MERIT SYSTEM REPORTER

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FROM THE COURT

OF PERSONNEL INTEREST

TO OUR READERS:

Following his appointment by Governor Whitman and confirmation by the Senate, Leo R. Vartan began his tenure as a member of the Merit System Board at the Board's November 9, 1999 meeting. Mr. Vartan is a graduate of West Virginia Wesleyan College and received his law degree from John Marshall Law School. From 1970 to 1973, he served as Assistant Hudson County Prosecutor and from 1973 to 1982, he was a Municipal Judge. From 1993 to 1997, he served as the Mayor of Kearny. He also maintains a private law practice.

NJDOP Personnel

Shaping a quality work force through competence, caring and commitment

Christine Todd Whitman, Governor

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WRITTEN RECORD APPEALS

Maximum Age for Reappointment Not Applicable for Reinstatement of Police Officer
In the Matter of Robert Terebetski
(Merit System Board, decided July 19, 1999)

Robert Terebetski, a Police Sergeant with the Borough of Carteret, represented by John Charles Allen, Esq., asks the Merit System Board (Board) to reinstate him to his position after a determination by the Police and Firemen's Retirement System (PFRS) that he is no longer disabled and is fit for duty.

The appellant was disabled from duty and placed on disability retirement by the PFRS in August 1986. After a medical examination, the appellant was cleared for duty by the PFRS on September 21, 1998. However, when Carteret did not reinstate the appellant, he filed an appeal with the Board requesting that he be reinstated.

The appellant argues that he is entitled to reinstatement pursuant to *N.J.A.C.* 4A:4-7.12, and *In the Matter of Allen*, 262 *N.J. Super.* 438 (App. Div. 1993). Specifically, the appellant states that *N.J.A.C.* 4A:4-7.12 mandates his reinstatement to his former position and *Allen* affords him the reinstatement with no loss of benefits, pursuant to *N.J.S.A.* 43:16A-8(2). He also argues that the provisions of *N.J.S.A.* 40A:14-127.1, which bars municipal police officers over the age of 45 from being *reappointed*, is not applicable since he is looking to be *reinstated*.

Carteret, represented by Brian O. Lipman, Esq., argues that *N.J.S.A.* 40A:14-127.1 serves as an absolute bar to municipal police officers over the age of 45 from being reappointed or reinstated where he or she has been separated for any reason other than a layoff or reduction-in-force. Mr. Terebetski is 49 years old. Carteret also argues that the appellant's reliance on *N.J.A.C.* 4A:4-7.12 is misplaced since this administrative regulation is not applicable in the face of the overriding State statute. In addition, Carteret argues that the cases of *Lucas v. State Division of Pensions*, 267 *N.J. Super.* 296 (App. Div. 1993) and *Canavera v. Township of Edison*, 271 *N.J. Super.* 125 (App. Div. 1994), support its position that the appellant is barred from being reappointed. It finally argues that *N.J.S.A.* 43:16A-8, a pension statute, is also inapplicable, since it is also overridden by the explicit language of *N.J.S.A.* 40A:14-127.

CONCLUSION

N.J.S.A. 43:16A-8 states:

> (2) Any beneficiary under the age of 55 years who has been retired on a disability retirement allowance under this act, on his request shall, or upon the request of the retirement system may, be given a medical examination and he shall submit to any examination by a physician or physicians designated by the medical board once a year for at least a period of 5 years following his retirement in order to determine whether or not the disability which existed at the time he was retired has vanished or has materially diminished. *If the report of the medical board shall show that such beneficiary is able to perform either his former duty or any other available duty in the department which his employer is willing to assign to him, the beneficiary shall report for duty;* such a beneficiary shall not suffer any loss of benefits while he awaits his restoration to active service [emphasis added].

Plainly, the Legislature intended that persons on disability retirement who are no longer disabled, *i.e.,* no longer entitled to disability retirement, and who are under the age of 55, be returned to either their prior positions or any available duty which their employers are willing to assign. *Ibid.* In other words, the employee should be returned to his or her position as if the employee's service was never interrupted and the disability retirement never occurred.

In order to effectuate this legislative mandate, the Board promulgated *N.J.A.C.* 4A:4-7.12, which states that:

> (a) A permanent employee who has been placed on disability retirement may be reinstated following a determination from the Division of Pensions that the retiree is no longer disabled.
> (b) The employee's reinstatement shall have priority over appointment from any eligible list, except a special reemployment list.

By adopting this regulation, the Board codified its longstanding practice of implementing the provisions of *N.J.S.A.* 43:16A-8. Again, the "reinstatement" of the formerly disabled retiree is merely returning this individual to his or her prior position, or other available duties as determined by the employer, as if the disability retirement never occurred. *See N.J.S.A.* 43:16A-8.

The reinstatement envisioned by the regulation implementing *N.J.S.A.* 43:16A-8 is to be contrasted with the "reappointment provision" contained in *N.J.S.A.* 40A:14-127.1. *N.J.S.A.* 40A:14-127 provides that no person shall be initially hired as a police officer if the person is less than 21 or more than 35 years of age. A limited exception to this requirement is set forth in *N.J.S.A.* 40A:14-127.1. That statute provides that:

> Notwithstanding the provisions of any other law to the contrary, any former State trooper, sheriff's officer or deputy, or county or municipal police officer who has separated from service voluntarily or involuntarily other than by removal for cause on charges of misconduct or delinquency, shall be deemed to meet the maximum age requirement for appointment established by *N.J.S.* 40A:14-127, if his actual age, less the number of years of his previous service as a law enforcement officer, would meet the maximum age requirement established by said section, but no person may be appointed who is over the age of 45 as of the date of his reappointment; except that in the case of a State trooper, sheriff's officer or deputy or county or municipal police officer whose separation from service was involuntary due to a layoff or reduction of force, such person shall be deemed to meet the maximum age requirement for appointment by complying with the procedure established hereinbefore without regard to his actual age at the time of reappointment.

Accordingly, certain categories of law enforcement officers have been given the opportunity to be "reappointed." However, under no circumstances may a person who is over the age of 45 be "reappointed" unless his or her separation from service was due to a layoff.

The underlying question is whether *N.J.S.A.* 40A:14-127.1 applies and/or limits the legislative mandate set forth in *N.J.S.A.* 43:16A-8. In other words, if a person who is more than 45 and on disability retirement from his or her former position as a Police Officer subsequently is determined by the Division of Pensions to no longer be disabled, should he or she be "reinstated?" A review of these two statutes supports the conclusion that they do not deal with the

same subject matter and that the provisions of *N.J.S.A.* 40A:14-127.1 simply have no impact upon the provisions of *N.J.S.A.* 43:16A-8. Pursuant to the plain language of *N.J.S.A.* 43:16A-8, once a person is determined to no longer be disabled, the appointing authority is *required* to return the officer to active duty or, in the language of *N.J.A.C.* 4A:4-7.12, to "reinstate" the officer in the same or as near as the same position he or she previously occupied. The purpose of this legislation is to return the previously disabled employee to work as if the officer had never been disabled and the officer's service was never interrupted. On the other hand, *N.J.S.A.* 40A:14-127.1 pertains to situations of "reappointment" where a former law enforcement officer has actually left his or her prior employment as a law enforcement officer and is attempting to be rehired by an appointing authority which was not necessarily his or her previous employer. Consequently, given the different scope of these two statutes, the mandatory age limitation set forth in *N.J.S.A.* 40A:14-127.1 does not impact upon the reinstatement provisions contained in *N.J.S.A.* 43:16A-8.

