STATE OF NEW JERSEY

In the Matter of N.B., Township of Lakewood, Department of Public Works	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket No. 2024-1324 OAL Docket No. CSV 00104-24	

ISSUED: APRIL 27, 2026

The appeal of N.B., a Municipal Recycling Coordinator[1] with the Township of Lakewood, Department of Public Works, of his removal, effective November 28, 2023,[2] on charges, was before Administrative Law Judge Jeffrey N. Rabin (ALJ), who rendered his initial decision on February 25, 2026. 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 attached ALJ's initial decision, including a thorough review of the exceptions and reply, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of April 8, 2026, accepted and adopted the Findings of Fact and Conclusions of Law as contained in the ALJ's initial decision and his recommendation to uphold the removal.

The Commission makes the following comments. As indicated above, the Commission thoroughly reviewed the exceptions filed by the appointing authority in this matter. The Commission finds the exceptions unpersuasive as the ALJ's findings and conclusions in upholding the removal were based on his thorough assessment of the record and are not arbitrary, capricious, unreasonable or legally incorrect.

[1] The appellant was permanent as a Truck Driver Heavy and was serving provisionally pending promotional examination procedures as a Municipal Recycling Coordinator at the time of his removal.
[2] The Final Notice of Disciplinary Action was issued on November 28, 2023 "immediately" removing the appellant. The appellant had been immediately suspended and was separated effective July 14, 2023.

Additionally, the Commission rejects the appellant's argument that the ALJ should have disqualified himself based on actual or perceived bias. Initially, the Commission notes that the appellant's claims are untimely and, technically, not properly before it. In this regard, any request by a party for an ALJ's disqualification must be made initially to the ALJ pursuant to *N.J.A.C.* 1:1-14.12(d). Further, if such a motion is made and a party wishes to further challenge its disposition, the party must then request interlocutory review of that determination pursuant to *N.J.A.C.* 1:1-14.10(j), (k), and (l). Those rules indicate that for issues of ALJ disqualification, any further interlocutory challenge must be filed with the *Director of the Office of Administrative Law*. Moreover, those rules indicate that such challenges can only be made interlocutory, and not to the agency head after the issuance of an initial decision. Accordingly, the matter of the ALJ's disqualification is not properly before the Commission. Nonetheless, as noted, the Commission has rejected the appellant's argument in that regard. *See In the Matter of Carlos Pina* (CSC, decided June 11, 2025).

As to the charges, the ALJ's findings that the appellant did not challenge his two previous failed alcohol tests and present a sufficient challenge to the reliability of the machine utilized in alcohol testing; he drove commercial vehicles pursuant to his commercial driver's license (CDL); he was in a safety-sensitive position; and he supervised employees in such positions all stemmed on the ALJ's assessment of the credibility of the witnesses. In this regard, the Commission acknowledges that the ALJ, who has the benefit of earing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See also, In re Taylor,* 158 *N.J.* 644 (1999) (quoting *State v. Locurto,* 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra).* The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri u. Public Employees Retirement System,* 368 *N.J. Super.* 527 (App. Div. 2004).

In this matter, the exceptions filed by the appointing authority are not persuasive in demonstrating that the ALJ's credibility determinations, or his findings and conclusions based on those determinations, were arbitrary, capricious or unreasonable. In this regard, the ALJ concluded that the appellant offered much contradictory testimony. For example, the appellant first indicated that he accepted the second failed alcohol test and the 60-day suspension because someone threatened his health insurance and later testified that he accepted it because he feared losing his job. However, the ALJ addressed this by stating:

Appellant has offered no legal arguments, statutes or caselaw which

> would permit reopening previous charges and disciplinary actions, and appellant's testimony regarding being coerced into accepting suspensions without appeal was found not to be credible as it was based on hearsay, unsupported by any residuum of corroborating evidence. As such, I **CONCLUDE** that appellant voluntarily waived his rights of appeal on the first two failed alcohol tests and that the time period for appealing those earlier failed tests has passed.

Additionally, the appellant gave contradictory testimony regarding his alcoholism and about whether he was terminated while on Family and Medical Leave Act (FMLA) leave. Furthermore, the ALJ indicated that:

> Appellant's case is based on challenging the failed Third Alcohol Test, but appellant failed to reconcile his claim that he was not drunk at six o'clock in the morning with his admission of having consumed eight alcoholic beverages the evening before. No other testimony was provided on behalf of appellant to confirm the number of drinks he had consumed prior to the 6 a.m. Third Alcohol Test or over what period of time he had consumed them. No expert or medical testimony was proffered to explain appellant's weight and alcohol absorption rate and other possible physical traits of [the appellant] in light of his admission that he consumed eight alcoholic beverages in the course of five hours. I found appellant's testimony to be self-serving, rehearsed, unsupported by other evidence, and ultimately lacking credibility.

However, the ALJ found the testimony of the appointing authority's witnesses credible. In addition, while the appellant claims that the ALJ failed to address his FMLA/disability claims as there was no "interactive process," the ALJ found that the appointing authority engaged in an "interactive process," notwithstanding that it did not know the appellant had a disability of alcoholism and the appellant never sought help or advised that he had the disability as the appointing authority sent the appellant for alcohol rehabilitation treatment on all three occasions when he failed the alcohol test regardless.

Moreover, the appellant contends that his actions did not warrant a penalty of removal given that it was based on a medical issue. Similar to its review of the underlying charges, the Commission's review of the penalty is *de novo*. In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). Further, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the principle of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary

infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007). In the instant matter, the appellant failed three separate alcohol tests, including testing above both the federal and collectively negotiated limits. The record evidenced that the appellant drove commercial vehicles pursuant to his CDL, was in a safety-sensitive position, and supervised employees in such safety-sensitive positions. Furthermore, the tenets of progressive discipline were followed in this matter. The appellant had received a 30-day suspension and a 60-day suspension for his prior alcohol violations. Notwithstanding the appellant's claims that he is being punished for having a disease, the appointing authority cannot have its employees driving Township owned vehicles, which include large trucks, while intoxicated. Accordingly, it is clear that removal is the appropriate penalty.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission, therefore, affirms that action and dismisses the appeal of N.B.

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 8TH DAY OF APRIL, 2026

Mary Cruz
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Dulce A. Sulit-Villamor
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 00104-24
AGENCY DKT. NO. 2024-1324

IN THE MATTER OF N[redacted] B[redacted],
TOWNSHIP OF LAKEWOOD,
DEPARTMENT OF PUBLIC WORKS.

Desha L. Jackson, Esq., for appellant, N[redacted] B[redacted] (Desha Jackson Law Group, LLC, attorneys)

Steven Secare, Esq., for respondent, Township of Lakewood, Department of Public Works (Secare & Hensel, attorneys)

Record Closed: January 12, 2026 Decided: February 25, 2026

BEFORE **JEFFREY N. RABIN,** ALJ:

STATEMENT OF THE CASE

Appellant, N[redacted] B[redacted] (B[redacted] or appellant), a former employee of the Department of Public Works (DPW) for respondent, Township of Lakewood (Lakewood or respondent), appeals the termination of his employment by respondent for failing a third alcohol test, resulting in the following charges pursuant to N.J.A.C. 4A:23-2-3: inability to perform duties; conduct unbecoming a public employee; neglect of duty; and other sufficient causes—violation of agreement between Lakewood and Teamsters Local 97.

The appellant denies the allegations and seeks to return to his position as the Lakewood Municipal Recycling Coordinator.

PROCEDURAL HISTORY

On July 14, 2023, respondent issued a Preliminary Notice of Disciplinary Action (PNDA), immediately suspending appellant from his position. On November 28, 2023, respondent issued a Final Notice of Disciplinary Action (FNDA) sustaining the charges and the removal of appellant from his position. Appellant, as a pro se litigant, filed a timely notice of appeal on November 30, 2023.

The Division of Appeals and Regulatory Affairs of the Civil Service Commission transmitted this case to the Office of Administrative Law (OAL), where it was filed on December 26, 2023, as an expedited case. N.J.S.A 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Appellant retained the above-referenced legal counsel as of January 10, 2024. By letter, dated February 14, 2024, appellant waived this case being treated as an "expedited" filing, and this matter was subsequently treated as a standard-time due process petition.

On October 9, 2024, appellant filed a motion to compel discovery. After oral argument on October 18, 2024, this Tribunal granted appellant's motion and facilitated a work session between the parties in order for respondent to comply with appellant's discovery requests. At the completion of the work session, appellant's counsel advised this Tribunal that she was satisfied that her discovery requests had been complied with.

Hearings were initially held on December 18, 2024, and January 8, 2025.

On December 18, 2024, respondent objected to any discussion of the Family Medical Leave Act (FMLA), but this Tribunal ruled in favor of appellant.

