STATE OF NEW JERSEY

In the Matter of Carmine Santa, Parsippany-Troy Hills, Department of Public Works	:	DECISION OF THE CIVIL SERVICE COMMISSION
CSC Docket No. 2022-26 OAL Docket No. CSV 06061-21	:	

ISSUED: OCTOBER 11, 2023

The appeal of Carmine Santa, Mechanic, Parsippany-Troy Hills, Department of Public Works, removal, effective June 7, 2022, on charges, was heard by Administrative Law Judge Ernest M. Bongiovanni (ALJ), who rendered his initial decision on September 13, 2023. Exceptions were filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, including a thorough review of the exceptions, the Civil Service Commission (Commission), at its meeting on October 11, 2023, remanded the matter to the Office of Administrative Law for further proceedings.

The only issue in real controversy in this matter is the penalty. In his initial decision, in recommending reducing the removal to a six-month suspension, the ALJ stated:

> And in three other instances Respondent had retained employees who lost their CDL for a year, one for his voluntary use of medical marijuana as a treatment for depression, and two others who lost theirs for DWIS one who kept his rank and salary and simply reduced his duties not to include driving a truck for a year.
>
> Also important is the fact that as stated the appropriate forum has punished appellant for his conduct, and additionally terminating appellant after seven years of good service with a practically unblemished record was unduly punitive, as well as constituting

> unexplained and therefore unjustified disparate treatment of employees who lose their licenses for DWI . . . .

In its exceptions, the appointing authority takes issue with the ALJ's reliance on its treatment of other employees in arguably similar circumstances. It contends that the ALJ either mischaracterized those matters or improperly indicated that the subject employees were similarly situated. It also argued that it was not given the opportunity to present other evidence regarding other similarly situated employees and the discipline taken in those matters. These exceptions were unopposed.

In this matter, the Commission is constrained to remand to the Office of Administrative Law. Initially, the Commission notes that it is generally not inclined to entertain "disparate" disciplinary treatment claims of employees as a reason to determine the proper penalty, as it reviews each matter *de novo*, and the penalty imposed is based on the particular facts and circumstances of each matter. How an appointing authority imposes initial penalties is not so critical to the Commission as it is its sole authority to ultimately determine the proper penalty. Nevertheless, how an appointing authority treats other employees could be instructive in determining the proper penalty where such an argument is introduced. In this case, as the ALJ allowed such evidence in the record, the matter is remanded for him to address the appointing authority's arguments that he mischaracterized those presented, as well as to allow it to present other evidence regarding other similarly situated employees. Afterward, the ALJ should present a redetermination of the recommended penalty taking the above into account.

ORDER

The Civil Service Commission remands the matter to the Office of Administrative law for further proceedings as indicated above.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 11TH DAY OF OCTOBER, 2023

Allison Chris Myers

Allison Chris Myers
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT NO. CSV 06061-21
AGENCY DKT. NO. 2022-26

IN THE MATTER OF CARMINE SANTA,
PARSIPPANY-TROY HILLS
DEPARTMENT OF PUBLIC WORKS.

Thomas A. McKinney Esq., for appellant Carmine Santa (Castronova and McKinney, LLC, attorneys)

Madeline P. Hicks, Esq., and **Ramon Rivera,** Esq., for respondent Parsippany-Troy Hills Department of Public Works (Antonelli, Kantor and Rivera, attorneys)

Record Closed: September 11, 2023 Decided: September 13, 2023

BEFORE **ERNEST M. BONGIOVANNI**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Carmine Santa (Santa/appellant) appeals his termination from his position as Mechanic, by the respondent, the Parsippany-Troy Hills Department of Public Works (DPW/ respondent).

A hearing was held via ZOOM on April 11, 2023. The record was left open for receipt of transcripts and submission of post hearing briefs. A telephonic conference was held on July 27, 2023, resulted in reopening the record for a limited purpose, and an additional date for hearing was held on September 11, 2023, at which time the record closed.

FACTUAL DISCUSSION AND FINDINGS

It is uncontested that Carmine Santa was employed by the respondent as a mechanic, Grade H3, with the DPW. He began work there as a Laborer, until promoted to a Mechanic in the mechanics shop where he was employed since March 2014.

