STATE OF NEW JERSEY

In the Matter of Tonya Howard, City of Newark	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
	:	Request for Back Pay
CSC Docket No. 2019-1398	:	

ISSUED: DECEMBER 18, 2019 (ABR)

Tonya Howard, a Police Communications Clerk with the City of Newark (Newark), represented by Samuel Wenocur, Esq., requests back pay and benefits in accordance with the attached Civil Service Commission (Commission) decision rendered on April 4, 2018.

By way of background, the appointing authority issued a Final Notice of Disciplinary Action (FNDA) removing the petitioner on charges of violations of the Newark Police Department Rules and Regulations, effective September 22, 2016. Upon her 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 of the record, the Commission modified the removal to a 45 working day suspension. Further, the Commission ordered that the petitioner undergo a pre-reinstatement drug test, noting, that in relevant part, if she passed, she was to be immediately reinstated. The Commission further ordered that the petitioner be granted back pay, benefits and seniority for the period after the imposition of her 45 working day suspension through the actual date of her reinstatement. The record reflects that the petitioner was reinstated on May 27, 2018. However, the parties were unable to agree on the amount of back pay and benefits due, and the petitioner has requested Commission review.

In the instant matter, the petitioner asserts that the parties disagree about whether the 45 working day suspension should start on September 22, 2016, the date of her immediate suspension, or on December 27, 2016, the date on which the FNDA was issued. The petitioner states that the appointing authority considers the

effective date of her 45 working day suspension to be December 27, 2016 and that it does not believe she is entitled to back pay for the period between September 22, 2016 and February 28, 2017, particularly as she did not seek interim relief for her immediate suspension. The petitioner argues that her decision not to seek interim relief does not negate her entitlement to back pay outside of her 45 working day suspension.

The petitioner indicates that the appointing authority has remitted to her $1,698.25 for 2017 and $14,335.89 for 2018, based upon its calculation of back pay owed to her. The petitioner asserts that the appointing authority's back pay calculation in September 2018 included deductions for $7,088 in unemployment benefits[1] she received between December 2016 and June 2017 and a $20,645 gross disbursement she received from the Public Employment Retirement System (PERS) in September 2017 after she closed her account.

The petitioner also questions how the New Jersey Division of Unemployment Insurance (Division of Unemployment) should be reimbursed for the $11,518 she received in unemployment benefits. Specifically, the petitioner maintains that the unemployment benefits she received should not have been deducted from her overall award of back pay, as the appointing authority has refused to reimburse the Division of Unemployment for that amount. The petitioner, citing *Bellamy v. Essex County Hospital Center*, 95 *N.J.A.R.2d* (CSV) 652 (1994), contends that if Newark refuses to remit the $11,518 back to the Division of Unemployment, then it must remit that amount to her so she can reimburse the Division of Unemployment herself.

Additionally, the petitioner contends that the $20,645 disbursement from PERS should not be deducted from her back pay award. She explains that the appointing authority treated this amount as income for mitigation purposes because, in September 2018, her attorney advised the appointing authority that the PERS disbursement was income because it did not have to be repaid. However, she indicates that she subsequently learned that she was required to repay these funds with the reinstatement of her PERS account and she states that she has been repaying PERS through additional paycheck deductions. In support, she submits documentation from PERS dated April 1, 2019, which states that the money she withdrew from her account had to be repaid.

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[1] The petitioner, in an affidavit of mitigation that she furnished to the appointing authority, dated August 1, 2018, stated that she received $7,088 in unemployment benefits between December 31, 2016 and June 26, 2017. On appeal, the petitioner submits an updated affidavit of mitigation, dated February 4, 2019, in which she states that the correct figure for the unemployment benefits she received during this period was $11,518. She also provides supporting documentation from the Department of Labor and Workforce Development.

The petitioner also maintains that the appointing authority is required to provide her with sick, vacation and other benefit days for the entire length of her wrongful termination. The petitioner acknowledges that she utilized her full allotment of vacation and sick days prior to the December 27, 2016 FNDA and that she received a prorated amount of vacation and sick days for 2018 upon her return to work on May 27, 2018. However, she states that she has not received any payment or other benefits to compensate her for any other benefits days owed to her in 2017 or 2018. Rather, she asserts that the payments she has received only partially compensate her for the salary she would have earned during this period of time.

