STATE OF NEW JERSEY

In the Matter of Rickie Dooley,
Southern State Correctional Facility,
Department of Corrections

CSC Docket No. 2021-1372
OAL Docket No. CSR 03338-21

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JANUARY 17, 2024

The appeal of Rickie Dooley, Senior Correctional Police Officer, Southern State Correctional Facility, Department of Corrections, removal, effective February 25, 2021, on charges, was heard by Administrative Law Judge Judith Lieberman (ALJ), who rendered her initial decision on December 8, 2023. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, including a thorough review of the exceptions and reply, the Civil Service Commission (Commission), at its meeting on January 17, 2024, adopted the ALJ's Findings of Facts and Conclusions but did not adopt her recommendation to modify the removal to a six-month suspension. Rather, the Commission upheld the removal.

The only issue in this matter is the proper penalty to be imposed. Upon its *de novo* review of the ALJ's determination in that regard, including the exceptions and reply filed by the parties, which do not require extensive comment, the Commission does not agree with the ALJ's determination that the removal should be modified to a six-month suspension. The Commission makes the following comments. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. However, it is well established that where the underlying

conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 *N.J.* 474 (2007). Even when a law enforcement officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense may nevertheless warrant the penalty of removal where it is likely to undermine the public trust. In this regard, the Commission emphasizes that a law enforcement officer, such as a Senior Correctional Police Officer, is held to a higher standard than a civilian public employee. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied*, 47 *N.J.* 80 (1966). *See also, In re Phillips*, 117 *N.J.* 567 (1990).

In this matter, the ALJ performed an analysis of the penalty to be imposed. In that regard, the ALJ ultimately stated:

> Mitigating factors include the length of appellant's service, twenty-one years; his voluntary participation in alcohol and mental health treatment; his drinking occurred while he was off-duty and did not adversely affect his job performance; and his sincere remorse and understanding of the gravity of his condition. Importantly, appellant's disciplinary history reveals that, while he was disciplined for failure to submit medical documentation for sick leave and for job attendance, the Department has never imposed major discipline. Also, he has no prior "C11" offenses and his next most recent offense for which he was disciplined occurred five years prior to the 2019 DUI.
>
> Removal could be the appropriate penalty had the 2019 DUI occurred while appellant was on duty; appellant had not acknowledged the seriousness of his offense and his condition; or he had not sought treatment. However, here, the mitigating factors and aggravating factors are either in equipoise, at worst, or the mitigating factors outweigh the aggravating factors . . . Nonetheless, appellant's offense is very serious and the maximum period of suspension should apply. I am constrained by the regulation that limits the maximum suspensions to six months without pay. *N.J.A.C.* 4A:2-2.4. Accordingly, I **CONCLUDE** that a six-month penalty is appropriate here.

While some of the above factors may be considered mitigating, the Commission does not agree that the fact that the infraction took place off duty lessens the severity of the offense. Moreover, while the appellant may have voluntarily participated in alcohol and mental health treatment, there is also information in the record that he

did not undertake such treatment consistently prior to his removal from employment, and even afterward was "not attending any form of group therapy or meeting" at the time of his appearance at the Office of Administrative Law. The Commission also notes that the appellant acknowledged a long history of struggling with alcohol and had even had prior inpatient treatments after a prior DUI, which, based on the matter at hand, proved ultimately unsuccessful. While the Commission acknowledges and commends the appellant on his current realization as to the nature of his issues and the impact that it has had, it does not find that as a basis to return the appellant to work. Clearly, his infraction is egregious, especially for a Senior Correctional Police Officer, who, as stated above, is held to a higher standard than other non-law enforcement public employees. Even the ALJ showed her trepidation in lessening the penalty, as evidenced by her imposition of the additional conditions that the appellant was to have competed even before he was to be reinstated. As such, the Commission finds the penalty of removal neither disproportionate to the offense nor shocking to the conscious.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore upholds that action and dismisses the appeal of Rickie Dooley.

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 17TH DAY OF JANUARY, 2024

Allison Chris Myers

Allison Chris Myers
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P.O. Box 312
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 03338-21
AGENCY DKT. NO. N/A
2021-1372

IN THE MATTER OF RICKIE DOOLEY, DEPARTMENT OF CORRECTIONS, SOUTHERN STATE CORRECTIONAL FACILITY.

Arthur J. Murray, Esq., for appellant Rickie Dooley (Alterman & Associates, LLC, attorneys)

Jana R. DiCosmo, Deputy Attorney General, for respondent Southern State Correctional Facility (Matthew J. Platkin, Attorney General of New Jersey, attorney)

Record Closed: October 11, 2023 Decided: December 8, 2023

BEFORE **JUDITH LIEBERMAN**, ALJ:

STATEMENT OF THE CASE

Appellant Rickie Dooley appeals from disciplinary action taken by respondent Department of Corrections (respondent or Department) removing him from his position of

Senior Correctional Police Officer (SCPO). The removal was based upon a determination that he violated N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and N.J.A.C. 4A:2-2.3(A12), other sufficient cause, as well as Department rules and policies, when he drove while intoxicated and refused to submit to a breathalyzer test. Respondent's motion for summary decision was granted with respect to the charges. A hearing was conducted concerning the appropriate penalty.

PROCEDURAL HISTORY

Respondent issued a final notice of disciplinary action (FNDA) against appellant on February 25, 2021. Appellant filed a timely appeal of the proposed removal and the matter was transmitted to the Office of Administrative Law on March 30, 2021, for hearing as a contested case. The matter was assigned to Hon. Joseph A. Ascione, ALJ. The matter was transferred to me on or about March 8, 2022, after Judge Ascione retired on February 28, 2022. On February 24, 2022, respondent filed a motion for summary decision, pursuant to a motion filing schedule established by Judge Ascione. Appellant filed a brief in opposition to the motion on March 31, 2022. Respondent filed a reply brief on April 14, 2022. Appellant requested oral argument, which was conducted on June 30, 2022. The record for the motion closed that day.

On August 11, 2022, an order denying the motion for summary decision in part was issued. The motion was granted with respect to the charges filed against appellant. His conduct was found to have constituted conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6), other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12), and the Department's policies, rules and regulations. Accordingly, summary decision was granted with respect to all of the charges enumerated in the February 25, 2021, FNDA. However, summary decision was denied with respect to penalty because appellant asserted facts and arguments concerning mitigating circumstances that he argued are relevant to penalty.

A hearing concerning penalty was conducted on February 7, 2023, and May 31, 2023. The record remained open for the submission of briefs, after the parties received the hearing transcript. Petitioner's brief was received on August 7, 2023. Respondent's brief was received on October 11, 2023, after extensions of time were permitted for good cause. An extension of the deadline for this Initial Decision was issued on November 17, 2023.

FACTUAL DISCUSSION AND FINDINGS

The following is undisputed. Therefore, I **FIND** the following as **FACT**:

1. Appellant Rickie Dooley began working as an SCPO at the Southern State Correctional Facility on November 26, 2002.

2. On November 16, 2019, New Jersey State Police (NJSP) officers pulled over appellant's car and administered field sobriety tests, which indicated that he was intoxicated. R-3. During the stop, appellant identified himself as a Department Corrections officer. R-3 at 25.

3. Appellant refused to submit to a breathalyzer test. Ibid. This refusal constituted a refusal to cooperate with law enforcement. J-1.

4. Appellant was arrested and issued summonses for operating a vehicle under the influence of alcohol (DUI), refusal to simple breath samples, and violations of Title 39 of the New Jersey statutes. R-3.

5. On November 19, 2019, the Department issued a Preliminary Notice of Disciplinary Action (PNDA), charging appellant with violations of N.J.A.C. 4A:2-3.3(A6), conduct unbecoming, and N.J.A.C. 4A:2-2.3(A12), other sufficient cause. The PNDA also charged violations of the Department's Human Resources Bulletin 84-

17 (C11), conduct unbecoming an employee, and (E1) violation of rule, regulation, policy, procedure, order, or administrative decision. R-1.