TESTIMONY

Hank Sunyak

Hank Sunyak (Sunyak), the Director Personnel for Parsippany Troy- Hills for 20 years testified for respondent. He explained on September 1, 2021, he signed a Preliminary Notice of Disciplinary Action (PNDA), (Exhibit R-1,) suspending Santa, after Santa had informed the DPW that same day that he had just been convicted of when Santa, driving while intoxicated (DWI) and refusal to take a blood alcohol test, said offenses having occurred December 19, 2020 in nearby Borough of Hopatcong (R-1A). He further informed the DPW that as part of his penalty for the driving offenses, his Commercial Driver's License (CDL) was suspended for one year, and that he was also required, during the next nine months while driving vehicles that required the driver to maintain a General Driver's License, to use an interlock devise. This DPW suspension became a permanent removal by respondent effective June 7, 2021, after a departmental hearing. Final Notice of Disciplinary Hearing, (FNDA) (R-5).

As explained by Director Sunyak, and as shown in postings for the position of Mechanic H-3 for February 2014, (R-3) and again for June, 2022 (R-4), the job title required, among other things, the "ability to drive a truck" and "possess a valid Commercial Driver's License (CDL) or obtain[ ] one before the expiration of [a] 90-day probationary period."

Sunyak testified that all the public employees who use commercial vehicles, which, as later explained, are so designated based on their size, and all mechanics who diagnose, repair and test drive vehicles are required to have and maintain their CDL. Significantly, according to Sunyak, if a mechanic lost his CDL for a period, it would be "inappropriate" to allow that employee to use a commercial vehicle even on township property or other non-public roads. He explained also that while there was no written policy requiring it, a protocol existed in which the mechanic who performs the repairs on the vehicle is required to certify to the repairs that were made. That certification meant, to him, that although their may be instances where one mechanic does the work and another test drives the vehicle, the mechanic "who does the work" certifies to it. Sunyak also said that while no policy exists, there is a past practice that no employee without a CDL license "starts or moves" a commercial vehicle.

When asked why since no policy exists which required that a mechanic test drive every vehicle he works on, and therefore why couldn't Santa continue to repair vehicles while other mechanics test drove them, Sunyak said that the respondent "couldn't afford to have a different mechanic road test" every vehicle repaired at the Mechanics Shop. Besides, he said, mechanics often have to test drive the vehicle to diagnose the problem before repairing it. Further, once the mechanic has done the work on the vehicle, if he has another mechanic test drive the vehicle, he has to explain to that mechanic the diagnosis of the problem as well as the repairs. This wasted township employee time and was not practical, he said. Although Sunyak admitted mechanics are not required to have a CDL during the 90-day probationary period, to him, that time was "usually a training period." Sunyak reluctantly, it seemed, admitted that the decision to terminate Santa was influenced by Santa not advising the DPW that he had been charged with the offenses soon after they occurred on December 19, 2020, but instead only informed the respondent after he had been convicted on February 1, 2021. There was a period of about 2-3 weeks, he said that Santa was working at his job, while having these charges outstanding. He said it was "expected" that an employee would tell his employer what had happened sooner than Santa did.

Sunyak was asked about another of his employees who had lost his CDL while employed as a mechanic was not fired, but was reassigned as a Laborer. In that case, a mechanic, L.R. voluntarily turned in his CDL in order to take medical marijuana. Because they had an open position for a laborer, they moved L.R. to that position where he apparently remains, in order for him to take medical marijuana. Sunyak explained "under the law" they were "required" to offer L.R. another position although he failed to explain which law he was referring to. Both attorneys for the Township noted the law that Sunyak referred to was either the ADA or New Jersey's Law Against Discrimination, although the witness never so identified it. They asked to brief the issue further which was denied. Sunyak did explain that the medical marijuana was prescribed for depression and that it was the third medication being tried by L.R.[1] In any case, Sunyak said the L.R. incident occurred 20 years ago and was "ancient history." In two other cases, employees in the Department of Sanitation, in two separate cases, one before the Santa firing and one after, both employees lost their CDL licenses for DWI convictions while employed but were permitted to keep their jobs. The first, C.F., was an employee who lost his CDL license for at least a year (the minimum penalty) as a result of a DWI conviction. Mr. Sunyak noted that a sanitation worker on a truck has two functions to drive and to pick up trash. In this instance, the Township allowed the worker to keep his job and his current rank as a sanitation worker but for the duration of the loss of license he simply collected trash and did not drive the truck. However, Sunyak said that was "ancient history." However, in another instance, which occurred after the Santa's firing, another sanitation employee who was required to have a CDL retained his job with the Department of Sanitation working on the truck, although he was reclassified as a Laborer until, presumably, he got his CDL back. Sunyak did not give any evidence that any of these other employees were disciplined whatsoever for losing their CDLs. They certainly were not fired but were instead, as characterized by counsel, "accommodated."