The petitioner submits an affidavit of mitigation and an updated affidavit of mitigation, wherein she states, in relevant part, that she received unemployment benefits in the amount of $11,518, searched online for work and received a total of $1,512 in Supplemental Nutrition Assistance Program (SNAP) benefits between April 2017 and June 2017.

In response, the appointing authority, represented by France Casseus, Assistant Corporation Counsel, asserts that the 45 working day suspension should begin on December 27, 2016. In this regard, it asserts that Howard's immediate suspension on September 22, 2016 was necessary to maintain the safety, health and effective direction of public services after she tested positive for marijuana. The appointing authority argues that because the petitioner did not seek interim relief for the immediate suspension,[2] there is no basis to provide her with back pay between September 22, 2016 and December 26, 2016.

The appointing authority states that it remitted $1,698.25 and $14,335.89 for 2017 and 2018, respectively. It asserts that these amounts represent the total back pay the petitioner is entitled to. In this regard, it states that the petitioner's annual salary was $39,712.50 in 2016, $41,112.50 in 2017 and $42,712.50 in 2018.

The appointing authority contends that the $20,645 that the petitioner received from PERS should be counted as income for mitigation purposes because it was money she received which it asserts did not have to be repaid. In support, it submits an email dated September 13, 2018 from the petitioner's attorney indicating that the money did not have to be repaid. The appointing authority also states that the $504 per month the petitioner received in SNAP benefits from April 2017 to May 2018 and the unemployment insurance benefits she received were counted as mitigation income and deducted from the sum it paid to the petitioner. It maintains that there is no basis for the Commission to address the issue of repayment of unemployment benefits. In this regard, it contends that the appropriate venue for such an action would be Superior Court, and it notes that

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[2] The appointing authority also maintains that even if she had requested interim relief, she would not have prevailed.

there is no evidence that the Division of Unemployment has sought repayment from the petitioner for her unemployment benefits.

The appointing authority states that the petitioner used all of her sick and vacation time prior to her suspension in 2016. With respect to vacation and sick leave time for 2017, the appointing authority states that the back amount the petitioner received also served to compensate her for the vacation and sick leave time she would have otherwise received for that year. It also indicates that she received a prorated allotment of vacation and sick leave days for 2018 in August 2018, based upon her May 27, 2018 return to work date.[3]

CONCLUSION

Initially, the petitioner asserts that the 45 working day suspension should have started on September 22, 2016, the date she was immediately suspended from work. However, the appointing authority asserts that she is not entitled to back pay for any part of 2016 because she did not challenge her immediate suspension from September 22, 2016 to December 26, 2016 and her 45 working day suspension did not take effect until December 27, 2016. The Commission finds that the effective date of the petitioner's working day suspension was September 22, 2016. In this regard, the Commission emphasizes that an immediate suspension is not a final disciplinary action. It is merely a mechanism to remove an employee from the workplace if the appointing authority can meet the strict standards found in *N.J.A.C.* 4A:2-2.5(a)1. Accordingly, the Commission finds that with its modification of the petitioner's removal to a 45 working day suspension, her suspension is deemed to have been in effect between September 22, 2016 and November 23, 2016. Accordingly, her entitlement to back pay would begin on November 24, 2016 and continue until her reinstatement on May 28, 2018.

Pursuant to *N.J.A.C.* 4A:2-2.10(d), an award of back pay shall include unpaid salary, including regular wages, overlap shift time, increments and across-the-board adjustments. Benefits shall include vacation and sick leave credits and additional amounts expended by the employee to maintain health insurance coverage during the period of improper suspension or removal. Additionally, *N.J.A.C.* 4A:2-2.10(d)1 states that back pay shall not include items such as overtime pay, holiday premium pay and retroactive clothing, uniform or equipment allowances for periods in which the employee was not working. *N.J.A.C.* 4A:2-2.10(d)3 provides, in pertinent part, where a removal has been reversed or modified, 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. *N.J.A.C.* 4A:2-2.10(d)4v provides that the burden of proof shall be on the employer to establish that the employee has not made reasonable efforts to find suitable

[3] The appointing authority states that the petitioner is entitled to 12 vacation and 15 sick leave days per year.

employment. *N.J.A.C.* 4A:2-2.10(d) provides that funds which must be repaid by the employee shall not be considered when calculating back pay.