The courts of this State have yet to directly analyze the different meanings associated with the term "reappointment," as the same is used in *N.J.S.A.* 40A:14-127.1, and the term "reinstatement," as the same is used in *N.J.S.A.* 43:16A-8. While several cases exist which interpret these statutes individually, none of the cases compare the different terms used in each of the statutes. For example, in *Lucas v. State Division of Pensions*, *supra*, the court considered the issue of whether the term "reappointment," as used in *N.J.S.A.* 40A:14-127.1, limited the application of the age reduction portion of the statute to persons who were previously enrolled in the New Jersey Police and Firemen's Retirement System. The court concluded that the term "reappointment" should be given its vernacular, rather than literal, meaning and that the provisions contained in this statute should apply to any overage candidate who was previously appointed as a law enforcement officer, regardless as to whether the appointment was out-of-state. *Id.* at 302-303. As was previously stated, no analysis was conducted by the court concerning whether the term "reappointment," as used in *N.J.S.A.* 40A:14-127.1, is synonymous with the term "reinstatement", as the term is used in *N.J.S.A.* 43:16A-8 and *N.J.A.C.* 4A:4-7.12, since that question was not at issue in this case.

In *Canavera v. Township of Edison*, *supra,* and *In the Matter of Allen*, *supra*, the court considered the ramifications of the application of *N.J.S.A.* 43:16A-8 in a non-merit system and merit system municipality, respectively. While neither case compares the terms "reappointment," and "reinstatement," the *Allen* decision does explain the "unique situation" which occurs when a police officer returns to his position after being determined to no longer be disabled:

> If the retired employee regains the ability to perform his or her duties, the Legislature mandated that he or she be returned to the former position. The Legislature clearly recognized that individuals returning from a disability retirement are in a unique situation, plainly different from all other employees returning to active service. [262 *N.J. Super*. at 444].

Also, while the terms "reappointment" and "reinstatement" are occasionally used interchangeably in these decisions, there is no indication that the court intended to interpret the term "reappointment," as used in *N.J.S.A.* 40A:14-127.1, as being synonymous with the term "reinstatement" set forth in *N.J.A.C.* 4A:4-7.12. Notably, *N.J.S.A.* 43:16A-8 does not use the term "reinstatement." That statute simply states that the formerly disabled officer shall be returned to active duty. Accordingly, the mandatory reappointment age requirement contained in *N.J.S.A.* 40A:14-127.1 does not apply

to any person who qualifies for reinstatement pursuant to *N.J.S.A.* 43:16A-8 and *N.J.A.C.* 4A:4-7.12 since the statutes do not deal with the same subject matter. Any other interpretation could result in the nullification of *N.J.S.A.* 43:16A-8. Absent an expression of a specific intent of the Legislature to render the provisions of *N.J.S.A.* 43:16A-8 obsolete or otherwise limit that statute, the statutes should be construed so that the mandatory age requirement contained in *N.J.S.A.* 40A:14-127.1 does not apply or limit the return to service of a previously disabled officer as contemplated by *N.J.S.A.* 43:16A-8. Therefore, since it is not disputed that the appellant is no longer disabled in the eyes of the PFRS, he should be immediately reinstated by Carteret according to the provisions of *N.J.S.A.* 43:16A-8 and *N.J.A.C.* 4A:4-7.12. At the time of retirement, the appellant had achieved the rank of Police Sergeant. A review of Department of Personnel (DOP) records shows that Carteret last tested for Police Sergeant in 1996 and last certified a list of eligibles on July 16, 1997. The last date of appointment from the July 16, 1997 certification was October 16, 1997. Since no appointment to Police Sergeant has been made after the appellant was deemed fit for duty in September 1998, Carteret is not required to reinstate him to his former position if none is currently available. However, the appellant is entitled to an immediate appointment to a Police Officer position if available. In this regard, DOP records show that Carteret has appointed six police officers from its most recent certification. The earliest appointment after the appellant was found fit for duty was December 18, 1998. The records also show that the last appointments made from that certification were Susan Holowchuk and James P. Hart, III on December 28, 1998. Therefore, the appellant is entitled to be reinstated to the position of Police Officer with seniority and benefits for the period from December 18, 1998 to the date of his actual reinstatement. However, the Board notes that while the appellant is entitled to immediate reinstatement to the position of Police Officer with retroactive seniority effective December 18, 1998, Carteret is not required to displace either Ms. Holowchuk or Mr. Hart. Additionally, the appellant is entitled to the first Police Sergeant vacancy. With regard to the issue of back pay, *N.J.A.C.* 4A:2-1.5(b) provides:

> Back pay, benefits and counsel fees may be awarded in disciplinary appeals and where a layoff action has been in bad faith. *See N.J.A.C.* 4A:2-2.10. In all other appeals, such relief may be granted where the appointing authority has unreasonably failed or delayed to carry out an order of the Commissioner or Board or where the Board finds sufficient cause based on the particular case.

The instant matter is not a disciplinary appeal. Thus, back pay may only be awarded if the Board finds sufficient cause in this particular matter. In this regard, the Board recognizes that the appellant did not have a vested property right in regard to appointment to the position at issue, and except in disciplinary matters concerning individuals with such property rights to their positions, the Board does not routinely grant awards of back pay for periods in which the individual has not worked. *See In the Matter of Marveinia Kitchen and the Department of Law and Public Safety*, Docket No. A-6402-91T1 (App. Div. Feb. 7, 1994). Additionally, in the present matter, there is no evidence in the record that Carteret delayed effecting the appellant's reinstatement for invidious reasons. Therefore, under the particular circumstances of this matter, the record does not establish a sufficient basis for the award of back pay.

Finally, the Board notes that if Carteret has a genuine concern about the appellant's ability to perform his duties, formal charges must be filed and served upon him, and he must be provided the opportunity for a hearing. *See N.J.S.A.* 11A:2-13 and *N.J.A.C.* 4A:2-2.1, *et seq*.

ORDER

Therefore, it is ordered that the appellant be reinstated to the position of Police Officer for the Borough of Carteret and awarded seniority and benefits from December 18, 1998.

It is further ordered that the appellant's overall seniority calculation shall include any prior permanent service and be aggregated with any future permanent service. The appellant's prior permanent service must be included in implementing seniority based programs such as salary step placement, layoffs and vacation leave entitlement.

Additionally, it is ordered that the appellant receive the next available appointment to Police Sergeant made by the Borough of Carteret.

In the event that Carteret has not made a good faith effort to comply with this order within 30 days of issuance of this decision, the Board orders that back pay be awarded to appellant beginning on the 31st day after the issuance of this Order.

