



STATE OF NEW JERSEY

In the Matter of James Kelly,
Newark School District

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket No. 2023-1491
OAL Docket No. CSV 00799-23

ISSUED: JULY 24, 2024

The appeal of James Kelly, Custodial Worker, Newark School District, removal, effective November 30, 2022, on charges, was heard by Administrative Law Judge Kelly J. Kirk (ALJ), who rendered her initial decision on June 10, 2024. Exceptions were filed on behalf of the appellant and a reply was filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, including a thorough review of the exceptions and reply, the Civil Service Commission (Commission), at its meeting on July 24, 2024, adopted the Findings of Fact and Conclusion as found in the initial decision and the recommendation to uphold the removal.

There is no real substantive challenge to the charges in this matter, including those that were not sustained in this matter. After its *de novo* review, the Commission agrees with the ALJ's determinations regarding both the charges that were dismissed and those that were sustained. The only real question in this matter, as argued in the appellant's exceptions, is the proper penalty to be imposed. In his exceptions, the appellant argues that removal is too harsh a penalty. The Commission disagrees.

Similar to its assessment of the charges, the Commission's review of the penalty is *de novo*. 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 public employee 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 her initial decision, the ALJ stated:

Kelly has no prior disciplinary history. Nevertheless, of paramount concern are his job functions, which include operation of potentially hazardous equipment, and his job location, which is inside a school. Although appellant presented an October 12, 2022, letter from Immersion, said letter was not presented at the October 25, 2022, departmental hearing or thereafter, despite the record being left open for Kelly to submit any documentation. There was no explanation for the failure to present the letter to the District or the hearing officer at the time. Further, although a printout reflects that Kelly "completed treatment" and the October 22, 2022, letter reflects that he "completed treatment" on October 12, 2022, after twenty-seven days in the program, Kelly admitted that he still had a substance-abuse problem after he returned. However, there was no documentation of any further treatment or of any follow-up with a psychiatrist, as noted in his aftercare instructions. Kelly also admitted that he did not comply with the terms of the Agreement. Although Kelly was apologetic and did not intend for a student to be injured, the seriousness of the incident, his noncompliance with the Agreement, the absence of any follow-up or evidence that there is not an ongoing substance-abuse problem, and the safety considerations and risk of harm unfortunately render Kelly unsuitable for continuation in his position in a school, and I **CONCLUDE** that termination was appropriate.

The Commission agrees that removal is the proper penalty in this matter. While the appellant had an unblemished disciplinary record over his more than 20 years of employment, the infractions that he committed are egregious and posed a serious safety and security risk in a school setting. The appellant brought unsecured alcoholic beverages to work, and subsequently tested positive for deleterious legal and illegal drugs. While he was apparently not impaired at work, given that he works in a setting where children are present, and given the ALJ's additional findings above, it is clear that the only appropriate penalty is removal. Any lesser penalty would serve to undermine the public trust. In this regard, the appellant's position

requires him to be among children of various ages, making his misconduct of even greater concern, and any potential reinstatement seriously problematic. Accordingly, 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 appeals of James Kelly.

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 24TH DAY OF JULY, 2024



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
Trenton, New Jersey 08625-0312

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 00799-23

AGENCY REF. NO. 2023-1491

**IN THE MATTER OF JAMES KELLY,
NEWARK PUBLIC SCHOOL DISTRICT.**

Samuel Wenocur, Esq.,¹ for appellant James Kelly (Oxfeld Cohen, P.C., attorneys)

Bernard Mercado, Senior Associate Counsel, for respondent Newark Public School
District (Brenda C. Liss, General Counsel, attorney)

Record Closed: May 7, 2024

Decided: June 10, 2024

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE

The Newark Public School District terminated custodial worker James Kelly for conduct unbecoming a public employee, inability to perform duties, incompetency, inefficiency or failure to perform duties, and other sufficient cause.

¹ William P. Hannan, Esq. represented appellant at the hearing.

PROCEDURAL HISTORY

James Kelly was served with a Preliminary Notice of Disciplinary Action (PNDA) dated August 31, 2022, for conduct unbecoming a public employee, inability to perform duties, incompetency, inefficiency or failure to perform duties, and other sufficient cause. A departmental hearing was held on October 25, 2022, and the Newark Public School District (District) issued a Final Notice of Disciplinary Action (FNDA), dated November 30, 2022, sustaining the charges, and terminating Kelly's employment. (R-A.)