On January 8, 2025, respondent objected to the planned testimony of two appellant witnesses, Alexandra Minnich and Gavin Knox. Respondent also objected to

appellant's attempts to challenge the results of the first two failed alcohol tests, claiming that the only matter before this Tribunal was appellant's challenge to the results of the third alcohol test from July 14, 2023 ("Third Alcohol Test"). After oral argument, this Tribunal ruled in favor of respondent. While this Tribunal initially was willing to have Minnich and Knox testify solely to prove that appellant was a recovering alcoholic prior to his termination, such testimony was no longer required because respondent stipulated to that fact on the record, and because Minnich and Knox would only be able to provide firsthand testimony as to appellant's rehabilitation progress post-termination; no proffer had been made that they had ever treated appellant prior to his termination or at any time subsequent to his first two failed alcohol tests. Rather, appellant-counsel proffered that Minnich would testify as to the general definition of "alcoholism," and Knox would testify as to appellant's post-termination treatment. Respondent's objection was sustained, with a holding that both of these areas of testimony lacked relevancy to whether or not appellant failed the Third Alcohol Test.[1] No interlocutory appeal of this ruling was filed by appellant.

Regarding respondent's objection to appellant's attempt to litigate the first two failed alcohol tests, this Tribunal had already ruled that the only legal issue transmitted to OAL was whether appellant failed the Third Alcohol Test. The records indicated that appellant had accepted the results of the first two failed alcohol tests without appealing those results, and had voluntarily accepted first a thirty-day and then a sixty-day suspension; accordingly, this Tribunal reiterated that the only matter to be heard by this tribunal concerned the results of the Third Alcohol Test.

At the close of respondent's case on January 8, 2025, appellant moved for a "directed verdict," treated by this Tribunal as a motion to dismiss. This Tribunal paused the proceedings for consideration before denying the motion to dismiss.

[1] Appellant-counsel speculated in her motion brief, and argued extensively during the hearings, that this Tribunal did not "understand alcoholism," and that respondent's termination of appellant was based on the potential for "relapse." As set forth in the Order of February 24, 2025, this was mere speculation by appellant that the purpose of the termination was relapse; respondent stated many times on the record that it worked with appellant to help him keep his job after the first two failed alcohol tests, but that appearing at work in a state of intoxication and failing a third alcohol test were the grounds for the termination.

On or about February 3, 2025, appellant filed a motion for reconsideration. This Tribunal ruled, by Order dated February 24, 2025, that appellant's motion for reconsideration offered no new arguments or evidence other than that had been argued by the appellant at the hearing and in the verbal motion to dismiss, and that the motion was an attempt to argue the ultimate merits of the case. This Tribunal affirmed its decision not to allow testimony regarding the first and second failed alcohol tests, and not to allow Minnich and Knox to testify to any issues other than alcohol treatment prior to appellant's termination.

Prior to appellant's breath test witness (Herb Leckie) being called, and without leave of the Tribunal, appellant obtained an audio copy of the testimony of Anthony Morreale (respondent's "Life-Loc"/alcohol test witness). Appellant did not provide a copy of the recording to opposing counsel or to the Tribunal. Leckie admitted to having listened to Morreale's testimony on February 2, 2025.

A third hearing date was held on April 16, 2025. At the completion of the hearings, transcripts were to be ordered, and the parties were given additional time to submit briefs due to appellant-counsel scheduling issues. The parties ultimately opted not to procure transcripts of the proceedings. Respondent's post-hearing brief was received on or about August 15, 2025. Appellant's post-hearing brief was received on or about September 30, 2025. After issues with the formatting of appellant's brief, the record was closed on October 17, 2025. Because appellant-counsel included in her summation brief a section purporting to be a second motion for me to recuse myself, the record was reopened on or about October 25, 2025.

By Order dated December 12, 2025, appellant's motion for recusal was denied. No appeal of the denial was filed by appellant. Pursuant to the terms of that Order, the record was closed on January 12, 2026.

FACTUAL DISCUSSION AND FINDINGS

Undisputed facts

Respondent stipulated that appellant is an "alcoholic" and a "recovering alcoholic."

Testimony for respondents

Patrick Donnelly had been Lakewood Township Manager for over four years, after being Director of Lakewood's Division of Public Works (DPW). Appellant worked for him, having been promoted by Donnelly in 2017. Even with 169 DPW employees and 550 employees in general, Donnelly never saw any racism.

Lakewood Township policies addressed alcohol use. A test over 0.02 percent (blood alcohol level) subjected an employee to discipline or discharge from their employment. (Exh. R-1.) Policy section J, paragraph three, addressed the disciplinary process. During Donnelly's time, more than ten Lakewood employees were charged with exceeding the alcohol limit, both Black and White employees, and most of those employees resigned their positions.

The Code of Federal Regulations (C.F.R.) sets the blood alcohol limit at 0.04 percent. (See 49 C.F.R. part 382.)

The PNDA (Exch. R-2) was dated July 21, 2021. Appellant's blood alcohol levels for the two tests that day were 0.047 and 0.050 percent. Appellant did not appeal the charge and voluntarily agreed to a thirty-day suspension and to participate in the Employee Assistance Program (EAP), an intensive, voluntary outpatient program. The collective bargaining agreement (CBA) contract called for a thirty-day suspension for a first failed alcohol test, and appellant accepted the suspension after discussion with his shop steward. An employee who did not voluntarily go to EAP would then be required to participate in the Supervisor Assistance Program (SAP). Appellant completed EAP and was given the accommodation of being able to use some sick time before returning to work.

The PNDA for the second failed alcohol test was dated August 2, 2022. (Exh. R-3.) The two blood alcohol levels were 0.035 and 0.033 percent, both exceeding the Township's 0.02 level. Appellant again waived his right to appeal the charge, voluntarily agreed to a sixty-day suspension, and agreed to participate in EAP after discussion with his shop steward. Appellant completed EAP and again was given the accommodation of being able to use some sick time before returning to work. Respondent Lakewood paid appellant's medical benefits contributions.

The PNDA for the failed Third Alcohol Test was dated July 14, 2023. (Exh. R-4.) Appellant B[redacted] drove a Township-issued vehicle to work that morning, and at 6:00 a.m., he arrived and was administered a random alcohol test. The two resulting blood alcohol levels were 0.046 and 0.048 percent, both exceeding the Township's 0.02 level. Appellant was taken by ambulance to a hospital to prevent him from harming himself. Nobody advised respondent when appellant was released from medical care, but he was cleared to return to work on October 10, 2023, because he had not yet been disciplined for the failed Third Alcohol Test. Respondent Lakewood paid appellant's medical benefits contributions until October 2023.

At that time, Donnelly felt that appellant needed help for an alcohol problem, and respondent continued paying appellant's medical contributions. Even after terminating appellant's employment, respondent continued to help appellant find new employment; Donnelly helped appellant get the job he currently works at.

Donnelly had no racial prejudice or personal dislike against appellant, but did not want him back in his position with Lakewood because appellant B[redacted] failed three alcohol tests and had driven to work in a Township vehicle while intoxicated.

On cross-examination, Donnelly explained that any employee subject to a CBA, such as appellant, was subject to the Township's 0.02 percent alcohol level and could be fired if an alcohol test exceeded 0.02 percent.

Appellant has a commercial driver's license (CDL). Federal CDL guidelines allow for random alcohol testing. Appellant drove a Township-owned vehicle. He had previously had an accident in a Township vehicle.

When questioned as to an "interactive process," Donnelly said it was an individualized assessment, like that provided by Donnelly to all employees. Donnelly clarified that he was not a substance abuse evaluator, although he had some training in the Americans with Disabilities Act (ADA); he relied on the CBA requirement of intensive outpatient rehabilitation. Any time an employee stated he had an issue, Donnelly would provide help.

Appellant was the DPW recycling department head. Every DPW employee was in a "safety-sensitive" position. It was routine for appellant B[redacted] to drive vehicles that would require a CDL. In fact, on the day of the last random alcohol test appellant drove to work in a Township vehicle that was assigned to him. The Department of Transportation (DOT) Rules and Regulations and the Federal Motor Carrier Safety Administration regulations were designed to ensure the safety of the public, the employee and the transportation industry.

After appellant was recalled to the witness stand, Mr. Donnelly was recalled as a rebuttal witness for respondent. He contradicted appellant's testimony that he never drove commercial vehicles, stating that appellant did drive commercial vehicles in his role as supervisor; Donnelly saw appellant drive dump trucks and trash collection trucks both before and after appellant became municipal recycling coordinator.

Anthony Morreale was the owner and president of Tri-State Safety Solutions. Tri- State performed drug and alcohol consulting and testing for 600–700 clients, such as OSHA, DOT, Cape May Coast Guard and various trucking companies. He has provided this service to Lakewood since 2019. He had received training on testing services from both the Township and the DOT. Morreale was admitted as an expert in drug and alcohol testing. He had been admitted as an expert in alcohol breath tests in other states.

Morreale supervised Madison Peterson, the breath alcohol technician, who performed the Third Alcohol Test. She was a certified "Life-Loc" operator, had been employed by Tri-State Safety Solutions but had gone on to other employment out-of-state. (Exh. R-5.) She had performed thousands of alcohol tests. Neither party called Ms. Peterson as a witness. Life Loc used a Phoenix 6.0 BT machine for alcohol testing, a machine recognized and approved by the DOT.

Appellant was subject to random testing due to two prior failed alcohol tests. (Exh. R-6.) Morreale explained the protocols followed by Peterson, including an "Evidential Blood Alcohol" test to help ensure that the testing equipment was not purchased outside the normal processes, i.e., bought on eBay. Machines were stored in Morreale's office to ensure against air temperature changes. Machines were calibrated before testing occurred. The test-taker breathed into a replaceable nozzle in a machine showing all zeroes. After the first test, they waited fifteen minutes and then administered a second test, without the test-taker being able to leave. An "error" signal would come up if a test-taker did not blow hard enough. DOT had a 0.04 limit for alcohol test results. DOT did not recognize blood testing, so respondent used only breath-based tests, like those used by police departments.

