A-2

STATE OF NEW JERSEY

In the Matter of Joanne Marino
Department of Children and Families

CSC DKT. NO. 2016-678
OAL DKT. NO. CSV 16936-15

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: MAY 04 2017 **BW**

The appeal of Joanne Marino, Assistant Family Service Worker 2, Department of Children and Families, removal effective June 30, 2015, on charges, was heard by Administrative Law Judge Irene Jones, who rendered her initial decision on March 22, 2017. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on May 3, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the removal has been modified, the appellant is entitled to back pay, benefits and seniority following her suspension until the date of her reinstatement. *N.J.A.C.* 4A:2-2.12(a) provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in the disciplinary appeal is the merits of the charges. See *Johnny Walcott v. City of Plainfield,* 282 N.J. *Super.* 121,128 (App. Div. 1995): *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, the charges were sustained. Consequently, as appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12, counsel fees must be denied.

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 However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections,* unpublished, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore modifies the removal to a six-month suspension. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A2-2.10. An affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

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 issuance of this decision. 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 shall be pursued in the Superior Court of New Jersey, Appellate Division. However, under no circumstances should the appellant's reinstatement be delayed based on any dispute regarding back pay.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MAY 3, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 16936-15
AGENCY DKT. NO. 2016-678

IN THE MATTER OF JOANNE MARINO,
DEPARTMENT OF CHILDREN AND FAMILIES.

Nancy Mahony, Esq., for appellant Joanne Marino (Law Office of Nancy Mahony, LLC, attorneys)

Elizabeth A. Davies, Deputy Attorney General, for respondent Department of Children and Families (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: February 7, 2017 Decided: March 22, 2017

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant Joanne Marino ("appellant" or "Marino") was employed by the Department of Children and Families ("respondent" or DCF) for more than twenty-four years. On June 29, 2015, she was issued a Preliminary Notice of Disciplinary Action (PNDA) that charged her with incompetency, inefficiency, failure to perform duties, conduct unbecoming a public employee, neglect of duty, violation of Department policy(ies) or procedural violation of Court Order, and other sufficient cause. The PNDA

suspended her with pay but advised that her removal was a possible penalty. On July 20, 2015, a Final Notice of Disciplinary Action (FNDA) was issued wherein appellant was removed from her position, effective June 30, 2015. The appellant timely filed an appeal with the Civil Service Commission.

On October 16, 2015, the matter was transmitted to the Office of Administrative Law for hearing as a contested case. On September 26, 2016, the appellant moved for summary decision. Respondent filed an answer in opposition on September 28, 2016. The respondent's answer was treated by the undersigned as a cross-motion.

On February 3, 2017, respondent's cross-motion for summary decision was **GRANTED** on the issues of neglect, failure to perform duties, incompetency, and conduct unbecoming a DCF employee. However, summary decision was **DENIED** on the penalty of removal. On January 24, 2017, a hearing was held on the penalty issue only. At the hearing, the parties presented witnesses and evidence in support of their respective positions. The parties submitted post-hearing closing statements on February 7, 2017, at which time the record closed.

UNDISPUTED FACTS

Based on the record, I **FIND** the following facts to be undisputed, thus they are adopted as the **FACTS** herein:[1]

1. Appellant was employed by the DCF for more than twenty-four years. At the time of her termination, she held the title of assistant family service worker 2, a position she held since 2007.

2. On December 1, 2014, appellant was assigned to a supervised visitation with "Jamie,"[2] his sister, and their parents. The visitation occurred at a McDonald's in Bayonne, New Jersey, from 1:00 p.m. to 3:00 p.m.

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[1] For a full discussion of the facts, see Order Granting Partial Summary Decision that is attached hereto.

[2] Pursuant to N.J.S.A. 9:6-8.10a, the name of the child is fictitious.

3. In addition to appellant, two other caseworkers were present for part of the visit. A home health aide was also present. At some point, Jamie, who was playing with his sister in the McDonald's play area, fell and hurt his leg. Jamie began to cry and his parents brought him to the appellant, stating that he was hurt.

4. The home health aide and Jamie's parents suggested to the appellant that Jamie be taken to the doctor.

5. The appellant did not see that Jamie was seriously injured and elected not to take him to the doctor or a hospital for examination.

6. The appellant did immediately end the visitation and called Jamie's resource parent to inform him that they were returning to the house.

7. Jamie was carried to the car.

8. The appellant called Jamie's caseworker, the DCF switchboard operator, and her immediate supervisor, Rhonda Johnson. She was only able to speak to the switchboard operator.

9. Jamie's parents called his caseworker and informed her that Jamie had hurt his leg.

10. The appellant did not examine Jamie's leg and/or touch him.

11. It was later revealed that Jamie had broken his leg.

FACTS

The DCF, the appointing authority herein, contends that the penalty of removal is appropriate and just.

