B-016

STATE OF NEW JERSEY

In the Matter of Alex Navas	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
	:	Court Remand
CSC Docket No. 2021-1503	:	

ISSUED: JUNE 7, 2021 (EG)

The Superior Court of New Jersey, Appellate Division, has remanded the Civil Service Commission's (Commission) decision reversing the 30-working day suspension of Alex Navas, a Laborer 1[1] with the Town of West New York, to allow the Commission to consider charges related to the May 15, 2017 incident. *See In the Matter of Alex Navas, Town of West New York*, Docket No. A-4786-18 (App. Div. April 19, 2021).

By way of background, the appellant was suspended for 30 working days on charges of incompetency, inefficiency, or failure to perform duties, insubordination, conduct unbecoming a public employee, neglect of duty, misuse of public property and other sufficient cause. Specifically, the appointing authority asserted that on May 1, 2017, the appellant removed construction debris located in front of an elderly resident's property without notifying the resident that it was the resident's responsibility to remove the debris and that the appellant failed to return the debris to the resident's property as instructed. Further, the appointing authority alleged that on May 15, 2017, the appellant refused a directive to investigate a list of violations at various properties and to issue a summons. Moreover, the appointing authority asserted that on May 19, 2017, the appellant refused to investigate an incident where pallets were left at a location for more than 10 days. The appellant appealed to the Commission, and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case.

In her initial decision, the Administrative Law Judge (ALJ) sustained the charges for the May 1, 2017 incident but determined that the May 19, 2017 charges were not established. With regard to the May 15, 2017 incident, the ALJ found no

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[1] It is noted that the appellant was removed from employment effective September 6, 2017.

evidence that the appellant was ever given a list of violations of various properties to investigate, as indicated in the Final Notice of Disciplinary Action (FNDA). However, the ALJ determined that the appellant conceded that he did not issue a summons despite being directed to do so. In this regard, the ALJ indicated that the Director of the Department Public Works (DPW) for the appointing authority testified that he asked the appellant to issue the summonses after a supervisor had already investigated the property and found there to be a violation. Thus, the ALJ concluded that the appointing authority had proven, by a preponderance of credible evidence, that appellant's conduct on May 15, 2017 was sufficient to sustain the charges. Based on the foregoing, the ALJ determined that given the charges that were sustained, that a 20-working day suspension was more appropriate and proportionate to the offenses.

Upon its *de novo* review, the Commission reversed the suspension. It agreed with the ALJ that the charges for the May 19, 2017 incident were not established. However, regarding the May 1, 2017 incident, the Commission reversed the charges as it found that there was no evidence the appellant was aware that he should not pick-up construction materials and that it was "unfathomable" and "was in no way in the best interest of the public" to return the debris. Regarding the May 15, 2017 incident, while the ALJ sustained the charges due to the appellant's failure to issue a summons, the Commission reversed this determination because the FNDA charged the appellant with failing to investigate a list of violations, not for failing to issue a summons.

Thereafter, the appointing authority appealed the Commission's decision regarding the May 1, 2017 and May 15, 2017 incidents to the Appellate Division. The Appellate Division affirmed the Commission's decision regarding the May 1, 2017 incident as it found the Commission aptly commented that the incident was not "worthy of a disciplinary action." However, the Appellate Division found that despite the FNDA not indicating that the appellant had refused to issue a summons, that due to testimony at the hearing "Navas had full notice of the charges and the specification." Therefore, the Appellate Division remanded this charge to the Commission to determine if the appellant refused to follow an order, and if so, whether any defenses to the charges exist.

On remand, the appointing authority, represented by represented by Gregory J. Hazley, Esq., argues that it is uncontested that the appellant's supervisor, Silvio Acosta, directed the appellant to issue a summons for a violation investigated by another supervisor and that the appellant refused to follow this directive. It contends that Acosta's order was in no way contrary to any law or DPW rules. Additionally, the appointing authority asserts that in its decision, the Commission found sufficient evidence in the record to support the ALJ's credibility determinations which found the testimony of Acosta more credible than that of the appellant. In this regard, the ALJ's initial decision indicates that Acosta testified that he directed the appellant to

go to a particular property, take a photograph of the infraction, and to issue a summons to a resident who left garbage/furniture outside of the building creating a public hazard. Further, the appointing authority argues that the ALJ correctly concluded that the appellant's failure to issue the summons as directed constituted insubordination, neglect of duty and conduct unbecoming a public employee. It adds that the ALJ held that the appellants refusal to issue the summons or at a minimum investigate the alleged violation was unreasonable and defiant. Moreover, it asserts that the fact the appellant's Union later told its members to write the name of the individual who inspected a property when it was someone other than the person issuing the summons, is irrelevant as this was not a change to any DPW policy or law. Finally, it argues that based on the appellant's prior disciplinary history, which include a 15-day suspension in 2012 and a written reprimand in 2016, the 20 working days suspension recommended by the ALJ should be affirmed.

