the Township of Lakewood (the Township).

On or about March 28, 2013, the Township manager received an anonymous letter [**396] purportedly from a "[v]ery concerned employee at Lakewood Public Works." The unsigned letter stated:

> I am writing this letter because I am very concerned about the mental well[-]being of [appellant]. We as co-workers dread

> being assigned with him and everyone knows he has some sort of mental issues and I truly feel it puts us all at risk with his tirades and outbursts on a daily basis like the one he had today with his union stewards [M.C., B.T., and P.R.] as well. The men and women here at Lakewood public works deserve to come to work and not be afraid of this man, we deserve a hostile free working environment and you as our employer are legally obligated to provide us such. For years we have complained about this man to former Director [J.F.], to our current administration in place now and it seems like a joke, it[']s not. [***3] In 1992 there were over 750 workplace killings and this is no laughing matter[;] it's very real and very serious. [Appellant] is a time bomb waiting to explode and he needs help, and it's your responsibility to ensure he gets it or provide some way for us to feel safe at work. I truly hope there is something you can do to ensure our safety, please don't put the township[']s fear of liability ahead of the employee's safety.
>
> Thank you for your time[.]

For over eight months, the Township took no action concerning the letter. On December 2, 2013, however, "the Township advised [*537] appellant that he would be sent for a psychological fitness-for-duty examination, and that if he did not attend such an examination he would face disciplinary action." Eight days later, the DPW director sent a letter to appellant notifying him that an examination had been scheduled for December 16, 2013, with "a follow-up meeting" set for December 20, 2013. The letter warned appellant that the Township would discipline him if he did not attend both appointments.

Appellant alleged that the examinations were not "job-related and consistent with business necessity" under *42 U.S.C.A. § 12112(d)(4)(A)* and, therefore, the Township could not demand that [***4] he undergo them. Therefore, appellant did not attend either evaluation.

On December 18, 2013, the Township served appellant with a Preliminary Notice of Disciplinary Action seeking to remove him from employment on charges of incompetency; inefficiency or failure to perform duties; inability to perform duties; conduct unbecoming a public employee; and "other sufficient cause" for discipline. The specification for the charges stated that appellant "failed to report for [the psychological fitness-for-duty] examination contrary to a direct instruction from [his] supervisors."

That same day, appellant requested a departmental hearing, which was held on January 6, 2014. The Township rejected appellant's contention that its demands were not permissible under the ADA and issued a Final Notice of Disciplinary Action terminating appellant's employment. Appellant appealed to the Commission, which transmitted the matter to the OAL for a contested case hearing.

At the OAL hearing, the Township presented the testimony of one witness, the DPW director, who testified that he had worked for the Township for thirty-two years and was familiar with appellant's work. The director stated that we "had problems [***5] with [appellant] over the past years" because he was "at times . . . confrontational, and at other times [he walked] away from someone who wished to speak with him." The director testified that he [*538] was not afraid of appellant. [**397] Other than "writing up" appellant "for not helping a fellow worker" on an unspecified date, the director did not identify any prior, formal disciplinary action taken against appellant. When asked to describe appellant "as a worker[,]" the director stated that he was "no different than any other employee[.]"

The director testified that the Township manager showed him the anonymous letter "[r]ight after he received it." The director did not investigate the allegations contained in the letter, and he was not sure what action, if any, the manager took concerning it. The director stated that appellant's "job performance was not a basis for [the Township] sending him to a psychological evaluation." The Township also stipulated that it had "never sent anyone for a psychological [examination] predicated upon the fact that they failed to help" other employees.

Appellant's union representative briefly testified on his behalf. The representative stated that the Township manager showed [***6] him the anonymous letter "shortly after it was received . . . ." The manager said that

he thought "he need[ed] to act on" the letter. The representative questioned whether the manager had "'a legal basis to act on it,'" and that was "the last" the representative "heard of" the letter until the Township filed charges against appellant over eight months later.

In a thorough Initial Decision, the Administrative Law Judge (ALJ) reversed the Township's decision to remove appellant. The ALJ found that there was "no documentary or testimonial evidence of an investigation by the Township of the anonymous letter to determine the veracity of the allegations contained therein." Based upon the director's uncontradicted testimony, the ALJ also found that the Township's demand that appellant "attend a psychological fitness-for-duty examination was not related to his work performance or to any specific allegation of psychologically[-]disruptive [*539] behavior."[1] The ALJ also noted that appellant's "work performance was satisfactory."

> 1 As we will discuss below, even if the anonymous letter did present a "specific allegation of psychologically[-]disruptive behavior[,]" the allegation was not based upon reliable information [***7] provided by a credible third party as required by *42 U.S.C.A. § 12112(d)(4)(A)*.

Under these circumstances, and relying upon *42 U.S.C.A. § 12112(d)(4)(A)*, the ALJ concluded that the Township's demand that appellant undergo a psychological examination was not "reasonably related" to his job duties and was not "consistent with business necessity." The ALJ stated:

> Here, there was no evidence of a risk of injury to a fellow employee or the public, and no evidence or allegation of physical contact with another employee. The evidence offered by the [Township] is an anonymous letter that the Township took eight months to act on. There is no showing of an investigation into the anonymous letter. [The DPW director] credibly testified that appellant may be confrontational at times; however, this observation regarding appellant was not the asserted basis for the Township's request for a psychological fitness-for-duty examination of [appellant].
>
> [Appellant] did fail to attend the psychological fitness-for-duty examination, but without a reasonable basis for the request that he undergo the examination, the Township cannot punish him for failure to attend. Such an examination was not job-related and consistent with business necessity.