In support of its case, the DCF presented the testimony of assistant area director Kristen Pinho ("Pinho"). Pinho testified that the role of an assistant family service worker (AFSW) includes supervising parent-child interactions during visits. If an incident occurs or if there is a problem during a visit, an AFSW is expected to seek supervisory assistance. Supervisory assistance is always available. In cases of immediate need, an AFSW is to act immediately, contact 9-1-1, and contact a supervisor. Appellant was an AFSW 2, and as a senior AFSW she should have had a more advanced skill set. Pinho concludes that the appellant's termination was just because she ignored the pleas of the child's parents to get immediate medical attention. Further, she failed to call 9-1-1. Appellant violated her duties, the duties of an AFSW 2 as set forth in R-1. She failed to assess the situation, conduct an interview, and gather the appropriate information to make a reasoned decision. (R-1.)

Pinho acknowledges that she and the appellant worked together for eighteen years, and she was appellant's supervisor for part of that time. She concedes that prior to this incident the appellant was good at her job. She does not dispute that she applauded the appellant's performance on an unrelated matter that was an extremely difficult case. (R-2.) However, she does not now believe that the appellant can function as an AFSW 2, in spite of her long-term experience with the DCF. Notwithstanding her view that the appellant should be terminated, she considers that the appellant's behavior in this incident was out of character because she is an extraordinarily compassionate person.

Pinho admits that appellant's Performance Assessment Review (PAR) (P-3) reflects a satisfactory rating for September 2014 through August 2015. The incident herein occurred during that PAR rating period. She did discuss the PAR rating with the appellant's direct supervisor, Rhonda Johnson. However, Johnson did not include this incident in the PAR and did not issue a revised evaluation after she spoke to her.

Pinho further acknowledged that the Office of the Public Defender, Law Guardian Section, conducted an investigation into this matter. It did not find substantiated abuse, but did find neglect for the risk of substantial injury. The Hudson County Prosecutor's

Office also conducted an investigation because of the injury and how it was inflicted. The investigation was concluded without any indictment.

Martha Thomas ("Thomas") and Olivia Ahumada ("Ahumada"), the appellant's coworkers, testified on her behalf. Thomas has known the appellant for twenty years. She was her last supervisor. She considers the appellant to be an outstanding AFSW 2, who went above and beyond her duties for her clients. Appellant was very generous, compassionate, and empathetic with her clients. Despite a heavy caseload, she did extra work, such as painting a client's family room. (P-5.)

Ahumada has worked for the DCF since 2002. She is a caseworker supervisor. She knows the appellant and is testifying on her behalf because she values and respects her. Appellant is hard working, organized, dependable, helpful, energetic, and loving. However, Ahumada acknowledged not having any personal knowledge about this incident.

Georgina Anzivino also testified for appellant. Her testimony essentially mirrored that of Thomas and Ahumada. She noted that the appellant has an extraordinary work ethic, but Anzivino conceded that she has no personal knowledge of this incident.

Rhonda Johnson, DCF supervising family service specialist 1, has worked for the DCF since 1999. She supervises three supervisors and their units. She supervised the appellant for two years. After being told about this incident, she spoke to the appellant. Exhibit P-3 is the PAR that she prepared. It included the December 2014 incident timeframe. Johnson stands by her positive PAR evaluation. The appellant was a great AFSW 2. She always did her assignments, and she was one of the best. Appellant did what was asked of her. The kids loved her and she loved them. She worked well with coworkers. Johnson was not consulted about appellant's termination. Under cross-examination, Johnson admitted that appellant did not call her about this incident on the date that it occurred. She did recall speaking to her one or two days after the incident. She admitted that this was unusual, since the appellant would usually call her, even at her home.

Joanne Marino, the appellant herein, testified that she is a high-school graduate. She started with the DCF on November 4, 1989, when she was twenty-nine years old. She was hired as a principal home service worker. She transported students, helped students, and would buy their groceries. A few years ago her title changed to AFSW 2. She loves her job and always wanted to be a case aide.

On December 1, 2014, after learning of Jamie's injury, she immediately ended the visit with the parents. Thereafter, she called the office and spoke to the switchboard operator. She also called Jamie's caseworker and spoke to her. Exhibit P-10 is a copy of her cell-phone records, and it shows that on December 1, 2014, she called the office at 2:32 p.m. Further, she called Mariann Mattia at 201-320-xxxx at least six or seven times. She also called the foster-parent worker in the Bayonne office three times. She never spoke to Rhonda Johnson on that day. However, Johnson's cell number is 201-452-xxxx, and appellant's phone records reveal that she called Johnson two to three times on that day. Prior to the incident, she had one CPR training session and one car-seat training session. She had no medical training.

P-13 is appellant's disciplinary history. She concedes that she has one prior infraction for using a State car improperly. In that incident, she drove a State car to a State training session and was fined $18.00 for the gas expense.