6. The PNDA noted that this was petitioner's third DUI offense, as he was found guilty of DUI in 2003 and 2004, while he was employed by the Department. The PNDA stated:

> It is expected, as a law enforcement officer, to cooperate with outside law enforcement. As a result, your failure to cooperate with outside law enforcement, including the refusal to submit to a breathalyzer, constitutes conduct unbecoming a correctional police officer.
>
> In addition, your overall reckless conduct is contrary to relevant rules and regulations, is unbecoming a law enforcement officer and a public employee, constitutes a significant safety risk, violates the public trust, damages the core mission of the Department and cannot be tolerated.
>
> [R-1.]

7. The Department did not produce documentation showing that appellant was formally disciplined for the 2003 or 2004 DUIs.

8. In the section of appellant's disciplinary history that addresses the 2019 DUI, there is a note referencing the 2003 and 2004 DUIs: "MV violations (DUI) in 2003 and 2004 while employed with [the Department]. This is the 3d DUI offense." R-10 at 192. The 2003 and 2004 DUIs are not referenced elsewhere in the disciplinary history.

9. The Department determined that appellant violated policies and procedures: R-8 at 179 ("No State officer or employee shall knowingly act in any way that might reasonably be expected to create an impression or suspicion among the public. . . that [he] may be engaged in conduct which violates his/her trust as a State officer or employee."); R-6 at 092 ("Employees of the [Department] are expected at all times to preserve a proper demeanor and to act as befits representatives of the

State."); R-7 at 108-109 ("No officer shall act or behave, either in an official or private capacity, to the officer's discredit, or to the discredit of the Department. Officers are public servants twenty-four hours a day and will be held to the law enforcement higher standard both on and off-duty.").

10. On July 23, 2020, appellant pleaded guilty to violating N.J.S.A. 39:4-50, DUI. He was sentenced to pay fines, complete an alcohol education course and thirty days of community service, and surrender his driver's license for two years. R-4.

11. The Civil Service Commission Job Specification for SCPOs requires that they maintain a valid New Jersey driver's license. R-11 at 2.

12. On August 4, 2020, the Department's Special Investigations Unit reported that appellant did not advise the SSCF Majors Office of his July 23, 2020, plea. R-5 at 73.

13. A Final Notice of Disciplinary Action (FNDA), charging the same violations as the PNDA, was issued on February 25, 2021. R-2.

14. Appellant does not dispute any of the charges or corresponding specifications set forth in the FNDA. Certification of Rickie Dooley (App. Cert.), A-1 at ¶¶3,4.

15. Appellant disputes only the penalty sought by the Department. Ibid.

16. Pursuant to the Department's Table of Offenses and Penalties, the penalty for a first offense of "conduct unbecoming an employee" ("C11") ranges from a three-day suspension to removal. R-12 at 163. Removal is the penalty for a second infraction. Ibid.

17. The penalty for a first offense for violation of a rule, regulation, policy, procedure, order or administrative decision ("E1") ranges from an official written reprimand

(OWR) to removal. The penalties for a second offense range from a five-day suspension to removal. For a third offense, the penalty is removal. Id. at 171.

18. Appellant was not sent for a fitness for duty evaluation after his first, second or third DUI arrest. He was not sent for a reasonable suspicion drug test or sent home from work due to his appearance at work. The Department did not move for his involuntary retirement based upon alcoholism or other alcohol-related reason.

19. Appellant was disciplined twice before for "E1" offenses, on April 21, 2019, and February 26, 2010. Both involved his failure to submit medical documentation to support his use of sick leave. He was suspended for two days in 2019 and a fine was imposed in 2010. R-10 at 191. He has no prior "C11" offenses.

20. The disciplinary record documents chronic issues with job attendance: He was disciplined for chronic or excessive absenteeism on November 24, 2008 (official written reprimand), December 12, 2008, (three-day suspension), December 26, 2008, (five-day suspension), and October 30, 2009, (five-day suspension). He was disciplined for calling out sick with no available sick time on June 23, 2014, (written reprimand), and July 5, 2014, (three-day suspension). These were all "A1" category offenses. Ibid. There is no evidence in the record that attendance problems were related to appellant's AUD.

21. There are periods of time during which appellant had no infractions: approximately ten months (December 26, 2009, to October 30, 2009); almost three years (February 26, 2010, to March 3, 2013); fifteen months (March 3, 2013, to June 23, 2014); almost five years (July 5, 2014, to April 21, 2019); and almost seven months (April 21, 2019, to November 15, 2019).

Testimony

The following is not a verbatim recitation of the testimony but a summary of the testimonial and documentary evidence that I found relevant to the above-described issue.

For respondent:

Major Brian Labonne, is a regional major responsible for overseeing the Department's southern region. He is responsible for reviewing and updating Department policies, conducting security audits of Department institutions, and addressing policy violations, including staff disciplinary matters. When he was first employed by the Department, he was assigned to Southern State Correctional Facility and worked with appellant occasionally. He has not had any personal disputes with appellant.

Department policies relevant to this matter are intended to maintain the public trust and are informed by the "concept that [Department staff] are held to a higher standard . . . as sworn law enforcement officers." T1[1] 58:4. Department officers are responsible for their actions while on and off duty, including in their "private capacity," "twenty-four hours a day, seven days a week." T1 58:9-10, R-7 at 8, R-8 at 2. The Department Handbook requires its employees to "at all times . . . preserve a proper demeanor and to act as befits representatives of the State." R-6 at 9. Also, they shall not "knowingly act in any way that might reasonably be expected to create an impression or suspicion among the public having knowledge of his acts that he may be engaged in conduct violative of his trust as a State officer or employee." Id. at 10.

The public need not have actual knowledge of a violation. The question is whether the public's trust would be diminished if it were aware of the violation. While an "allowance" for a single DUI could possibly be made, the impact on the public's trust and

[1] "T1" refers to the transcript of the February 7, 2023 hearing date; "T2" refers to the transcript of the May 31, 2023 hearing date. They are followed by the referenced page and line numbers.

confidence in the Department "really gets magnified" when there are additional DUIs. T1 63:4.

Removal would the appropriate penalty for a first DUI offense if there were aggravating circumstances such as an accident with significant injuries to innocent people or if the officer were criminally charged with assault by automobile. If it were a "standard DUI arrest," without an accident, and if the officer cooperated with the responding police officers, removal might not be the appropriate penalty. T1 69:21. However, removal would be warranted after a third "standard DUI arrest." T1 70:20. The Department "wouldn't really be able to explain or justify to a member of the public why we chose to continue to employ someone with three DUI arrests." T 71:16-19. It would not be relevant whether he was or was not disciplined for the first two arrests.

With respect to insubordination (violations of a rule, regulation, policy, procedure, order or administrative decision), there have been some instances in which removal was not imposed for a third offense. However, it is "more cut and dry" when a Department employee has been arrested three times such that removal is appropriate. T1 74:11.

Appellant's refusal to submit to a breathalyzer test is relevant because Department policies require its officers to be professional, ethical and cooperative with other law enforcement agencies. The public trust would be "destroyed" if the public were to learn that the Department retained an officer who was convicted three times for DUI. T1 61:1.

With respect to appellant's obligation to maintain a valid driver's license, he did not have seniority such that he could avoid driving as part of his job duties. While senior officers can bid to avoid duties that involve routine driving, there was a staffing crisis at the time of the hearing in this matter. Officers were mandated to remain on duty for the following shifts and could not control their assignments. Also, medical emergencies that require driving occur frequently at all Department institutions. This requires personnel including officers to be able to drive, regardless of their regular assignment.

On cross-examination, Labonne acknowledged that appellant was never in his command and, thus, he did not observe appellant working as his subordinate. He also did not seek to discipline appellant based upon his personal observation or a report of wrongdoing. Labonne did not have a role in preparing the charges, specifications or penalties in the PNDA or FNDA in this matter.