Request for Make-up Examination Denied Based on Inadequate Medical Documentation
In the Matter of Joseph Juliano, Jr., Police Sergeant (PM0959W), City of Newark
(Merit System Board, decided Aug. 31, 1999)

Joseph Juliano, Jr. appeals the decision of the Division of Selection Services which denied his request for a make-up examination for Police Sergeant (PM0959W), City of Newark.

A review of the record reveals that the promotional examination for Police Sergeant (PM0959W), City of Newark, was announced in July 1998 and administered on October 22, 1998. Formal written notification cards, advising candidates of when and where to report for testing, were mailed on October 1, 1998. The promotional examination announcement contained a bold faced note entitled MAKE-UP EXAMINATIONS, which indicated that the make-up policy noted in *N.J.A.C.* 4A:4-2.9 would be *strictly* adhered to and also noted that testing was tentatively projected for October 1998. The announcement also noted, in the section captioned IMPORTANT INFORMATION, that a make-up examination must be requested within five days of the original test date. *N.J.A.C.* 4A:4-2.9 (b) states that for police, fire and professional level engineering promotional examinations, make-up examinations may be authorized only in cases of:

1. Debilitating injury or illness requiring an extended convalescent period, provided the candidate submits a doctor's certification containing a diagnosis and a statement clearly showing that the candidate's physical condition precluded his or her participation in the examination;
2. Death in the candidate's immediate family as evidenced by a copy of the death certificate;
3. A candidate's wedding which cannot be reasonably changed as evidenced by relevant documentation;
4. Error by the Department of Personnel or appointing authority.

On October 14, 1998, appellant requested a make-up examination and included certifications from two physicians, one dated October 9, 1998 and the other dated October 14, 1998. Both referenced treatment for back pain and one specifically noted appellant's diagnosis as back pain. The certification which noted the diagnosis went on to state that the back pain required "analgesic medication which may affect test performance – hence less than 100% of his best possible performance." The certificate then stated as follows: "Chronic back pain, of itself, is known to affect concentrating ability and

cause anxiety. As such it would preclude appellant from his best possible performance on the written examination." The request was denied due to the fact that the medical documentation submitted did not specifically state that appellant's physical condition precluded his participation on the examination date.

On appeal, appellant states on October 20, 1998 he learned of the denial of his make-up request via a telephone call from the Supervisor of the Make-up Unit. He stated that he felt "threatened and forced by coercion to take this test." He subsequently did take the examination on October 22, 1998 and related that during the examination he was dizzy and unable to concentrate due to the medications he was taking for the back pain. He cited drowsiness, blurred vision, anxiety, loss of comprehension and the inability to concentrate as side effects of his medications. He contends that upon his review of the examination, he felt that he identified where his score became deficient. He explained that if the correct answer sheet were lined up with his answer sheet and dropped down by one space, it is apparent that several of his answers are correct, which would leave him with a passing score.

CONCLUSION

The record establishes that appellant's request for a make-up examination was denied on October 20, 1998. He subsequently took the scheduled promotional examination on October 22, 1998 and received a failing score. On February 3, 1999 he was notified of his test results and on February 11, 1999 filed the instant appeal. Under these circumstances, this appeal is clearly untimely since it was filed nearly four months after he was notified of denial of his request for a make-up examination. *See N.J.A.C.* 4A:2-1.1(b) and *N.J.A.C.* 4A:4-6.4(c). Additionally, there would be no remedy that could be fashioned for appellant; he has seen and taken the subject examination and has also reviewed the examination and the answer key. Examination candidates are all provided with one testing opportunity; to administer a retest for the appellant would give him an unfair advantage over all of the other 652 candidates who took the subject promotional examination. Additionally, a different or alternate test would be problematic since there is no valid statistical methodology available to equate different retest results to the original test.

Notwithstanding the above, the merits of the appeal were reviewed. *N.J.A.C.* 4A:4-2.9(b) provides four acceptable reasons for make-up examinations for police, fire and professional level engineering promotional examinations. Included is a debilitating injury or illness requiring an extended convalescent period, provided the candidate submits a doctor's certification containing a diagnosis and a statement clearly showing that the candidate's physical condition precluded his or her participation in the examination.

The promotional examination announcement also specifically stated that the make-up policy contained in the above-cited Merit System rule would be *strictly* adhered to; appellant's medical authorization did *not* contain the specified documentation when he submitted his make-up request. The medical documentation indicated a diagnosis of back pain which required analgesic medication and the fact that chronic back pain is known to affect concentrating ability and cause anxiety which *may* affect test performance and that this would preclude appellant from "his best possible performance" on the written examination. However, it did not definitively state that the medication *will* affect test performance nor did it state that the physical condition precluded appellant's *participation* in the examination as required by *N.J.A.C.* 4A:4-2.9(b)1.

The cited rule is applied uniformly to the types of examinations specified (police, fire and professional level engineering promotional examinations) based on the highly competitive candidate population and the need to enhance examination security. The City of Newark, the largest city in the State of New Jersey, indeed has a highly competitive candidate population;

there were a total of 691 eligible competitors: 333 passed the examination, 320 failed the examination and 38 failed to appear for the examination.

Finally, a review of appellant's answer sheet and the scoring key does not substantiate his assumption that he would have a passing score if his answer sheet were lined up with the scoring key and his answer sheet were dropped down by one space. Appellant's claim in this regard is unfounded.

ORDER

Therefore, it is ordered that this appeal be denied.

Partial Counsel Fees Awarded Where Primary Charge Dismissed
In the Matter of Diane Murphy
(Merit System Board, decided June 8, 1999)

Diane Murphy, represented by Michael J. Herbert, Esq., petitions the Merit System Board for reconsideration of that portion of its final decision, rendered on January 12, 1999, which denied counsel fees.

Appellant was removed from her position of Supervisor of Legal Secretarial Services, Division of Criminal Justice (DCJ), Department of Law and Public Safety, on charges of conduct unbecoming a public employee and violation of Department procedures. Specifically, the appointing authority asserted that appellant compromised an ongoing confidential investigation by knowingly disclosing information pertaining to the investigation to the subject of the investigation. After a hearing at the Office of Administrative Law (OAL), the Administrative Law Judge (ALJ) modified the penalty to a five-day suspension.

The ALJ found that the appointing authority did not demonstrate that appellant breached the secrecy of an investigative process. The ALJ found, however, that appellant did divulge restricted information. Therefore, the ALJ concluded that although appellant's actions were not blameless, she did not imperil an investigation. The ALJ took the principle of progressive discipline into account in determining the penalty, noting that appellant had an unblemished record of 26 years of service. *See West New York v. Bock*, 38 *N.J.* 500 (1962). Under these circumstances, the ALJ found that the appropriate penalty, based on the totality of the record, was a five-day suspension. The Board agreed.