In the instant matter, the appointing authority submits that it has paid the petitioner $16,034.14, which represents the full amount of back pay owed to her, including $1,698.25 for 2017 and $14,335.89 for the period between January 1, 2018 and May 26, 2018. The appointing authority states that the petitioner's gross salary would have been $39,712.50 in 2016, $41,112.50 in 2017 and $42,712.50 in 2018. It contends that any back pay award to the petitioner for 2017 must be reduced by the unemployment insurance benefits and SNAP benefits she received.

The Commission finds that the unemployment benefits the petitioner received should be deducted from her back pay award. In this regard, for the purposes of back pay due to a Civil Service employee, the Commission and its predecessor, the Merit System Board, have always maintained that unemployment benefits are considered as income during a period of separation for purposes of mitigation. *See In the Matter of John Raube, Senior Correction Officer, Department of Corrections,* Docket No. A-2208-02T1 (App. Div. March 30, 2004); *In the Matter of Judith Leeds* (MSB, decided May 19, 1998); *See also In the Matter of James Nance* (MSB, decided October 1, 2003); *In the Matter of William Carroll* (MSB, decided November 8, 2001); *In the Matter of Carl Underwood* (MSB, decided July 10, 2001). The Commission notes that the petitioner states in her updated affidavit of mitigation that she received $11,518 in unemployment benefits between December 31, 2016 and June 26, 2017. Accordingly, the appropriate deduction for unemployment benefits during this period is $11,518. As to the petitioner's concerns about potentially having to reimburse the State for the unemployment benefits she received, if at some future date the petitioner is notified that she is required to make such a repayment, she may petition the Commission to address that issue.

As to the SNAP benefits the petitioner received, it is noted that the petitioner states in her affidavit of mitigation that she collected $1,512 in benefits between April 2017 and June 2017 and that the appointing authority indicates that it deducted $504 per month for SNAP benefits from the back pay award for the period between April 2017 and May 2018 and it argues that her back pay award should be reduced by this amount. However, the Commission finds no basis to reduce her back pay award by this amount, as it has previously held that SNAP benefits should not be counted as income for this purpose. *See In the Matter of Gilberto Reyes* (CSC, decided July 13, 2017) (Food stamps received should not be deducted from back pay as such benefits cannot be considered income since they are only usable for certain specific purposes).

The parties also dispute whether the petitioner's cash disbursement from PERS in September 2017 is mitigation income which should be deducted from her

income. The petitioner has submitted documentation which indicates that she has been repaying PERS for the $20,645 disbursement she received. Accordingly, because she is obligated to repay this sum, it would be improper to treat it as income for mitigation purposes.

Therefore, based upon the foregoing, the petitioner should have received $3,804 in gross pay ($152.16 per diem rate multiplied by 25 work days) for the period between November 24, 2016 and December 31, 2016; $41,112.50 for 2017; and $17,183.25 ($163.65 per diem rate multiplied by 105 working days) for 2018. The $62,099.75 should be reduced by the $11,518 in unemployment benefits for a total of $50,581.75. Here, given that the appointing authority has issued checks to the petitioner representing $16,034.14 in gross wages, the additional balance due to the petitioner is $34,547.61.

As to her request for vacation leave for 2017, vacation leave not taken in a given year can only be carried over to the following year. *See N.J.S.A.* 11A:6-3(e) and *N.J.A.C.* 4A:6-1.2(f); *See also In the Matter of Donald H. Nelsen, Jr.*, Docket No. A-2878-03T3 (App. Div. February 4, 2005); *In the Matter of John Raube, Senior Correction Officer, Department of Corrections*, Docket No. A-2208-02T1 (App. Div. March 30, 2004). Since the accumulation of vacation leave is statutory, the Commission is unable to award her the vacation leave she would have earned in 2017. As to her entitlement to vacation leave for 2018, the petitioner should have received 12 vacation days.