Labonne also acknowledged that appellant's disciplinary history indicates that a PNDA or FNDA was not issued with respect to the first or second DUIs. They are referenced only in connection with the third DUI. While Labonne suggested that it is possible that a data entry error resulted in the omission of information about discipline for the first two DUIs, he was not aware that such an error occurred and did not know why there was no reference to disciplinary action. He found it difficult to believe that the Department would not have disciplined an officer who was arrested for a DUI.

Labonne acknowledged that the Department has some discretion with respect to penalty and officers have not been penalized in accordance with the Department's Table of Offenses and Penalties (R-12.). The Department considers the individual facts of each case. Labonne was aware of staff who were charged with a second DUI who were allowed to maintain their employment with the Department, even though the officers lost their driving privileges. He was also aware of officers who were not removed from their positions after a third insubordination offense. He further acknowledged that he was not aware of a Department policy automatically requiring removal after a third DUI. Appellant's license suspension had elapsed, and his driving privilege was reinstated, by the time of his testimony.

For appellant:

Gary Michael Glass, M.D., was admitted as an expert in forensic psychiatry. He has been licensed in New Jersey since 1976 and is Board Certified by the American Board of Psychiatry and Neurology since 1980. He has worked with law enforcement since 1980, having treated approximately 500 police officers; serving as the designated

psychiatrist for several New Jersey police departments; and having conducted approximately 14,000 pre-hire and fitness for duty evaluations for police departments. To the extent he was previously retained to consult for departments of corrections, it did not concern preparation of DOC policies.

Dr. Glass was asked to evaluate appellant after he was suspended after his third DUI arrest. He was to determine whether appellant had a psychiatric illness or emotional condition, and, if so, "what impact it may have had on" his DUI arrests. T1 18:10. When asked to clarify his charge, he explained that he was "to determine whether there was a mental health issue that led to this problem and might represent an explanation. [He] then learned that it was really about the termination as things progressed." T1 41:9-12.

Dr. Glass met with appellant three times. He interviewed appellant, reviewed documents that were provided to him, and administered the Minnesota Multiphasic Personality Inventory (MMPI), which is "considered often the gold standard of psychological tests." T1 19:21-22. It shows whether the subject is honest and whether they're exaggerating. No other testing was required because substance abuse disorder is clearly documented. People with this disorder continue to use the substance "even though it has caused some difficulty in their life one way or another." T1 21:14-15. While AUD was previously punished as a crime, more recently it has been understood to be a disease, with genetic components. Alcohol impacts neurotransmitters that lead to "craven behavior" and "comorbid disorders" including anxiety and depression.

Appellant was also diagnosed with major depressive disorder and generalized anxiety disorder. The former diagnosis involves symptoms such as sadness and melancholy for at least several months. The latter diagnosis involves symptoms such as high intensity, discomfort and discomfort every day for at least a "number of months." T1 21:4.

Assuming that appellant was not disciplined or sent for a fitness for duty evaluation after by his employer after his first two DUIs, Dr. Glass presumed that appellant's DUI did

not create problems in his workplace. Also, appellant's DUIs were "not a problematic behavior to the employer" if his employer did not act after it discovered the first two DUIs after they occurred. "[I]n the workplace, if there's no consequences, one can presume that it's not interpreted with a significance that perhaps it should be." T1 25:20-22. Based upon his "extensive experience with law enforcement in a whole variety of areas," Dr. Glass opined that "usually the controlling factor" is the employee's job performance. If performance is unacceptable or there is "any presumption" that he has a mental health or substance use disorder, they are "referred rather promptly for fitness for duty evaluations for the protection of the agency as well as the public or the people they're serving." T1 26:9-18. When an employer does not respond in this manner, it "plays into his illness and his pre-determined style of denial and allows them to minimize the responsibility for what they're doing." T1 26:19-23.

While he acknowledged that he is not a human resource professional, Dr. Glass considered it "very disturbing" that the appointing authority did not send appellant for a fitness for duty evaluation after the third DUI, and instead sought his removal. T1 27:7-8. It was disturbing to him because substance abuse disorder is an illness and it appears that it did not adversely impact appellant's job performance. This is not unusual as there are "countless individuals who are able to perform in the workplace while secretly or simply out of the workplace [are] struggling with a substance abuse problem." T1 27:19-22. This indicated to Dr. Glass that appellant's substance abuse did not impact his work performance.

Assuming that the appointing authority did not send appellant home from work because he was intoxicated or required him to take a drug test because it believed he may have been intoxicated, and that it never sought to involuntarily retire him due to an alcohol use disorder, Dr. Glass opined that appellant's behavior did not adversely impact his work performance. He noted that, in the correctional setting, the staff are in close proximity to each other. Thus, it would be difficult to hide evidence of intoxication.

Dr. Glass could not opine with certainty whether appellant would be involved in "future alcohol related entanglements[.]" T1 35:5. However, with "appropriate treatment. appropriate intervention, the likelihood of that happening is decreased dramatically." T1 35:14-16. People with family support and a satisfying job or career "do far better than those who have neither of these things." T1 35:22-23. Nonetheless, he could not guarantee that, even with appropriate interventions, there would not be another incident. Any penalty that is imposed other than removal should include "stop gaps" to help ensure compliance, such as regular treatment by a psychiatrist, participation in Alcoholics Anonymous (AA), and other measures that would be reported to the appointing authority. T1 36:22. Even with such measures, Dr. Glass could not guarantee compliance, although he could have a "high level of confidence." T1 36:15.

On cross-examination, Dr. Glass acknowledged that he has not been employed by a department of corrections, the Civil Service Commission or the Motor Vehicle Commission. He acknowledged that, even when conditions are imposed to facilitate successful treatment, there is no way to guarantee relapse prior to retirement from work. When asked if he understood that appellant was removed from his position because he was arrested a third time for DUI, not because he has AUD, he explained that the two cannot be separated. Although some people who are charged with DUI may have simply gotten very drunk on a specific occasion, "more often than not," they have AUD. T1 45:8. Based upon his personal experience and "a certain intuition in the field[,]" not data provided by the State Police or another organization, Dr. Glass clarified that the "majority of the time that DUI summons are issued are [sic] individuals who have an ongoing drinking problem." T1 46:13-15. The State Police would not have data showing whether a person charged with DUI has a history of AUD.

Dr. Glass believed that appellant would not have been removed from his position had he not been arrested for DUI. T1 47:17-20. He was not presented with information showing that appellant's behavior affected his job performance. Appellant reported that his earlier abuse of sick time was not related to his DUIs but was a result of his youth and immaturity. However, Dr. Glass did not see documents concerning this.

Appellant's likelihood of recovering successfully from AUD was dependent upon his taking responsibility for his actions. Family or friends who are impacted by a person's DUI contribute to the problem by not addressing it, which allows it to get out of control.

Michelle Husted has known appellant since fall 2017 and has dated him exclusively since summer 2018. She is a fourth grade teacher and does not have a personal history of alcohol use disorder. She learned about the 2003 and 2004 DUIs a couple months into their relationship, before they began dating exclusively. Although he still drank alcohol at that time, it did not impact their relationship. She never saw him "drunk out of control or anything like that." T2 15:20-21. She viewed his alcohol use as related to his youth and considered it a "stupid type of thing." T2 15:24. Nonetheless, he "always kept it together" and he was never out of control. T2 15:25. She did not think he was an alcoholic because sometimes he would not drink for a period of days or months.

She moved in with appellant after he lost his job, to help support him emotionally and financially and help him stay on track. She submitted a certification in which she enumerated the steps he has taken to address his alcoholism, including participation in a forty-five-day residential rehabilitation program; use of online resources; being open about and taking responsibility for his problems; expressing a willingness to seek treatment from a mental health professional when he has insurance. A-2 at ¶6. He does not consume alcohol now; they do not go to places where alcohol is consumed; and there is no alcohol in their house. She is not aware of any time that he has "fallen off the wagon" since he became sober. T2 17:10-11. There were times that were difficult for appellant, when he could have consumed alcohol to cope; however, he used the techniques he learned while at the rehabilitation program to control anxiety and stay calm. She certified his good character. A-2 at ¶7.