Appellant requests reconsideration of the Board's decision to deny counsel fees, arguing that she prevailed on the primary issue in this matter pursuant to *N.J.A.C.* 4A:2-2.12. This rule provides for the award of counsel fees where an employee has prevailed on all or substantially all of the primary issues in an appeal of disciplinary action. Appellant contends that she was found not guilty of the primary charge: that she obtained information related to an ongoing investigation and disclosed the identity of the investigators. Appellant argues that the ALJ concluded that there was no investigation, and even if there were, the alleged subject was informed of the Division's activities by Showboat Casino personnel. Appellant argues that the only charge sustained was the lesser charge of divulging restricted information which stemmed from her accessing of the Criminal Justice Information System log. She notes that the Board found that, based on this charge, only a five-day suspension was warranted. Therefore, the Board erred in denying counsel fees on the grounds that one of the charges against appellant was sustained. In this regard, appellant relies on *In the Matter of Thomas D. Peck and Baron O'Bryan* (MSB, decided September 21, 1989), in which the Board awarded partial counsel fees. In that case, four of the more serious charges were dismissed, while three less serious charges were upheld. The Board also or-

dered counsel fees for that portion of the legal representation attributable to the charges that were reversed.

The appointing authority, represented by Jennifer Meyer-Mahoney, DAG, opposes the instant request. It contends that counsel fees are not appropriately awarded since, although appellant prevailed on one charge, she was found guilty of the second. Therefore, she did not prevail on all or substantially all the primary issues in her appeal. The appointing authority contends that the charge of divulging restricted information is not insignificant nor insubordinate to the first charge. The fact that the Board found appellant's long record of service as mitigation in determining the penalty does not obviate the guilty finding. The appointing authority relies on *Polk v. City of Camden Utilities Dept.*, 97 *N.J.A.R. 2d* (CSV) 163, and *Ortiz v. DOT*, 97 *N.J.A.R. 2d* (CSV) 393, as support for the denial of counsel fees when charges are upheld. She contends that these cases are more appropriate to define the legal standard than *Peck, supra*, which is older.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which the Merit System Board may reconsider a prior decision. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding. A review of the record in the instant matter reveals that reconsideration is justified.

The instant petition for reconsideration is based on an assertion that a clear material error was made in the Board's denial of counsel fees. The Board agrees. The prior decision stated:

> *N.J.A.C.* 4A:2-2.12 provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield*, 282 *N.J. Super.* 121, 128 (App. Div. 1995); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). Although the Board modified the penalty in this matter from a removal to a five-day suspension, it sustained one of the principal charges. Consequently, as appellant has failed to prevail on the primary issue in her appeal, counsel fees must be denied in accordance with *N.J.A.C.* 4A:2-2.12.

A *de novo* review indicates that the Board's reliance on the one charge upheld to support a denial of counsel fees was mistaken. The controlling issue in this matter is whether the primary charge against appellant was dismissed; *i.e.*, whether the charge that was sustained was as serious as the one dismissed. The Board is unpersuaded by the appointing authority's argument that both charges were of equal weight. Certainly the charge of impeding an ongoing investigation must be considered as the more serious. While a charge of divulging restricted information may, in some cases, be very serious, in this case, it is not. The Board notes that appellant was found guilty only of obtaining information that was not law enforcement in nature by accessing a computer system to which she had access and divulging this information to an individual with whom she had a relationship. It is noted that the Board did not uphold the charge that she divulged this information to the *subject of an investigation*, based on the ALJ's finding that there was no investigation, and since any in-

vestigation that might have taken place was already concluded. Additionally, the Board found that the information at issue was provided to the individual by others, and that he could have, upon request to DCJ, been provided with this information directly. Accordingly, the Board notes that appellant was actually found guilty only of the more benign charge of accessing the computer to obtain information that was not of a law enforcement nature and divulging this information to a person who was not the subject of an investigation.

Further, the circumstances of the present matter are distinguishable from those presented in both *Polk* and *Ortiz, supra*. In *Polk, supra*, the appellant appealed the good faith of his release at the end of his working test period. The Board found that there was no evidence of bad faith in the release. However, the Board found that the record did not demonstrate that appellant successfully completed a working test period; therefore it granted him a new working test period, and did not award him permanent status. In conclusion, the Board stated, ". . . as the record does not support that appellant completed the working test period or that the action of the appointing authority was in bad faith, appellant has not prevailed on the primary issues in this appeal. Accordingly, appellant is not entitled to counsel fees, pursuant to *N.J.A.C.* 4A:2-2.12." As to *Ortiz, supra,* the appellant, a security officer, appealed a five-day and a 20-day suspension. In that case, the Board upheld the charge of neglect of duty (five days), and dismissed the charge of falsification (20 days). However, it is not clear from the case that, even though a charge was dismissed, there was a request for partial counsel fees.

The Board notes that in *In the Matter of Joanne Chase* (MSB, decided June 24, 1997), the Board, upon reconsideration of its prior decision which did not award counsel fees, awarded counsel fees in the amount of 90 percent of services. The Board determined that the appellant prevailed on substantially all of the primary issues since the Board upheld only one of the two charges, and modified the removal to an official reprimand. Although the Board upheld the charge of conduct unbecoming a public employee, this charge was based on the appellant's inappropriate remarks in the workplace. Conversely, the charge that was dismissed stemmed from the more serious allegation that she had made threats against fellow employees. The Board found that "the modification of the penalty from termination to an official reprimand clearly represents a substantial change in the outcome of the case." *See also In the Matter of Donald Fritze* (MSB, decided January 26, 1993) and *In the Matter of James Haldeman* (MSB, decided September 7, 1994).

Under the foregoing circumstances, the Board finds that appellant prevailed on substantially all of the primary issues. However, unlike *Chase, supra*, in the instant matter, although the Board upheld the lesser charge, it did not reduce the penalty to an official reprimand. Rather, the Board concluded that, while only minor discipline was warranted, the appropriate penalty was more substantial, *i.e.*, a five-day suspension. Additionally, the behavior which gave rise to the upheld charge in *Chase, supra,* making inappropriate remarks in the workplace, is of a less serious nature than is evident in the present matter. No matter that appellant's actions cannot be characterized as egregious in that they did not entail a significant breach of security, she was found to have inappropriately accessed security information and divulged that information to a friend. This behavior was the result of a deliberate intention, and not, as in *Chase, supra*, the result of poor impulse control and social judgment. Accordingly, an award consistent with the amount of partial counsel fees awarded in *Chase, supra*, is not appropriate. Therefore, the Board concludes that an appropriate award is the lesser amount of 75 percent of the reasonable counsel fees involved in the appeal of appellant's removal.

ORDER

Therefore, it is ordered that this request for reconsideration be granted and counsel fees be awarded equal to 75 percent of services. An affidavit of services in support of reasonable counsel fees should be presented to the appointing authority within 30 days of the receipt of this order.

Time Limit for Appeal Not Tolled By Arbitration
In the Matter of Richard Vogel, Sr.
(Merit System Board, decided March 9, 1999)

The Superior Court, Law Division, has referred the consolidated cases of Richard Vogel, Sr., a Mechanic Diesel with Passaic County, to the Merit System Board to determine whether he timely filed an appeal of his removal.