Under cross-examination, she admitted that on December 1, 2014, she called Johnson on her cell phone at 7:00 p.m. in the evening for one minute and at 7:21 p.m. for one minute. She further admitted that she told the prosecutor's office that she should have called her supervisor and should have gotten an ambulance after learning of Jamie's injury.

DISCUSSION AND CONCLUSION

The only issue is whether the penalty of removal is the appropriate penalty. It is well beyond dispute that New Jersey is a progressive-discipline jurisdiction. Town of West New York v. Bock, 38 N.J. 500 (1962). Under the doctrine of progressive discipline, a trier of fact must consider an employee's entire disciplinary history and not

just the incident that lies before it. In re Wilkinson, No. A-2355-11T1 (App. Div. February 24, 2014), <http://njlaw.rutgers.edu/collections/courts/>, affirms that even in the most egregious cases, the doctrine of progressive discipline still attaches. Indeed, the Wilkinson court cited to In re Stallworth, 208 N.J. 182 (2011), wherein our Supreme Court discusses what should be considered when conducting a progressive-discipline analysis:

> To assure proper "progressive discipline," and a resulting penalty based on the totality of the work history, an employee's past record with emphasis on the "reasonably recent past" should be considered. Bock, supra, 38 N.J. at 524. This includes consideration of the totality of the employee's work performance, including all prior infractions. See Carter, supra, 191 N.J. at 484. . . . [P]rogressive discipline is a flexible concept, and its application depends on the totality and remoteness of the individual instances of misconduct that comprise the disciplinary record. The number and remoteness of timing of the offenses and their comparative seriousness, together with an analysis of the present conduct, must inform the evaluation of the appropriate penalty. Even where . . . the present conduct alone would not warrant termination, a history of discipline in the reasonably recent past may justify a greater penalty; the number, timing or seriousness of the previous offenses may make termination the appropriate penalty.
>
> [Wilkinson, supra, No. A-2355-11T1 (App. Div. February 24, 2014), <http://njlaw.rutgers.edu/collections/courts/>, (quoting In re Stallworth, supra, 208 N.J. at 199).]

In imposing the penalty of removal, the court noted that the appellant therein had a record of disciplinary actions.

> [Wilkinson]'s actions are sufficiently egregious and warrant his removal even without consideration of his prior employment record. Nevertheless, in this case [his] employment record also reveals two major disciplinary actions (a 30-day suspension in 2002 for engaging in a verbal and physical altercation with a co-worker and a 53-day suspension in 2004 for . . . leaving his assigned work area without permission, falsification and negligence) and several minor disciplines [sic] since his employment commenced in 1999. Finally, as noted above, even if the

> Commission found that [Wilkinson]'s conduct did not rise to the level of patient abuse and was, rather, inappropriate physical contact, his actions, coupled with this disciplinary history, justify his removal.
>
> [Ibid. (quoting In re Wilkinson, OAL Dkt. No. CSV 8568-09, Final Decision (December 9, 2011)) (citation omitted).]

Likewise, the court most recently affirmed this analysis in In re Knowlden, No. A-4963-11T2 (App. Div. April 30, 2014), <http://njlaw.rutgers.edu/collection/courts/>, where the appellant, a human services technician, was charged with physical abuse of a patient, inappropriate physical contact or mistreatment of a patient, falsification, conduct unbecoming a public employee, and violation of Department of Human Services (DHS) policy and procedures with regard to reporting an incident where the appellant was found to have punched a patient after being attacked. The administrative law judge found the appellant guilty of the charges and removed him from his position, finding the conduct so egregious as to warrant removal in spite of mitigating circumstances and a de minimis disciplinary history. On review, the Civil Service Commission modified the finding and the penalty. The Commissioner found that the punch was a reflexive act in response to the attack by the patient and that there was no intent to harm him. The Commission found the appellant guilty of inappropriate physical contact of a patient, constituting conduct unbecoming a public employee, and reduced the penalty to a six-month suspension.[3]

On appeal, the appellate court affirmed the Commission and held that their review would consist of a three-prong analysis. The first prong, the agency-review test, is whether there was an express or implied violation of legislative policies—whether the decision "was not premised upon a consideration of all relevant factors [or conversely] a consideration of irrelevant or inappropriate factors." Knowlden, supra, No. A-4963-11T2, <http://njlaw.rutgers.edu/collection/courts/> (quoting In re Warren, 117 N.J. 295, 297 (1989) (citations omitted)). The court concluded that one relevant factor was the employee's disciplinary history. Thus, a reviewing court may intervene in an agency's

[3] On reconsideration, the Commissioner acknowledged that Administrative Order (A.O.) 4:08 was amended to eliminate malicious intent, thus, In re Taylor, 158 N.J. 644 (1999), on which the Commission had relied, was not applicable. The Commissioner further acknowledged that Knowlden's action satisfied the DHS definition of physical abuse.

modification of a penalty when the agency fails to consider the significance of the employee's prior record. See Stallworth, supra, 208 N.J. at 200 (remanding where the Commission reduced the penalty without fully addressing employee's extensive record of misconduct).