While Husted recognizes that there is not a guarantee that appellant will never drink again, he is in a better position now than when he drank. She, his friends and his

current boss support him; he talks openly about his issues; he does not want to disappoint the people who support him.

On cross-examination, Husted explained that she was drinking with appellant the day of his third DUI arrest. She had three beers. The day had been very upsetting, as appellant surrendered two of his three dogs to a foster caregiver and he had problems with a house he recently purchased. She was very upset about the day's events. She woke appellant up from his sleep and told him to leave the house. She was not aware at that time that he had taken Xanax. Had she known, she would not have told him to leave. However, she was aware that he had been drinking.

She told a police officer at the scene that she had consumed three beers. She also told the officer that it was her fault that appellant was arrested. While appellant was in the back of the police vehicle, she told the officer that appellant's house was not far away and it was safe for him to go home on his own. She believed he had not had much to drink and did not realize at that time that he had taken Xanax. She thus thought that perhaps he had not been driving while intoxicated. When questioned about other reasons he would have been detained in the back of the police vehicle, she suggested that he could have been pulled over for driving in the middle of the road, which he would have done because there were potholes. She asserted that she had been pulled over for driving in this manner. However, she ultimately acknowledged that she has never been arrested for driving in this manner and that she and appellant had been drinking.

Husted acknowledged that appellant told her about his prior DUIs prior to this incident. She further acknowledged that, by asking him to leave her house after he had been drinking, she was not serving as a "stabilizing force" for appellant. T2 35:14. Her behavior was caused by the difficulties of the day. She acknowledges that, despite her commitment to appellant's well-being, they will likely confront difficult circumstances in the future.

Richie E. Dooley, Jr., is forty-one years old. He graduated high school in 1999.. He passed the Department's mandatory psychological examination and began work as a correctional officer recruit in August 2002.e. After passing the recruit stage, and becoming a correction officer, he was not promoted above that title.[2] He last worked for the Department on or about November 20, 2019.

Appellant acknowledged that he committed two DUI offenses prior to the 2019 incident. None occurred while he was on duty, although he was a correction officer at the time of each offense.

The 2003 incident occurred after he spent a few hours with friends. He suggested that he probably did not come to a full stop at a stop sign. He did not seek medical treatment after the incident. He reported the DUI to the Department; however, he was neither formally nor informally disciplined.

In 2004, he was involved in a motor vehicle accident after he had been out with friends. He was on his way home when the accident occurred. He was treated at the hospital for an injury but did not receive treatment for alcohol use after the incident. He lost his license and was ordered to participate in the Intoxicated Driver Resource Center (IRDC) program, which he explained offered education rather than treatment. He reported the DUI to the Department. He was neither formally nor informally disciplined by the Department.

In 2019, he drank alcohol with Husted and returned to her house, where he fell asleep on her couch. He had taken Xanax, which had been prescribed to him, to relax after a bad day. He believed it caused him to become drowsy. She woke him to tell him that his dog urinated on her floor. He left rather than engage with her. He intended to drive to his house, which was approximately two miles away. He reported the DUI to the Department.

[2] The title was later changed to correctional police officer.

Appellant did not "formally" stop drinking between the 2004 DUI and the 2019 DUI. He sought medical treatment after the last DUI. He entered an inpatient treatment program in Florida, which lasted approximately forty-one days. He has not entered another inpatient treatment program.

Appellant did not receive mental health treatment, including for addiction, prior to his employment with the Department. He has been told that alcoholism runs in his family. He was not aware of it when he was young, but, upon reflection, he can see that problems between family members, including his parents, were related to alcohol. His father drank more than his mother, who he recalled did not drink to excess.

While employed by the Department, he was never sent home from work due to intoxication or ordered to submit to a reasonable suspicion drug test. None of the random drug tests conducted by the Department produced a positive result. He was not sent for a fitness for duty or functional capacity examination in response to a physical or mental problem, or for substance abuse. He was never the subject of an involuntary disability application.

Appellant asserted that the statements to which he previously certified were still accurate:

1. He has "struggled with alcohol since the age of [twenty]." Alcohol abuse and addiction has affected several members of his family including his father. A-1 at ¶¶11, 12.

2. In 2003, he used alcohol to cope with his parents' arguing and a "hostile" home environment. Id. at ¶19.

3. After the 2004 DUI, he received inpatient therapy for alcoholism. The "incident . . . opened [his] eyers to what may happen in the future if [he] did not come to come to grips with [his] alcohol problem. Even though it was difficult for [him] to admit

[he] was struggling with depression, he sought help" from his doctor. Although he tried medication for depression and anxiety, it did not solve these problems. Depression and anxiety affected him more during the winter months when he could not stay busy with outdoor activities he enjoyed. "When [he] would drink alcohol, [he] would try not to drink in excess due to the previous DUI." He would drink at home or have a designated driver. Id. at ¶20.

4. On November 16, 2019, he was experiencing "increased stressors" due to the recent purchase of a home and the home remodeling process, which uncovered significant structural problems and unanticipated costs. Also, that day, he surrendered two of his dogs to a foster caretaker. He and his girlfriend fought, went to a local restaurant and bar and then to her house, where appellant "was still stressed out and took a Xanax to calm [his] nerves and help [him] sleep." Overnight, his remaining dog soiled the floor, which caused appellant to decide to go home in the middle of the night. He was pulled over while driving home. Id. at ¶22.

5. The third DUI "had the greatest impact" on him. As a result of the forty-five-day inpatient rehabilitation program, he "gained an understanding of the harmful effects alcohol has had not only on [him] and [his] life, but also [his] family." He understands the disease "can never be 'cured' but is an everyday struggle, which [he] deal[s] with every single day." Id. at ¶21.

6. He has realized that his alcohol use was, "in part, a masking agent for some anxiety." His alcohol use was curtailed when he took anxiety medication. However, he no longer has health insurance and "it has been difficult" for him to get medical help. Id. at ¶23.

7. He has taken the following steps, which do not require health insurance, to help "battle [his] alcohol addiction":

a. Listen to other people's stories and challenges, which gives him a perspective on the relative magnitude of his problems.
b. Free online apps that provide inspirational messages and meditation.
c. Shares his feelings and struggles with a friend who is also mentor and employer who has alcoholic family members. Their talks have "opened [appellant's] eyes to see if through his point of view and how [appellant has] hurt" the people around him."
d. Exercise.

[Id. at ¶24.]

8. Appellant acknowledged that he has "only attended a few [AA] meetings online." While he finds in-person meetings to be more effective, he has not asked Husted to drive him to meetings. Although she has offered to drive him to evening meetings, he does not want to add to her already busy schedule. "She has mentioned many times that if she sees me heading down the wrong path again, she will take time off school and make sure I do not relapse." Ibid.

9. Appellant further certified, "I do not believe I should be removed. I say this because I have truly battled my addiction for 15 years between my second and third [DUI]. I admit I am an alcoholic who deals and struggles every day, but I realize now after losing my job that it is more important than alcohol. My job as a Correction Police was something I was very proud of in my life. I have always had low self-esteem, but was proud of my accomplishment and years of service to the prison. After my stay in Florida, I understand how my anxiety and depression led to my drinking." Id. at ¶27.

10. Appellant proposes, in lieu of removal, that his return to work should be conditioned upon a fitness for duty examination, "daily alcohol testing prior to the start of [his] shift to prove [he] had not been drinking as well as

> random spot testing during [his] shift to provide [he] had not been drinking." He also offered to attend "weekly AA meetings" and provide proof of his attendance if he were reinstated to his position. Id. at ¶¶28-30.