The Court order, dated November 17, 1998, sets forth that on September 30, 1997 the County of Passaic served Mr. Vogel with a final notice of disciplinary action imposing a removal effective that date on charges of conduct unbecoming a public employee. The notice informed Mr. Vogel of his right to file an appeal within 20 days; however, it contained an inaccurate name and address for the agency to which the appeal should be forwarded. It is noted that the final notice provided a prior name for the Merit System Board, the Civil Service Commission, and the prior address for the Department of Personnel now located at 44 South Clinton Avenue, P.O. Box 312, Trenton, New Jersey 08625. The prior address was listed as 215 East State Street, CN 312, Trenton, New Jersey 08625.

The decision further sets forth that, prior to receipt of the final notice, the union representing Mr. Vogel, Teamsters Union Local No. 11, had filed a request for arbitration of the proposed termination as provided for in the controlling collective bargaining agreement. Although the County advised the union that Mr. Vogel's claim should be filed with the Merit System Board rather than the subject of an arbitration request to the Public Employment Relations Commission (PERC), the parties agreed to submit the complaint to binding arbitration. The arbitrator rendered a decision in favor of Mr. Vogel, the County filed an action with the Superior Court, Law Division to vacate the arbitration award, and the union and Mr. Vogel filed actions to enforce the award. However, the union became aware upon filing its action that *N.J.S.A.* 34:13A-5.3 specifically prohibits binding arbitration of major discipline for a merit system employee with permanent status. Therefore, it raised a claim that the arbitration could not have been binding, and that the County must have meant to rescind its September 30, 1997 final notice in order to first engage in advisory arbitration. Therefore, the union contended that Mr. Vogel had not been removed from his position.

The Court rejected the union's argument since the contract does not provide for advisory arbitration prior to the issuance of an effective final notice under civil service law. The Court found that all parties treated the arbitration award as binding, even to the point of filing court actions to vacate or confirm the award. However, Mr. Vogel should have filed an appeal with the Merit System Board within 20 days of receiving the final notice pursuant to *N.J.S.A.* 11A:2-15. The Court also did not accept Mr. Vogel's argument that the County, having engaged in arbitration, is now estopped from contesting his right to arbitration. The County cannot lawfully agree to do that which the Legislature has prohibited. Hence any agreement to submit appeals of major discipline to binding arbitration would be *ultra vires* and unenforceable. *See State v. Richford*, 161 *N.J. Super.* 165, 173-174 (App. Div. 1978). Therefore, the Court found that the arbitrator's decision was advisory, and not binding on the County. Since it could not be enforced or vacated, the Court denied all of the parties' applications in this regard.

The Court concluded that it would be fundamentally unfair to deprive Mr. Vogel of an opportunity for a remedy before the Merit System Board, when both his employer and his union mistakenly led him to believe that he should obtain relief through binding arbitration. However, the Court noted that it does not have jurisdiction to decide whether the final notice of disciplinary action was so deficient as not to be effective in terminating Mr. Vogel's employment. Therefore, the Court transferred the matter to the Merit System Board for determination as to whether the final notice was effective, and if so, whether the 20-day time limit for filing an appeal should be relaxed to provide Mr. Vogel with a hearing to challenge his removal.

In the instant matter, the County, represented by James V. Convery, Deputy County Counsel, contends that Mr. Vogel did not comply with the time limits for filing his appeal and is properly denied a hearing. The County submits an October 1, 1997 letter from its Personnel Officer to Thomas Walker, Business Agent of Teamsters Union Local No. 11, which advised that Mr. Vogel's "claim has been filed with the wrong division and should be appealed to the Civil Service Commission as indicated on the Final Notice of Disciplinary Action." The County argues that, although Mr. Vogel's union representative should have known of the consequences of a failure to present a timely appeal to the Board, it pursued the claim with PERC and failed to file a timely appeal to the Board. Further, the County asserts that, no matter the incorrect agency name and address on the final notice, the union representative was aware of the correct name and address based on his expertise in filing such appeals.

Mr. Vogel, represented by Earl R. Pfeffer, Esq., argues that he should be granted a hearing in regard to his removal based on the erroneous advice provided by his union representative. He also contends that, as set forth in the findings by the Court, the defective notice effectively thwarted any appeal he may have made. He asserts that the County's allegations that his counsel was aware of the proper agency name is without any factual support in the record and inaccurate. He additionally argues that the Court's findings indicate that he was similarly prevented from effecting an appeal based on the mutual mistake of the parties that the matter could be finally arbitrated. Further, Mr. Vogel maintains that the County's contention that it participated in the arbitration process at the insistence of the union or its counsel, despite its knowledge that binding arbitration was not applicable, is not supported by the record. Finally, he asserts that to deny a hearing at this stage of the proceedings would be a gross injustice and, as stated by the Court, fundamentally unfair.

CONCLUSION

N.J.S.A. 11A:2-15 provides that any appeal from adverse actions specified in *N.J.S.A.* 11A:2-13 and subsection a.(4) of *N.J.S.A.* 11A:2-6 shall be made in writing to the Board no later than 20 days from receipt of the final written determination of the appointing authority. *N.J.A.C.* 4A:2-2.8 provides that an appeal from a final notice of disciplinary action must be filed within 20 days of the receipt of the notice by the employee, and if the appointing authority fails to provide the employee with a final notice, an appeal may be made directly to the Board within a reasonable time. The instant matter concerns a disciplinary action covered by *N.J.S.A.* 11A:2-13 and subsection a.(4) of *N.J.S.A.* 11A:2-6; therefore the 20-day time limit is applicable. *The 20-day time limitation is jurisdictional and cannot be relaxed*. *See Borough of Park Ridge v. Salimone*, 21 *N.J.* 28, 46 (1956); *See also Murphy v. Department of Civil Service*, 155 *N.J. Super*. 491, 493 (App. Div. 1978).

The principal issue to be decided in the instant matter is whether Mr. Vogel has established his entitlement to a hearing in regard to his removal. The record clearly establishes that he failed to appeal his removal to the Merit System Board until the instant matter, and therefore, the matter was not presented to the Board

within the time limits provided in *N.J.S.A.* 11A:2-15. In this regard, the record establishes that Mr. Vogel was provided with notice and an opportunity for a hearing pursuant to *N.J.S.A.* 11A:1-1 *et seq*. Although Mr. Vogel presents that the notice was deficient in that it provided the former name and address of the agency with which the appeal should be filed, the Board notes that had Mr. Vogel addressed an appeal to the name and address provided on the final notice, it would have reached the Merit System Board at its current address without incident or unusual delay. Since his letter of appeal would have been distributed through the Capitol Post Office, it would have been forwarded to the Merit System Board at its Clinton Avenue address. Further, since all CN numbers have been changed to P.O. Box numbers (*i.e.*, CN 312 is now P.O. Box 312), mail addressed to CN 312, Trenton, New Jersey 08625 would have automatically been distributed to P.O. Box 312, Trenton, New Jersey 08625. Moreover, since the Merit System Board determines the date of filing appeals by the postmark on the envelope, any additional time for distribution based on the old address would not have adversely affected Mr. Vogel's request for a hearing.