Kelly appealed, and the Civil Service Commission transmitted the contested case to the Office of Administrative Law, where it was filed on August 2, 2023. The hearing was scheduled for October 23, 2023. Respondent's attorney, a union representative, and five witnesses appeared for respondent. Appellant's attorney appeared but appellant did not appear, and the hearing was adjourned at the request of Kelly's attorney. The hearing was rescheduled for February 26, 2024, to allow appellant's attorney time to contact appellant and/or file a motion to withdraw as counsel. The hearing was held on February 26, 2024, and the record closed on May 7, 2024, after receipt of the parties' post-hearing briefs and exhibits.

EVIDENCE AND FINDINGS OF FACT

Background

James Kelly testified on his own behalf. Anthony Jackson, Atiba Buckman, and Jacquelin Chavis testified on behalf of respondent. Based upon a review of the evidence presented, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

Beginning September 15, 1997, Kelly was employed by the Newark Public School District (District) as a per-diem custodial worker, and since May 24, 1999, has been employed by the District as a full-time custodial worker. He has had no other disciplinary history.

On March 23, 2022, Kelly was working at Malcolm X. Shabazz High School. While working in the high school cafeteria, Kelly removed his jacket and hung it on a chair at one of the tables. He left the area and left his jacket hanging on the chair. There was a security guard in the cafeteria. J.D.,² a female ninth-grade student, entered the cafeteria. J.D. picked up Kelly's jacket and began looking through the pockets. She then sat down at the table and continued looking through the pockets. A security guard sat down at the table. J.D. left the cafeteria with Kelly's jacket and went into the hallway. She removed some items from Kelly's jacket and put them in her pocket. Kelly's jacket pockets contained an inhaler, money, and two "nips" bottles of alcohol. J.D. looked around and then began drinking the alcohol she had removed from Kelly's jacket.

The high school has video cameras inside the cafeteria and in the hallways, and the video cameras captured the entire incident. (R-C.) No one touched Kelly's jacket after he hung it on the chair until J.D. picked it up.

Anthony Jackson is employed by the Newark Board of Education (Board) as the District compliance investigator. He investigates complaints reported by an administrator or supervisor and conducts sensitivity examinations. Jackson investigated the incident and prepared an investigation report, dated March 23, 2022. (R-G.) Jackson's investigation report details the following:

At Approximately 2:20 PM 3/23/2022 Security Supervisor Hasan Bullock informed me, Mr. Steven Cullars reported a student [J.D.] ingested 2 small bottles of an alcoholic beverage he believes she found in custodian James Kelly's coat pocket.

Investigator Martinez and I responded to Malcom X. Shabazz to meet with Mr. Cullars. On our arrival, we were told Mr. Cullars was in the security camera room located in the school library to the south of the main entrance on the first floor of the building. Upon arrival I asked Mr. Cullars about the incident, he stated, one of his security guards Mr. Maurice Slade informed him Mr. Kelly told him the student told [sic] 2 (nips) out of his pocket. I then asked what was a "Nip"? He stated, a small bottle of alcohol. We then observed the camera footage of [J.D.] finding Mr. Kelly's coat in the cafeteria. She picked up the coat from a

² Fictitious initials for confidentiality.

chair in the cafe and exited to the hallway. As she walked down the hall toward the camera we can see her checking the coat pockets and pulling out what's believed to be the small alcohol bottles. It appears she opened the bottles and drank the beverages. She then proceeded to way down the hall.

After viewing the footage, I called Labor Relation [sic] Ms. Xiomara Alvarez to explain what we witnessed and to get further instruction on how the district wanted to handle the situation? Ms. Alvarez informed me to escort Mr. Kelly to Concentra for alcohol and drug testing. . . .

Once we arrived at Concentra Mr. Kelly was taking [sic] for a Breath Alcohol test and a Rapid Drug test. The alcohol test came back negative and the drug test came back inconclusive.

[R-G.]

Due to the alcohol in his jacket pocket, Kelly was taken to Concentra for drug and alcohol testing. The Breath Alcohol Testing Form reflects that Kelly's urine sample tested negative for alcohol. (R-J.) On March 23, 2022, the District notified Kelly that a request was made for disciplinary action against him. (R-H.)