James Walsh

[1] However, I believe it is common knowledge that medical marijuana is only one of the many therapies available to treat depression and that further marijuana remains one of the most, if not the most, abused drug in our society

James Walsh (Walsh), the Director of Public Works, since August 2021, and employed by the Town for 38 years also testified for respondent. He said that there were occasions where mechanics were in their 90-day probationary period and had still not obtained their CDL. He stated that on those occasions, if they were otherwise performing their normal duties, and the mechanic had ended his probationary period and still had not obtained his CDL, the Town could extend that period for up to another 90 days or 180 days in total. Those mechanics would do, as he called it "simple stuff" or work that doesn't require test driving such as oil changes and tire changes, or work on non-commercial vehicles so that wouldn't have to go out on the road to test or diagnose them.

Alberto Cosse

Alberto Cosse (Cosse), acting supervisor of the Mechanics Shop, was the respondent's final witness. Prior to becoming acting Supervisor, he was a mechanic there for ten years and was familiar with Santa's work. He testified that the Town has 40-45 CDL vehicles and 20-25 non CDL. He said that the non CDL vehicles are less complicated repairs, but that because they are used every day, they require more frequent repairs. For repairs that require a test drive it was possible for a mechanic who had not repaired the vehicle to test drive it, but it was "not practical." A typical road test would involve driving a vehicle out to Route 80 and getting its speed up to 45 mph. He conceded there are days when a mechanic works a full day without test driving a vehicle.

Carmine Santa

Carmine Santa (Santa) was the only witness for his appeal. He downplayed the importance of test driving a vehicle, saying a test drive might take ten minutes on average. When Santa worked there, he said, the shop had 5-6 mechanics but may have averaged 2-3 test drives a day. Much of the time is spent and a mechanic can keep busy by doing less complicated work that doesn't require a test drive, such as oil changes and tire changes cleaning the shop, and paperwork.

It was noted that the motor vehicle offenses Santa committed occurred while he was driving his own off road terrain vehicle in another township, after 1:00 a.m., so that the offenses of DWI and Refusal did not involve the municipality, its time or its property.

Santa said that when he was terminated, he would have taken any other job, rather than Mechanic, if given that alternative, but was told by Sunyak and "Greg" that this was not an option for him. Santa noted his CDL was restored one year and two weeks after his suspension, on February 14, 2022. When asked if he had applied for a different township position since having his license restored, or for the mechanics position that became open in June 2022, he said he didn't consider doing that because of the "ongoing process" of this appeal. He would be competing for the job (which he held for seven years) with others, would have to take a "significant" pay cut and lose the value of seven years seniority.

I **FIND** as **FACTS** that:

1. Santa was terminated because he became, in the respondent's view, unsuited for the position because part of the work he did as a mechanic required his having a lawful CDL while test driving a vehicle, which he was deprived of for one year, and because the events that caused Santa to lose his CDL should have been reported by him to the respondent sooner.
2. Having a valid CDL within 180 days (although the respondent's policy called for having one within 90 days) after being hired as a Mechanic was a condition of employment.
3. Prior to the motor vehicle offenses, Santa's disciplinary history was one written warning for leaving work one day without informing any one and that in midafternoon reporting sick, and 2 verbal warnings, one for excessive lateness (13 times in four months) and another for excessive sick leave (11 times in a 12-month period). (R-6)
4. Test driving the DPW's commercial vehicles requires a valid CDL and is expected that all mechanics, regularly, if not every day, test drive such vehicles, depending on the work needed, for diagnosis and to certify the repairs addressed the reported problem with the vehicle. Thus, test driving

commercial vehicles was and is an important, if not particularly time consuming, part of the job of DPW mechanics.