In the instant matter, the record indicates that Mr. Vogel was, at the time of the removal, in the midst of an arbitration proceeding before PERC in regard to his removal. However, *N.J.S.A.* 34:13A-5.3 clearly prohibits binding arbitration of disputes involving the major discipline of employees with statutory protection under tenure or civil service laws. Accordingly, since Mr. Vogel's removal is defined by merit system law and rules as major discipline, he was barred from pursuing a challenge to that removal through binding arbitration. Further, in *Murphy, supra*, the Appellate Division explicitly held that the statute of limitations for filing an appeal with the Civil Service Commission (now, Merit System Board) was not tolled by arbitration proceedings. *See also County of Monmouth v. Communications Workers of America*, 300 *N.J. Super*. 272, 288 (App. Div. 1997).

Based on the foregoing circumstances, the record establishes that Mr. Vogel received a final notice of disciplinary action which provided him with his appeal rights to the Merit System Board in regard to his removal. While this notice was deficient to a certain extent, and the Board recommends that the County use up-to-date forms in the future, the deficiency did not rise to the level where it interfered with Mr. Vogel's receipt of his appeal rights. The record further indicates that, even though the County Personnel Officer advised Mr. Vogel's union representative against pursuing a request for arbitration and that an appeal must be pursued through the Board, Mr. Vogel failed to file a timely appeal of his removal to the Board. Accordingly, he is properly denied a hearing on his removal on charges.

ORDER

Therefore, it is ordered that Mr. Vogel's request for a hearing in regard to his removal on charges be denied.

HEARING MATTERS

N.J.A.C. 4A:2-2.3(a) provides that discrimination that affects equal employment opportunity, including sexual harassment, is a cause for disciplinary action. The Merit System Board has adopted the test outlined in the New Jersey Supreme Court decision, *Lehmann v. Toys R' Us, Inc.*, 132 *N.J.* 587 (1993), for use in deciding cases of alleged sexual harassment involving complaints of a hostile work environment. Under the *Lehmann* analysis, in order to state a claim for sexual harassment, a complainant must allege conduct that occurred because of his or her sex and that a reasonable person would consider sufficiently severe or pervasive to alter the conditions of employment and create an intimidating, hostile, or offensive working environment. For the purposes of establishing and examining a cause of action, the test can be broken down into four prongs: the complained-of conduct (1) would not have occurred but for the employee's gender; and it was (2) severe or pervasive enough to make a (3) reasonable person of the same gender believe that (4) the conditions of employment are altered and the working environment is hostile or abusive.

The following decisions address various situations in which employees have been disciplined for sexual harassment, and represent a sampling of the circumstances in which charges of this nature are appropriate, and the range of penalties which are warranted. Additionally, please see page 20 for a description of the State's updated policy prohibiting sexual harassment.

Single Incident of Sexual Assault Warrants Removal

In the Matter of Brian Brown

(Merit System Board, decided June 21, 1999)

Brian Brown, a Clerk with the Department of the Treasury, was removed from his position, effective November 7, 1997, on charges of conduct unbecoming a public employee, sexual harassment and engaging in behavior that created a hostile work environment. Specifically, the appointing authority asserted that Brown grabbed a female employee of a cleaning crew supplied by an outside agency, from behind and rubbed her breasts and squeezed her thighs.

The matter was transmitted to the Office of Administrative Law (OAL) for a hearing. The victim did not testify at the OAL hearing. However, the State Trooper who interviewed her based on her sexual harassment complaint recounted that the victim told him that on the date of the incident, Brown asked her for a birthday hug which she refused. Later that day, while she was in the basement of the building working, Brown came up from behind her, put his arms around her, touched her all over her body including rubbing her breasts. She stated that Brown also put his hands between her legs and squeezed her thighs. The victim responded by turning around, kicking Brown in the groin and running away.

Brown testified that he saw the victim in the morning and asked her for a birthday hug and she told Brown "later." At lunch, Brown went into the basement and saw the victim again and asked her for a birthday hug and they hugged for two or three seconds. He testified that he might have touched the victim's hip and "brushed" against her breasts, but it was a consensual hug.

The Administrative Law Judge (ALJ) determined in his initial decision that Brown was

guilty of both conduct unbecoming a public employee and creating a hostile work environment. In arriving at this decision, the ALJ relied mainly on the documentary evidence, discounting much of the testimonial evidence at the hearing. He found Brown's written statements especially incriminating, stating "I conclude that the weight of Brown's voluntary written statements is more than sufficient to support the finding that Brown grabbed, touched and forced himself upon . . . [the victim]." Specifically, in his written statements, Brown admitted that "I grab[bed] her butt," and "I felt her butt" and "grave [grazed] her breast." The ALJ found these contemporaneous written statements as persuasive in his conclusion that Brown had, in fact, committed the acts admitted to in the statements. Also, the ALJ concluded that Brown's actions were not consented to since Brown also wrote that the victim "pushed" him away after he "felt her butt" and "grave [grazed] her breast."

The ALJ finally concluded that whether or not consented to, Brown's behavior was unjustifiable in a State building during normal work hours, and constituted conduct unbecoming a public employee. The ALJ also upheld the charge that Brown's behavior created a hostile, harassing work environment since his actions occurred in the workplace during normal business hours. However, the ALJ dismissed the charge of sexual harassment since Brown's actions were not directed at a State employee, as required under *N.J.A.C.* 4A:7-1.3(e), but rather to an individual doing business with the State.

In his exceptions to the ALJ's initial decision, Brown argued that the ALJ did not apply the proper standards in concluding that he created a hostile, harassing work environment. He asserted that the ALJ should have used the standards set forth in *Lehmann v. Toys R' Us, Inc.*, 132 *N.J.* 587 (1993). Brown specifically contended that the single incident involved in this case could not be considered severe or pervasive enough to warrant the penalty imposed. He stated that under *Lehmann*, it is a "rare and extreme case in which a single incident will be so severe that it would, from the perspective of a reasonable woman, make the working environment hostile . . . " *Id.* at 606-607.

The Board rejected Brown's position in this regard. The ALJ specifically found that Brown's actions were not consensual. The Board found nothing in its *de novo* review of the record to disturb that finding and concluded that Brown made an unwelcome sexual assault on the victim in this case. The Board also concluded that such a single incident is extremely disturbing and that no individual should have his or her personal privacy violated unwillingly, especially when such a violation includes sexual contact. Other than instances where such activity crosses over into violent sexual criminality, the Board could not fathom a more severe type of harassment occurring in a single incident. Consequently, the Board determined that Brown's actions in this single incident were sufficiently severe and pervasive to satisfy the second prong of the test outlined in *Lehmann*. Further, based on this conclusion, the Board found that the third and fourth prongs of the *Lehmann* test were also satisfied. The Board stated that any reasonable woman, while on the job, would feel that she was in a hostile, harassing work environment if she were subjected to the assault directed at the victim by Brown. Therefore, the Board found that the ALJ's determination that Brown was guilty of conduct unbecoming a public employee and creating a hostile, harassing work environment was amply supported in the record.