A Security Incident Report submitted by security guard Maurice Slade, dated March 24, 2022, at 3:19 p.m., states:

Today while doing my building tour, I walked through stairwell 2. I observed the jacket sitting in the corner. I picked it up I realize that it was one of the custodian jacket. I then took it to him and told him Where I had found it at. Asked MR. Kelly to check it to make sure he wasn't missing anything and he responded and said money and nip.

[R-D.]

A Security Incident Report submitted by security guard Steven Cullars, dated March 24, 2022, at 3:19 p.m., states:

On Wednesday March 23, 2022 around 12:40 Security Guard Mr. Slade informed Mr. Cullars that he found Custodian Worker Mr. Kelly jacket and returned it to him. Mr. Slade went into

details and said he found the jacket on the 2nd Floor behind stairwell #2 doors with two empty bottles of alcohol on top of the jackets. Mr. Slade also informed me that when Mr. Kelly received the jacket from him he notices his money and his alcohol were missing. Mr. Cullars started viewing the security cameras and found student [J.D.] picking up the jacket in the cafeteria. [J.D.] went through the jacket and notice the bottles were in the jacket pocket. [J.D.] went in the hallway on the 1st floor by room 102 and drank the alcohol. [J.D.] seen by the school nurse. [J.D.] parents was notified.

[R-E.]

The Newark Board of Education Report of Incident, drafted by vice principal Omar Muhammad, reflects:

At 12:01 pm custodian James Kelly placed his coat on the back of a chair in the cafeteria. Shortly after student [J.D.] picked up the coat and left the cafeteria proceeding down the hallway. As [J.D.] proceeded down the hallway she pulled out 2 bottles (nip size) of alcohol from the pockets of Mr. Kelly's coat, opened them and drank the contents of the nip size bottles. Mr. Craighead the first floor security guard saw [J.D.] drank the contents and reported to Steven Cullars—Head Security guard.

[R-F.]

Kelly returned to work on March 24, 2022.

The Specimen Result Certificate, dated March 30, 2022, reflects that Kelly's March 23, 2022, urine sample tested positive for marijuana, opiates, and morphine. (R-I.)

Kelly was served with a Preliminary Notice of Disciplinary Action (PNDA) dated August 31, 2022, for conduct unbecoming a public employee; inability to perform duties; incompetency, inefficiency or failure to perform duties; and other sufficient cause.

Jacquelin Chavis is employed by the Board as the employee relations officer, and handles disciplinary actions and grievances filed by the union on behalf of employees. A Conditions of Employment Agreement (Agreement), between Kelly and the Newark Board

of Education, was signed by Kelly and Chavis on September 1, 2022. The Agreement reflects that Kelly agreed to the following conditions:

1. I agree to contact the EAP³ within 24 hours of signing this agreement.
2. I agree to follow the recommendations of the EAP, maintain contact with my assigned EAP case manager and attend all counseling sessions with the therapist recommended to me.
3. I will contact the counselor recommended to me within 24 hours and set up an appointment with that counselor/program within 3 days of contacting them for an appointment.
4. By signing this agreement, I give permission to the counselor to provide information about my situation to the EAP, and the EAP to provide information about my progress and participation to my employer.
5. My continued employment is contingent upon my strict adherence to the treatment plan prescribed by the counselor/program that I have been referred to by the EAP. Any cancellation or no show for an appointment may be considered a violation of this agreement.
6. Payment for services will be determined by the employer. Employer, please check below option:

- Employee is responsible for payment
- ✓ Employer is responsible for payment

[R-L.]

Kelly did not follow the recommendations of the EAP (Employee Assistance Program) and did not maintain contact with his assigned EAP case manager.

Kelly was admitted to Princeton Detox & Recovery Center (Princeton House) on September 7, 2022. (A-2.) Kelly was discharged from Princeton House on September 16, 2022. (A-2.) Among the medications noted on the aftercare instructions are: "Keppra,

³ Handwritten below EAP is "Melanie Moore (EAP Counselor) [telephone number and extension]."

500 mg x 1 tablet, oral, tablet two times a day schedule (BID), for 14 days, indication: Seizure prevention"; and "Thiamine, 100 mg x 1 tablet(s), oral, tablet, once a day (AM) until further notice, indication: ALCOHOL DETOX." (A-2.) The aftercare instructions also reflect that he was to follow up with a psychiatrist. (A-2.)

A letter dated October 12, 2022, ostensibly from Immersion Residential/Immersion Recovery Center (Immersion) states as follows:

This letter is being written on behalf of James Kelly who was admitted to Immersion Residential on 9/16/22 and completed treatment on 10/12/22. Patient completed 27 days in the program.