In reply, the appellant, represented by Jason L. Jones, Esq., argues that he never refused to follow Acosta's directive to issue a summons to a resident. Rather, he asserts that he requested union representation as he felt uncomfortable writing a summons for a volition he had not investigated. In this regard, the appellant contends that he had never before written a summons for a violation that he had not investigated. Additionally, the appellant claims that during discussions between Acosta, two union representatives and himself, Acosta never told the appellant that a supervisor had already investigated the violation, never indicated why the appellant could not go investigate the violation, and never responded to the union's suggestion that he write "per Silvio" on the summons. Thereafter, the union wrote a letter dated July 19, 2017, to the Township Administrator stating that it had instructed its members who felt uncomfortable writing a summons without personal knowledge about the content of debris after being instructed by any supervisor or director to include the supervisor or director's name on the summons. Further, the appellant argues that following the directive to issue a summons for a violation he did not witness would have been improper and possibly illegal. Specifically, he asserts that on the summons there is a certification section he must sign which states "I certify that the forgoing statements made by me are true. I am aware that if any of the foregoing statements made by me are false, I am subject to punishment." The appellant argues that if he had signed the certification for a summons where he had not witnessed the violation, he believed he could be imprisoned or lose his job if the summons was challenged in court. Thus, the appellant asserts that even if the Commission finds that he refused to follow an order, that order was improper and illegal, and he should not receive any disciplinary action for his refusal.

CONCLUSION

The Appellate Division has remanded instant matter to the Commission to review the merits of the May 15, 2017 incident to determine if the appellant refused

to follow an order, and if so, whether any defenses to the charges exist. In reviewing the matter, the Commission agrees with the ALJ's determination that the appellant was insubordinate, neglected his duty and that his conduct was unbecoming a public employee when he failed to carry out a directive from his Director. Specifically, the ALJ noted that Acosta testified that he had directed the appellant to go to a particular property, take a photograph of the infraction, and to issue a summons to a resident who left garbage/furniture outside of the building creating a public hazard. The appellant failed to carryout this order. As the ALJ held, the appellants refusal to issue the summons or at a minimum investigate the alleged violation was unreasonable and defiant. The appellant argues that Acosta never told the appellant that a supervisor had already investigated the violation, never indicated why the appellant could not go investigate the violation, and never responded to the union's suggestion that he write "per Silvio" on the summons. However, as the Commission indicated in its prior decision, it acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997) and *In re Taylor*, 158 *N.J.* 644 (1999). The Commission previously found that there was sufficient evidence in the record to support the ALJ's credibility determinations Acosta's testimony was more credible than that of the appellant.

Further, while the appellant argues that he was uncomfortable writing a summons for a violation he had not investigated, this does not address the fact Acosta credibly testified that he directed the appellant to go to site of the violation and take a photograph. Had the appellant followed this directive he would have seen the violation at issue firsthand and presumably not had any apprehension in issuing a summons. Moreover, had he gone to the take the photograph, it would have erased any concerns he had about signing the certification in the summons as he himself would have seen the violation. In addition, the fact that the union advised its members to write the name of who ordered a summons be issued when the member had not conducted the inspection is irrelevant as it was not a change instituted by the appointing authority and it does not excuse the appellant's failure to follow a directive.

In determining the proper penalty, the Commission's review is *de novo,* and the Commission, in addition to its consideration of the seriousness of the underlying incident, utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). Further, 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 principle 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). The official record reveals that the

appellant had been employed since May 2011 and had received a 15-day suspension in 2012 and a written reprimand in 2016. Further, the appellant clearly failed to follow a directive from his director. The appellant claims he was uncomfortable issuing a summons for a violation he did not investigate and that he felt he could be punished for signing the certification on said summons for the same reason. In this regard, had he followed the order and gone to the site and taken a photograph, the alleged reasons for his apprehension in issuing a summons would have been resolved. The Commission notes that the original penalty imposed by the appointing authority was a 30-working day suspension for three separate incidents. Accordingly, given the circumstances presented, and the fact that the Commission has upheld the charges for only one of the incidents, the Commission finds that a 10-working day suspension is the appropriate penalty in this matter.

Since the 30-working day suspension was reduced to a 10-working day suspension, the appellant is entitled to 20 days of back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10. With regard to counsel fees, since the appellant has not prevailed on all the primary issues on appeal, he is not entitled to an award of counsel fees. *See N.J.A.C.* 4A:2-2.12. 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, while the penalty was modified, charges were upheld, and major discipline was imposed. Consequently, as the appellant has failed to meet the standard set forth in *N.J.A.C.* 4A:2-2.12, counsel fees must be denied.

ORDER

The Civil Service Commission finds that the appointing authority's action in imposing a 30-working day suspension was not justified. Therefore, the Commission modifies the 30-working day suspension to a 10-working day suspension. The Commission further orders that the appellant be granted 20 days of back pay, benefits, and seniority.

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

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 2ND DAY OF JUNE, 2021

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