Brown also argued that even if the charges against him were sustained, the penalty of removal was too severe, especially for an employee who had been employed by the State for 15 years and had no relevant disciplinary history. The Board rejected this argument. The Board, in addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, utilizes, where appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). However, it is well established that where the

underlying conduct is of such an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. The ALJ found that Brown's conduct regarding the unwelcome advance on White to warrant removal. The Board agreed with the ALJ's assessment of the nature and seriousness of the sustained charges. The Board found that Brown's actions were highly offensive and could not be condoned or tolerated. Therefore, the Board concluded that the penalty of removal was appropriate.

Supervisor Suspended for Creating Hostile Work Environment
In the Matter of Peter Amato
(Merit System Board, decided August 10, 1999)

Peter Amato, a Supervising Medical Review Analyst with the Division of Medical Assistance and Health Services, Department of Human Services (DHS), was suspended for 45 days on charges of sexual harassment which created a hostile work environment. Specifically, DHS asserted that appellant violated its administrative order regarding sexual harassment by conducting conversations of an explicit sexual nature with a female employee, using hand gestures of a sexual nature (grabbing his crotch), and placing a condom under an office Christmas tree. In his initial decision, the Administrative Law Judge (ALJ) set forth that DHS's administrative order defined sexual harassment as deliberate or repeated unsolicited verbal comments, gestures or physical contact of a sexual nature which is unwelcome. The ALJ found that appellant's conduct in the condom incident did not rise to the level of sexual harassment, but his conversations and hand gestures constituted sexual harassment. In regard to the conversations, the ALJ indicated that appellant testified that he had a prior personal relationship with the female employee. The ALJ also noted that the conversations were alleged to have occurred during the period when appellant supervised this employee and continued after she was reassigned to another unit. The ALJ found that the female employee believed that by her tacit behavior, she communicated her displeasure at the conversations.

Upon its review of the initial decision, the Merit System Board remanded the matter to the Office of Administrative Law based on its conclusion that it did not have sufficient information to evaluate the ALJ's findings in regard to the charge of sexual harassment as it related to the conversations. The initial decision did not contain sufficient discussion regarding the exact nature of the conversations and the role that the female employee played in the conversations. In this regard, the Board indicated that, in order to uphold or dismiss the charge of sexual harassment in this particular matter, due to the supervisor-subordinate relationship between appellant and the employee which may have precluded her willingness to show her disapproval, it was not necessarily incumbent on the female employee to inform appellant that his actions were unwelcome. Therefore, the Board instructed the ALJ to provide more discussion regarding the female employee's willingness to participate in the conversations in light of a personal relationship, as well as her reluctance to demonstrate her displeasure at his actions.

Upon remand, the ALJ provided evidentiary support for her findings that appellant's repeated explicit sexual comments to the female employee regarding his relationship with his wife and other women, and his insistence of continuing such conversations with her after she asked him to limit all conversations to work-related matters, constituted a hostile work environment. In regard to the other incidents at issue, the ALJ found that while appellant's grabbing of his crotch was a habit he unconsciously developed, and he did this less often after he

was told twice about the habit, the action constituted sexual harassment since it created a hostile work environment for the female employees. However, the ALJ found appellant's explanation credible that his intent in placing a condom under the Christmas tree was to promote an awareness of the health issue of safe sex, and concluded that this incident did not constitute sexual harassment. The ALJ found appellant's conduct in this incident devoid of sexual intent, and noted that appellant removed the condom and apologized to the employees near the tree at the time. In evaluating the appropriateness of the penalty, the ALJ noted that while appellant did not have a record of prior discipline, the 45-day suspension was warranted based on the seriousness of the charges. The ALJ stated that as a supervisor, appellant "has the responsibility of setting a good example for his subordinates and to assure that those under his supervision have an unthreatening work environment." Upon its *de novo* review, the Board agreed with the ALJ's determination to uphold the charges and the recommendation to sustain the 45-day suspension.

Removal Appropriate for Sexual Harassment in Correctional Facility
In the Matter of Hollis Bruce, Jr.
(Merit System Board, decided Nov. 10, 1998)

Hollis Bruce, Jr., a Senior Correction Officer with Bayside State Prison, Department of Corrections (DOC), was removed on charges of discrimination which affects equal employment opportunity, including sexual harassment, discrimination and/or retaliation. DOC asserted that appellant had, on various occasions, verbally and sexually harassed a female Senior Correction Officer. After a hearing, the Administrative Law Judge (ALJ) upheld the charge and the penalty of removal. The ALJ found that appellant told inmates that the female co-worker was having sexual relations with other inmates, was heard to have made other statements suggesting that she received "good jobs" as a result of performing sexual favors for superiors, and that she was having sexual relations with other co-workers. The ALJ also set forth that there was testimony given that appellant constantly referred to the female co-worker as "the bitch." The ALJ found that there was abundant, unrefuted credible testimony that appellant's name calling and comments about the female co-worker's alleged sexual exploits or physical attributes to inmates and officers created a situation which could result in a breach of security, jeopardizing that Officer or other officers at the prison. In this regard, the ALJ indicated that several years earlier a female officer was sexually assaulted and brutally beaten by an inmate. The ALJ concluded that the foregoing misconduct as well as appellant's remarks that the female co-worker was carrying on a sexual relationship with her superiors in order to secure more desirable jobs created a "severe and pervasive" hostile work environment which had the effect of unreason-

ably interfering with the female co-worker's work performance or of creating an intimidating, hostile or offensive work environment. The ALJ rejected appellant's argument that the female co-worker, by her behavior, had invited the comments. The ALJ noted that even if the female co-worker received special treatment on the job as a result of her relationships with her supervisors, her relationships had no bearing on whether harassment by co-workers was unwelcome. The female co-worker's private and personal activities did not constitute a waiver of her legal protections against appellant's unwelcome and unsolicited sexual harassment.

In finding that the offense warranted removal, the ALJ concluded that appellant's 13 years of service with four minor disciplinary infractions did not mitigate his culpability. The Merit System Board affirmed the determination of the ALJ in regard to the charges and the penalty. The Board noted that the nature and seriousness of appellant's infraction could not be countenanced and warranted removal despite the lack of a major disciplinary history. Based on the charge of sexual harassment of another officer which had the effect of compromising the safety of the officer and others, the Board found that the penalty was neither unduly harsh nor disproportionate to the offense, and should be upheld.

Six Month Suspension Appropriate Penalty for Sexual Harassment of Co-Worker
In the Matter of Joseph H. Jurkiewicz
(Merit System Board, decided May 9, 2000)

Joseph Jurkiewicz, a Maintenance Repairer with the Borough of Sayreville, was suspended for six months on charges of conduct unbecoming a public employee and violating internal policies regarding employee conduct and sexual harassment. These charges related to an incident on February 18, 1999, when it was alleged that Jurkiewicz hugged a female employee in an inappropriate manner. Specifically, the appointing authority alleged that the hug was unwelcome, offensive and of a sexual nature.

The matter was transmitted to the Office of Administrative Law (OAL) for a hearing. The victim in this matter, a 20-year old part-time library page, testified that she and Jurkiewicz met when he began as regular maintenance man at the library, some time in early 1999. They greeted each other in a friendly way, usually daily. Jurkiewicz would say, "Can I have a hug?" As he embraced her, he would kiss each of her cheeks and say, "That's a Polish hug."