Because the Township [***8] "failed to meet its burden to prove by a preponderance of the evidence that [appellant] committed the [**398] charged violations[,]" the ALJ ordered that he be immediately reinstated to his truck driver position with back pay from the date of his termination to the date of his reinstatement. The ALJ also granted appellant "reasonable counsel fees."

The Township filed exceptions and, on March 5, 2015, the Commission reversed the ALJ's determination. In its decision, the Commission failed to address appellant's contention that the Township's demand that he undergo a psychological examination was impermissible under the ADA. Indeed, the Commission did not even cite the ADA in its decision.

The Commission found that appellant was insubordinate because he "fail[ed] to perform his duty by disregarding his superiors' [*540] orders to appear for the fitness-for-duty examinations." Although the Township had not charged appellant with insubordination, the Commission reasoned that the specifications for the charges set forth in the Preliminary and Final Notices of Disciplinary Action "clearly subsumed allegations of insubordination."

The Commission determined that appellant should not be removed from employment, and instead [***9] imposed a six-month suspension. The Commission explained that "appellant's blatant disregard of oral and written orders from his superiors is significantly egregious to warrant a substantial penalty."

The Commission also ordered appellant to undergo a psychological examination before he was reinstated to ensure that he was "fully capable of performing the duties of his position." If the psychologist determined that "appellant [was] fit for duty, without qualification," the Commission directed the Township to immediately

reinstate appellant. However, if the psychologist determined that appellant was "unfit for duty," the Commission ordered the Township to charge appellant "with inability to perform duties" and remove him from employment, subject to appellant's right to appeal such a determination to the Commission. The Commission also denied appellant's request for counsel fees. This appeal followed.[2]

2 Appellant initially filed a notice of appeal, which we dismissed on our own motion because it was interlocutory. We thereafter granted appellant's motion for leave to appeal the Commission's March 5, 2015 decision.

II.

Established precedents guide our task on appeal. Our scope of review of [***10] an administrative agency's final determination is limited. *In re Herrmann, 192 N.J. 19, 27, 926 A.2d 350 (2007)*. "'[A] strong presumption of reasonableness attaches'" to the Commission's decision. *In re Carroll, 339 N.J. Super. 429, 437, 772 A.2d 45 (App.Div.)* (quoting *In re Vey, 272 N.J. Super. 199, 205, 639 A.2d 724 (App.Div.1993)*, *aff'd, 135 N.J. 306, 639 A.2d 718 (1994)*), [*541] *certif. denied, 170 N.J. 85, 784 A.2d 718 (2001)*. The burden is upon the appellant to demonstrate grounds for reversal. *McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563, 790 A.2d 974 (App.Div.2002)*; *see also Bowden v. Bayside State Prison, 268 N.J. Super. 301, 304, 633 A.2d 577 (App.Div.1993)* (holding that "[t]he burden of showing the agency's action was arbitrary, unreasonable[,] or capricious rests upon the appellant"), *certif. denied, 135 N.J. 469, 640 A.2d 850 (1994)*.

To that end, we will "not disturb an administrative agency's determinations or findings unless there is a clear showing that (1) the agency did not follow the law; (2) the decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial evidence." [**399] *In re Application of Virtua-West Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422, 945 A.2d 692 (2008)* (citing *Herrmann, supra, 192 N.J. at 28, 926 A.2d 350*); *see also Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 9-10, 970 A.2d 347 (2009)*. We are not, however, in any way "bound by the agency's interpretation of a statute or its determination of a strictly legal issue." *Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93, 312 A.2d 497 (1973)*.

Moreover, if our review of the record satisfies us that the agency's finding is clearly mistaken or erroneous, the decision is not entitled to judicial deference and must be set aside. *L.M. v. State of N.J., Div. of Med. Assistance & Health Servs., 140 N.J. 480, 490, 659 A.2d 450 (1995)*. We may not simply "rubber stamp" an agency's decision. *In re Taylor, 158 N.J. 644, 657, 731 A.2d 35 (1999)*.

On appeal, appellant contends that, under the ADA, "the Township lacked the lawful authority" to order [***11] him to undergo a psychological fitness-for-duty examination. We agree.

The ADA "provide[s] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities[.]" *42 U.S.C.A. § 12101(b)(1)*. In enacting the ADA, [*542] Congress found that "discrimination against individuals with disabilities persists in such critical areas as employment," *42 U.S.C.A. § 12101(a)(3)*, and therefore sought to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals[.]" *42 U.S.C.A. § 12101(a)(7)*.

Regarding employment discrimination, *42 U.S.C.A. § 12112(a)* sets forth the "general rule" that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to [the] . . . discharge of employees[.]" *42 U.S.C.A. § 12112(d)(1)* states that this "prohibition against discrimination as referred to in [*42 U.S.C.A. § 12112(a)*] shall include medical examinations and inquiries." *42 U.S.C.A. § 12112(d)(4)(A)* prohibits employers, like the Township, from "requir[ing] a medical examination" or "mak[ing] inquiries of an employee as to whether such employee is an individual with a disability . . . unless such examination or inquiry is shown to be job-related and consistent with business necessity."