The court further held that another relevant factor is the severity of the conduct, finding that "[a] reviewing court may intervene when the agency fails to consider the seriousness of the misconduct within the overall context of the work environment as it relates to public safety and the safety of other employees." Knowlden, supra, No. A-4963-11T2, <http://njlaw.rutgers.edu/collection/courts/> (citations omitted).

The Knowlden case also makes clear that although the DHS removed malicious intent from the A.O., the court found that the Commission could reasonably reduce the penalty to something less than termination where there is a lack of prior major discipline and a lack of malicious intent.

In this matter, the record reflects that the appellant does not have a prior major disciplinary history. Her conduct in this instance was isolated and aberrational. Indeed, it is not disputed that appellant was well respected by all her coworkers and supervisors. Her only disciplinary history is for a minor infraction, and it occurred more than twenty years ago. The penalty for the infraction was an $18.00 fine. While there is no doubt that appellant's inattentiveness/neglect conduct was inappropriate, I **CONCLUDE** that the conduct was isolated and no harm was inflicted by the appellant. Even if appellant had taken Jamie straight to the hospital, the outcome would have not been any different.

I **CONCLUDE** that after considering all of the aforementioned factors, a six-month suspension is the appropriate penalty herein. Respondent's removal penalty totally ignores appellant's minimal disciplinary history and her exemplary service to the DCF.

ORDER

Therefore, I hereby **REVERSE** the action of the respondent that terminated appellant from her position.

It is **ORDERED** that appellant is hereby suspended for six months, effective from her date of separation.

It is **ORDERED** that appellant be returned to her position with back pay and seniority.

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

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

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

March 22, 2016

DATE

IRENE JONES, ALJ

Date Received at Agency: March 22, 2017

Date Mailed to Parties: MAR 24 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

sej

APPENDIX

WITNESSES

For Appellant:

Joanne Marino

Martha Thomas

Olivia Ahumada

Georgina Anzivino

Rhonda Johnson

For Respondent:

Kristen Pinho, Assistant Area Director

EXHIBITS

For Appellant:

P-1 Final Notice of Disciplinary Action

P-2 Memo from K. Pinho

P-3 Performance Assessment Review, 9/1/14–8/31/15

P-4 ID only

P-5 Letter dated 7/11/15

P-6 Letter dated 7/14/15

P-7 Letter dated 7/2/15

P-8 Letter dated 7/15/15

P-9 Ledger of calls

P-10 Cell-phone bill

P-11 Petition to return Marino to work

P-12 Letter dated 7/7/15

P-13 Disciplinary history

For Respondent:

R-1 Job description AFSW 2

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING PARTIAL SUMMARY DECISION
OAL DKT. NO. CSV 16936-15
AGENCY DKT. NO. 2016-678

IN THE MATTER OF JOANNE MARINO, DEPARTMENT OF CHILDREN AND FAMILIES.

Nancy Mahony, Esq., for appellant Joanne Marino (Law Office of Nancy Mahony, LLC, attorney)

Elizabeth A. Davies, Deputy Attorney General, for respondent Department of Children and Families (Christopher S. Porrino, Attorney General of New Jersey, attorney)

BEFORE **IRENE JONES**, ALJ t/a:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant Joanne Marino ("appellant" or "Marino") was employed by the Department of Children and Families ("respondent" or DCF) as an assistant family service worker for some twenty-four years. On June 29, 2015, she was issued a Preliminary Notice of Disciplinary Action (PNDA) that charged her with incompetency, inefficiency, failure to perform duties, conduct unbecoming a public employee, neglect of duty, and other sufficient cause, violation of Department policy(ies) or procedural

violation of Court Order. The PNDA suspended the appellant with pay but advised that her removal was a possible penalty. On June 30, 2015, a pre-termination hearing was conducted. The hearing officer imposed an immediate suspension, finding that appellant neglected her duties.

Appellant received a second PNDA on July 1, 2015. This second notice was identical to the first except that it indicated that the suspension was effective June 30, 2015, without pay. On July 20, 2015, a Final Notice of Disciplinary Action (FNDA) was issued wherein appellant was removed from her position, effective June 30, 2015.