Immersion Recovery Center is a State of Florida Department of Children and Families licensed substance abuse facility. Our program is highly structured with services geared toward addressing issues of addiction and chemical dependency. The program is designed to fit each individual's treatment needs. Thank you for your attention in this matter and if you need any more information please do not hesitate to contact me

[A-3.]

A printout ostensibly from Immersion reflects that Kelly was admitted on September 16, 2022, and discharged on October 12, 2022, and that the discharge type was "Completed Treatment." (A-4.)

Kelly never submitted any correspondence or documentation from Princeton House or Immersion to the District. Kelly likewise never submitted any documentation that he followed up with a psychiatrist.

A letter ostensibly from Melanie Moore, MSW, at EAP specialists Charles Nechtem Associates, LLC, dated October 17, 2022, states, in pertinent part, as follows:

I am the EAP case manager for James Kelly, who is employed with Newark Public Schools. While I cannot go into the specifics of treatment for Mr. Kelly, I certify that he is in non-compliance

with his requirements for the Conditions of Employment program.

Mr. Kelly was instructed to contact Princeton House to begin his treatment upon HR notifying case manager that he was referred to the program for substance use. Mr. Kelly was advised to make contact with case manager upon check in with Princeton House, and to sign a release so I can make contact with both Mr. Kelly and his providers at Princeton. Mr. Kelly has not made contact with myself or the EAP since he was provided with the information for Princeton House. Case manager has made repeated attempts to contact employee and advise him that he is required to call her, provide updates, and sign a release.

Although Princeton House should not have provided me this information (because there was no release signed by employee), I was informed that Mr. Kelly had gone to Florida for residential treatment. Mr. Kelly never informed me that he was leaving the area and we had a discussion prior to him entering Princeton House that I would be locating a local treatment facility, and any out of state travel was not necessary. It is unclear why this decision was made without speaking to Mr. Kelly.

Because I have not heard directly from Mr. Kelly since providing him with the treatment center's information, he is non-compliant with the program and I am unable to provide any clear information or update for him.

[R-M.]

A departmental hearing was held on October 25, 2022, and the Newark Public School District issued a Final Notice of Disciplinary Action (FNDA), dated November 30, 2022, sustaining the charges, and terminating Kelly's employment. (R-A.)

A December 19, 2023, letter ostensibly from Princeton House, states, in part:

To whom it may concern,

We wish you well as you or your loved one continue the road to recovery! I have included a statement reflecting the breakdown from your insurance provider.

We know life can sometimes be difficult and staying on top of invoices is not always easy. That is why we want to send you

a friendly reminder regarding the open balance that is currently due.

[A-1.]

Testimony

Anthony Jackson

Employees cannot be under the influence of drugs or alcohol at school and cannot bring drugs or alcohol to school because Board policies prohibit drugs and alcohol on school property. Generally, to determine if an employee is under the influence of a substance, Jackson observes the employee's physical appearance, and completes a sensitivity exam sheet. Kelly did not exhibit signs of being under the influence but was tested because he had alcohol in his jacket pocket. Cullars was already reviewing the video when Jackson and Martinez arrived. Cullars rewound the video and showed it to the investigators and told them that Slade told him that Kelly had said he made a mistake and had liquor in his pocket, which was taken by a student. Kelly's alcohol test was negative, but the drug test was inconclusive, meaning that there was something there, but it was not yet known what it was without sending it to a lab for testing.

J.D. was taken to the nurse because she was a little inebriated, and her parents had to come to school and take her to the emergency room. It was inappropriate and dangerous for Kelly to leave his jacket with alcohol in it and it disrupted school operations.

Atiba Buckman

Atiba Buckman is the principal of Malcolm X. Shabazz High School. Policies prohibit staff members from bringing drugs or alcohol onto school property or being under the influence on school property. There are minors in the school, and it is illegal for minors to consume alcohol. A custodian uses chemicals and needs to handle things safely.

She was informed by vice principal Muhammad that a student drank alcohol she found in a jacket. J.D. came to her office after she was taken to the nurse for vitals. She

called J.D.'s parents to explain what happened. The parents were very upset. The incident caused injury to J.D. It interrupted student instruction and disrupted the operation of the school because security, other staff, and the administrative team had to deal with the situation and were unable to do anything else.