"There is very little discussion of [*42 U.S.C.A.] § 12112(d)(4)(A)* in the ADA's legislative history." *Kroll v White Lake Ambulance Auth., 691 F.3d 809, 815 n.8 (6th Cir.2012)*. However, [***12] the Equal Employment Opportunity Commission's regulations make clear that an employer cannot require an employee to undergo medical tests that do not serve a legitimate business purpose. *See 29 C.F.R. § 1630.13(b)* (stating the general rule that, except as permitted by *29 C.F.R. § 1630.14*, "it is unlawful for a covered entity to require a medical examination of an employee"); *29 C.F.R. § 1630.14(c)* (stating that a medical examination may only be

conducted if it is "job-related and consistent with business necessity"). Courts give "'substantial deference'" to the EEOC's regulations interpreting the ADA, including *42 U.S.C.A. § 12112(d)*. *Tice v. Ctr. Area Transp. Auth., 247 F.3d 506, 515 n.8 (3d Cir.2001)* (quoting *Chevron. Deane v. Pocono Med. Ctr., 142 F.3d 138, 143 n.4 (3d Cir.1998)* (en banc)).

In addition, the EEOC has issued interpretive guidelines to provide employers with detailed guidance on when they may [*543] lawfully require an employee to undergo a medical examination. *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of* [**400] *Employees Under the Americans with Disabilities Act (ADA)*, THE U.S. EQUAL EMP'T OPPORTUNITY COMM'N [hereinafter *Enforcement Guidance* or *Guidance*], http://www.eeoc.gov/policy/docs/guidance-inquiries.html (last visited Jan. 19, 2016). We have long recognized that deference "should be afforded to the interpretation of the agency charged with applying and enforcing a statutory scheme." *Hargrove v. Sleepy's, LLC, 220 N.J. 289, 301, 106 A.3d 449 (2015)*. Thus, while not binding, "[t]he EEOC's [***13] interpretative guidelines . . . 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Duda v. Bd. of Educ., 133 F.3d 1054, 1060, n.12 (7th Cir.1998)* (quoting *Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65, 106 S. Ct. 2399, 2404, 91 L. Ed. 2d 49, 58 (1986))*.

In its *Guidance*, the EEOC explained that, prior to the enactment of the ADA, "many employers asked . . . employees to provide information concerning their physical and/or mental condition. This information often was used to exclude and otherwise discriminate against individuals with disabilities -- particularly nonvisible disabilities, such as mental illness -- despite their ability to perform the job." *Enforcement Guidance, supra*. Thus, "[t]he ADA's provisions concerning . . . mental examinations reflect Congress's intent to protect the rights of . . . employees to be assessed on merit alone, while protecting the rights of employers to ensure that individuals in the workplace can efficiently perform the essential functions of their jobs." *Ibid.*

Psychological fitness-for-duty examinations are "medical examinations" under the ADA. *Enforcement Guidance, supra*. Thus, the examinations that the Township ordered appellant to undergo would only have been lawful if they were "job-related and consistent with business necessity." *42 U.S.C.A. § 12112(d)(4)(A)*. The *Guidance* defines these terms and "addresses situations in [***14] which an employer would meet the general standard for . . . requiring a [*544] medical examination." We therefore quote from the *Guidance* at length.

The EEOC has defined the "job-related and consistent with business necessity" set forth in *42 U.S.C.A. § 12112(d)(4)(A)* as follows:

> Generally, a disability-related inquiry or medical examination of an employee may be "job-related and consistent with business necessity" when an employer "has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition."
>
> [*Enforcement Guidance, supra* (footnotes omitted).]

Pursuant to *29 C.F.R. § 1630.2(r)*, the term "[d]irect threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."[3] The EEOC has further explained:

> Sometimes this standard may be met when an employer knows about a particular employee's medical condition, has observed performance problems, and reasonably can attribute the problems to the medical condition. An employer also may be given *reliable information* by a *credible third party* that an employee has a medical [***15] condition, or the employer may observe symptoms indicating that an employee may have a medical condition that will impair his/her [**401] ability to perform essential job functions or will pose a direct threat. In these situations, it may be job-related and consistent with business necessity for an employer to make disability-related inquiries or require a medical examination.

[*Enforcement Guidance, supra* (footnotes omitted) (emphasis added).]

3 Although not specified in the regulation, we discern no reason why the term "direct threat" would not also include a significant risk that the individual would harm property.

In other words, the employer must reasonably believe, either through direct observation or through reliable information received from credible sources, that the employee's perceived medical condition is affecting his or her work performance or that the employee poses a direct threat. Then, and only then, may the employer lawfully require the employee to undergo a psychological fitness-for-duty examination. *See Yin v. California, 95 F.3d 864, 868 (9th Cir.1996)* (observing that an employer cannot require an employee to undergo a medical examination unless the employee's [*545] "problems have had a substantial and injurious impact on [the] employee's job performance"), [***16] *certif. denied, 519 U.S. 1114, 117 S. Ct. 955, 136 L. Ed. 2d 842 (1997)*.