5. Santa did not attempt to justify or minimize the reason for loss of his CDL license, which bolstered his overall credible testimony.
6. Santa's driving offenses occurred in his own vehicle on his own time, late at night or in the very early morning, in another town.
7. Respondent did not reasonably explain any aggravating factor other than the motor vehicle convictions causing the temporary CDL loss for the termination.
8. Santa's statement he would have taken, before he was fired any other municipal job if offered was not contested, and the respondent's Director of Personnel simply explained that no other job was available at the time. Both statements were credible; however, the disparate treatment accorded Santa, whose loss of license was imposed on him, and that of the treatment received by the Mechanic L.R. who voluntarily gave up his CDL so that he could take medical marijuana, and the other two Sanitation employees, who also lost their CDL licenses, both for DWI, one who simply had his duties modified with no change in rank and no other discipline, and the other who was allowed to continue working for the same Dept of Sanitation and continuing working on the same truck, but at reduced pay, while having no CDL, and no other stated discipline for the loss of license, was not reasonably explained by respondent.
9. While Sunyak said he was told the ADA was involved in the decision to retain L.R. who lost his license due to getting a prescription for medical marijuana to treat depression, I found that portion of the respondent's case to be less credible, as the ADA is a federal law, and under federal law, marijuana is still illegal and thus medical marijuana would appear to provide any legal protection under the ADA.
10. Santa's explanation for not applying for the mechanic's position in June 2022 or for any such position (if there was one) since then because of the pendency of this appeal was reasonable; further I do not believe the respondent would have hired him, and the respondent's statement that his job application would be treated just like any other application I believed, rang hollow. In any event, this option was not offered to him when he was fired, and Santa testified his employer told him there was simply nothing was

available at the time. Sunyak reiterated that no "other" jobs were available at the time of the suspension and then removal; however this explanation does not address why Sunyak couldn't, for example be suspended for six months, and then after coming back from suspension, simply do exclusively the same work, until his license was restored, that other DPW mechanics do, for up to 180 days, before they get their CDL.

LEGAL ANALYSIS AND CONCLUSIONS

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6 governs a civil service employee's rights and duties. The act is an important inducement to attract qualified personnel to public service. It is to be liberally constructed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1 N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super 583 (App. Div. 1972) Mastrobattista v. Essex County Park Comm'n., 46 N.J. 138, 147 (1965).

Governmental employers also have delineated rights and obligations. The Act sets forth that it is State policy to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). The Act also recognizes that the public policy of New Jersey is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A1-2 (b). To carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against him and, if so,

the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In this matter, the Borough of Elmwood Park bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Therefore, I must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

In Hartmann v. Police Department of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992), that court stated that a finding of misconduct need not "be predicated upon the violation of any particular rule or regulation but may be based merely upon the violation of the implicit standard of good behavior, which devolves upon one who stands in the public eye as an upholder of that, which is morally and legally correct."

As to the charge as stated in the FNDA, it is uncontested that the charge that Santa lost his CDL as a result of a one-year suspension for DWI and Refusal to submit to a blood alcohol test, and therefore the charge must be and is **SUSTAINED**. The respondent does not allege that committed an offense such as Neglect of Duty was incompetent, or a failure to perform his duties. Nor was even more egregious conduct alleged. It was not seriously contested that while maintaining a CDL was a requirement of all mechanics after the period of probation, mechanics were allowed to work, and did perform full time mechanics duties, for up to 180 days without the CDL. Accordingly, the only issue is the penalty for this infraction of not maintaining the CDL.

I agree with, and the respondent does not contend otherwise, the appellant's characterization of Santa as a "well regarded employee" with seven years' experience as a mechanic who when he lost his CDL for the two driving infractions had a disciplinary history of just three verbal warnings. While the municipal court infractions which took place while off duty were quite serious, justice was meted out, as they should have, in the municipal court. Moreover, it is important to note that those infractions occurred during appellant's personal time, with his own property, and not even within the town where he is employed. Thus, the appellant's conduct had nothing whatsoever to do with his employment in the town. Nor should his conduct have caused any adverse condition for the town, such as bad publicity. It is simply the consequent penalty, as a result of the conduct, for which the appellant already paid a heavy price in municipal court, which is at issue here.

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a civil service employee's rights and duties. The act is an important inducement to attract qualified personnel to public service. It is to be liberally constructed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1 N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of New Jersey is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A1-2(b). To carry out this policy, the Act also includes provisions authorizing the discipline of public employees. Consistent with public policy and civil service law, a civil service employee may be subject to major discipline. N.J.S.A. 11A:1-2(a). As noted, the Board had adopted, for its non-instructional staff, the Rules and Regulations of the Civil Service Commission and Office of Administrative Law with respect to disciplinary procedures. Major discipline may include removal, disciplinary demotion, a fine or suspension no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

Employees may be disciplined for insubordination, neglect of duty, conduct unbecoming a public employee and other sufficient cause, among other things.