Jacquelin Chavis

Board drug and alcohol policies prohibit alcohol on school property and prohibit ingestion of drugs. It is a drug- and alcohol-free work environment. She received the reports reflecting that Kelly tested negative for alcohol but positive for marijuana, opiates, and morphine, and the specifications were drafted for disciplinary action. The incident disrupted the school environment.

The incident occurred in March 2022, but the PNDA was not issued until months later because her colleague had started the disciplinary process but then went on a personal leave of absence. The process was later picked up by Chavis. She and Kelly both signed the Agreement, and he was provided with the EAP counselor phone number. She wrote it on the Agreement. Kelly did not comply with the Agreement, and a letter from Moore at Charles Nechtem Associates explains the reasons why he was not compliant. There is also a timeline with the letter. Kelly was afforded the opportunity to present any documentation during the disciplinary process, but he never provided any documentation from rehab. The record was held open an extra seven days by the hearing officer for Kelly to provide any documentation he may have had at that time, but he submitted nothing. He submitted no certificate of completion of a program and the October 12, 2022, letter was never produced to the Board or the hearing officer.

James Kelly

He was with a friend the night before and he had put the two small bottles of alcohol—nips of Amsterdam pineapple—in the jacket pocket. He did not realize the bottles were in his pocket when he went to work the next day. He would not knowingly have brought alcohol onto school property. He did not consume alcohol or drugs on

school property that day. He took the drugs the night before. His jacket pockets also contained an Advair disc for asthma and approximately \$47.

He first became aware that a student took his jacket and consumed the alcohol when he talked to the head of security and was shown the video. When he realized his jacket was missing, he began looking for it, and then went to the head of security to ask about it. When asked what was missing, he only said his money was missing. He did not say anything about nips bottles because he did not know the nips bottles were in his pocket. When the head of security asked if the nips bottles were his, he said they were not and could not be his. But then he saw the video and realized they were his and that he had made a big mistake.

He went home after his drug and alcohol testing at Concentra and reported to work the next day. He continued to work without any issue from March 24, 2022, until September 2022. He was served the PNDA, and the District gave him the option to go to detox and rehab. The District referred him to a rehab program, and he attended beginning in September 2022. While at Immersion, he did not contact the District because he did not have a phone. He believed he was doing what he needed to do to keep his job. When discharged from Immersion, he returned home.

Both drugs and alcohol were a problem. He had been taking drugs at least a year prior to the incident. He knew he had a drug problem, so he asked the union for help. He never took any drugs while at work and was sober at work. He did not take drugs every day but did take them approximately every other day. Sometimes he would miss a day or two. When the feeling came, he took drugs, but he could do his job and it did not affect him. He never had an incident before involving drugs. He asked the union for help before the incident because he needed and wanted help. He was looking for rehab places voluntarily prior to this incident. He did not enter any rehab program until labor relations started working with him. He signed the Agreement with the Board and agreed to comply with the terms, and he thought he was complying. He called up Moore within twenty-four hours, and she sent him to Princeton House. He was sent to Immersion and assumed it was by the Board. He was required to maintain contact with the assigned EAP case manager, but he did not know where they were. He did not call Moore when he left

Princeton House because he did not have a phone. He had to sign the Agreement to keep his job. He did not understand it. He thought all he had to do was go to Florida and finish the program and then return to work. He does not remember when the October 12, 2022, letter from Immersion was generated or when he first obtained that letter. He does not remember providing it to the Board prior to the departmental hearing. He had no contact with Moore after the initial contact. He did not contact Chavis. He does not remember having the Princeton House or Immersion documents. He did not send any documents to the EAP case manager or to the Board.

He does not have a drug problem anymore because he is too old for that. He did not stop drugs immediately after the program, but he is not like he was then. He was really hooked then. He still smokes marijuana. He occasionally drinks alcohol. If he returns to work, he would not be under the influence of drugs or alcohol. He knows he messed up. It will not happen again. He is struggling and really needs his job back. He is required to operate equipment like lawnmowers and knows he cannot be impaired while on duty because it would be dangerous. He wants to return to work as a custodian and is in a place personally and health-wise where he feels he can return and perform his job functions. He made a mistake and did not mean to hurt anyone. He apologizes to the student and her parents.