The *Enforcement Guidance* cautions employers that they may not

> require a medical examination of an employee based, in whole or in part, on information learned from another person[, unless] the information learned is reliable and would give rise to a reasonable belief that the employee's ability to perform essential job functions will be impaired by a medical condition or that s/he will pose a direct threat due to a medical condition[.]
>
> [(emphasis omitted).]

In determining whether the information provided by a credible third-party is sufficiently reliable to support an order requiring the employee to submit to a psychological examination, the *Guidance* states that the employer should consider the following factors:

> (1) the relationship of the person providing the information to the employee about whom it is being provided; (2) the seriousness of the medical condition at issue; (3) the possible motivation of the person providing the information; (4) how the person learned the information (*e.g.*, directly from the employee whose medical condition is in question or from someone else); and (5) other evidence that the employer has that bears on the reliability of the information [***17] provided.
>
> [*Enforcement Guidance, supra.*]

To illustrate these requirements, the EEOC provided the following example, which is particularly pertinent to the case at hand:

> Example[ ]: Kim works for a small computer consulting firm. When her mother died suddenly, she asked her employer for three weeks off, in addition to the five days that the company customarily provides in the event of the death of a parent or spouse, to deal with family matters. During her extended absence, a rumor circulated among some employees that Kim had been given additional time off to be treated for depression. Shortly after Kim's return to work, Dave, who works on the same team with Kim, approached his manager to say that he had heard that some workers were concerned about their safety. According to Dave, people in the office claimed that Kim was talking to herself and threatening to harm them. Dave said that he had not observed the strange behavior himself but was not surprised to hear about it given Kim's alleged recent treatment for depression. Dave's manager sees Kim every day and never has observed this kind of behavior. In addition, none of the co-workers [**402] to whom the manager spoke confirmed Dave's statements.
>
> [(emphasis omitted).]

[*546] Based [***18] upon the facts of this hypothetical example, the EEOC advised that

> the employer does not have a reasonable belief, based on objective evidence, that Kim's ability to perform essential

> functions will be impaired or that s/he will pose a direct threat because of a medical condition. The employer, therefore, would not be justified in asking Kim disability-related questions or requiring her to submit to a medical examination because the information provided by Dave is not reliable.
>
> [*Enforcement Guidance, supra.*]

After carefully reviewing *42 U.S.C.A. § 12112(d)(4)(A)* and the EEOC's regulations and its *Guidance*, and distilling them to their essence, we conclude that an employer may only require an employee to undergo a psychological fitness-for-duty examination when the employer has a reasonable belief, either through direct observation or through reliable information from credible sources, that the employee's perceived mental state will either affect his or her ability to perform essential job functions or that the employee poses a direct threat. As the EEOC has observed, the employer's "reasonable belief . . . must be based on *objective evidence* obtained, or reasonably available to the employer, prior to . . . requiring a medical examination. [***19] Such a belief requires an assessment of the employee and his/her position and cannot be based on general assumptions." *Enforcement Guidance, supra.*

III.

Applying these principles to the facts of this case, we hold that the Township violated *42 U.S.C.A. § 12112(d)(4)(A)* when it ordered appellant to participate in a psychological fitness-for-duty examination based upon the information contained in the anonymous letter. Simply stated, the Township did not meet its burden of demonstrating that its directive was "job-related and consistent with business necessity."

Here, the DPW director testified that appellant's work performance was satisfactory and "was not a basis" for the Township's demand that he undergo the evaluation. While appellant was "confrontational" at times, the director stated that appellant was "no different than" other employees. Under these circumstances, [*547] we are satisfied that the Township failed to demonstrate that appellant's ability to perform his job functions was impaired by any suspected medical or mental condition.

The Township also failed to prove that appellant posed a direct threat to either himself, others or property. Again, the Township did not present any evidence that appellant had threatened other employees. The [***20] DPW director only mentioned one specific incident in appellant's nine years of employment where appellant was disciplined for not helping a co-worker. However, the Township stipulated that other employees were similarly disciplined over the years, but none of them were ordered to undergo psychological evaluations. The Township did not present any documentary evidence concerning any other disciplinary actions involving appellant.

In addition, the Township obviously did not consider appellant to be a direct threat to other employees or property because, after it received the anonymous letter, it failed to take any action concerning it for over eight months. During that entire time, appellant performed the duties of his position without incident.

[**403] Turning to the anonymous letter, it is clear that, even though the letter made allegations of disruptive behavior, it did not represent the type of reliable information from a credible source upon which the Township could reasonably rely in ordering a psychological examination. The identity of the "[v]ery concerned employee at Lakewood Public Works" who sent the letter was unknown. Therefore, the information in the letter was exactly the type of innuendo [***21] and rumor that the EEOC has advised employers is insufficient to support a mandatory evaluation.