Appellant agrees that he deserves to be disciplined for his actions. However, he does not agree that termination is appropriate. He previously misunderstood the signs of alcoholism, having thought that an alcoholic must drink in the morning or fall down drunk. Due to his rehabilitation, he now knows that he had a problem with alcohol and he no longer consumes it. While he recognizes, thanks to his rehabilitation, that there cannot be a guarantee that he will never drink again, he now appreciates the position he has put himself in. He previously treated the loss of his driver's license "almost like a joke." T2 54:24. It "took a long while for [him] to wake up and see . . . what has actually happened and what it has caused, and it's not worth it." T2 54:25 to 55:2. He now appreciates the embarrassment he has caused himself and others, including the Department. He explained that the "major thing" that has enabled him to remain sober was

> coming to a realization of the issues that I was [sic] dealing with and the seriousness of everything that has happened and what [sic] continue to happen if I drink. . . . I'm not able to drink. It's taken too much for [sic] me. It's stolen everything. So, something like that, I don't need to be a part of. It's just not . . . an option at this point, and it cannot be ever. It's just taken too much from this. It's been a toll on everybody and myself in general. It's not worth it.
>
> [T2 56:5-14.]

For these reasons, he "promise[d] wholeheartedly" that he sincerely intended to not drink again. T2 54:13.

On cross-examination, appellant acknowledged that, before the 2019 DUI, he did not "constantly" seek assistance to maintain sobriety. He also acknowledged that Dr. Glass wrote that he "can succeed in his fight against alcoholism if he can (a) find a therapist, (b) find a meeting (AA) that he is comfortable with and (c) find a sponsor to

assist him in difficult times. " P-4 at 10. He explained that he tried AA several times and that he was not in AA at the time of the hearing. He attributed this to the religious foundation of AA, which he is "not into. . . so much." T2 63:25. He explained that AA "cannot make you stop" drinking and he can do other things on his own to maintain sobriety. He also acknowledged that he was not attending any form of group therapy or meeting and that, instead, he relies upon videos, reading and talking with others.

Appellant acknowledged that, after the 2019 DUI, his driver's license was suspended for two years because it was his third offense. His driver's license was reinstated prior to May 31, 2023, the day he testified.

Document Review

On October 21, 2021, Dr. Glass wrote the following about appellant's treatments:

> He was referred to IDRC and other programs but the success of those programs was brief and he returned to drinking. However, when he finally got out of his environment and into a month long program that included both group and individual sessions, [he] began to take notice. Initially the record reflects that he was resistant to opening up to a group and found himself more comfortable in one to one sessions but nevertheless he continued with the group and little by little began to make use of the modality of treatment most often successful with alcoholics. . . . Much like the obese individual who chooses his/her self-induced diet approach rather than a more traditional or medical supervised program[,] the alcoholic fails to maintain sobriety on his or her own and further consequences rear their heads until there is no choice. Professionals who deal with alcohol often speak of how many times the alcoholic fails before they succeed.
>
> [P-4 at 9-10.]

On January 11, 2023, Dr. Glass wrote that appellant's employer, with whom he is close, "serves much the same role as an AA sponsor." R-5 at 2. He described appellant's efforts to maintain sobriety, listening to online podcasts, use of online apps, exercise and

talking with his employer/mentor as "helpful tools" that "can have a very positive impact on one's recovery." Id. at 5. Addressing prior treatment attempts, he wrote that appellant "was referred into treatments that were well intended but not sufficient for his needs and he failed. Ultimately[,] when he found himself in real jeopardy, he 'got it.' This is not at all unusual. Most people with AUD seek help when their job or marriage is in jeopardy and so it was with [appellant.] This impetus often leads to the most successful treatment." Id. at 6. He opined that appellant could successfully return to his Department position subject to his compliance with a "treatment plan that it wants or is ordered by a mental health professional who has evaluated appellant as to fitness for duty and return to work criteria." P-6 at 5.

ADDITIONAL FACTUAL FINDINGS

It is the obligation of the fact finder to weigh the credibility of the witnesses before making a decision. Credibility is the value that a fact finder gives to a witness' testimony. Credibility is best described as that quality of testimony or evidence that makes it worthy of belief. "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Estate of Perrone, 5 N.J. 514, 522 (1950). To assess credibility, the fact finder should consider the witness' interest in the outcome, motive, or bias. A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). In addition to considering each witness' interest in the outcome of the matter, I observed their demeanor, tone, and physical actions. I also considered the accuracy of their recollection; their ability to know and recall relevant facts and information; the reasonableness of their testimony; their demeanor, willingness or reluctance to testify; their candor or evasiveness; any inconsistent or contradictory statements and the inherent believability of their testimony.

Labonne testified professionally, clearly and directly about his knowledge of Department rules and policies, which was not contested by appellant. He readily and candidly acknowledged when he did not have firsthand knowledge of relevant information. I find his testimony to be reliable. Accordingly, I **FIND** as **FACT** that the Department has not consistently removed employees after their third insubordination infraction or after a second DUI. It has not consistently removed officers who have lost their driving privileges. Also, the Department does not have a policy that requires automatic removal after a third DUI offense. It considers the individual circumstances of each case when determining the appropriate discipline. I also **FIND** as **FACT** that appellant could have been required to operate a vehicle during the times his driver's license was suspended, notwithstanding the nature of his regular work assignment. However, his driving privilege was reinstated before he testified in this matter.

With respect to Dr. Glass' testimony, "[t]he weight to which an expert opinion is entitled can rise no higher than the facts and reasoning upon which that opinion is predicated." Johnson v. Salem Corp., 97 N.J. 78, 91 (1984) (citation omitted). "The testimonial and experiential weaknesses of the witness, such as (1) his status as a general practitioner, testifying as to a specialty, or (2) the fact that his conclusions are based largely on the subjective complaints of the patient or on a cursory examination, may be exposed by the usual methods of cross-examination." Angel v. Rand Exp. Lines, 66 N.J. Super. 77, 86 (App. Div. 1961). Other factors to consider include whether the expert's opinion finds support in the records from other physicians, and the information upon which the expert has based his conclusions. Ibid. Dr. Glass testified clearly, directly and professionally and thoroughly explained his analysis and conclusions, which were based upon his expertise as a psychiatrist and use of objective testing. His conclusions and opinions are not contradicted. I find his testimony to be reliable.

Husted testified in a measured, calm and pleasant manner. She reasonably acknowledged that she could "never guarantee" appellant's sobriety. However, she initially did not address essential aspects of the events preceding and relating to the 2019 police stop and arrest. Rather, she tried to minimize them. Nonetheless, she ultimately

acknowledged the relevant facts and circumstances, including that she told appellant to leave her home—and thus drive—after he had been drinking; that she drank with him that day notwithstanding her knowledge of his AUD; and that she attempted to convince the police officer who detained appellant that he could safely drive home. This calls into question the assertion that she is a "stabilizing force" and she will be capable of providing him meaningful assistance through his recovery.

Appellant became emotional when he discussed his realization of the harm caused by his drinking and how it impacted others, including his employer. His emotional response appeared to be sincere. However, his certification belies, to some extent, his and Husted's assertions that they are endeavoring in every way possible to ensure his sobriety. He certified that he has opted not to ask Husted or anyone else to drive him to AA meetings and that he does not attend online AA meetings. Despite this, he asserted that he would agree to attend AA as a condition of re-employment. Moreover, he offered inconsistent reasons for not attending AA: while he certified that he did not want Husted to expend the time required to drive him to meetings, he testified that he does not relate well to the spiritual aspect of AA and he downplayed the impact AA can have on someone with AUD.

Appellant's accounts of the treatment he has received are also inconsistent. He testified that, in 2004, he was treated at the hospital for an injury but did not receive treatment for alcohol use. He described the IRDC program as educational and testified that it did not provide treatment. However, he certified that he received inpatient therapy for alcoholism and that this "opened [his] eyes to what may happen in the future if he did not come to grips with [his] alcohol problem." He certified, at length, that he learned that he had depression and anxiety and sought treatment for these conditions. He also certified that he has "battled [his] addiction for [fifteen] years between [his] second and third [DUI]." This diminishes his assertion that it was only after the 2019 incident and subsequent inpatient treatment that he understood the nature of his problems – alcoholism, depression and anxiety. Further, although he noted that he currently does not have health insurance, he presumably had health insurance while he was employed

and thus could have obtained medication for anxiety, which he certified was directly connected to his alcohol use.