N.J.A.C. 4A:2-2.3. Hearings at the Office of Administrative Law are conducted de novo and determine the appellant's guilt or innocence as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987); Ennslin v. Twp. of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994), certif. den., 142 N.J. 446 (1995).

On such appeals, the Civil Service Commission may increase or decrease the penalty, N.J.S.A. 11A:2-19, and the concept of progressive discipline guides that determination, In re Carter, 191 N.J. 474, 483-86 (2007). Thus, an employee's prior disciplinary record is inherently relevant to determining an appropriate penalty for a subsequent offense, Id. at 483, and the question upon appellate review 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." Id. at 484 (quoting Polk, 90 N.J. at 578 (internal quotes omitted)).

When dealing with the question of penalty in a *de novo* review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and penalty on appeal based on the charges. N.J.S.A. 11A:2-19. Factors determining the degree of discipline include the employee's work history, his prior disciplinary record, and the gravity of the misconduct. In West New York v. Bock, 38 N.J. 500, 522 (1962), our Supreme Court first recognized the concept of progressive discipline, under which "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct."

A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty. See Bock, 38 N.J. at 523-24. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of the concept of progressive discipline is the nature, number and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential. In addition to considering an

employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, a fine or suspension no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

However, the theory of progressive discipline is not a fixed rule to be followed without question. In re Carter, 191 N.J. 474, 484 (2007). "[S]ome disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." Ibid. The question for the fact finder is whether the disciplinary action is so disproportionate to the offense, considering all the circumstances, to shock one's sense of fairness. Ibid. Removal has been upheld where the acts charged, with or without a prior disciplinary history, have warranted imposition of that sanction. Ibid. Hence an employee may be removed, without regard to progressive discipline, if their conduct was egregious. Ibid.; In re Herrmann, 192 N.J. 19, 33-34 (2007). Indeed, progressive discipline "is not a necessary consideration when . . . it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest." Herrmann, 192 N.J. at 33. Here the conduct by appellant Santa, unfortunately so common in our society, was addressed by the penalties in the appropriate forum. As already shown, his conduct at work was not an issue. It simply caused him to be unable to perform one particular function at work for a period of one year. If appellant had instead of losing his license for getting drunk but had instead negligently caused a car accident where he broke both his legs, resulting in his being unable to drive for a year, and setting aside any union contract, labor law requirements, or consideration of workman's compensation law, it is highly unlikely that the respondent would have terminated him. And in three other instances Respondent had retained employees who lost their CDL for a year, one for his voluntary use of medical marijuana as a treatment for depression, and two others who lost theirs for DWIS one who kept his rank and salary and simply reduced his duties not to include driving a truck for a year.

Also important is the fact that as stated the appropriate forum has punished appellant for his conduct, and additionally terminating appellant after seven years of good service with a practically unblemished record was unduly punitive, as well as constituting unexplained and therefore unjustified disparate treatment of employees who lose their licenses for DWI. Regarding his conduct as an employee, (failing to maintain his CDL) was certainly not of such gravity and so egregious so that the goal of progressive discipline does not apply. As noted, his conduct at work was not an issue. There was no policy that said employees who lose their licenses shall be terminated or are subject to termination, so this is not a question of violating a town's work policy on conduct. Again, it is only the unintended consequence of the appellant's purely off duty conduct that created the problem which the Town sought to address. Therefore, in this case, the goal of progressive discipline is truly the only guidance we have in assessing the appropriate penalty.

I find that appellant's termination after seven years of good service, with no prior major disciplinary history, and only verbal warnings, does not support the goal of progressive discipline. The conduct, getting intoxicated while driving, and refusing to take a blood alcohol test, while off duty and in his personal car, was not so egregious as to warrant the ultimate penalty of termination. Furthermore, it was proven that a mechanic employed as one of five or six other mechanics in the Department could perform, almost all the daily functions that are part of the job without a CDL, just as other mechanics who start work in that position are allowed to do, up to six months, without a CDL The only mechanic's task that Santa was unable to perform was test drive a vehicle which was shown a) to use only a small portion of the mechanic's daily work hours b) to be ably performed, and sometimes was performed, by mechanics other than the one who worked on the vehicle. Further, it appeared common that mechanics were permitted to work in the shop for up to 180 days without a CDL. Finally, there were occasions when the Township dropped the requirement completely that an employee whose job classification required a CDL was transferred, and permitted a transfer to another department, or allowed to continue without having to perform all of his usual functions, during an even lengthier period, apparently, without even suspending the employee. One of those employees, like Santa lost his CDL for DWI.