With regard to the amount of sick leave due to the petitioner, it is noted that she used her full allotment of sick days prior to her removal and that she received 8.75 sick days in August 2018, based upon the proration of her 15 days of annual leave entitlement for the period between May 27, 2018 and December 31, 2018. However, she should have received any unused sick days up to and following her removal, since sick leave can accumulate from year to year without limit. *See N.J.S.A.* 11A:6-5 and *N.J.A.C.* 4A:6-1.3(f); *See also, In the Matter of John Raube, Senior Correction Officer, Department of Corrections*, Docket No. A-2208-02T1 (App. Div. March 30, 2004). As such, she should have been credited with her full entitlement of sick days for 2017 and for 2018. However, pursuant to *N.J.A.C.* 4A:6-1.1(a)1 and *N.J.A.C.* 4A:6-1.3(c), the appointing authority must prorate her sick leave entitlement for 2016 to account for her 45 working day suspension, effective September 22, 2016.

As to any other benefit days, the Commission has no authorization to review benefits provided by the local jurisdiction and not specifically awarded by Title 11A of the New Jersey Statutes Annotated. *See In the Matter of James Nance* (MSB, decided October 1, 2003).

ORDER

Therefore, it is ordered that the petitioner be awarded back pay in the amount of $34,547.61 and grant her vacation leave and sick leave as noted above.

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 DECEMBER, 2019

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

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Attachment

c: Tonya Howard
Samuel Wenocur, Esq.
Aondrette Williams
France Casseus, Assistant Corporation Counsel
Kelly Glenn
Records Center

STATE OF NEW JERSEY

In the Matter of Tonya Howard,
City of Newark

CSC Docket No. 2017-2286
OAL Docket No. CSV 01510-17

DECISION OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 19, 2018 (DASV)

The appeal of Tonya Howard, a Police Communications Clerk with the City of Newark, of her removal, effective September 22, 2016, on charges, was before Administrative Law Judge Jude-Anthony Tiscornia (ALJ), who rendered his initial decision on January 17, 2018. Exceptions were filed on behalf of the appellant, and a reply to the exceptions was 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 April 4, 2018, did not adopt the ALJ's recommendation to uphold the removal. Rather, the Commission modified the removal to a 45 working day suspension and ordered that the appellant undergo a pre-reinstatement drug test.

DISCUSSION

The appellant was charged with violations of the Newark Police Department Rules and Regulations concerning disobedience of orders and intoxication or illegal use of drugs. Specifically, the appointing authority asserted that on August 30, 2016, the appellant tested positive for marijuana (cannabis). Upon the appellant's appeal to the Commission, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In his initial decision, the ALJ set forth that the appellant tested positive for marijuana, a controlled dangerous substance. Additionally, the ALJ indicated that

the appellant did not dispute the test result, but she argued that her removal was unjust. The appointing authority moved for summary decision, asserting that no material facts were in dispute and a decision could be rendered without further hearing. The appellant also agreed that there were no material facts in dispute. Upon a review of the parties' submissions, the ALJ found that on June 6, 2016, the appointing authority received an anonymous tip that the appellant had been engaged in the illegal use of marijuana. An investigation commenced, and on August 30, 2016, the appellant submitted a urine sample, which tested positive for marijuana. Subsequent to the drug test, the appellant voluntarily entered into a drug rehabilitation facility. Considering the positive drug test and the appellant's admission of using an illegal substance, the ALJ granted the appointing authority's motion for summary decision and upheld the charges against the appellant. Regarding the penalty, the ALJ indicated that the appellant is employed in a public safety department and is in charge of receiving emergency communications from the public. As such, the ALJ determined that the appellant's position "directly and explicitly involve[s] public safety." Thus, the ALJ found that the appellant's misconduct causes risk of harm to persons or property. Accordingly, the ALJ concluded that progressive discipline principles need not be followed in this instance, and removal of the appellant was warranted. The ALJ noted that the appointing authority was under no obligation to consider the appellant's subsequent rehabilitation efforts.