Appellant filed an appeal with the Civil Service Commission, and on October 16, 2015, the matter was transmitted to the Office of Administrative Law for hearing as a contested case. On September 26, 2016, the appellant moved for summary decision. Respondent filed an answer in opposition on September 28, 2016.[1]

FACTUAL DISCUSSION

Appellant was hired by respondent DCF, Division of Child Protection and Permanency (DCPP) (formerly the Division of Youth and Family Services), on November 5, 1990, as an assistant family service worker 2 (AFSW2). (Resp't's Opp. to Summary Decision at Ex. A.) Appellant was hired on November 4, 1989 as a principal home service worker where she was required to transport and assist clients and with shopping for food, among other duties. She was elevated to an AFSW 2 in April 2007, a title that she held until her removal. According to the DCF, the duties of an AFSW2 may include providing transportation services, setting up medical or dental appointments, and the oversight of visitation between children and families. (Id. at Ex. C.) Appellant's duties included assisting caseworkers in their oversight of the care of children whom the court has placed in the DCPP's custody.

[1] Respondent's opposition is treated as a cross-motion for summary decision, pursuant to N.J.A.C. 1:1-14.6(h), (p).

By Order of the court dated September 8, 2014, the DCF had custody, care, and supervision of two children, four-year-old "Jamie"[2] and his younger sister. The court Order authorized the DCF to provide or secure routine and emergent medical treatment for the children. Supervised visitation between the parents and the children was permitted. The parents' request for unsupervised visitation was specifically denied by the court.

Jamie's case was assigned to the appellant for supervised visitation on December 1, 2014. (App.'s Mot. for Summary Decision at 3.) The supervised visit was to last for two hours, from 1 p.m. to 3 p.m., at a McDonald's located in Bayonne, New Jersey. Both of Jamie's biological parents were present for the visitation.

During the visit, DCF caseworkers Mariam Attia ("Attia"), who was assigned to the family, and Alexandra Troast ("Troast") stopped at the McDonald's. A home health aide was also present. (Resp't's Opp. at Ex. D.DCF33.) According to Attia's Certification, she was there to drop off bus tickets to Jamie's parents. (Id. at Ex. F:2.)

On her arrival, appellant informed Attia that she (Marino) was going to the counter to get coffee. (Ibid.) Appellant explained that it is common for DCF employees to cover for each other while one employee uses the restroom or is briefly indisposed, and that she expected Attia to remain with the family until she returned. (App.'s Mot. at 4). It is undisputed that while appellant was on line at the McDonald's, Attia and Troast approached her to notify her that they were leaving. (Resp't's Opp. at Ex. F:2; App.'s Mot. at 4.) As Attia left she saw Marino heading back to the play area. (Resp't's Opp. at Ex. F:2). The area is separated from the restaurant area by a large glass wall. The play area includes an apparatus that allows children to climb into a tunnel and down to the floor. (Ibid.)

The parties agree that during the visit Jamie somehow fell and hurt his leg. However, it is unclear whether Marino was present when he fell or whether she was still on line at the McDonald's counter.

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[2] Pursuant to N.J.S.A. 9:6-8.10a, the name of the child is fictitious.

Marino avers that she did not see Jamie fall, and that his father was holding him in his arms when she approached after getting coffee. (Ibid.) However, the home health aide avers that appellant returned from buying coffee about ten to twenty minutes before Jamie was injured. (Resp't's Opp. at Ex. D:DCF34.) Similarly, the aide further avers that appellant was seated drinking her coffee when his father brought Jamie over crying. (Id. at Ex. D:DCF33.) Appellant recalls that Jamie cried, then smiled and laughed, and then cried again. (App.'s Mot. at 4.) Respondent asserts that Jamie only laughed because his parents were trying to distract him from the pain he was in. (Resp't's Opp. at 5.)

It is undisputed that Jamie said that his leg hurt. (App.'s Mot. at 4). Further, it is undisputed that appellant did not seek or immediately obtain emergency medical care for the child at the time of injury. (Ibid.; see also Resp't's Opp. at 6.) Although the home health aide suggested that Jamie be taken to the doctor, appellant did not see any indication that Jamie was seriously hurt or that he needed immediate medical attention. (App.'s Mot. at 4.) Rather, appellant immediately ended the visit and returned Jamie to his resource parent so he could be monitored to determine whether he needed medical attention. (Ibid.) Jamie was carried to appellant's car. None of the witnesses commented on whether there was any attempt by anyone to see if Jamie was capable of standing on his own.

At or around 2:34 p.m., appellant attempted to call caseworker Attia to notify her about Jamie's injury, but was unable to reach her. (Resp't's Opp. at Ex. F:2.) She left a voicemail explaining that Jamie had hurt his leg and that she (Marino) was going to contact his resource parent. (Id. at Ex. F:2.) Attia stated that appellant's voicemail indicated that she was bringing Jamie home so that his resource parent, M.S., could take him to the doctor. (Ibid.) At or around 2:35 p.m., appellant called a second time and spoke to Attia, reiterating what she had left in her previous voicemail. Attia does not verify that she spoke to appellant at that time. (Resp't's Opp. at Ex. F:2.) However, appellant claims that Attia did not offer her any guidance suggestions or alternatives to taking Jamie home to his resource parent. (App.'s Mot. at 5.)