Contrary to the Township's contention, it was not powerless to take appropriate action after it received the anonymous letter. *42 U.S.C.A. § 12112(d)(4)(B)* plainly provides that an employer "may make inquiries into the ability of an employee to perform job-related functions." Thus, the Township could have solicited information from the DPW director and any other supervisors concerning appellant's job performance. The Township also could have [*548] contacted the three "union stewards" specifically named in the anonymous letter for information about the alleged "outburst" appellant had on March 28, 2013. Instead, the Township failed to investigate the allegations in the anonymous letter for over eight months and then sought to rely upon that letter as the sole basis for its order requiring appellant to submit to the psychological evaluation. Thus, this order clearly violated *42 U.S.C.A. § 12112(d)(4)(A)*. Accordingly, the

Commission's finding of insubordination,[4] given the undisputed circumstances presented, was erroneous as a matter of law.

> 4 Neither the Civil Service Act, *N.J.S.A. 11A:1-1 to -12-6*, nor the applicable regulation, *N.J.A.C. 4A:2-2.3(a)(2)*, define "insubordination." However, we [***22] have observed that it is ordinarily defined as a failure to obey a lawful order. *See Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 71, 278 A.2d 218 (App.Div.1971), certif. denied, 59 N.J. 269, 281 A.2d 531 (1971).*

Therefore, we conclude that the Commission's decision is arbitrary, capricious, and unreasonable and, accordingly, we reverse and vacate the penalty imposed. We remand to the Commission for a calculation of back pay due to appellant upon his reinstatement to his former position and for consideration of his request for counsel fees. In remanding, we express no view on the merits of appellant's application for counsel fees or the amount that may be due him in back pay.

Reversed and remanded. We do not retain jurisdiction.

STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of Paul Williams,
Township of Lakewood

CSC Docket No. 2014-1750
OAL Docket No. CSV 01037-14

MAR 11 2015

ISSUED: MAR 05 2015 (CSM)

The appeal of Paul Williams, Truck Driver, Heavy, Township of Lakewood, Department of Public Works, of his removal effective January 7, 2014, on charges, was heard by Administrative Law Judge Joseph A. Ascione (ALJ), who rendered his initial decision on December 10, 2014. Exceptions were filed on behalf of the appointing authority.

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 February 4, 2015, did not adopt the ALJ's recommendation to reverse the removal. Rather, the Commission imposed a six-month suspension and ordered that the appellant undergo a psychological fitness-for-duty examination prior to returning to work.

DISCUSSION

The appointing authority removed the appellant on charges of incompetency, inefficiency or failure to perform duties, inability to perform duties, conduct unbecoming a public employee and other sufficient cause. Specifically, the appointing authority asserted that the appellant failed to report to a fitness for duty examination. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In his initial decision, the ALJ found that on or about March 28, 2013, Mike Muscillo, Township Manager, received an anonymous letter from a "very concerned employee" of the Lakewood Public Works Department making allegations about the

appellant's conduct in the workplace. Eight months later, on December 2, 2013, the appellant had a meeting with his supervisors, who advised him that he would be sent for a psychological fitness-for-duty examination and that if he did not attend the examination he would face disciplinary action. Thereafter, Alvin Burdge, Director, Department of Public Works, notified the appellant by letter of an initial appointment scheduled with Dr. Raymond F. Hanbury, Jr., Ph.D, for December 16, 2013 and a follow-up appointment scheduled for December 20, 2013. The letter indicated that transportation would be provided and that failure to attend either appointment would be grounds for disciplinary action. However, the appellant did not attend either evaluation with Dr. Hanbury. Burdge testified that the appellant exhibited extremes of demeanor, at times being confrontational, and at other times walking away from someone who wished to speak with him. Although he became aware of the anonymous letter sent to Muscillo in April 2013, Burdge never investigated the letter or its contents and did not know the name of the individual who wrote the letter. Additionally, Burdge testified that while the appellant has been a problem, he performed his work satisfactorily.

Based on the foregoing, the ALJ determined that the nature of the appellant's work as a Truck Driver, Heavy did not constitute a compelling reason to subject him to a psychological examination, particularly since the appointing authority offered no evidence that any investigation of the anonymous letter had been taken or that specific facts uncovered through such an investigation would constitute a reasonable basis on which to request a psychological examination. Therefore, since there was no reasonable basis for the appellant to attend the examination, the ALJ concluded that the appointing authority failed to meet its burden of proof and recommended reversing the removal.

In its exceptions to the ALJ's decision, the appointing authority concedes that it did not conduct an investigation and argues that it would be difficult, if not impossible, to investigate an anonymous letter. Nevertheless, as the letter was anonymous, it is clear that the author was in fear of the appellant as well as fearful for fellow employees' safety, making it doubtful that an investigation would have revealed the author of the letter. Regardless, Burdge testified that the appellant had been a problem in the past, exhibited extremes in behavior and had been disciplined in the past for refusing to assist another employee on a job related task. Therefore, the appointing authority maintains that it would have been derelict in its duty to protect its employees and potentially been liable had the appellant actually harmed a fellow employee. In this regard, it states that the fact that the appellant refused to attend the examination is evidence of a problem and when faced with a choice of not sending or sending him for an examination, it opted to send him for the examination.

Upon on its *de novo* review of the record, the Commission does not agree with the ALJ's assessment of the charges. Initially, there is no dispute as to what

occurred. The appellant was ordered by his superiors to report for a fitness-for-duty evaluation and he did not comply with that order. The ALJ specifically found that the appointing authority's evidence only addressed the appellant's failure to appear for the examinations. Thus, the appellant was insubordinate for failing to perform his duty by disregarding his superiors' orders to appear for the fitness-for-duty examinations. The ALJ interpreted the charges of incompetency, inefficiency or failure to perform duties, conduct unbecoming a public employee, and other sufficient cause narrowly, finding that the appellant's conduct could not be considered under those charges.