In her exceptions, the appellant argues that the ALJ failed to analyze whether the appointing authority had a sufficient basis to subject her to a "reasonable suspicion" drug test. She contends that the appointing authority "acted off" an anonymous tip and did not visit her home during the investigation. Further, the appellant indicates that the appointing authority was suspicious of her weight, but she attributes her thin frame to a documented medical treatment that she underwent. Moreover, the appellant maintains that the ALJ incorrectly concluded that the appointing authority was not obligated to apply progressive discipline principles. She states that "[j]umping immediately to termination should be reserved for only the most severe misconduct." In addition, the appellant takes exception with the ALJ's disregard of her rehabilitation efforts when determining the appropriate penalty. She maintains that treatment and rehabilitation are mitigating factors and the Commission has afforded employees who seek such drug rehabilitation treatment a "second chance." The appellant indicates that the ALJ could have recommended that she undergo a drug test as a condition of her return to work.

In its reply, the appointing authority maintains that it has a "legal and contractual right" to remove the appellant. It indicates that despite the appellant's arguments regarding a "reasonable suspicion" drug test, the parties agreed that the arguments did not raise factual issues. In other words, the appellant did not dispute any of the underlying facts. Nonetheless, in response to these arguments,

the appointing authority sets forth that its Drug Screening Policy lists objective factors in making a determination as to what constitutes "reasonable suspicion" to test an employee for drugs. For instance, the appellant was under investigation, had "exorbitant absenteeism," and "bizarre behavior patterns." With regard to the latter, the appointing authority indicates that the appellant had "lied about reasons for being booked off" and had been absent from work with no reason. Additionally, the Police Lieutenant who conducted the appellant's investigation observed the appellant in an interview of an unrelated investigation and she "had an extremely thin frame and her mannerisms suggested potential drug use." Thus, the appointing authority maintains that there was a reasonable basis to subject the appellant to a drug test. Furthermore, it contends that, as determined by the ALJ, it had no obligation to consider the appellant's alleged rehabilitation. Therefore, the appointing authority submits that her removal was warranted for the safety and well-being of its citizens.

Upon its *de novo* review of the record, the Commission agrees with the ALJ's assessment of the charges but does not adopt the ALJ's recommendation to uphold the removal. Rather, the Commission modifies the removal to a 45 working day suspension. Initially, it is clear from the record that the matter was ripe for summary decision. It was undisputed that the appellant tested positive for marijuana and admitted to having used an illegal substance. In reviewing these facts, the ALJ properly determined that the charges against the appellant were sustained. Moreover, regardless of the ALJ's lack of analysis on the propriety of subjecting the appellant to a drug test, as noted, the appellant admits to illegal drug use. She voluntarily admitted herself to a drug rehabilitation facility. Thus, there is no question that the charges against her have been sustained.

However, in determining the proper penalty, in addition to its consideration of the seriousness of the underlying incident, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). 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 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. Upon an independent review of the record and in consideration of the appellant's prior record of service, the Commission concludes that removal is too harsh a penalty. The Commission is guided by the principles of progressive discipline in this case. The appellant's disciplinary history does not evidence any discipline related to drug use in her approximately eight years of

employment prior to her removal.[1] Further, while the Commission is mindful of the seriousness of the appellant's conduct, the Commission notes that for non-law enforcement employees, who are not held to the stricter standard of conduct expected of law enforcement officers, a "second chance" is generally provided by appointing authorities for drug-related infractions. *See e.g., In the Matter of Brian Huntley* (CSC, decided February 12, 2014) (Removal modified to a six-month suspension and the appellant, a Heavy Equipment Operator, was ordered to undergo a return to work drug and alcohol test prior to reinstatement and random monthly testing for a period of 24 months upon reinstatement); *In the Matter of John Daraklis* (MSB, decided June 11, 2008) and *In the Matter of John Simpson* (MSB, decided March 26, 2008) (Removals modified to four-month suspensions and the appellants, a Laborer Heavy and Truck Driver, respectively, were ordered to undergo a return to work drug test prior to reinstatement, referral to the Township's Employee Assistance Program, and monthly random drug testing for a period of one year upon reinstatement); *In the Matter of Glenn Steiger* (MSB, decided July 11, 2007) (Removal modified to a four-month suspension and required testing before reinstatement and random drug testing thereafter, where Truck Driver failed random alcohol test); *In the Matter of Richard Wilkins, Jr.* (MSB, decided September 21, 2005) (Removal modified to a six-month suspension and required referral to Township's Employee Assistance Program and random testing after reinstatement, where Police Aide tested positive for marijuana and PCP). While the appellant is employed as a Police Communications Clerk in the City of Newark's Department of Public Safety, she is not in a law enforcement position. Further, the appellant sought treatment and voluntarily entered into a drug rehabilitation facility. Such efforts are certainly considerations to afford her a "second chance."