On July 14, 2023, appellant first "blew" a 0.046 percent. An employee of Lakewood Township could not go to work after blowing greater than 0.039. Accordingly, per protocol, Peterson immediately advised Morreale of appellant's failed alcohol test, and Morreale reminded her to wait the required fifteen minutes, recalibrate the machine, and conduct a second test. Using a new nozzle, appellant then blew a 0.048. Because the body is continually metabolizing, an increasing blood alcohol level at 6 a.m. meant appellant B[redacted] had just finished drinking prior to driving to work.

Testimony for appellant

Kelly Boucher had been assistant director of human resources for Lakewood Township for six years. She had received discrimination training. Patrick Donnelly was her supervisor's supervisor; Donnelly did not supervise her work.

Boucher mentioned, without explaining, a concept referred to as an "interactive process" between an employer and employee, and mentioned the ADA, New Jersey disability laws, and accommodations at work. Boucher was responsible for approving employee "leave" requests. She dealt with employees directly. She handled FMLA.

If a doctor determined that an employee had a disability that kept them from performing their job, Boucher would advise the Township manager, and Boucher would hold an accommodation meeting or seek a second medical opinion. She did not have to offer someone an alternative job if that person could not perform that job. She testified that "alcoholism" is a disease under the ADA. The Township could not terminate a person in a "protected group" without cause. However, no accommodation would allow a person who was intoxicated to remain at work. Boucher was not aware of any alcoholics allowed to return to work. She did not state whether appellant was in a protected group.

Boucher was not involved with alcohol testing for employees with a CDL; CDL testing was conducted by an administrative assistant at the DPW. Boucher was only involved with alcohol testing for non-CDL employees if there had been an accident. Boucher was not involved in Township litigation. Every employee who had an accident in a municipal vehicle was tested for drugs and alcohol. She had no knowledge of any employee deemed an alcoholic who was not tested.

Appellant was the municipal recycling coordinator for the DPW. Boucher only dealt with appellant regarding the granting of his FMLA request. She was not familiar with any employee who had received FMLA for alcoholism who had not been disciplined.

Traci Kaplan was an outside contractor serving as a behavioral specialist and substance abuse counselor for Lakewood. She was a licensed therapist but did not meet with employees regarding an "interactive process."

Appellant never came to Boucher seeking EAP or help for alcoholism. After his second failed alcohol test, appellant met with Kaplan as his substance abuse counselor and then returned to his job as municipal recycling coordinator.

After his failed Third Alcohol Test, appellant applied for FMLA with a doctor's letter saying he needed to be away from work. Respondent Lakewood agreed to continue paying appellant while he was on FMLA. Kaplan approved appellant to return to work on September 9, 2023, but he did not return to work, and nobody heard from him. Respondent then extended appellant's FMLA through October 11, 2023. It was against Township policy for an employee to fail to return to work after a doctor approved their return.

It was not unusual for a person failing a third alcohol test to be terminated. Appellant's termination did not happen while he was on FMLA.

N[redacted] B[redacted], the appellant, started working for respondent on April 3, 2006, as a DPW laborer. He was promoted to being a driver for the Township in 2007. He was promoted to municipal recycling coordinator on July 4, 2017. His last day working for respondent was July 14, 2023. He had an associate's degree and was a "certified recycling professional."

Appellant received his CDL in 1999 and formerly drove buses. CDL holders are subject to random alcohol testing. He had not failed any alcohol tests prior to 2021.

A 0.02 alcohol test result was a "positive" test under Township rules. A 0.04 was a DOT infraction. Appellant opined that a result under 0.04 meant your employer had to send you home and then retest, and that there usually was no suspension involved. Appellant said his designated employee representative (D.E.R.) told him that if he challenged the results of an alcohol test, he would "lose his health insurance," so appellant accepted the sixty-day suspension for his second failed test "so he'd not lose his job."

After his first failed alcohol test in 2021, appellant received outpatient care as part of the thirty-day suspension he agreed to. He did not request any alternatives to the suspension.

Appellant testified that while driving, he had previously hit and killed a motorcyclist, and "I assume this put me in a bad way mentally. . . this triggered my alcohol use more."

Appellant testified that after the failed Third Alcohol Test, he entered inpatient alcohol rehabilitation. His last drink was on July 13, 2023, and he came to realize that he was an alcoholic. He applied for FMLA. He was terminated on November 28, 2023, and his health insurance was cancelled by respondent on November 30, 2023. Around that time, he paid Traci Kaplan $500 to help him get his CDL restored, which happened in January 2024. She got him into Alcoholics Anonymous.

He was unaware that his doctor sent a letter on September 9, 2023, opining that appellant could return to work on September 22, 2023; appellant believed his return to work date was October 10, 2023, the date his FMLA had been extended to. The PNDA charging him with failing to return on September 22, 2023, was later rescinded by respondent. However, appellant later testified that on September 22, 2023, he had in fact seen the doctor's letter saying he could return on September 22, 2023.

Appellant was recalled to the witness stand. He offered the conclusion that a test result over 0.04 was a violation when one had a CDL, which he had since 1999.

On July 14, 2023, he punched in to work at 5 a.m., and at 6 a.m., he was told he had to take an alcohol test. He took the test in the cafeteria in front of fifteen people, some of whom were there for breath tests. He was not in a private area, as required by DOT regulation. Paterson (the test administrator) did not observe him during the fifteen-minute break between tests.

Appellant drank alcohol between 3 p.m. and 8 p.m. on July 13, 2023, consuming six Heineken beers and two Maker's Mark bourbons and cranberry juice. He had used mouthwash the morning of the Third Alcohol Test.

His Township-issued vehicle was a Ford F-150 pickup truck. As municipal recycling coordinator, he never drove a commercial vehicle between the years of 2017 and 2023, except to perhaps move a vehicle a few feet.

Appellant had crashed a municipal vehicle one time, but others have crashed cars and were never tested. Other employees used drugs and were not fired. His firing was racial and selective prosecution; others kept their jobs due to political connections or having better unions.

Herb Leckie was a State Police officer from 1983 through 2003. He had a juris doctorate. He had previously been deemed an expert witness in approximately twenty-five "Breathalyzer," field sobriety, and DWI/DUI-law cases in New Jersey and federal courts, and he was currently a breath test consultant. He had been a breathalyzer operator in 1984. He took a course taught by the inventor of the Breathalyzer, and he trained people on administering Breathalyzer tests. The within case was not a Breathalyzer case. New Jersey no longer uses Breathalyzer tests. Respondent had administered Life-Loc tests to appellant, using Life-Loc's "Phoenix 6.0 BT Workplace Breath Test." Leckie never gave instruction or taught courses on administering Life-Loc. Leckie never received training in Life-Loc. Leckie never worked with the Phoenix 6.0 BT Workplace Breath Test. Leckie was not present during appellant's Third Alcohol Test. Leckie was not an expert in DOT regulations.

Leckie admitted that on February 2, 2025, he listened to a recording of Anthony Morreale's testimony, although appellant did not provide a copy of the recording to opposing counsel or to the Tribunal, and did not provide respondent with copies of the notes Leckie had taken. Leckie stated that he was basing the opinions in his testimony on Morreale's testimony.

Leckie was qualified herein as an expert in general alcohol breath test knowledge, but not an expert in Life-Loc's Phoenix 6.0 BT Workplace Breath Test, and not an expert in DUI law with regard to breath tests. Appellant's motion to reconsider this qualification was considered and denied, as respondent correctly argued that this was not a DUI case.

Leckie opined that the key testimony would have to come from the operator of the breath test, to know if it had been administered correctly (such as with regard to changing the mouthpiece, eliminating radio signals, etc.) It must be noted that neither appellant

nor respondent called Madison Peterson, the breath alcohol technician, as a witness. Leckie himself testified that Ms. Peterson should have been called to testify.

Leckie testified that breath tests must be conducted in a "controlled environment," and without defining that, gave an example that electronic devices and other people must be removed from the testing area. Leckie was not present during the Third Alcohol Test and could not testify as to whether or not there was a "controlled environment."

Leckie reviewed printouts of the calibration data from the Third Alcohol Test. The machine calibrated between 0.038 and 0.043, which was the normal, expected tolerance. He testified that no breath test was absolute. Leckie confirmed that on July 14, 2023, the first test administered resulted in a reading of 0.046, and the second test resulted in a 0.048. Leckie said they should have performed another three to four tests but acknowledged that this is never done, and that state troopers never perform three to four repeated breath tests. Leckie also said that the alcohol reading from a breath test should be compared to the alcohol level in the blood, referring to a "partition rate." Leckie said Morreale failed to address appellant's partition rate. He testified that the breath test operator is not supposed to know partition rates.

Leckie confirmed that any reading over 0.04 is a "per se" automatic violation when operating a commercial vehicle. A person testing at 0.046 would not be permitted to drive a commercial truck. He defined a "commercial vehicle" as one weighing more than 26,000 pounds. Appellant had driven a Township-owned pickup truck to work the day of the Third Alcohol Test, but Leckie did not state whether appellant's Township-owned pickup truck qualified as a commercial vehicle. Leckie had no knowledge of whether appellant ever drove commercial vehicles during the workday.