LEGAL ANALYSIS AND CONCLUSIONS

N.J.S.A. 11A:1-1 through 12-6, the "Civil Service Act," established the Civil Service Commission in the Department of Labor and Workforce Development in the Executive Branch of the New Jersey State government. N.J.S.A. 11A:2-1. The Commission establishes the general causes that constitute grounds for disciplinary action, and the kinds of disciplinary action that may be taken by appointing authorities against permanent career service employees. N.J.S.A. 11A:2-20. N.J.S.A. 11A:2-6 vests the Commission with the power, after a hearing, to render the final administrative decision on appeals concerning removal, suspension or fine, disciplinary demotion, and termination at the end of the working test period of permanent career service employees.

N.J.A.C. 4A:2-2.2(a) provides that major discipline shall include removal, disciplinary demotion, and suspension or fine for more than five working days at any one time. An employee may be subject to discipline for reasons enumerated in N.J.A.C. 4A:2-2.3(a), including "incompetency, inefficiency or failure to perform duties," "inability to perform duties," "conduct unbecoming a public employee," and "other sufficient cause." N.J.A.C. 4A:2-2.3(a)(1), (3), (6), and (12).

The Notice of Disciplinary Action reflects that Kelly was charged with conduct unbecoming a public employee, inability to perform duties, incompetency, inefficiency or failure to perform duties, and other sufficient cause. In appeals concerning such major disciplinary actions, the burden of proof is on the appointing authority to establish the truth of the charges by a preponderance of the believable evidence. N.J.A.C. 4A:2-1.4; N.J.S.A. 11A:2-21; Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

The District's policy (File Code 4119.23) regarding, inter alia, possession or use of drugs/alcohol prohibited, states, in pertinent part:

Alcoholic Beverages

The use of alcoholic beverages in/on any worksite is prohibited. Violations of this prohibition may subject a district employee to disciplinary action, which may include, but not be limited to, nonrenewal, suspension, or termination at the discretion of the Superintendent recommendation to the local school board.

Substance Abuse

District employees are not permitted on any worksite after having ingested any controlled dangerous substance or drug (other than a prescription drug or an over-the-counter medication) or after having consumed any alcoholic beverage. Violations of these provisions shall result in disciplinary action against the district employee.

The unlawful manufacture, distribution, dispensing, possession of, use of or sale of any narcotic drug, hallucinogenic drug, amphetamine, barbiturate, marijuana or any other controlled substance on or in any worksite is prohibited. Any violation of this policy is grounds for termination of employment and may

subject the district employee to prosecution as well as termination.

[R-K.]

The District's policy (File Code 4219.23) regarding employee substance abuse was referred to in the PNDA and cross-referenced by File Code 4119.23, but was not presented at the hearing. Kelly's alcohol test was negative; thus it appears there was no "use of alcoholic beverages in/on" school. However, the policy also reflects that "District employees are not permitted on any worksite after having ingested any controlled dangerous substance or drug (other than a prescription drug or an over-the-counter medication)." Kelly testified that he took the drugs the night before and he tested positive for opiates and morphine.

There was no evidence presented of any deficiency in Kelly's work, and I **CONCLUDE** that the charges of inability to perform duties and incompetency, inefficiency or failure to perform duties have not been proven. However, the witnesses, including Kelly, testified that alcohol and drugs are not permitted on school property, and there are policies prohibiting the same. N.J.A.C. 4A:2-2.3(a)(6) does not define conduct unbecoming but courts have held that conduct unbecoming a public employee is "any conduct which adversely affects . . . morale or efficiency . . . [or] which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (quoting In re Zeber, 156 A.2d 821, 825 (1959)); Karins v. Atl. City, 152 N.J. 532, 554 (1998). A finding of conduct unbecoming need not be predicated upon violation of any 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. In re Emmons, 63 N.J. Super. at 140. What constitutes conduct unbecoming a public employee is primarily a question of law. Karins v. Atl. City, 152 N.J. at 553.

In violation of District policy, Kelly brought alcoholic beverages to school. Unfortunately, his alcohol was discovered and consumed by a child, resulting in the child being evaluated by the school nurse, her parents being summoned to the school, and the

child being transported for medical attention. The incident also resulted in considerable disruption to the school's operations. Kelly tested positive for opiates and morphine, and despite his signed Agreement with the District, he failed to comply with the terms of the Agreement and provided no documentation of any substance-abuse treatment to the District. As such, I **CONCLUDE** that Kelly's conduct was unbecoming a public employee.