Regardless, it is clear that those charges could have been amended to include insubordination. This amendment would not have prejudiced the appellant, since the specification underlying the charges in the Preliminary Notice of Disciplinary Action (PNDA) and the Final Notice of Disciplinary Action (FNDA) clearly subsumed allegations of insubordination. Specifically, the specifications on the PNDA and FNDA clearly indicated that the appellant was told both orally and in writing by his supervisors to attend fitness-for-duty examinations and he refused to attend them. Thus, the appellant was on notice of the accusations against him via the sustained specifications. *See N.J.A.C.* 1:1-6.2(a)("Unless precluded by law or constitutional principle, pleading may be freely amended when, in the judge's discretion, an amendment would be in the interest of efficiency, expediency, and the avoidance of over-technical pleading requirements and would not create undue prejudice"); *See also, Hammond v. Monmouth County Sheriff's Department*, 317 *N.J. Super.* 199 (App. Div. 1999); *Lamont Walker v. Burlington County*, Docket No. A-3485-00T3 (App. Div. October 9, 2002); *In the Matter of Charles Motley* (MSB, decided February 25, 2004). Accordingly, the Commission finds that the appellant is guilty of the charge of insubordination for his actions in this matter.

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 also 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 appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. However, 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). In this case, the appellant's blatant disregard of oral and written orders from his superiors is significantly egregious to

warrant a substantial penalty. Failure to comply with the orders of a superior is precisely the type of conduct that adversely affects morale or efficiency and has a tendency to destroy public respect for governmental employees and confidence in the operation of public services. Accordingly, the Commission finds that a six-month suspension is an appropriate penalty in this matter and is neither unduly harsh nor disproportionate to the offense.

Regarding the appellant's fitness for duty, the Commission finds the appointing authority's exceptions persuasive that it had a duty to follow up on the letter and corroborating reports from supervisors with a psychological examination. Thus, while his insubordinate behavior of refusing to attend the scheduled examinations is an insufficient basis to support the appellant's removal, the Commission has trepidation ordering the appellant's reinstatement without some assurance that he is fully capable of performing the duties of his position. Thus, the appellant should be scheduled for an evaluation with a qualified psychiatrist or psychologist. The selection of the psychiatrist or psychologist shall be by agreement of both parties within 30 days of the date of this decision. The appointing authority shall pay for the cost of this evaluation. If the psychiatrist or psychologist determines that the appellant is fit for duty, without qualification, the appellant is to be immediately reinstated to his position. If the psychologist or psychiatrist determines that the appellant is unfit for duty, then the appointing authority should charge the appellant with inability to perform duties based on his current unfitness, with a current date of removal. Upon receipt of that FNDA, the appellant may appeal that matter to the Commission in accordance with *N.J.A.C.* 4A:2-2.8. Upon timely submission of any such appeal, the appellant would be entitled to a hearing regarding the current finding of unfitness only. In either case, he would be entitled to mitigated back pay, benefits, and seniority from the end of his six-month suspension until the time he is either reinstated or removed. If he passes the examination, under no circumstances should his reinstatement be delayed pending resolution of any back pay dispute. Additionally, in light of the Appellate Division's decision in *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.

With respect to counsel fees, *N.J.A.C.* 4A:2-2.12 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. 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. A4489-02T2 (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 sustained the charge of insubordination for the appellant's underlying

conduct and imposed a six-month suspension. Therefore, he is not entitled to counsel fees.

ORDER

The Civil Service Commission finds that the removal of the appellant was not justified and instead, imposes a six-month suspension. The Commission also orders, prior to reinstatement, the appellant undergo a psychological fitness-for-duty examination. The outcome of that examination shall determine whether the appellant is entitled to be reinstated or removed, as outlined previously. In either case, the appellant is entitled to back pay, benefits and seniority for the period following his six month suspension until he is either reinstated or removed. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. The appellant shall provide proof of income earned to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any back pay dispute.

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

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4th DAY OF FEBRUARY, 2015

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
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 01037-14
AGENCY DKT. NO. 2014-1750

IN THE MATTER OF PAUL WILLIAMS,
TOWNSHIP OF LAKEWOOD,
DEPARTMENT OF PUBLIC WORKS.

Kevin P. McGovern, Esq., for appellant Paul Williams (Mets, Schiro, McGovern, attorneys)

Steven Secare, Esq., for respondent Township of Lakewood, Department of Public Works (Secare & Hensel, attorneys)

Record Closed: September 30, 2014 Decided: December 10, 2014

BEFORE **JOSEPH A. ASCIONE**, ALJ:

STATEMENT OF THE CASE

Appellant, Paul Williams, appeals his January 7, 2014, removal as a "truck driver, heavy," by the Township of Lakewood, Department of Public Works (DPW), for failing to report for a psychological fitness-for-duty examination. Appellant argues that there was no reasonable basis to request the psychological fitness-for-duty examination, and therefore the Township's removal action for failure to attend the examination must be dismissed.