Leckie admitted to not being familiar with the particular machine used to administer appellant's Third Alcohol Test, but he acknowledged that Life-Loc is approved by DOT. He acknowledged that Ms. Peterson had a Life-Loc certification as of July 7, 2023, which was in effect for appellant's Third Alcohol Test, and he did not dispute that Peterson was qualified to conduct the Third Alcohol Test. Leckie confirmed that most of his paid testimony was related to DUI cases.

FINDINGS OF FACT

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div.1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

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).

Patrick Donnelly testified clearly and was knowledgeable and seemingly honest in his testimony. He displayed a good memory for details, and great familiarity with Lakewood Township rules and appellant's case, though less familiarity with federal guidelines. He displayed concern for appellant's health and welfare. He remained calm on cross-examination, referring to written policies before giving his responses, and asking for clarification of appellant-counsel questions before answering. I found his testimony credible.

Anthony Morreale was a knowledgeable witness who explained his answers in clear detail. He was admitted as an expert in drug and alcohol testing. He displayed great expertise in the field of drug and alcohol testing. He did not administer the Third Alcohol Test, but one of the employees under his supervision did. (Again, Madison Peterson, who administered the test, was not called as a witness by respondent nor

subpoenaed to testify by appellant.) He explained the forms and protocols required in great detail. Morreale was hired by employers and has testified frequently on behalf of employers. He confirmed that DOT utilized breath tests for alcohol, not blood tests. I found him to be a credible witness.

Kelly Boucher testified in a clear, direct manner. She worked in the Lakewood Human Resources Department, but she was an assistant, not the supervisor of that department. She was unfamiliar with appellant's dates of employment. She did not recall many details throughout her direct testimony, and appellant-counsel did not use exhibits to refresh her memory. She was not deemed an expert in any field and was not admitted as an expert in human resources or alcohol testing. She reached certain legal conclusions without being deemed an expert in employee law or an expert in ADA and failed to provide citations to support her conclusions. She provided testimony that did not support appellant's claims, such as testifying that there are no accommodations available to allow a person who was drunk at work to remain at work, and that she was not aware of any alcoholics who were allowed to return to work. She discussed "protected groups" without discussing what they meant and without concluding that appellant was in any protected class. Her experience in alcohol testing was limited, and she did not display detailed knowledge of these tests. Her only responsibility in this context was scheduling pre-hiring breath tests for non-CDL employees; here, appellant was a CDL employee, and he was tested for alcohol after he was already a Lakewood employee. Boucher was not present for the Third Alcohol Test, but she was aware that appellant had failed three tests.

I ultimately can give only limited weight to Ms. Boucher's testimony.

N[redacted] B[redacted], the appellant, spoke clearly and was well-prepared. He offered lay opinions regarding alcohol testing, having not been deemed an expert in that field, and offered non-expert views of DOT regulations without any proof that he had familiarity with them. He discussed DOT alcohol rules without acknowledging that respondent had its own rules regarding alcohol use and testing. He offered unsubstantiated hearsay statements to explain why he accepted the results of his first two failed alcohol tests without appealing them. At one point, he testified that he accepted the second

suspension without appeal, the sixty-day suspension, because someone threatened to take away his health insurance. But later he contradicted himself and testified that he accepted the results of his second failed alcohol test without appeal because he feared losing his job. He offered unsubstantiated and unclear testimony about having hit a motorcyclist with his vehicle and killing him. He offered self-analysis as to what triggered his alcoholism, although he was not an expert in the field, and without offering expert medical or psychological testimony by a treating physician. He admitted during his testimony that he failed an alcohol test a third time, although the crux of his case was that he had not failed a third test. He claimed respondent offered him no help despite acknowledging that Lakewood sent him to alcohol rehabilitation on three separate occasions, and despite admitting that he told nobody about his alcoholism until he failed the Third Alcohol Test.

Appellant argued that he had been terminated while on FMLA, ignoring the fact that respondent had in fact rescinded the PNDA calling for his termination for failure to return to work on September 22, 2023, and the fact that his termination on November 28, 2023, occurred subsequent to the end of his FMLA on October 10, 2023. At one point, appellant testified that he had been totally unaware that his doctor submitted a letter to respondent indicating that appellant could return to work on September 22, 2023, but appellant later contradicted himself by testifying that he had seen the letter (on September 22, 2023).

Appellant testified to his recollection of the conditions surrounding the administering of the Third Alcohol Test, but failed to offer any corroborating testimony, such as he could have done by subpoenaing Madison Peterson, who administered the test. Appellant's case is based on challenging the failed Third Alcohol Test, but appellant failed to reconcile his claim that he was not drunk at six o'clock in the morning with his admission of having consumed eight alcoholic beverages the evening before. No other testimony was provided on behalf of appellant to confirm the number of drinks he had consumed prior to the 6 a.m. Third Alcohol Test or over what period of time he had consumed them. No expert or medical testimony was proffered to explain appellant's weight and alcohol absorption rate and other possible physical traits of Mr. B[redacted] in light of his admission that he consumed eight alcoholic beverages in the course of five hours.

I found appellant's testimony to be self-serving, rehearsed, unsupported by other evidence, and ultimately lacking credibility.

Herb Leckie was a last-minute witness, whose testimony was permitted by the Tribunal over respondent's objection. He was accepted as an expert in general alcohol breath test knowledge, but not an expert in the Life-Loc Phoenix 6.0 machine that had been used for appellant's third alcohol test, and not an expert in Driving Under The Influence (DUI) law as regards breath tests. He authored no expert report. He may be an expert in Breathalyzer tests, but the Breathalyzer was not used to test appellant. Leckie might have trained others on Breathalyzer testing, but he had never trained people or provided course instruction on Life-Loc. He never received any training on Life-Loc. He was not an expert in DOT regulations regarding CDLs, and he was unaware of whether appellant used his CDL to drive commercial vehicles. Leckie never worked with the Life-Loc 6.0 BT Phoenix machine before. Appellant called no other breath test expert to substantiate Leckie's testimony regarding Life-Loc. Leckie was not present during the Third Alcohol Test and provided no firsthand information. Leckie seemingly based his testimony on listening to a recording of the prior testimony of respondent's expert Anthony Morreale, a copy of which had not been provided to respondent or to the Tribunal prior to Leckie's testimony. Leckie admitted to making notes while listening to the Morreale testimony, but no copy of them was ever produced. The majority of Leckie's testimony was in relation to DUI matters, despite the within matter not being a DUI case.

Leckie offered hearsay testimony about how the Third Alcohol Test was conducted, despite having not been present during the testing, and despite claiming that he had never spoken with appellant. Leckie opined that performing two rounds of testing, as was done for the Third Alcohol Test, was not sufficient, and that three or four rounds were required; however, Leckie then testified that three or four rounds of testing are never done, and even state troopers do not administer an alcohol test more than two times. Leckie testified that the Life-Loc was supposed to be calibrated at 0.040, yet the first calibration-controlled test resulted in a calibration of only 0.038, and a second calibration result was 0.043. But Leckie subsequently testified that there is typically a calibration range, and that a range of 0.038 to 0.043 was a normal tolerance range.

Finally, I find that Leckie impeached his own testimony: he testified that he was unable to state whether the results of the two rounds of alcohol testing during the Third Alcohol Test were credible without hearing testimony from the operator of the test. Thus, Leckie could not provide a credible conclusion because appellant failed to produce Madison Peterson as a witness. While the burden of proof lay with the respondent in this matter, appellant could have bolstered his case and Leckie's credibility by introducing testimony from Madison Peterson.

I cannot give any weight to Mr. Leckie's testimony.

Therefore, after reviewing the testimony and evidence, I **FIND,** by a preponderance of credible evidence, the following additional **FACTS**:

Patrick Donnelly was respondent Lakewood's Township Manager, after previously serving as Director of Lakewood's DPW; Donnelly promoted appellant to the position of municipal recycling coordinator in 2017; Donnelly never saw any racism amongst the 169 DPW employees and 550 overall employees at Lakewood Township; per Lakewood Township policy, an alcohol test result of over 0.02 percent subjected an employee working under a CBA to discipline or discharge from their employment; during Donnelly's time, more than ten Lakewood employees were charged with exceeding the alcohol limit, both Blacks and Whites, with the majority of those employees choosing to resign their position; the Federal Motor Carrier Act, U.S.C.A. 49 CFR part 40, set the DOT alcohol limit at 0.04 percent for those in safety sensitive positions; appellant had a CDL, and federal CDL guidelines allowed for random alcohol testing; appellant drove a Township-issued Ford F-150 pickup truck vehicle; appellant had previously had an accident in a Township vehicle in which he killed a motorcyclist; every DPW employee was in a safety sensitive position; it was routine for appellant B[redacted] to drive vehicles that would require a CDL, and appellant continued to drive dump trucks and trash collection trucks both before and after becoming municipal recycling coordinator.