At or around 2:36 p.m., both of Jamie's biological parents called Attia informing her that Jamie needed to go to the hospital immediately because his injuries were more severe than appellant had described. (Resp't's Opp. at Ex. F:2.) Indeed, Jamie was crying hysterically and was very upset. (Id. at 6.) As a result, Attia immediately contacted appellant to share the parents' concerns. (Id. at Ex. F:3.) Allegedly, appellant thought that the parents were exaggerating and that Jamie could see a doctor the following day. Attia states that despite the parents' concerns, appellant was bringing Jamie back to his resource parent because she was already in-route, she did not know where the nearest hospital was, and she did not have his Medicaid card. (Ibid.) Attia advised appellant that she could find the nearest hospital using her GPS. Attia denies appellant's contention that Attia told her to "use her own judgment" on how to proceed.

Appellant further avers that she attempted to contact her supervisor, Rhonda Johnson ("Johnson") on her cell phone, but that Johnson did not answer the call. (App.'s Mot. at 5, Ex. 12.) Johnson denied having any contact with appellant on December 1, 2014, nor did she receive a voicemail from appellant regarding Jamie's injury.

Appellant alleges that failing to reach Johnson, she attempted to contact her a second time and called the DYFS switchboard operator, Nabile Elraheb ("Elraheb") (Id. at 5), who reported that Johnson was in training and could not be disturbed. (Ibid.) Neither party presented a certification, interview, or affidavit from Elraheb. However, appellant submitted a list of calls she allegedly made and their relevant alleged outcomes. (Id. at Ex. 12).

Johnson asserts that she learned of Jamie's injury on December 2, 2014, through an internal department email. (Resp't's Opp. at Ex. J-2.)

Appellant asserts that on the thirty-minute drive from McDonald's to the resource parent's home in Harrison, Jamie did not cry. (App.'s Mot. at 5.) Appellant claims that upon arriving at the resource parent's residence, Jamie began crying when the caregiver asked him what was wrong. (Id. at 6.) The resource parent believed Jamie

needed immediate medical attention, proceeded to call 911, and sought medical treatment. (Ibid.) She picked up Jamie from his car seat and carried him inside until an ambulance arrived because he was unable to walk. (Resp't's Opp. at Ex. D.DCF36.) The resource parent recalled hearing bones cracking in Jamie's leg. (Id. at 6.) None of the witnesses indicated whether Jamie was asked to walk when he arrived at the residence. At 3:27 p.m., Attia received a hysterical phone call from the resource parent telling Attia that she was waiting for an ambulance to arrive to take Jamie to the hospital. (Id. at Ex. D.DCF31.)

Appellant stayed with the resource parent until the ambulance arrived. (App.'s Mot. at 5.) She offered to accompany them to the hospital, but the resource parent refused. (Ibid.) Jamie was then transported via ambulance to University Hospital in Newark, where he was treated by Dr. Maureen Rickerhauser in the emergency room. It was determined that he had a "significant fracture in his left femur which is the same as a broken leg." (Resp't's Opp. at Ex. D.DCF28.) He was admitted to the hospital at 9:49 p.m. Jamie's injury required surgery and the insertion of two small rods in his leg. (Id. at Ex. D.)

On December 10, 2014, appellant was interviewed at the Hudson South Local Office in Bayonne by investigators from the Office of the Public Defender ("OPD"), Law Guardian Conflict Investigators Unit, at 10:22 a.m. In this interview, appellant recalled that she only called Attia and the resource parent; she admitted that she should have called her supervisor. (Id. at 7.)

Christina Gervasi, the general manager of the McDonald's, stated that management was not informed of Jamie's injury at the time it occurred and that no video was available of the play area. (Id. at Ex. D:DCF35.)

While the DCF was conducting an internal investigation into the incident, appellant was reassigned to the Department's Intake Unit. Respondent now contends that the reassignment was done to prevent Marino from endangering additional children. (Ibid.)

On February 2, 2015, after the instant incident but prior to appellant's removal, appellant received a performance evaluation with an overall rating of "satisfactory." (App.'s Mot. at 7.) This rating was applicable to "problem solving," defined as "identifies and analyzes problems, uses sound reasoning to arrive at conclusions; finds alternative solutions to complex problems; distinguishes between relevant and irrelevant information to make logical judgments." (Ibid.) Appellant contends that because she received this review after the instant incident involving Jamie, the DCF was indicating that her handling of the incident with Jamie was appropriate. (Ibid.) However, the DCF states that the evaluation was performed prior to the completion of the internal investigation, and therefore the December 1, 2014, incident was not included in the evaluation. (Resp't's Opp. at 21). Despite the DCF's assertion, the interim performance evaluation designates the relevant rating period as between September 1, 2014, and August 31, 2015. (App.'s Mot. at Ex. 13.)