PROCEDURAL HISTORY

On December 16, 2013, a Preliminary Notice of Disciplinary Action (PNDA) was issued against Williams charging him with violations of N.J.A.C. 4A:2-2.3(a):[1] (1) incompetency, inefficiency or failure to perform duties; (3) inability to perform duties; (6) conduct unbecoming a public employee; and (12)[2] other sufficient cause. (J-3.) The incident giving rise to the charges was appellant's failure to attend a "mandatory fitness for duty examination." A departmental hearing was held on January 6, 2014, and on January 7, 2014, a Final Notice of Disciplinary Action (FNDA) was issued sustaining the charges and notifying appellant of his removal. (J-5.) Williams appealed, and the matter was transmitted by the Civil Service Commission to the Office of Administrative Law, where on January 27, 2014, it was filed for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A hearing was held on August 14, 2014. At that time, the parties requested the opportunity to submit written closing statements and legal memoranda. The record closed on September 30, 2014, upon the receipt of the post-hearing submissions.

FINDINGS OF FACT

I **FIND** the following undisputed **FACTS**, as stipulated by the parties (J-4):

1. Appellant Paul Williams was employed by respondent Township of Lakewood (hereinafter, "Township") as a "truck driver, heavy."

2. Appellant is a member of the International Brotherhood of Teamsters, Local 97 (hereinafter, "Union"), and is covered under the terms of a Collective Negotiations Agreement entered into between the Union and the Township.

[1] The notices of disciplinary action cited incorrect regulations in the "Charges" section. Pursuant to the parties' Stipulation of Facts, the regulation that the Township alleges has been violated by appellant is N.J.A.C. 4A:2-2.3(a).

[2] Amended by R.2012 d.056, effective March 5, 2012; recodified former (a)(11) as (a)(12).

3. On or around March 28, 2013, Mike Muscillo, Township manager, received an anonymous letter (from a "Very concerned employee at Lakewood Public Works"). A date stamp on the letter indicates that it was received in the Township's Office of the Municipal Manager on April 4, 2013. This letter made allegations about appellant's conduct in the workplace. (J-1.)

4. On December 2, 2013, appellant had a meeting with his supervisors. At that meeting, the Township advised appellant that he would be sent for a psychological fitness-for-duty examination, and that if he did not attend such an examination he would face disciplinary action.

5. On or around December 10, 2013, Alvin Burdge, the DPW director, notified appellant by letter of an initial meeting with Dr. Raymond F. Hanbury, Jr., Ph.D., on Monday, December 16, 2013, at 2:00 p.m. The letter stated that a follow-up meeting was scheduled for Friday, December 20, 2013, at 9:00 a.m. at Dr. Hanbury's office. The letter stated that transportation to the appointments would be provided, and that failure to attend either appointment would be grounds for further disciplinary action. (J-2.)

6. Appellant did not attend either of the evaluations with Dr. Hanbury arranged by the Township.

7. On December 18, 2013, appellant was served with a Preliminary Notice of Disciplinary Action, suspending him immediately, for allegedly violating the following sections of N.J.A.C. 4A:2-2.3(a): incompetency, inefficiency or failure to perform duties; inability to perform duties; conduct unbecoming a public employee; and other sufficient cause. (J-3.)

8. On December 18, 2013, appellant requested a hearing concerning his suspension. (J-4.)

9. Appellant's hearing concerning his suspension was held on January 6, 2014.

10. On January 7, 2014, appellant received a Final Notice of Disciplinary Action terminating his employment. (J-5.)

11. On January 10, 2014, through his Union, appellant filed a timely appeal of his termination. (J-6.)

TESTIMONY

Alvin Burdge

Burdge testified that he has been employed with the Lakewood DPW for thirty-two years, the last four as acting director. He testified that appellant Williams has been a problem in the past. Williams exhibited extremes of demeanor, at times being confrontational, and at other times walking away from someone who wished to speak with him. In the past year, Williams received a discipline for refusal to assist another employee. In April 2013, Burdge became aware of the contents of the anonymous letter received by the Township manager, Michael Muscillo. He did not investigate the letter or its contents. Burdge never knew the name of the individual who wrote the letter. Burdge could not testify what investigation, if any, Muscillo made into the allegations contained in the letter.

In 2010, Williams, subsequent to a serious work-related injury, had been asked to appear for a fitness-for-duty examination, which he did. The 2010 request to undergo a fitness-for-duty examination was related to medication he was taking at the time, not related to the present issue. The 2013 request to undergo a psychological fitness-for-duty examination was not related to job performance. Burdge testified that while Williams has been a problem, he did perform his work satisfactorily.

Patrick Guaschino

Guaschino testified to his position as business manager of Teamsters Local 97 and his familiarity with Williams from prior dealings with Williams's employer. He became aware of the request made to Williams to attend a fitness-for-duty psychological examination. He attended a hearing with Muscillo and presented case law in support of appellant's argument that the request to attend was unfounded. He saw the anonymous letter while meeting with Muscillo on another matter. Guaschino testified that Muscillo stated at that meeting that he had to act on the letter. Guaschino questioned Muscillo about the legal basis for taking such action. Muscillo advised Guaschino that he would contact counsel. Guaschino did not know that Muscillo had taken action on the anonymous letter until the disciplinary proceedings. Guaschino recognized that the anonymous letter could create a justifiable concern, but he had no knowledge of whether the letter was investigated by Muscillo. Guaschino said that he would have done further investigation to learn the identity of the writer and discover whether there was any truth to the allegations in the letter.