Appellant failed alcohol breath tests on two separate dates prior to the Third Alcohol Test; the first failed test and resulting PNDA were dated July 21, 2021; appellant did not appeal the charges and voluntarily agreed to a thirty-day suspension, and to

participate in the EAP, an intensive, voluntary outpatient program; appellant's union CBA called for a thirty-day suspension for a first failed alcohol test, and appellant accepted the suspension after discussion with his shop steward; appellant completed EAP, and was given the accommodation of being able to use sick time before returning to work; the PNDA for the second failed alcohol test was from August 2, 2022; appellant again waived his right to appeal the charge, and voluntarily agreed to a sixty-day suspension, and to participate in EAP, after discussion with his shop steward; appellant completed EAP, and again was given the accommodation of being able to use sick time before returning to work; respondent Lakewood paid appellant's medical benefits contributions after both suspensions.

Because appellant operated under a CDL and because he failed two prior alcohol tests, appellant was subject to random alcohol testing; the failed Third Alcohol Test and resulting PNDA were dated July 14, 2023; appellant drove a Township-issued Ford F-150 pickup truck to work that morning, and shortly after 6:00 a.m. was administered a random alcohol test by Madison Peterson of Tri-State Safety Solutions, Breath Alcohol Technician; Peterson was a certified Life-Loc operator, working under the supervision of Anthony Morreale, the owner and President of Tri-State Safety Solutions, and had performed thousands of breath tests; Peterson used the Life-Loc Phoenix 6.0 BT machine for appellant's Third Alcohol Test, a machine recognized and approved by the DOT; Peterson conducted an "Evidential Blood Alcohol" test to ensure that the testing equipment was not purchased outside the normal processes; the Life-Loc machine was stored in Morreale's office to ensure against air temperature changes; the Life-Loc was calibrated before the testing began; for the test, the test-taker would breathe through a replaceable nozzle into a machine showing all zeroes; after the first round of testing, Peterson advised Morreale that appellant had exceeded the applicable limits, and he advised her to continue following the standard protocols, which was to wait fifteen minutes, recalibrate the machine, then administer a second test, without the test-taker being able to leave.

The two resulting blood alcohol levels from the Third Alcohol Test were 0.046 and 0.048 percent, both exceeding the Township's 0.02 level and the DOT's 0.04 level; because a body is continually metabolizing, an increasing blood alcohol level at 6 a.m.

meant appellant B[redacted] had been drinking not long before driving to work; after the failed Third Alcohol Test, appellant was taken by ambulance to a hospital to preclude him from harming himself; appellant was cleared to return to work on October 10, 2023, having not yet been disciplined for the failed Third Alcohol Test; respondent continued to pay appellant's medical benefits contributions until October 2023; appellant was terminated by respondent on November 28, 2023, subsequent to the end of his FMLA on October 10, 2023, and thus appellant's termination did not happen while he was on FMLA; after terminating appellant's employment with Lakewood, respondent continued to help appellant find new employment, and helped him get his current job.

LEGAL ANALYSIS AND CONCLUSION

The issue before this Tribunal is whether appellant failed a third alcohol test, which indicated that he was intoxicated when he appeared for work on July 14, 2023.

As correctly set forth by appellant, in Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), the court found that "[i]n proceedings before an administrative agency . . . it is only necessary to establish the truth of the charges by a preponderance of the believable evidence and not to prove guilt beyond a reasonable doubt." In re Suspension or Revoc. License of Kerlin, 151 N.J. Super. 179, 184 n.2 (App. Div. 1977) ("Where disciplinary proceedings with respect to a profession or occupation are vested in an administrative agency in the first instance, the charges must be established by a fair preponderance of the believable evidence.") A preponderance of the evidence has been defined as that which "generates belief that the tendered hypothesis is in all human likelihood the fact." Martinez v. Jersey City Police Dept., OAL Dkt. No. CSV7553-02, Initial Decision (October 27, 2003) (quoting Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959)). "Fair preponderance of the evidence" is "the greater weight of credible evidence in the case; it does not necessarily mean the evidence of the greater number of witnesses but means that evidence which carries the greater convincing power to our minds." State v. Lewis, 67 N.J. 47, 49 (1975) (citing Model Jury Charge, Criminal, 3:180.); see also Zive v. Stanley Roberts, Inc., 182 N.J. 436, 457 (2005) (applying the standard to a wrongful termination). While credible hearsay evidence is admissible in administrative hearings to prove one's

case, pursuant to N.J.A.C. 1:1-15.5, the parties "must produce a residuum of competent evidence to prove any ultimate fact." Weston v. State, 60 N.J. 36 (1972).

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A.11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A. 1 1A:1-2(a). A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline, including removal. N.J.S.A. 1 1A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. The general causes for such discipline are set forth in N.J.A.C. 4A:2-2.3(a).

This matter involves a major disciplinary action brought by the respondent against the appellant. Appellant's filing of an appeal required the OAL to conduct a hearing *de novo* to determine the appellant's guilt or innocence as well as the appropriate penalty, if the charges were sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). Respondent had the burden of proof to establish by a fair preponderance of the credible evidence that appellant was guilty of the charges. Atkinson, at 143. Again, evidence is found to preponderate if it establishes the reasonable probability of the fact alleged and generates a reliable belief that the tendered hypothesis, in all human likelihood, is true. Loew, at 104.

Appellant has been charged pursuant to N.J.A.C. 4A:23-2.3 with inability to perform duties; conduct unbecoming a public employee; neglect of duty; and other sufficient causes--violation of agreement between Lakewood and Teamsters Local 97.

Regarding Conduct Unbecoming a Public Employee, N.J.A.C. 4A:2-2.3(a)(6), "Conduct unbecoming a public employee" encompasses conduct that adversely affects

the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Pursuant to N.J.A.C. 4A:2-2.3(a)(7), Neglect of Duty can arise from an omission or failure to perform a duty as well as negligence. The term "neglect" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" signifies conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957). Neglect of duty can arise from omission to perform a required duty as well as from misconduct or misdoing. State v. Dunphy, 19 N.J. 531, 534 (1955). While "neglect of duty" is not specifically defined in the New Jersey Administrative Code, it has been interpreted to mean that an employee has neglected to perform and act as required by his or her job title or was negligent in its discharge. Avanti v. Dep't of Mil. and Veterans Affs., 97 N.J.A.R.2d (CSV) 564; Ruggiero v. Jackson Twp. Dep't of Law and Safety, 92 N.J.A.R.2d (CSV) 214.

Respondent argued that appellant was not terminated because he was an alcoholic, but purely for the fact that, pursuant to DOT and Lakewood Township rules and regulations, he was at work and over the maximum alcohol limit on three occasions. An employer like Lakewood Township must follow the federal rules and its own rules for the protection of the public and the employee. Respondent pointed to the federal regulations creating DOT requirements, set forth in 49 C.F.R section 40 et. seq., for their argument that safety-sensitive employees who held commercial driver licenses were prohibited from consuming alcohol while on duty or within four hours before performing safety-sensitive duties. The regulations required that an employee must not report for duty or remain on

duty with an alcohol concentration of 0.04 or greater. The DOT regulations also stated that if an employee had an alcohol concentration between 0.02 and 0.039, they must be removed from safety-sensitive duties for at least twenty-four hours. Respondent has said several times that it wished appellant the best of luck in his recovery, but that failing three alcohol tests was sufficient grounds for termination.

Appellant has appealed his termination, arguing that there was an abuse of discretion. Appellant's first claim, that he has never been given an opportunity to challenge the validity of his positive test results, is incorrect on its face, and I have already ruled on this matter: appellant had the opportunity to appeal each of his first two failed alcohol tests and chose not to file appeals on either one. The first failed test and resulting PNDA were dated July 21, 2021. Appellant did not appeal the charges. Instead, he voluntarily agreed to a thirty-day suspension (as called for in appellant's CBA) and to participate in the outpatient Employee Assistance Program (EAP) after discussion with his shop steward. The PNDA for the second failed alcohol test was from August 2, 2022. Appellant again waived his right to appeal the charge and voluntarily agreed to a sixty-day suspension, and to participate in EAP after discussion with his shop steward.

Appellant has offered no legal arguments, statutes or caselaw which would permit reopening previous charges and disciplinary actions, and appellant's testimony regarding being coerced into accepting suspensions without appeal was found not to be credible as it was based on hearsay, unsupported by any residuum of corroborating evidence. As such, I **CONCLUDE** that appellant voluntarily waived his rights of appeal on the first two failed alcohol tests and that the time period for appealing those earlier failed tests has passed.

The case before this Tribunal is only about the failed Third Alcohol Test from July 14, 2023, and here the appellant has been given the opportunity to challenge the results of that test.

Appellant phrased its second claim as being that appellant "was targeted for impermissible and faulty drug and alcohol testing," and that respondent "failed to establish the reliability of the breathalyzer test used as a basis for Mr. B[redacted] termination." This

Tribunal will overlook the mistake made by appellant-counsel in referencing "breathalyzer" (sic) instead of the machine actually used for the third test, the Life-Loc Phoenix 6.0 BT.