Nonetheless, Dr. Glass's expert opinion is that it was not until appellant lost his job that he fully accepted the gravity of his situation. That is, appellant did not suffer any serious consequence, other than the loss of his license, after the two earlier DUIs. His job security was not previously impacted and there is no evidence in the record that his drinking adversely impacted his job performance. He finally had the "impetus" he needed to pursue "the most successful treatment" after he lost his job and "found himself in real jeopardy." Dr. Glass also opined that the treatment that appellant received prior to 2019 was insufficient. Unlike in the past, the post-2019 series of treatments has enabled him to refrain from drinking. Dr. Glass's expert opinion was not rebutted by respondent. Accordingly, I **FIND** as **FACT** that appellant's sincere acknowledgement of the severity of his problem and his obligation to engage in serious treatment followed, and was compelled by, the loss of his job. I also **FIND** as **FACT** that, despite this, appellant does not participate in AA, notwithstanding Dr. Glass's recommendation.

LEGAL ANALYSIS AND CONCLUSION

Respondent previously established that summary judgement should be granted with respect to all of the charges enumerated in the February 25, 2021, FNDA. Thus, the remaining issue is the appropriate penalty.

Appellant argues that he should not be removed from his position because (1) New Jersey has a strong public policy favoring rehabilitation of people with AUD and that AUD itself may be considered a mitigating factor; (2) the absence of an involuntary disability retirement petition filed by the Department indicates that his AUD did not adversely impact his work performance; (3) his first two DUIs should be discounted due to their remoteness; and (4) the Department cannot presume that his AUD will prevent him from performing his job, particularly because the Department can impose conditions that will help determine if he is intoxicated and may take future disciplinary action if necessary.

The Department contends that removal is appropriate here because it is not disciplining appellant for having AUD but rather, for having committed a third DUI. Appellant "was not qualified to perform the essential functions of his position because of the loss of his driver's license[.]" Resp. Brf. at 19. It also argues that, even if appellant has a valid driver's license, he "will never be qualified in the future because of the existence of this third conviction." Id. at 19. That is, given the high standard of conduct expected of law enforcement officers, the third conviction and refusal to submit to a breathalyzer test rise to a level that renders him ineligible for continued employment. The Department also questions the veracity of appellant's assertions concerning his attempts at recovery as well as Husted's assertions concerning her status as a "stabilizing force."

To determine the appropriate penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463 (Final Decision). Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983).

> [P]rogressive discipline is a flexible concept, and its application depends on the totality and remoteness of the individual instances of misconduct that comprise the disciplinary record. The number and remoteness or timing of the offenses and their comparative seriousness, together with an analysis of the present conduct, must inform the evaluation of the appropriate penalty. Even where the present conduct alone would not warrant termination, a history of discipline in the reasonably recent past may justify a greater penalty; the number, timing, or seriousness of the previous offenses may make termination the appropriate penalty.
>
> [In re Stallworth, 208 N.J. 182, 199 (2011)(emphasis added).]

However, "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, 33 (2007)(citing Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980); Bowden v. Bayside State Prison, 268 N.J. Super. 301, 306 (App. Div. 1993), certif. denied, 135 N.J. 469, 640 A.2d 850 (1994)). 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. 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). Further, "[t]here 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).

Although the focus is generally on the seriousness of the current charge as well as the prior disciplinary history of the appellant, consideration must also be given to the purpose of the civil service laws. Civil service laws "are designed to promote efficient public service, not to benefit errant employees. The welfare of the people, and not exclusively the welfare of the civil servant, is the basic policy underlining [the] statutory scheme." State-Operated School Dist. of City of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). "The overriding concern in assessing the propriety of the penalty is the public good." George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) at 465. Among the relevant considerations is that appellant's status as a law enforcement officer places his conduct under heightened scrutiny. His primary duty is to enforce and uphold the law. He "is constantly called upon to exercise tact, restraint and good judgment." In re Disciplinary Procedures of Phillips, 117 N.J. 567, 576-77 (1990) (quoting Moorestown, 89 Super. at 566). Being held to this heightened standard of conduct is one of the obligations the appellant undertook "upon voluntary entry into the public service." In re Emmons, 63 N.J. Super. 136, 142 (App. Div. 1960).

The Americans with Disabilities Act (ADA) provides that no covered entity shall discriminate against a qualified individual with a disability because of said disability regarding job applications, hiring, promotions, or discharge; employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. §

12112(a). Similarly, the New Jersey Law Against Discrimination (LAD) forbids employers from refusing to hire or from discharging a person for discriminatory reasons. N.J.S.A. 10:5-12.

Since Clowes v. Terminex Int'l, Inc., the State has held that alcohol and drug addictions (such as AUD) are a qualifying disability under the LAD. 109 N.J. 575, 590-95 (1988). Under both the ADA and LAD employers are required to provide a reasonable accommodation to those with AUD, namely by providing the employee with an opportunity for rehabilitation and recovery. See e.g., In re Cahill, 245 N.J. Super. 397 (App. Div. 1991) (reasonable accommodations included continuing to employ a firefighter while he underwent a detoxification and inpatient drug rehabilitation program); In re Michael Overton, Twp. of Pennsauken, Pub. Safety Dep't, 2008 N.J. AGEN LEXIS 197 (Mar. 17, 2008), adopted, Comm'r (Apr. 24, 2008) (while on duty, a building maintenance worker drove employer's vehicle while under the influence of alcohol; appointing authority provided reasonable accommodations when it had an Employee Assistance Program, provided information on how to seek assistance and the resources available, and did not remove employee after appearing at work intoxicated and his first loss of license for a DUI); Rutkowski v. Police Dep't, Borough of Elmwood Park, 1995 N.J. AGEN LEXIS 402 (Sept. 6, 1995) (permitting police officer to attempt alcohol rehabilitation programs four different times before seeking his removal was a reasonable accommodation); Arose v. Twp. of Little Egg Harbor Police Dep't, 1995 N.J. AGEN LEXIS 835, *7-8 (May 23, 1995) (holding that police officer should be given the opportunity to complete his rehabilitation program before disciplinary action resulting in removal was imposed).[3]

However, while the employer must provide reasonable accommodations, the employee must still be able to perform the essential duties of their position and can be held to the same standards of behavior that the employer requires of non-disabled employees. Cahill, 245 N.J. Super. at 401; Robinson v. City of Wildwood Police Dep't, 1996 N.J. AGEN LEXIS 1276, *10-11 (Dec. 17, 1996); In re Nickolas Tuyahov, Cty. of

[3] Administrative decisions are not precedential. They are cited here because they provide relevant guidance.

Monmouth, 2010 N.J. AGEN LEXIS 427, *24-26 (Aug. 30, 2010), adopted, Comm'r (Oct. 8, 2010) (finding that the requirement to have a driver's license was a standard clause for most jobs but in the instant matter was necessary for the appellant to perform the essential duties of his position and the two-year loss of a license supported his removal); Overton, 2008 N.J. AGEN LEXIS at *12-14 (finding that an essential duty of the position required the appellant to drive motor vehicles, the ALJ held that the township was not required to create as a reasonable accommodation a position which did not require a driver's license).

Similarly, and especially in cases involving law enforcement officers, an appointing authority is not required to continue employing a person with a disability when employment in a particular position would be hazardous to that individual or to others. First, law enforcement officers, including correctional police officers, are held to a higher standard than that of other employees. See Rutkowski, 1995 N.J. AGEN LEXIS at *9-11 (holding that due to appellant's continuous state of severe intoxication and recommendations from two medical experts that the appellant not return to duty, the reinstatement of appellant as a police officer would create a hazard to himself and the public); In re Benito Gonzalez, Camden Cty., Police Dep't, 2020 N.J. AGEN LEXIS 116, *33-35 (July 1, 2020) (when considering the adverse impact it would have on the department and its mission of public safety, the removal of an officer who had exposed himself and masturbated in view of a young woman was proper notwithstanding his diagnoses of post-traumatic stress disorder, AUD and major depressive disorder).