Accordingly, contrary to the arguments of the appointing authority, the Commission does not find the appellant's conduct so egregious as to warrant removal without following the tenets of progressive discipline. Therefore, the Commission determines that the appropriate penalty is a 45 working day suspension. This significant major discipline should serve as a warning to the appellant that any future infraction may result in her removal. The Commission further notes that its decision reducing the penalty in this case is not meant to minimize the seriousness of the appellant's infraction. In addition to the 45 working day suspension, the Commission orders that the appellant undergo a pre-reinstatement drug test to be administered by the appointing authority. Should the appellant pass this drug test, the appellant is to be immediately reinstated to her position. If the appellant fails this drug test, the Commission orders that the appointing authority issue a new Final Notice of Disciplinary Action (FNDA) removing the appellant with a current date of removal. Upon receipt of the FNDA, the appellant may appeal that matter to the Commission in accordance with

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[1] Agency records indicate that the appellant was appointed as a Police Communications Clerk effective June 17, 2008.

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 drug test only. In either case, pursuant to *N.J.A.C.* 4A:2-2.10, the appellant would be entitled to mitigated back pay, benefits, and seniority from the end of the 45 working day suspension until the time she is either reinstated or removed.

However, regarding counsel fees, *N.J.A.C.* 4A:2-2.12(a) provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield*, 282 *N.J. Super*, 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, the charges were sustained. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth in *N.J.A.C.* 4A:2-2.12(a), 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 decision of the Superior Court of New Jersey, Appellate Division, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. In the interim, as the court states in *Phillips, supra*, should the appellant pass the pre-reinstatement drug test ordered herein, the appointing authority shall immediately reinstate the appellant to her permanent position.

ORDER

The Civil Service Commission finds that the appointing authority's action in imposing a removal was not justified. Therefore, the Commission modifies the removal to a 45 working day suspension. The Commission also orders, prior to reinstatement, that the appellant undergo a drug test to be administered by the appointing authority. 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 after the imposition of the 45 working day suspension through the date of her actual reinstatement or removal. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned and 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.

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, if applicable, be delayed pending the resolution of any potential 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). Any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4TH DAY OF APRIL, 2018

Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

Inquiries
and
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Christopher S. Myers
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. CSV 01510-17

AGENCY DKT. NO. 2017-2286

TONYA HOWARD,

Petitioner,

v.

CITY OF NEWARK, DEPARTMENT OF PUBLIC SAFETY,

Respondent.

John Branigan IV, Esq., (Oxfeld Cohen, attorneys) for petitioner

France Casseus, Assistant Corporation Counsel, for respondent

Record Closed: December 11, 2017 Decided: January 17, 2018

BEFORE **JUDE-ANTHONY TISCORNIA**, ALJ:

STATEMENT OF THE CASE

Tonya Howard (petitioner) appeals removal from her position as a communications clerk for the City of Newark, Division of Public Safety, because she tested positive for marijuana, a Controlled Dangerous Substance (CDS). Petitioner does not dispute the test results or her past use of CDS but asserts that removal is unjust and unwarranted under the circumstances.

New Jersey is an Equal Opportunity Employer

ISSUE

May respondent City of Newark remove petitioner based on her testing positive for CDS?

PROCEDURAL HISTORY

On January 9, 2017, petitioner was served with a Final Notice of Disciplinary Action (FNDA), removal effective September 22, 2016. (R-1.) Petitioner was charged with violating the following Department Rules and Regulations, in addition to the New Jersey Administrative Code:

1. Obedience to Orders – Civilian
   (Newark Police Dept. Rules and Regulations, Ch. 5:4-1)

2. Drug Screening Policy
   (Newark Police Dept. Rules and Regulations, General Order 89-2)

3. Intoxication or Illegal Use of Drugs
   (Newark Police Dept. Rules and Regulations, Ch. 18:9.6)

4. Drug and Alcohol Use/Testing
   (N.J.A.C. 4A:2-2.3(a)(10))

Petitioner filed the instant appeal at the Office of Administrative Law on February 1, 2017 (N.J.S.A. 40A:14-202d).