Appellant claimed that respondent failed to produce the relevant calibration logs and failed to produce the relevant test operator for examination, and that both of these were deemed "foundational requirements" in the case of State v. Johnson, 42 N.J. 146, 171 (1964). Johnson may be a frequently relied-upon case and may have useful information in it. However, that case concerns a Driving While Intoxicated (DWI) charge, unlike the matter at hand. Further, Johnson specifically applied to a Breathalyzer case, unlike the within matter. Johnson was a criminal case, and the Tribunal therein grappled with whether the administrative authority met their burden of proving guilt of criminal charges "beyond a reasonable doubt," unlike the "preponderance of evidence" standard for the within appellant's case. Further, nowhere in Johnson did the New Jersey Supreme Court hold that calibration logs and test operator testimony were "foundational requirements" to establish drunk driving beyond a reasonable doubt. Thus, while the test operator might, *arguendo*, provide the best evidence, I **CONCLUDE** that a breath test operator's testimony was not an absolute requirement, as long as a party could otherwise establish the propriety of how its test was administered.

If anything is to be gleaned from the Johnson decision, it is its requirement for "competent, reasonably credible evidence." Johnson, at 161, citing 12 Rutgers L. Rev. at 484–485. That Tribunal, in upholding the drunk-driving conviction against Mr. Johnson, held that a decision must be based on "sufficient credible evidence." The court held that the statute in that case, N.J.S.A. 39:4-50.1 (not applicable to the within matter), neither detailed the particular kinds of alcohol tests which were acceptable nor did it specifically state which results were admissible in evidence, but found that the legislative inference was that the result of a "reliable test, properly administered, is admissible." Johnson, at 170.

It must be noted that appellant B[redacted], unlike the defendant in Johnson, did not challenge the general reliability of the particular breath test machine. In fact, the Johnson court held that the Breathalyzer used therein was sufficiently established and accepted as a scientifically reliable and accurate device for determining blood alcohol content, so as to

admit testimony regarding the results of a properly conducted test without any need for expert testimony as to the Breathalyzer itself. Appellant B[redacted] did not argue that the Life-Loc Phoenix 6.0 BT was inherently unreliable, and credible evidence was produced by respondent to establish that the Life-Loc Phoenix 6.0 BT machine was approved by DOT.

The standard in Johnson was that the proper administration of the test must be clearly established before the reading can be admitted in evidence. This includes proof that the equipment was in proper order, the operator was qualified, and the test was given correctly. Johnson, at 171.

Applying this standard to appellant B[redacted] appeal, the evidence proffered by respondent must be examined. Anthony Morreale provided credible testimony regarding the test administered to appellant on July 14, 2023. He was admitted as an expert in drug and alcohol testing and had been admitted as an expert in alcohol breath tests in other states. He was the owner and president of Tri-State Safety Solutions, a company that performed drug and alcohol consulting and testing for 600-700 clients, such as OSHA, DOT and the Cape May Coast Guard. He had received training on testing services from both the Township and the DOT.

Morreale's employee, Madison Peterson, was the breath alcohol technician who performed the B[redacted] Third Alcohol Test on July 14, 2023, working under Morreale's supervision. In fact, Peterson was in telephone contact with Morreale between rounds of testing on July 14, 2023. She was a certified Life-Loc operator and completed her training and received her certification on Life-Loc on June 7, 2023, shortly before appellant's test on July 14, 2023. She was a highly experienced test administrator, having performed thousands of alcohol tests. The Life- Loc Phoenix 6.0 BT was recognized and approved by the DOT for use in the breath testing of CDL holders for alcohol. Peterson's calibrations of the Life-Loc machine used for appellant were admitted into evidence as Appellant's Exhibit A-14, had been provided to appellant prior to the within hearing, and were also attached to the U.S. Department of Transportation (DOT) Alcohol Testing Form. Additionally, appellant did not challenge the calibration results themselves; their own witness, Herb Leckie, found that the calibrations were proper and within the normal range.

Appellant B[redacted] testified, without offering any credible corroborating evidence, that DOT required that breath testing be conducted in a private space with no other persons present, which appellant said had not occurred. However, appellant failed to provide any legal or regulatory citation confirming appellant's understanding of the rules. Further, there was no evidence other than appellant's own testimony that the testing did not take place as required by the regulations. Conversely, Peterson completed a DOT Alcohol Testing Form, in which she certified that "I have conducted alcohol testing on the above named individual [appellant B[redacted]] in accordance with procedures established in the US Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s), and that the results are recorded." (Exh. R-6.)

Appellant was subject to random testing due to two prior failed alcohol tests. Morreale explained the protocols followed by Peterson, including an "Evidential Blood Alcohol" test to help ensure the testing equipment was not purchased outside the normal processes, i.e., bought on eBay. The machine employed by Peterson was stored in Morreale's office to ensure against air temperature changes. The machine was calibrated before each round of testing occurred. Peterson called Morreale after the first test that day to announce that appellant had exceeded the DOT limit of 0.040, and Morreale reiterated the protocols to be followed when administering the second round of testing, which resulted in the 0.048 reading. I **FIND** that Morreale participated in the Third Alcohol Test given to appellant on July 14, 2023.

Having reviewed Peterson's submission and heard Morreale's credible testimony, and based on the above analysis, I **CONCLUDE** that respondent met its burden of proving by a preponderance of the credible evidence that the two breath tests given during the Third Alcohol Test were administered using a reliable breath test machine and were properly administered. I **CONCLUDE** that the breath test results of 0.046 and 0.48 from appellant's Third Alcohol Test were accurate alcohol test results. I **CONCLUDE** that appellant failed an alcohol test for a third time as an employee of respondent Lakewood Township.

Appellant argued that being tested at all for alcohol was improper because he was not a driver of a commercial motor vehicle (CMV). Although appellant-counsel argued this in her summation brief, nothing at the hearing was established through credible evidence.

Township Manager Donnelly's testimony was deemed credible, and it has been established as fact that appellant B[redacted] drove a Ford F-150 pickup truck that was owned by Lakewood Township and also drove Township dump trucks and trash trucks. Donnelly witnessed appellant driving dump trucks and trash trucks. Although appellant testified that he "never" drove commercial vehicles since becoming municipal recycling coordinator, he subsequently clarified that statement by testifying that he sometimes would move trucks short distances. Appellant's summation brief first stated that, "Mr. B[redacted], however, has not driven a commercial vehicle in five (5) years." But then appellant wrote that, "It could be said with certainty that Mr. B[redacted] rarely, if ever, drove any commercial vehicles during his tenure as a supervisor." These conflicting statements leave open the possibility that appellant sometimes drove a CMV.

Neither party introduced a definition for a CMV, but this Tribunal can take judicial notice that Lakewood Township gave appellant use of a truck, not a passenger vehicle, because of his role as municipal recycling coordinator, and thus, an argument can be made that the pickup truck was chosen because it had a truck-bed capable of carrying trash or recyclables as well as equipment. Appellant argued in his summation brief that there was no intent for his Township-owned truck to be used as a commercial vehicle, but there was no testimony as to "intent," and this statement also begs the question of why, if it was only for transportation to and from work, the Township gave appellant a truck instead of a passenger car.

One must then look to N.J.S.A. 39:3-10.11, which states that a "Commercial motor vehicle" or "CMV" means a motor vehicle or combination of motor vehicles used or designed to transport passengers or property:

> If the vehicle has a gross vehicle weight rating of 26,001 or more pounds or displays a gross vehicle weight rating of 26,001 or more pounds;
>
> If the vehicle has a gross combination weight rating of 26,001 or more pounds inclusive of a towed unit with a gross vehicle weight rating of more than 10,000 pounds;
>
> If the vehicle is designed to transport 16 or more passengers including the driver;

> If the vehicle is designed to transport eight or more but less than 16 persons, including the driver, and is used to transport such persons for hire on a daily basis to and from places of employment;
>
> If the vehicle is transporting or used in the transportation of hazardous materials and is required to be placarded in accordance with Subpart F. of 49 C.F.R. s.172, or the vehicle displays a hazardous material placard; or
>
> If the vehicle is operated by, or under contract with, a public or governmental agency, or religious or other charitable organization or corporation, or is privately operated, and is used for the transportation of children to or from a school, school connected activity, day camp, summer day camp, summer residence camp, nursery school, child care center, preschool center or other similar places of education.
>
> The chief administrator may, by regulation, include within this definition such other motor vehicles or combination of motor vehicles as the chief administrator deems appropriate.
>
> This term shall not include recreation vehicles.
>
> This term shall not include motor vehicles designed to transport eight or more but less than sixteen persons, including the driver, which are owned and operated directly by businesses engaged in the practice of mortuary science when those vehicles are used exclusively for providing transportation related to the provision of funeral services and which shall not be used in that capacity at any time to pick up or discharge passengers to any airline terminal, train station or other transportation center, or for any purpose not directly related to the provision of funeral services.

Accordingly, a CMV is a vehicle with a gross weight of 26,001 pounds. Per the Ford and Car & Driver websites, a Ford F-150 pickup truck with a 6.5-foot length cab weighs 4,391 pounds, with a 9,000-pound maximum available towing weight and a maximum payload of 1,859 pounds. Thus, if appellant's Township-issued pickup truck had a 6.5-foot cab and was fully loaded and towing the maximum weight, the overall weight would be 15,250 pounds, less than the 26,001-pound threshold. Regarding the other vehicles driven by appellant, various online sources indicate that while a dump truck's weight varies greatly, an empty light-duty truck can weigh anywhere from 10,000 to 28,000 pounds, while a

heavy-duty tandem or tri-axle truck can weigh 20,000 to 36,000 pounds empty, and up to 80,000 pounds fully loaded. The website trashtruckrental.com states that empty trash trucks weigh between 20,000 and 40,000 pounds and can weigh up to 60,000 pounds fully loaded. Neither party specified what type of trucks were used by the Lakewood Recycling Department or the weight of the trucks driven by appellant, but this Tribunal can take judicial notice, and I hereby **CONCLUDE** that dump trucks and trash trucks are CMVs. As I have already concluded that appellant sometimes drove dump trucks and trash trucks, I hereby **CONCLUDE** that appellant sometimes drove CMVs.