An appellant's efforts at rehabilitation has been a relevant factor in cases involving alcohol abuse. See, e.g., In re Walters, 2014 N.J. CSC LEXIS 265 (taking into consideration as a mitigating factor a correction officer's rehabilitation efforts after two DUIs in one month, but ultimately concluding that the severity of his misconduct warranted removal); In re Garcia, CSR 8090-12, Initial Decision (September 27, 2012) (acknowledging voluntary alcohol-rehabilitation efforts in reducing the penalty from

removal to one-month suspension for correction officer who came to work drunk), modified, Comm'n (January 9, 2013), <http://njlaw.rutgers.edu/collections/oal/>.[4]

In re Joyce, CSV 9145-06, Initial Decision (August 23, 2007), modified, Merit Sys. Bd. (October 15, 2007), <http://njlaw.rutgers.edu/collections/oal/>, an off-duty police officer who acted irreverently while drunk received a 120-day suspension for his misconduct. The officer went to a bar, where he refused to pay a cover charge and his bill while stating that he was a police officer and could do what he wanted to do; pushed the bar owner and challenged both the owner and a bouncer to a fight; told the Lyndhurst police officers who were called to the bar because of his behavior, "I'm a Passaic cop and I'll do whatever the f--k I want to"; and otherwise acted in a rude and offensive manner toward the police officers. The ALJ recommended that the sixty-day suspension imposed by the appointing authority be upheld, but the Merit System Board modified the penalty to a 120-day suspension. According to the Board, despite "a minor disciplinary history" that included a three-day suspension over five years of employment, "[t]he Board finds this conduct to be egregious and worthy of a severe sanction," and "notwithstanding the appellant's prior history, the Board determines that a 120-day suspension is the appropriate penalty."

The temporal proximity of past offenses must also be considered when evaluating the appropriate penalty. Although there is no record of appellant's 2003 and 2004 DUIs in his Department disciplinary history,[5] respondent considers them to be prior infractions that militate in favor of removal. In Feldman v. Town of Irvington Fire Dep't, 162 N.J. Super. 177 (App. Div. 1978), the Appellate Division addressed a firefighter's disciplinary history, which included three violations involving abuse of the sick leave policy, one of

[4] In modifying the suspension imposed by the ALJ from one month to six months, the Commission noted that after the ALJ issued his initial decision, the parties agreed to a six-month suspension.

[5] In the section of the disciplinary history that addresses the 2019 DUI, there is a note referencing the 2003 and 2004 DUIs: "MV violations (DUI) in 2003 and 2004 while employed with [the Department]. This is the 3d DUI offense." R-J at 192. The 2003 and 2004 DUIs are not referenced elsewhere in the disciplinary history.

which also involved a finding of insubordination. These violations occurred four years prior to his failure to respond to a call. The court noted that, in W. New York v. Bock, 38 N.J. 500, the Supreme Court found that a period of seven years between the "past record" and the charges being adjudicated "mandated that the 'past record' should not be considered on the penalty issue." 162 N.J. Super. at 182. The Feldman court added, "Although we cannot say that a span of four years automatically renders a past record too remote for consideration by the Commission, nevertheless such a period of service unblemished by infractions weighs heavily in mitigation of the penalty to be imposed." Id. at 182-183. While the court declined to establish a bright line rule for when a past record was too remote for consideration, it concluded that the conduct supporting the charges was not so egregious as to warrant removal and the prior four years of service "unblemished by infractions weigh[ed] heavily in mitigation of the penalty to be imposed." Id. at 182-83. See also Scott v. Burlington Cty. Jail, CSV 10396-94, 96 N.J.A.R.2d at 174 (CSV) (1995) (concluding that a six-month suspension eight years prior was remote enough to justify not removing the corrections officer but held that his behavior was unacceptable conduct and demonstrated a disregard for the law, thus upholding the eighty-seven-day suspension).

However, a period of years between offenses does not necessarily require that the earlier offenses be disregarded. In In re McIver, 2012 N.J. Super. Unpub. LEXIS 1049 (App. Div. May 14, 2012),[6] the Appellate Division held that a DUI offense committed several years earlier could properly be considered. A senior corrections officer did not report that, on June 16, 2010, he pleaded guilty to refusing to submit to a breathalyzer examination and was sentenced as a third-time DUI offender. He reported the conviction two months later. After he reported the conviction, Department officials conducted an investigation that revealed that McIver had two earlier DUI convictions. McIver reported the first conviction, in 2001, but not the second conviction.[7] The Department recommended removal of McIver from his position, relying in part upon the fact that he

[6] Overruled on other grounds by Steinel v. Jersey City, 99 N.J. 1, 3-4 (1985). This unreported Appellate Division decision is not precedential. It is referenced here because it provides relevant guidance.

[7] The date of the second DUI conviction is not stated in the decision.

was convicted of DUI three times. McIver argued that a lesser sanction was appropriate, as he was not previously disciplined by the Department. The Appellate Division concluded that removal was appropriate:

> Here, the penalty of removal was appropriate even though McIver did not have a prior disciplinary record. Indeed, the fact that McIver had no prior disciplinary record was not a product of exemplary conduct. As noted, this was McIver's third arrest and conviction for alcohol-related driving offenses while he was a corrections officer. In 2001, after reporting the first arrest, McIver could have been disciplined but was fortunate to avoid sanctions for this offense. And McIver was not disciplined for his second DUI, because he never reported it. Had McIver accurately reported the second event, as he was required to do, it seems certain he would have been disciplined and would not have been able to assert, as he does here, that he had an unblemished disciplinary record. In these circumstances, removal is hardly "shocking to one's sense of fairness."
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> [Id. at **16-17 (quoting In re Stallworth, 208 N.J. 182, 195 (2011).]

Here, however, unlike in McIver, appellant's prior DUIs were fifteen and sixteen years earlier. Given the guidelines set forth in the preceding cases, the two prior DUIs are sufficiently remote such that they should not be weighed as heavily as they would be had they occurred more recently.

With respect to the remainder of appellant's disciplinary history, while he was disciplined for other infractions between the first two DUIs and the 2019 DUI, major discipline was never imposed. He was disciplined twice before for "E1" offenses, on April 21, 2019, (two-day suspension) and February 26, 2010, (fine), for failure to submit medical documentation to support his use of sick leave. R-10 at 191. He was disciplined several times for "A1" category offenses: chronic or excessive absenteeism on November 24, 2008 (official written reprimand), December 12, 2008, (three-day suspension), December 26, 2008, (five-day suspension), and October 30, 2009, (five-day suspension);

calling out sick with no available sick time on June 23, 2014, (written reprimand), and July 5, 2014, (three-day suspension).[8] He has no prior "C11" offenses. Ibid. Apart from the April 21, 2019, two-day suspension, the next most recent discipline was issued in response to a July 5, 2014, infraction, which was five years prior to the DUI at issue. Ibid.

Here, the nature of appellant's offense is a significant aggravating factor. DUI convictions are serious quasi-criminal offenses and cannot be taken lightly. In re Vincent Greenfield, Bayfield State Prison, Dep't of Corr., 2007 N.J. AGEN LEXIS 1127, *9-10, Final Decision (June 8, 2007) (citing State v. Emery, 27 N.J. 348, 353 (1958)). DUI offenses are "serious and deeply affect the safety and welfare of the public . . . They are not victimless crimes." Matter of Connor, 124 N.J. 18, 21 (1991). Similarly, appellant's refusal to comply with State Police orders to submit to a breathalyzer is serious and violates his obligation as a correctional police officer to uphold the law and cooperate with other law enforcement officers. The need to deter others from engaging in such behavior and the adverse impact of the conduct upon his employer, including the morale of appellant's coworkers, weigh in favor of discipline. Similarly, the impact of appellant's actions upon the public's perception about the Department's capacity to perform its duties also weighs in favor of discipline.

Respondent's argument that, by not disciplining appellant for the first two DUIs, it gave him an opportunity to reform is unsupported by the evidence in the record. Furthermore, while respondent argued that appellant became unqualified for his position when he lost his driver's license, it did not cite this in the PNDA or FNDA. It solely relied upon appellant's multiple DUIs and failure to submit to a breathalyzer test.