ADDITIONAL FINDINGS OF FACT

Based on both witnesses' credible testimony and the documentary evidence, I FIND the following additional FACTS:

12. There is no documentary or testimonial evidence of an investigation by the Township of the anonymous letter to determine the veracity of the allegations contained therein.

13. The request that Williams attend a psychological fitness-for-duty examination was not related to his work performance or to any specific allegation of psychologically disruptive behavior.

14. Williams's work performance was satisfactory.

LEGAL ANALYSIS AND CONCLUSION

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A. 11A:1-2(a). Such an employee may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a).

An appeal to the Civil Service Commission requires the OAL to conduct a de novo hearing to determine the employee's guilt or innocence, as well as the appropriate penalty if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987).

The burden of persuasion falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The appointing authority must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson v. Parsekian, 37 N.J. 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

In this case, the issue is whether the Township's action of removing Williams from his position for his failure to attend a psychological fitness-for-duty examination

was reasonably justified. In order for the action to be reasonably justified, this tribunal must find that the Township had sufficient factual information upon which to base a request for a psychological examination.

A request that an employee attend a psychological fitness-for-duty examination cannot be made lightly. The request for the examination must be reasonably related to the individual's job duties or the individual's psychologically disruptive behavior in the work environment. 42 U.S.C.A. § 12112(d)(4)(A) provides that "[a] covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity." Williams worked in the position of truck driver, heavy. The nature of his work, as compared with, for example, that of a law enforcement officer, did not constitute a compelling reason to subject him to a psychological examination. The work that Williams regularly performed did not involve the safety of other Township personnel or the public. The anonymous letter may have legitimately raised concerns for the Township; however, respondent offered insufficient evidence that any investigation of the anonymous letter had been undertaken by the Township. Burdge testified that Muscillo's responsibility included investigation of the anonymous letter, but the Township offered no evidence of specific facts uncovered through such an investigation that would constitute a reasonable basis upon which to request a psychological examination. The Township's evidence addressed only Williams's failure to appear for the examinations.

In support of its actions, the Township cited Hamilton v. Monroe Municipal Utilities Authority, 94 N.J.A.R.2d (CSV) 656, and Perrin v. New Jersey Veterans Memorial Home, Vineland, 92 N.J.A.R.2d (CSV) 148. Hamilton involved failure by an employee to have his pager turned on over a weekend when on emergency call. The employee had a history of alcoholism and excessive absenteeism. The employer offered direct testimony of the danger to the public of the employee's inability to respond to an emergency. Perrin involved an actual assault by an employee on a coworker (an unwanted sexual advance) on more than one occasion. In both cases,

the employer's removal of the employee was upheld. The facts of these two cases are very different from the facts of the instant case. Here, there was no evidence of a risk of injury to a fellow employee or the public, and no evidence or allegation of physical contact with another employee. The evidence offered by the respondent is an anonymous letter that the Township took eight months to act on. There is no showing of an investigation into the anonymous letter. Burdge credibly testified that appellant may be confrontational at times; however, this observation regarding appellant was not the asserted basis for the Township's request for a psychological fitness-for-duty examination of Williams.

Williams did fail to attend the psychological fitness-for-duty examination, but without a reasonable basis for the request that he undergo the examination, the Township cannot punish him for failure to attend. Such an examination was not job-related and consistent with business necessity. Williams has been charged with violations of N.J.A.C. 4A:2-2.3(a): (1) incompetency, inefficiency or failure to perform duties; (3) inability to perform duties; (6) conduct unbecoming a public employee; and (12) other sufficient cause. None of these charges can be sustained with the limited evidence presented by the Township. I **CONCLUDE** that the Township has failed to meet its burden to prove by a preponderance of the evidence that Williams committed the charged violations.

ORDER

For the reasons stated above, I hereby **ORDER** that the removal of Williams by the Township is **REVERSED**, and I **ORDER** that the Township immediately reinstate Williams to the position of truck driver, heavy.

I further **ORDER** that Williams be awarded back pay, benefits and seniority from January 7, 2014, to the date of reinstatement pursuant to N.J.A.C. 4A:2-2.10. I further **ORDER** that Williams be awarded reasonable counsel fees pursuant to N.J.A.C. 4A:2-2.12.

I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

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

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

December 10, 2014
DATE

Joseph A. Ascione
JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 12/10/14

Date Mailed to Parties: 12/10/14

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APPENDIX

LIST OF WITNESSES

For Appellant:

Patrick Guaschino, Business Representative, Teamsters Local 97

For Respondent:

Alvin Burdge, Acting Director of Public Works, Township of Lakewood

LIST OF EXHIBITS

Joint:

J-1	Anonymous letter, April 4, 2013
J-2	Burdge letter, December 10, 2013
J-3	Preliminary Notice of Disciplinary Action
J-4	Request for hearing, December 18, 2013
J-5	Final Notice of Disciplinary Action
J-6	Appeal of removal, January 10, 2014
J-7	Stipulation of Facts