Appellant provided the State of New Jersey job description for a municipal recycling coordinator in its summation brief, which was that the coordinator "supervises employees at a recycling facility engaged in the maintenance, adjustment, and operation of machinery used to process solid waste material for reuse, and in the operation of mechanical equipment to transport, mix, screen, separate, aerate, and arrange a variety of substances to produce compost material; does other related duties." Although this did not specifically state that the supervisor was considered a "driver," it is not speculation to state that "other duties" could include assisting in the operation of machinery or driving recycling trucks, especially in conjunction with Township Manager Donnelly's testimony that appellant did in fact occasionally operate trash trucks and dump trucks. Further, appellant himself acknowledged that a CDL was required for his position as municipal recycling coordinator.

Most importantly, respondent provided the Township of Lakewood Policy Statement (the "Policy"), covering "Drug and Alcohol Policy for Safety Sensitive Employees In Transit." (Exh. R-1.) It covers employees in safety-sensitive positions who perform safety-sensitive transportation functions, "or supervise personnel in safety-sensitive transportation functions." This makes safety-sensitive employees and supervisors of safety-sensitive personnel subject to the federal guidelines set forth in 49 C.F.R. Part 40 regarding workplace testing. "Safety Sensitive" is defined to include 1) operating a revenue service vehicle, including when not in revenue service, and 2) operating a non-revenue service vehicle, when required to be operated by a holder of a Commercial Driver's License. Based on this language, I **CONCLUDE** that as a driver of a Township-owned pickup truck and driver of trash trucks and dump trucks, and as a

supervisor of employees in safety-sensitive positions, appellant is in a safety-sensitive position subject to the Policy.

There is no question that having a CDL was a prerequisite to operating a CMV, and that having a CDL made an employee like appellant subject to random drug and alcohol testing, per 49 CFR Part 40. Appellant-counsel admitted as much in her summation brief by writing, "Since 1999, Mr. B[redacted] has held a Commercial Driver's License and, in turn, has been subject to random drug and alcohol testing." It is disingenuous for appellant to now argue that he did not actually use his CDL and therefore was not subject to DOT guidelines. Regardless, it has been established that appellant did, in fact, drive commercial vehicles for Lakewood Township, was in a safety-sensitive position, and supervised employees in safety-sensitive positions and therefore was using his CDL and was subject to DOT guidelines calling for CDL holders to be subject to random drug and alcohol testing.

Finally, in addition to being subject to random testing as a CDL holder, appellant was subject to random alcohol testing because of his two previous failed alcohol tests in 2021 and 2022. (Exh. R-1.) Lakewood Township Policy section 10-24.4(d) requires random alcohol testing when an employee has returned to work after an infraction of its alcohol policy.

I **CONCLUDE** that respondent acted properly in conducting a third random alcohol test of appellant, because he operated Township vehicles pursuant to a Commercial Driver's License, and because he had previously failed two alcohol tests.

Applying these facts and conclusions and afore-referenced caselaw to the charges against appellant, I **FIND** that driving to work in a Township-owned vehicle while intoxicated equates to conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. I **FIND** that such behavior, particularly where the employee is a department supervisor who has been issued a government-owned vehicle and must sometimes drive commercial motor vehicles, is conduct that would offend publicly accepted standards of decency. Although such conduct need not necessarily violate

some rules or laws, I **CONCLUDE** that appellant surpassed the alcohol level set out in by Township policy for a third time and also exceeded the DOT guidelines for persons holding a CDL.

I therefore **CONCLUDE** that respondent has proven by a preponderance of the credible evidence that appellant committed Conduct Unbecoming a Public Employee, pursuant to N.J.A.C. 4A:2-2.3(a)(6).

Regarding Neglect of Duty, I **FIND** that appellant's behavior in driving to work in a Township-vehicle while intoxicated, and appearing for work in a supervisory position while intoxicated, connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). I **FIND** appellant's conduct to have been unreasonable in light of the risk of harm to appellant, his employees, and the general public. Wytupeck v. Camden, 25 N.J. 450, 461 (1957).

I therefore **CONCLUDE** that respondent has proven by a preponderance of the credible evidence that appellant committed Neglect of Duty, pursuant to N.J.A.C. 4A:2-2.3(a)(7).

As neither party addressed the first charge (inability to perform duties) nor the third charge (other sufficient causes—violation of agreement between Lakewood and Teamsters Local 97), I reach no conclusions as to whether there were any such violations.

PENALTY

Having met its burden of proving the above-referenced violations, this Tribunal must then look to whether respondent acted properly in applying discipline against appellant in the form of termination of employment.

The determination of a penalty is both subjective and fluid, following no specific formula. One may consider the seriousness of the infraction, the length of employment, the amount of training received, as well as prior disciplinary matters. West New York v. Bock, 38 N.J. at 523–24.

Appellant argued that under the Americans with Disabilities Act ("ADA") 42 U.S.C.A. § 12101 to § 12213, and the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 et. seq., an employer commits unlawful discrimination if the employer does not reasonably accommodate the known physical or mental limitations of an otherwise qualified disabled employee unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the employer]." Appellant cited In re Daniel Cahill, 245 N.J. Super. 397 (App. Div. 1991) for the finding that alcoholism qualifies as a disability under the LAD and requires employers to offer an opportunity for treatment—not just impose discipline—before termination.

While appellant cited to the LAD, he failed to advise this Tribunal that N.J.S.A. 10:5-29.1 states, "Unless it can be clearly shown that a person's disability would prevent such person from performing a particular job . . ." This limitation means that an employer can defeat an action under LAD by proving that an employee's disability would negatively affect their ability to perform a specific job. In the within matter, if appellant had asked for an accommodation in the form of a different job position with Lakewood Township, respondent might have had the opportunity to consider moving him to a different, non-safety-sensitive job; however, appellant wanted to keep his position as municipal recycling coordinator. Respondent has proven that appellant showed up to his job while intoxicated on three occasions and had driven a Township-owned vehicle to work while intoxicated. This limitation allows an employer to decide that a particular disability does not allow a person to continue in a safety-sensitive position that requires the employee to drive Township-owned motor vehicles.

Appellant also ignored the provisions of the LAD calling for this matter to be brought in Superior Court within 180 days of the effective action. Thus, appellant was required to file a disability discrimination case in New Jersey Superior Court by approximately May 30, 2024. N.J.S.A. 10:5-13 and 5-18. However, despite raising a "medical condition" as a defense in his *pro se* termination appeal of November 30, 2023, appellant never filed a disability discrimination case against Lakewood Township in Superior Court, even after retaining legal counsel on January 10, 2024.

Alcoholism is not the same disability as a physical injury, where, for example, a person with a bad back or broken leg cannot sit at a desk for long hours working as a typist and must be permitted to take extra breaks. There is no accommodation for a person who is intoxicated to perform their job. There is no accommodation for a person who is intoxicated to be allowed to operate heavy machinery, trucks, or Township-owned pickup trucks. Allowing an employee who failed three alcohol tests to continue in a safety-sensitive job that required him to drive a Township-owned vehicle to work and possibly even drive 26,000-pound trucks certainly would impose an undue hardship on the operations of Lakewood's Recycling Department. There is no proof that appellant ever sought the accommodation of a different position with respondent, instead requesting that he be returned to the safety-sensitive position of municipal recycling coordinator.

Accordingly, one may focus on appellant's claim that an employer must provide an employee with the opportunity for treatment. Appellant has failed to offer any credible testimony or evidence that there must be some sort of "interactive process" with the employee to determine accommodations. However, the facts are that on two occasions respondent did provide appellant the opportunity for alcohol rehabilitation treatment, at respondent's expense; after each of the first two failed alcohol tests, the respondent sent appellant B[redacted] to outpatient rehabilitation. At the end of each rehabilitation period, respondent gave appellant the accommodation of using sick time before returning to work. After each of these two periods of alcohol treatment, respondent welcomed appellant back to his supervisory position at the Township. Appellant himself never disclosed that he had alcoholism at the time of the first two failed alcohol tests, and prior to the failed tests, never told anybody at work that he suffered from alcoholism or asked Township Manager Donnelly for help. Appellant never told anyone in the Lakewood Human Resources Department that he suffered from alcoholism or needed help with a disability. Appellant himself testified that only when he failed the Third Alcohol Test did he realize that he suffered from alcoholism, and even then, the respondent Township paid for him to attend rehabilitation.

I **CONCLUDE** that respondent met its burden of proving by a preponderance of the credible evidence that it sent appellant to alcohol rehabilitation treatment on three

occasions and met its obligation to work with appellant to address his alcoholism once it became known that appellant was an alcoholic.