A hearing was scheduled for October 25, 2017, at which time it was determined by counsel that there were no material facts in dispute and a motion was made on the record by respondent for summary decision. Respondent filed a supporting brief with attachments which were received on November 20, 2017. Opposition to the motion was filed and received on December 11, 2017, at which time the record was closed.

The parties had not requested oral argument and I determine that the written submissions are sufficient to dispose of the matter.

FINDINGS OF FACT

The following facts are undisputed and I therefore **FIND** them to be the **FACTS** of the case.

Tonya Howard had been employed as a police communications clerk by respondent City of Newark, Department of Public Safety. Her job duties included receiving and responding to emergency 911 calls from the general public.

On June 6, 2016, respondent received an anonymous tip aleging that petitioner had been engaged in the illigal use of CDS marijuana. An internal investigation ensued as a result of the tip and on August 30, 2016, petitioner submitted a urin sample which ultimatly tested positive for CDS marajuana.

As a result of the positive drug test, petitioner was issued a Priliminary Notice of Diciplinary Action on December 1, 2016, and a Final Notice of Diciplinary Action on December 27, 2016, with termination effective September 22, 2016. (See R-1.)

Subsequent to the positive drug test, petitioner entered a drug rehabiitation facility of her own volition.

LEGAL ANALYSIS AND CONCLUSION

1. Summary Decision Standard

A "motion for summary decision shall be served with briefs and with or without supporting affidavits." N.J.A.C. 1:1-12.5(b). A summary decision may be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Ibid. A court should grant

summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29 (1995).

Here, both parties agree that there is no material fact in dispute. Petitioner merely argues that 1) the tenants of progressive discipline would preclude removal of petitioner and 2) respondent should consider other mitigating circumstances, such as her voluntary rehabilitation, in making a final determination.

2. The law does not require strict application of progressive discipline.

Petitioner argues that since she has never been disciplined for illicit drug use in the past, her removal is precluded by the principle of progressive discipline, which allows for an employee's past disciplinary record to be used as "guidance in determining the appropriate penalty for the current specific offense. See W. New York v. Bock, 38 N.J. 500 (1962).

The concept of progressive discipline is often used as a guiding principle when determining the degree of severity and overall fairness of an agency's disciplinary action against its own employee. However, a state agency is not bound by progressive discipline, especially in instances regarding a risk to public safety: "progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property." In re Hermann, 192 N.J. 19 (2007)

In the case at bar the petitioner tested positive for CDS marijuana and admitted to using the illegal narcotic. I **FIND** an employee's use of illegal narcotics constitutes severe misconduct. Petitioner is employed by the public safety department for the City of Newark and she is charged with receiving emergency communications from the general public. I **FIND** that the petitioner's position does directly and explicitly involve public safety and I therefore **FIND** that petitioner's misconduct causes risk of harm to persons or property. Under the standard set forth in Hermann as sited above I **FIND**

respondent rightfully bypassed progressive discipline in this instance and I **CONCLUDE** petitioner's removal was warranted under Hermann.

3. Respondent is not obliged to consider petitioner's subsequent rehabilitation.

Petitioner voluntarily entered into a drug rehabilitation facility subsequent to her positive drug test. Petitioner argues that her openness to rehabilitation coupled with her assertion that marijuana is not "the most serious of narcotics" should afford her the "opportunity to rehabilitate and return to work." (See Pet'r's Response Br. at p. 5.) While her pursuit of rehabilitation is commendable, petitioner fails to demonstrate how this attempt at self-amelioration precludes respondent from removing petitioner due to her admitted drug use while employed as a communications clerk for the department of public safety.

ORDER

Based upon the foregoing, it is **ORDERED** that respondent's motion for summary decision is **GRANTED** as there are no issues of material fact in dispute and the moving party is entitled to prevail as a matter of law.

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.

1/17/18

DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency: 1/17/18

Date Mailed to Parties: JAN 18 2018

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

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