On or about February 19, 2015, the OPD, Law Guardian Conflict Investigators Unit, issued a report ("Report") that determined that child abuse was established for neglect of substantial risk of physical injury to the child, and that the appellant was the person responsible for medical neglect of the child. (Resp't's Opp. at Ex. D.DCF44.) It concluded that appellant knew or should have known to promptly obtain medical care for the child, or, at a minimum, seek guidance from a supervisor. As a result of this determination, the DCF asserts that it can no longer rely on the appellant to carry out her job duties and responsibilities as an assistant family service worker. (Id. at 3.)

On July 15, 2015, Johnson wrote a letter stating that the appellant was an asset to the Department. (Id. at 9.) In the letter, Johnson wrote that appellant had never received a complaint regarding her work with families or children and that she always went above and beyond. (App.'s Mot. at Ex. 1). Despite this, Johnson asserts that she had never directly observed the appellant working with families or children. (Resp't's Opp. at Ex. J:2.) In her certification, Johnson clarified that she considered appellant to be an asset because she was punctual and there had been no complaints regarding her work. (Ibid.)

Findings

Based on the above, I make the following **Findings** of **Fact**. On December 1, 2014, the DCF was responsible for the custody, care, and supervision of four-year-old Jamie. Appellant, an assistant family service worker 2, was assigned to accompany Jamie to a supervised visit with his biological parents at a McDonald's restaurant, during which she was responsible for his care. The child was injured during the visit. Appellant did not promptly notify her supervisor of the incident, and she did not seek immediate medical attention for the child. The OPD, Law Guardian Conflict Investigators Unit, issued a report that determined that child abuse was established for neglect of substantial risk of physical injury to the child, and that the appellant was the person responsible for medical neglect of the child. The DCF subsequently brought disciplinary charges against appellant, and removed appellant from her position effective June 30, 2015.

LEGAL ANALYSIS AND CONCLUSIONS

Under the New Jersey Uniform Administrative Procedure Rules, a party may move for summary decision regarding all or any substantive issues in a case. N.J.A.C. 1:1-12.5(a). Motions for summary decision may be granted if the papers and discovery, together with any supporting affidavits, show there is no genuine issue of material fact and that the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b).

A motion for summary decision is almost identical to the standard used for summary judgment under the New Jersey Rules of Court, which provides that summary judgment should be granted if

> the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the

> non-moving party, would require submission of the issue to the trier of fact.
>
> [R. 4:46-2(c).]

In Brill v. Guardian Life Insurance Co., 142 N.J. 520, 536 (1995) (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 251–52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)), the New Jersey Supreme Court further refined the standard for summary decision, stating that the inquiry is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one-sided that one party must prevail as a matter of law." Thus, a court should deny a motion for summary decision only where the party opposing the motion has come forward with evidence that creates a genuine issue of material fact. Id. at 529. The Court stated:

> [a] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."
>
> [Id. at 540 (quoting Liberty Lobby, supra, 477 U.S. at 249, 106 S. Ct. at 2511, 91 L. Ed. 2d at 212).]

The Brill standard contemplates that the analysis performed by the trial judge in determining whether to grant summary judgment should comprehend the evidentiary standard to be applied to the case or issue if it went to trial. "To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed 'worthless' and will 'serve no useful purpose.'" Id. at 541.

As a result, for a party opposing summary decision to prevail, that party must file a responding affidavit setting forth specific facts demonstrating the existence of a genuine issue that can only be determined by an evidentiary proceeding. Ibid. The opposing party must demonstrate, moreover, that the disputed issue of fact is material

to the adjudication. See Frank v. Ivy Club, 120 N.J. 73, 98 (1990). The genuinely disputed material fact must be essential to the decision in the case. Ibid. In addition, the opposing party must establish the issue with competent evidential materials. Robbins v. City of Jersey City, 23 N.J. 229, 240–41 (1957). "Bald allegations or naked conclusions" are insufficient to warrant an evidentiary hearing. J.D. v. Div. of Developmental Disabilities, 329 N.J. Super. 516, 525 (App. Div. 2000). If the opposing party fails to raise a material factual issue with competent proofs, then the issue should be resolved on summary decision. Frank, supra, 120 N.J. at 98–99.

In the instant matter, there is no genuine dispute of material fact that Jamie was injured while on a supervised visit during which appellant was ultimately responsible for his care, and that appellant did not report the child's injury to her supervisor or seek immediate medical attention for the child. Based on the facts and the analysis of the law, I **CONCLUDE** that appellant failed to exercise due diligence in determining the extent of Jamie's injury, specifically, whether he required immediate medical attention. I **CONCLUDE** that appellant's conduct constituted neglect, failure to perform duties, incompetency, and conduct unbecoming a DCF employee. Clearly, appellant neglected her duties as a DCF in failing to determine the nature and extent of Jamie's injury. Further, her failure to take Jamie to the hospital for examination also constitutes failure to perform her duties, incompetency and conduct unbecoming a DCF employee. I am persuaded that Jamie's parents and the home health aide alerted the appellant that Jamie was hurt. The appellant choose to ignore them and to simply hand Jamie off to his resource parents for further care.