Mitigating factors include the length of appellant's service, twenty-one years; his voluntary participation in alcohol and mental health treatment; his drinking occurred while he was off-duty and did not adversely affect his job performance; and his sincere remorse

[8] *Whether appellant's chronic or excessive absenteeism was related to appellant's AUD was not discussed by the parties.*

and understanding of the gravity of his condition. Importantly, appellant's disciplinary history reveals that, while he was disciplined for failure to submit medical documentation for sick leave and for job attendance, the Department has never imposed major discipline. Also, he has no prior "C11" offenses and his next most recent offense for which he was disciplined occurred five years prior to the 2019 DUI.

Removal could be the appropriate penalty had the 2019 DUI occurred while appellant was on duty; appellant had not acknowledged the seriousness of his offense and his condition; or he had not sought treatment. However, here, the mitigating factors and aggravating factors are either in equipoise, at worst, or the mitigating factors outweigh the aggravating factors. As respondent has the burden of proof, either result compels a finding that it has not demonstrated by a preponderance of the credible evidence that the proposed removal of appellant is appropriate. Nonetheless, appellant's offense is very serious and the maximum period of suspension should apply. I am constrained by the regulation that limits the maximum suspensions to six months without pay. N.J.A.C. 4A:2-2.4. Accordingly, I **CONCLUDE** that a six-month penalty is appropriate here.

In other cases involving serious offenses such as DUI, reinstatement to employment has been made subject to successful completion of a fitness for duty exam or other prerequisites. In Wilmouth v. Department of Environmental Protection, CSV 2446-03, Initial Decision (April 24, 2004), adopted as modified, Merit Sys. Bd. (July 15, 2004), http://njlaw.rutgers.edu/collections/oal/, a forest-fire observer employed by the Department of Environmental Protection (DEP) was charged with conduct unbecoming for assaulting a co-worker and threatening a superior. The ALJ modified the proposed removal penalty to a six-month suspension and recommended anger-management classes prior to the appellant's reinstatement. The Merit System Board further ordered the employee to undergo a fitness-for-duty exam prior to his reinstatement:

> Although the Board agrees with the ALJ's determination to modify the removal to a six-month suspension, the Board is concerned with the unprovoked nature of the appellant's attack, and whether this is indicative of a psychological

> condition which may have an impact upon the appellant's ability to perform his job duties. Therefore, the Board orders that prior to the appellant returning to work, he is to undergo a psychological examination to determine his fitness for duty. See N.J.S.A. 11A:2-6(f). The DEP is to select, and pay for, the psychiatrist or psychologist who will administer the psychological examination. If the State-authorized psychiatrist or psychologist determines that the appellant is fit for duty, then he is to be immediately reinstated with mitigated back pay, benefits and seniority. Additionally, if the appellant is determined to be fit for duty, he must undergo an anger management course. However, if the State-authorized psychiatrist or psychologist determines that the appellant is unfit for duty, then the DEP may immediately suspend the appellant as of the date of the report and issue a Preliminary Notice of Disciplinary Action for unfitness. It is noted that, even if the appellant is determined to be unfit, he would still be entitled to mitigated back pay, benefits and seniority, from the end of his six-month suspension until his immediate suspension on the new charge of being unfit for duty.

See also In re Brown, 2009 N.J. CSC LEXIS 1324 (noting that "if the appointing authority has a specific and legitimate basis to require fitness-for-duty examinations, it has the authority to order the appellant, as its employee, to submit to such examinations"); In re Kingston, 2013 N.J. CSC LEXIS 32, aff'd, No. A-3288-12 (App. Div. June 2, 2015), http://njlaw.rutgers.edu/collections/courts/ (conditioning the reinstatement of a laborer who harassed and assaulted a co-worker upon his successful completion of a fitness exam); In the Matter of Brian Whittle, 1999 N.J. AGEN LEXIS 1233 (June 8. 1999)(Merit System Board ("appellant's history of substance abuse problems demonstrates a need for a counseling program as a condition of his return to employment").

Although there is no evidence in the record that appellant's AUD has adversely impacted his job performance, Dr. Glass expressly opined that any success he may have with rehabilitation includes attendance at AA, as well as working with a therapist and a sponsor. I therefore **FIND** and **CONCLUDE** that there is a reasonable basis for ordering that, as a condition of his employment, appellant shall regularly attend AA and work with a therapist and sponsor. A psychiatrist or psychologist selected and paid for by the Department shall perform a fitness for duty evaluation prior to appellant's return to work

to (1) confirm that he is fit to return to duty and (2) identify any additional therapies or programs that shall be required as a condition of his employment.[9] Appellant shall submit documentation of his participation with all recommended programs and treatments to the psychiatrist or psychologist. Documentation of participation in each required program or treatment shall be produced prior to appellant's return to work and shall continue until the psychiatrist or psychologist determines it is no longer necessary.

Since the penalty has been modified, I **CONCLUDE** that appellant is entitled to back pay, benefits and seniority pursuant to N.J.A.C. 4A:2-2.10. The amount of back pay awarded is to be reduced and mitigated for that period of time when back pay was waived.[10]

I also **CONCLUDE** that appellant is not entitled to counsel fees. Pursuant to N.J.A.C. 4A:2-2.12(a), the award of counsel fees is appropriate 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, September 21, 1989). Here, while the penalty was modified, the appointing authority has sustained all the charges and major discipline was imposed. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. See In the Matter of Bazyt Bergus (MSB, decided December 19, 2000), aff'd, Bazyt Bergus v. City of Newark, Docket No. A-3382-00T5 (App. Div. June 3, 2002); In the Matter of Mario Simmons (MSB, decided October 26, 1999). See also, In the Matter of Mario Simmons (MSB, October 26, 1999). See also In the Matter of Kathleen Rhoads (MSB decided September 10, 2002).

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[9] If the psychiatrist or psychologist concludes that a program other than AA with a sponsor and/or therapy is required, their recommendation shall control.

[10] On July 19, 2021, appellant waived back pay during the pendency of this matter. OAL-1.

ORDER

I ORDER that the charges of conduct unbecoming a public employee and of other sufficient cause, and violations of Departmental rules and policies are **SUSTAINED**. I **ORDER** that the appointing authority's proposed penalty of removal is **MODIFIED** to a six-month unpaid suspension contingent upon a satisfactory fitness for duty evaluation and documentation of regular participation in AA and therapy and any other prerequisites ordered by the Department-selected psychiatrist or psychologist. Since the penalty has been modified, I **ORDER** that appellant is entitled to back pay, benefits and seniority pursuant to N.J.A.C. 4A:2-2.10. The amount of backpay awarded is to be reduced and mitigated for that period of time when backpay was waived. I further **ORDER** that appellant is not entitled to counsel fees.

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

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

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

December 8, 2023
DATE

JUDITH LIEBERMAN, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

JL/mg/mph

APPENDIX
LIST OF EXHIBITS

OAL

OAL-1 July 19, 2021, waiver letter

Joint:

J-1 Correspondence from DAG Jana R. DiCosmo, May 30, 2023

For appellant:

A-1 Certification of Rickie Dooley
A-2 Certification of Michelle Husted
A-3 C.V. of Dr. Gary Michael Glass
A-4 Dr. Glass report, October 21, 2021
A-5 Dr. Glass report, January 11, 2023
A-6 Dr. Glass certification, March 23, 2022

For respondent:

R-1 Preliminary Notice of Disciplinary Action
R-2 Final Notice of Disciplinary Action
R-3 Police report and citations
R-4 Guilty plea documentation
R-5 Administrative Investigation Report
R-6 Department Employee Handbook
R-7 Law Enforcement Personnel Rules and Regulations
R-8 Standards of Professional Conduct
R-9 New-hire orientation checklist and policy receipts

R-10 Disciplinary history

R-11 Civil Service Commission job description

R-12 Table of Offenses and Penalties

R-13 New Jersey State Police Bodycam Footage of November 19, 2019