Even if we were to apply, *arguendo*, the standard set forth in appellant's summation brief, the burden would then switch to the employee to show that an employer failed to participate in the "interactive process"; the employee must demonstrate: (1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for their disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith. Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3rd Cir. 1999), at 319–20. All four prongs must be met.

However, appellant failed to prove that respondent knew that appellant B[redacted] had a disability. Simply failing alcohol tests meant that a person was intoxicated at the time of the testing; appellant was improperly asking this Tribunal to place a burden on respondent's administrative leaders, Health Department and/or Human Resources Department to investigate whether appellant B[redacted] was an alcoholic instead of just being a person who on a particular day abused alcohol and went to work. Further, appellant himself did not recognize that he was an alcoholic until after the failed Third Alcohol Test.

The second prong was not met because appellant never sought help from the Township or advised anyone at the Township that he believed he had a disability. In addressing the third and fourth prongs, after the failed Third Alcohol Test and after appellant admitted he was an alcoholic, respondent again sent appellant to alcohol rehabilitation.

In light of appellant sending appellant twice to alcohol rehabilitation treatment after the first two failed alcohol tests, and returning him to his position as Lakewood Township Municipal Recycling Coordinator both times, I **CONCLUDE** that respondent met its burden of proving by a preponderance of the credible evidence that it made all reasonable accommodations for appellant but that the third failed alcohol test was sufficient grounds for imposing additional discipline.

Finally, appellant has argued racial discrimination by respondent. Appellant, an African American male, was hired by respondent in 2006 as a DPW laborer. He was promoted to being a driver for the Township in 2007, and was promoted again, to municipal recycling coordinator in 2017. No mention is made of racial discrimination in appellant's *pro se* appeal of November 30, 2023, and the only claim raised in the appeal petition was that appellant felt he was terminated for a medical condition.

The LAD required that a racial discrimination case be brought in Superior Court within 180 days of the effective action. Thus, appellant was required to file a racial discrimination case against Lakewood Township in Superior Court by approximately May 30, 2024. N.J.S.A. 10:5-13 and 5-18. Appellant did not raise racial discrimination in his petition of appeal dated November 30, 2023, and appellant never filed a racial discrimination case against Lakewood Township in Superior Court, even after retaining legal counsel on January 10, 2024.

As appellant never filed an action under LAD, there is no reason to address the McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), elements of a LAD claim. Further, appellant failed to make a proffer of a *prima facie* case of racial discrimination before this Tribunal; if he had, then the burden would shift to the respondent to demonstrate that the adverse employment action was motivated by legitimate reasons, and then the burden would shift back to the appellant to prove that the respondent's legitimate reasons were pre-textual. Evidence of disparate treatment could be used to show that legitimate reasons were pre-textual. Ibid. Appellant admitted in its summation brief, without any confirmatory, independent documentary evidence, that four of twelve Lakewood supervisors had been alcohol tested, two of them Black and two of them White. This in no way indicated any racial disparity. Appellant himself did not refer to any discriminatory acts against him during his seventeen years working for respondent, such as racial jokes or disparaging remarks. Township Manager Donnelly's credible testimony noted that he saw no racism amongst Lakewood Township employees. There can be no claim that appellant was passed over for advancement, as he had been promoted in 2007 and promoted again to a supervisory position in 2017.

Finally, I find no support for appellant's claim that they would have produced evidence of racism but for being blocked by respondent. Appellant was afforded months of discovery time. Appellant promulgated dozens of document requests and interrogatories, and this Tribunal found in appellant's favor by granting its motion to compel discovery, even sitting down with the parties and orchestrating a three-hour discovery work session in my hearing room, which resulted in appellant reporting to the Tribunal that she was satisfied that her discovery requests were complied with by respondent.

I **CONCLUDE** that appellant failed to make a *prima facie* case of racial discrimination against respondent. I **CONCLUDE** that appellant did not raise racial discrimination in his petition of appeal and never filed a racial discrimination case against respondent in Superior Court, as required by N.J.S.A. 10:5-13 and 5-18.

Having found that appellant had committed the violations of Conduct Unbecoming a Public Employee and Neglect of Duty, the proper penalty must be assessed.

This Tribunal admitted respondent's Township of Lakewood Policy, covering "Drug and Alcohol Policy for Safety Sensitive Employees In Transit." (Exh. R-1.) It covers employees in safety-sensitive positions who perform safety-sensitive transportation functions, "or supervise personnel in safety-sensitive transportation functions. . . ." This makes safety-sensitive employees and supervisors of safety-sensitive personnel subject to the federal guidelines set forth in 49 C.F.R. Part 40 regarding workplace testing. Appellant was in a safety-sensitive position subject to this policy.

The Policy prohibits the abuse of alcohol while at work. It also states that "it is a violation of this policy for any employee to work under the influence of alcohol, including rest and meal periods." Additionally, "It is a violation of this policy for any covered employee to consume alcohol for the four (4) hours before a scheduled work period." Per section J, positive results from an alcohol test, meaning the test-taker exceeded the stated alcohol limits, subject the employee to discipline. The test-taker would also then be subject to follow-up testing, per both the Policy and DOT guidelines. A test result of 0.040 or greater, the federal standard, subjected the test-taker/employee to discipline,

including discharge from his position. Further, it was Lakewood's own policy in Section J that "it is a violation of this policy for any covered employee to test positive for alcohol at or above a Breath Alcohol Level (BRAC) of 0.020L of breath."

Where appropriate, concepts of progressive discipline involving penalties of increasing severity are used in imposing a penalty and in determining the reasonableness of a penalty. West New York v. Bock, 38 N.J. 500, 523–24 (1962). Factors determining the degree of discipline include the employee's prior disciplinary record and the gravity of the instant misconduct.

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. Henry v. Rahway St. 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. In re Carter v. Bordentown, 191 N.J. 474 (2007). Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. In re Herrmann, 192 N.J. 19, 32 (2007). "There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998).

Driving a Township-owned vehicle to work, to perform a job that might entail driving huge trucks, while intoxicated, is certainly egregious behavior. Appellant was in a safety-sensitive position, and was in a supervisory position, being the face of the Recycling Department. But regardless of the egregious nature of appellant's violations, respondent had already exercised progressive discipline on behalf of appellant by allowing appellant to return to work after each of the first two failed alcohol tests.[2] Per respondent's

[2] In disputing the thirty-day and sixty-day suspensions voluntarily accepted by appellant after the first two failed alcohol tests, appellant has misinterpreted the rules that a test between 0.020 and 0.039 required only a 24-hour suspension as discipline. The applicable rule is that the employee cannot work for 24 hours as a safety precaution and must pass an alcohol test to return to work, but then that employee is subject to discipline. Township Policy section 10-24.7(a)1.

employee policy, a permanent employee may be discharged from his position for even a first violation of Neglect of Duty or intoxication on duty, per section 10-18.1(a) and (e).

I **CONCLUDE** that respondent had the authority to terminate appellant from his position for a first violation of its policies against Conduct Unbecoming, Neglect of Duty and intoxication on duty, but used progressive discipline by offering a thirty-day suspension, which appellant voluntarily accepted. I **CONCLUDE** that respondent had the authority to terminate appellant from his position for his second violation of its policies against Conduct Unbecoming, Neglect of Duty and intoxication on duty, but used progressive discipline by offering a sixty-day suspension, which appellant voluntarily accepted. Finally, I **CONCLUDE** that respondent had the authority to terminate appellant from his position for a third violation of its policies against Conduct Unbecoming, Neglect of Duty and intoxication on duty, and I **CONCLUDE** that respondent properly exercised its authority to terminate appellant from his position.

ORDER

I **ORDER** that the charges of N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming a Public Employee and N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty be **SUSTAINED**. I **FURTHER ORDER** that respondent's termination of appellant from his position as Lakewood Township Municipal Recycling Coordinator at the Lakewood Department of Public Works be **AFFIRMED**. The within appeal is **DISMISSED**.

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.

February 25, 2026
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: February 25, 2026

Date Mailed to Parties: February 25, 2026

JNR/on/gd

APPENDIX

WITNESSES

For appellant

Patrick Donnelly

Anthony Morreale

For respondent

Kelly Boucher

N[redacted] B[redacted], appellant

Herb Leckie

Exhibits

For appellant

A-1 Coles letter, dated July 31, 2023

A-2 Coles letter, dated August 21, 2023

A-3 PNDA, dated October 6, 2023

A-4 Counselling letter, dated September 22, 2023

A-5 Secare email

A-6 Counselling letter, dated October 6, 2023

A-7 FNDA, dated November 28, 2023

A-8 Interrogatory answers

A-9 Document production correspondence

A-10 Appellant's deficiency list, dated September 19, 2024

A-11 Amended interrogatories

A-12 Deficiency answers

A-13 Leckie CV

A-14 Breathalyzer calibrations

A-20 Alcoholics Anonymous document

A-21 Department of Transportation guidelines

For respondent

R-1 Township of Lakewood Policy Statement

R-2 Preliminary Notice of Disciplinary Action

R-3 Preliminary Notice of Disciplinary Action

R-4 Preliminary Notice of Disciplinary Action

R-5 Certificate of Completion for Madison Peterson

R-6 U.S. Department of Transportation (DOT) Alcohol Testing Form