Also, The Township proffered no other example of any employee who lost his CDL license for a DWI, nor as a result of any other conduct who was terminated. Therefore, it cannot be said or assumed that firing an employee for the loss of his CDL, when the CDL was a condition of employment, was the policy of the Township. To the contrary, the opposite appears true-that those employees were not even disciplined but rather were either reassigned or kept in their positions while simply not performing their driving function during the CDL suspension.

Thus, having Santa continue to perform all his other duties as a Mechanic for another six months after six months of disciplinary suspension, while conceivably inconvenient, was not so problematic or unusual as to rise to the level, as argued by respondent, to make termination "necessary." Nor can I say that such a harsh penalty in light of the conduct, the complete record, and the assessment of Santa's worth as an employee of the Township is "just and proper." Santa could have suspended for six months, and in the remaining (approximately) six months period before receiving back his CDL, (which in fact he did on February 14, 2022) he was more than qualified to do all the work other mechanics in the department typically do before receiving their CDL, as it was uncontested that mechanics sometimes did not obtain their CDLs for up to 180 days (essentially six months) from the date of employment as a mechanic. While it certainly is the prerogative of the employer to determine how long a mechanic can work in their department without obtaining a CDL, suspending Santa for six months and then permitting him to remain employed without test driving the vehicles for another six months by time his CDL would be restored, was consistent with past practices of respondent, and advances the goal of progressive discipline.

Accordingly, termination was, in this case arbitrary and capricious at worse or failed to advance the goal or progressive discipline at best. However, I **CONCLUDE** a suspension of the maximum period, short of termination, of six months is an appropriate penalty, especially given the fact that had that penalty been imposed, petitioner could have maintained his position as Mechanic H3 for the one-year CDL suspension, consistent with the Township's policy of employing Mechanics for up to 180 days even though they have no CDL. Therefore, I **CONCLUDE** and impose a penalty of six months suspension commencing February 1, 2021, as the appropriate penalty for

Santa's loss of his CDL. This penalty will adequately encourage this employee to work harder to avoid unintended consequences of off duty behavior and at the same time better advance the goal of progressive discipline for other employees better than the ultimate far harsher penalty of termination, which should be reserved for more egregious conduct where the employee as here, has no adverse major disciplinary history.

ORDER

It is therefore **ORDERED** that the charge of failing to maintain his CDL license after having it suspended for one year as described in the FNDA dated August 7, 2021, is **SUSTAINED**, but that the penalty of removal is hereby **REVERSED**, and that instead, a penalty of six months suspension be imposed; and it is further

ORDERED that Carmine Santa be restored to his position of Mechanic H3 after serving a six-month suspension commencing February 1, 2021.

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**, who 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.

September 13, 2023

Ernest M. Bongiovanni

DATE

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency: 9/13/23

Date Mailed to Parties: 9/13/23

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APPENDIX

LIST OF WITNESSES

For Appellant

Carmine Santa

For Respondent

Hank Sunyak, Director of Personnel

James Walsh, Director of Public Works

Alberto Cosse, Acting Supervisor of the Mechanic Shop

LIST OF EXHIBITS IN EVIDENCE

For Appellant

P-1 to P-7 Not offered in evidence.

P-8 Texts between Carmine Santa and Marge Woeik, dated 2/10 and 2/11/21

For Respondent

R-1[2] Final Notice of Disciplinary Action, (FNDA) dated 2/16/21

R-1A Borough of Hopatcong & Stanhope Municipal Court Summons, 2/4/21

R-1B Stanhope Boro Municipal Court Ticket, dated 12/19/20

R-2 Carmine Santa Driver History Inquiry and Status, Suspension of CDL

R-3 2014 Parsippany-Troy Hills Open Announcement for Automotive Mechanic

R-4 2022 Parsippany-Troy Hills Open Announcement for Automotive Mechanic

R-5 Final Notice of Disciplinary Action (31-B) dated 6/7/21

R-6 Minor Disciplinary history of Carmine Santa.

[2] These exhibits were pre-marked R-A through R-E but have been redesignated herein as R-1 through R-6for consistency.