However, the appropriate penalty is a materially disputed fact.

New Jersey is a progressive-discipline state. The theory underlying progressive discipline provides that "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct." In re Herrmann, 192 N.J. 19, 29 (2007) (citing West New York v. Bock, 38 N.J. 500, 522 (1962)). An employee's past record includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been

previously brought to the attention of and admitted by the employee." Bock, supra, 38 N.J. 523–24.

"While a single instance [of misconduct] may not be sufficient, numerous occurrences over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference amounting to neglect of duty." Id. at 522. "[P]rinciples of progressive discipline can support the imposition of a more severe penalty for a public employee who engages in habitual misconduct." Herrmann, supra, 192 N.J. at 30.

Conversely, In re Carter, 191 N.J. 474, 484 (2007), recognizes that "some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." See Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197–98 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense). Thus, the question for the courts is "whether such punishment is 'so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness.'" In re Polk License Revocation, 90 N.J. 550, 578 (1982) (considering punishment in license-revocation proceeding) (quoting Pell v. Bd. of Educ., 313 N.E.2d 321 (1974)).

Progressive discipline has also been used to mitigate the penalty for a current offense. Herrmann held that progressive discipline may be used to downgrade the penalty for an employee who has "a substantial record of employment that is largely or totally unblemished by significant disciplinary infractions." In re Herrmann, supra, 192 N.J. at 27–28; see, e.g., Saniuk v. Div. of Youth and Family Servs., CSV 2251-01, Initial Decision (December 20, 2001), modified, MSB (March 18, 2002), <http://njlaw.rutgers.edu/collections/oal/> (Merit System Board reduced forty-five-day suspension to written reprimand because of employee's long record of public service without any major disciplinary infractions). In Stein v. Division of Youth and Family Services ("DYFS"), CSV 4336-01, Initial Decision (May 23, 2003), adopted, MSB (August 22, 2003), <http://njlaw.rutgers.edu/collections/oal/>, an ALJ recommended reduction of a penalty of removal for a DYFS worker who had been charged with improperly divulging confidential information, constituting conduct unbecoming a public

employee under N.J.A.C. 4A:2-2.3(a)(6). The ALJ found the worker's record from years of service in his position to be "more than commendable" and, in fact, "exemplary," and concluded that the employee's high performance ratings and praise from supervisors warranted a suspension instead of removal.

Likewise, it is undisputed that given the sensitive nature of work performed by the DCF, and the importance of the proper care and welfare of children, egregious conduct may demand removal. In In re Herrmann, the Court acknowledged public-policy concerns that the Division faces, including frequent contact with families, remediation of family conflicts, and investigations of abuse and neglect. In re Herrmann, supra, 192 N.J. at 35. DCPP workers are the people trusted to behave appropriately and to use sound judgment when making, at times, on-the-spot decisions about the families they visit and supervise. The DCPP must be able to rely on a worker's demonstrated good judgment from the moment of the initial investigation until the best interests of the child have been secured. Id. at 36.

Here, appellant has not engaged in numerous instances of misconduct during her career with the DCF and, as a result, is not subject to removal on the basis of habitual misconduct. Appellant's only prior disciplinary issue arose when she used a State vehicle for training purposes. (Resp't's Opp. at Ex. D:19). As a result, she was required to reimburse the DCPP the sum of $19.46. (Ibid.) This offense is a minor disciplinary infraction, and the penalty reflected that. However, notwithstanding the appellant's lack of major disciplinary history, it is undeniable that the injury Jamie sustained while under appellant's supervision is far more severe than misuse of a State vehicle. The OPD Report found this to be an isolated incident, meaning that appellant had never had an issue like this before involving Jamie or any other child that had been placed in her care. (Id. at Ex. D:DCF44). Indeed, appellant has the support of her coworkers, who signed a petition, as well as multiple letters from professionals who observed appellant's work with children and families throughout her career. (App.'s Mot. at Ex. 3-10).

Therefore, for the foregoing reasons, I **CONCLUDE** that the issue of the appropriateness of the instant penalty is a materially disputed fact.

ORDER

Based on the above findings and conclusions, summary decision is **GRANTED** to the respondent on the issue of neglect, failure to perform duties, incompetency and conduct unbecoming a DCF employee. Summary decision is **DENIED** on the issue of penalty.

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

February 3, 2017

DATE

IRENE JONES, ALJ/ta

sej