With respect to the penalty, the Civil Service Commission may increase or decrease the penalty imposed by the appointing authority, though removal cannot be substituted for a lesser penalty. N.J.S.A. 11A:2-19. When determining the appropriate penalty, the Commission must utilize the evaluation process set forth in West New York v. Bock, 38 N.J. 500 (1962), and consider the employee's reasonably recent history of promotions, commendations, and the like, as well as formally adjudicated disciplinary actions and instances of misconduct informally adjudicated. Since West New York v. Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct: to support the imposition of a more severe penalty for a public employee who engages in habitual misconduct, and to mitigate the penalty for a current offense. In re Herrmann, 192 N.J. 19, 30–33 (2007). However, in an instance where an employee commits an act sufficiently egregious, removal may be appropriate notwithstanding the lack of a prior history of infractions. See, e.g., In re Herrmann, 192 N.J. 19. According to the Supreme Court, progressive discipline is a worthy principle, but it is not subject to universal application when determining a disciplined employee's quantum of discipline. Id. at 36.

Although progressive discipline is a recognized and accepted principle that has currency in the [Civil Service Commission's] sensitive task of meting out an appropriate penalty to classified employees in the public sector, that is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, 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.

Thus, 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. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580, 410 A.2d 686 (1980); Bowden v. Bayside State Prison, 268 N.J. Super. 301, 306, 633 A.2d 577 (App. Div. 1993), certif. denied, 135 N.J. 469, 640 A.2d 850 (1994).

[Id. at 33–34.]

The theory of progressive discipline is not a fixed and immutable rule to be followed without question, as some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007). The Supreme Court has noted that “the question for the courts is ‘whether such punishment is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one’s sense of fairness.’” Ibid. (quoting In re Polk License Revocation, 90 N.J. 550, 578 (1982)). The Supreme Court also noted that the Appellate Division has likewise acknowledged and adhered to this principle, upholding dismissal where the acts charged, regardless of prior discipline, warranted the imposition of the sanction. Id. at 485.

Kelly has no prior disciplinary history. Nevertheless, of paramount concern are his job functions, which include operation of potentially hazardous equipment, and his job location, which is inside a school. Although appellant presented an October 12, 2022, letter from Immersion, said letter was not presented at the October 25, 2022, departmental hearing or thereafter, despite the record being left open for Kelly to submit any documentation. There was no explanation for the failure to present the letter to the District or the hearing officer at the time. Further, although a printout reflects that Kelly “completed treatment” and the October 22, 2022, letter reflects that he “completed treatment” on October 12, 2022, after twenty-seven days in the program, Kelly admitted that he still had a substance-abuse problem after he returned. However, there was no documentation of any further treatment or of any follow-up with a psychiatrist, as noted in his aftercare instructions. Kelly also admitted that he did not comply with the terms of the Agreement. Although Kelly was apologetic and did not intend for a student to be injured, the seriousness of the incident, his noncompliance with the Agreement, the absence of

any follow-up or evidence that there is not an ongoing substance-abuse problem, and the safety considerations and risk of harm unfortunately render Kelly unsuitable for continuation in his position in a school, and I **CONCLUDE** that termination was appropriate.

ORDER

I hereby **ORDER** that the charges of conduct unbecoming a public employee and other sufficient cause are **SUSTAINED**, and that the penalty of termination is **AFFIRMED**.

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.

June 10, 2024



DATE

KELLY J. KIRK, ALJ

Date Received at Agency:

June 10, 2024

Date Mailed to Parties:

June 10, 2024

am

APPENDIX

LIST OF WITNESSES

For Appellant:

James Kelly

For Respondent:

Anthony Jackson

Atiba Buckman

Jacquelin Chavis

EXHIBITS IN EVIDENCE

For Appellant:

A-1 Princeton House letter & invoice, dated December 19, 2023

A-2 Aftercare Instructions

A-3 Immersion letter, dated October 12, 2022

A-4 Immersion printout

For Respondent:

R-A Final Notice of Disciplinary Action

R-B Job Specification for Custodial Worker

R-C Surveillance Video

R-D Security Incident Report (Slade)

R-E Security Incident Report (Cullars)

R-F Report of Incident

R-G Investigation Report (Jackson)

R-H Conduct Unbecoming Memorandum

R-I Specimen Results Certificate

R-J Breath Alcohol Testing Form

R-K File Code 4119.23 Policy

R-L Conditions of Employment Agreement

R-M Charles Nechtem Associates, Inc., letter and timeline