On the day of the incident, the victim stated that Jurkiewicz asked her to help tie papers together for disposition. Jurkiewicz asked her for a hug, but this time it was different. He held her more tightly than usual, kissed her neck and rubbed her back. She pulled back and he released her. She then walked away. Jurkiewicz approached her and asked to give her a hickey and she emphatically said no. She testified that the first hugs were "grandfatherly." The hug on that day, however, was not. Later, she went to the Police Department and proffered charges, which were later dropped. The victim stated that she did not want to get Jurkiewicz fired, but did want him to stop what he was doing. She also stated that the hugs were not offensive or sexual in nature until the incident.

In his initial decision, the Administrative Law Judge (ALJ) found that the incident occurred as described by the victim in her testimony, and that there was improper contact initiated by Jurkiewicz which the victim did not welcome, notwithstanding the prior consensual contacts between the two. After a thorough and independent review of the entire record, the Board agreed with the ALJ's assessment regarding the charges and agreed that the penalty imposed was appropriate.

In determining the proper penalty, the

Board considered several factors, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *West New York v. Bock*, 38 *N.J.* 500 (1962). 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. In this case, the Board's review of Jurkiewicz's disciplinary history showed that he had no major discipline over his 24-year career. However, notwithstanding Jurkiewicz's prior disciplinary history, the Board found that his actions were extremely inappropriate and serious and warranted a severe penalty. The Board stated that incidents of unwelcome sexual touching cannot be tolerated or condoned in a public employee. Additionally, it stated that the six-month suspension, the most severe allowable under Merit System law and rules, would serve as a clear warning to Jurkiewicz that his actions were highly inappropriate and any additional instances of such behavior could lead to his removal from employment. Finally, the Board noted that, regarding Jurkiewicz's contention that the suspension was unreasonably punitive, the imposition of a six-month suspension is less harsh than the penalties imposed for similar conduct in prior Board decisions. *See e.g., In the Matter of Brian Brown* (MSB, decided June 21, 1999).

OF PERSONNEL INTEREST

GOVERNOR WHITMAN UNVEILS NEW SEXUAL HARRASSMENT POLICY

By: Valerie L. Holman, Director, Division of Equal Employment Opportunity and Affirmative Action

Governor Christine Todd Whitman strongly believes that all New Jersey State employees have an important role to play in changing the societal attitudes, stereotypes, and biases that have allowed discrimination/harassment to exist.

On December 16, 1999, Governor Whitman and Department of Personnel Commissioner Janice Mitchell Mintz signed the "New Jersey State Policy Prohibiting Discrimination, Harassment or Hostile Environments in the Workplace." It is accompanied by the Model Procedures for Internal Complaints Alleging Discrimination, Harassment or Hostile Environments in the Workplace.

On December 17, 1999, Governor Whitman issued Executive Order No. 106, which authorized the use of the Policy and Model Procedures throughout agencies of the State, effective immediately. That means the Policy and Procedures apply to all employees and applicants for employment in State departments, commissions, State colleges, authorities, vendors and those doing business with the State. The Policy applies to conduct which occurs in the workplace as well as to conduct which occurs at any location that can be reasonably regarded as an extension of the workplace.

The Policy is designed to prevent unlawful workplace discrimination/ harassment, advises employees and supervisors of their responsibilities and prohibits retaliation against employees who become involved in the complaint process. The Model Procedures outlines the process for reporting, investigating and, where appropriate, remedying discrimination/harassment complaints.

The EEO/AA Officers within each agency have been charged with the responsibility to oversee the dissemination of the Policy and Procedures. Every employee must sign an acknowledgement form that they received the Policy and Procedures. The Officers are required to report quarterly on the results of the dissemination to employees as well as notification to companies or persons doing business with the state. The EEO/AA Officer will be required to monitor and maintain records of all prevention training. They are also required to monitor every aspect of these initiatives as well as track the number and types of infractions. In some cases, Human Resource personnel will also be asked to assist in various aspects of this endeavor.

The Department of Personnel's Human Resources Development Institute (HRDI), in consultation with the Division of Equal Employment Opportunity/Affirmative Action, will be implementing a mandatory Discrimination/Harassment Prevention Training Plan.

Proposed amendments to the rules governing EEO/AA (*N.J.A.C.* 4A:7-1.1 *et seq.*) are being developed incorporating the new policy and requirements.

Our goal mirrors that of the Governor to ensure a working environment in which the dignity of every individual is respected. That can only be done if we all act in concert to eliminate discrimination/harassment.

FROM THE COURT

Following are recent Supreme Court and Appellate Division decisions in Merit System cases. As the Appellate Division opinions have not been approved for publication, their use is limited in accordance with *R.*1:36-3 of the *N.J. Court Rules.*

This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized.

Penalty of Removal Excessive for Inappropriate Physical Contact
In the Matter of Eva Taylor
158 N.J. 644 (1999)

The issue in this appeal is whether the Court should sustain an order issued by the Merit System Board that terminated an employee of a State psychiatric hospital for physical abuse of a patient.

Eva Taylor was employed for more than fifteen years at Greystone Park Psychiatric Hospital, a facility run by the New Jersey Department of Human Services (DHS). On November 29, 1995, Taylor was suspended without pay for physically abusing a patient. On January 5, 1996, after an administrative hearing, she was removed from her job. Prior to the incident under review, Taylor had an unblemished disciplinary record.

The incident occurred during the afternoon dispensation of medication to patients. While waiting in line for medication, two female patients, B.M. and E.S., began to argue. Taylor attempted to separate them. She had difficulty calming B.M. and called for assistance from Anna Samji, a registered nurse. The remaining facts underlying the incident were sharply disputed.

According to Taylor, when Samji did not respond immediately to her call for help, Taylor went to the nurses' station. She found Samji in the station and informed her of the altercation. Samji ordered another nurse, Georgia Edwards, to give B.M. an injection of a tranquilizer and directed Taylor to take B.M. to the medication room for the injection. B.M. resisted and Taylor was unable to get her to the medication room without the assistance of Linda Wright, a human services technician. Once B.M. was seated in the medication room, Wright was able to secure Taylor's release from the grasp of B.M. Taylor left the medication room before the injection was administered.

Samji's testimony was in stark contrast to Taylor's. According to Samji, she was in the nurses' station when she heard Taylor call for assistance. Samji left the station and determined that B.M. needed a tranquilizer to "calm her down." Samji went to check B.M.'s chart, which was in the nurses' station and then returned to the medication room. At the half-opened door of the medication room, Samji saw Taylor hitting B.M. while Edwards watched. The hitting consisted of Taylor using her clenched fist "up and down" on the patient. Samji entered the room, told Taylor to stop hitting B.M., and had Wright come in and separate Taylor from B.M. Later, B.M. told Samji that Taylor had hit her.

Samji wrote up an incident report before her shift was over. The report did not state that Taylor had hit B.M. Samji reported Taylor's conduct to her supervisor the following day (his shift had already ended when Samji called after the incident occurred). Samji's supervisor, Theodore Bryant, Edwards, and Wright all tes-

tified in a manner that supported Taylor's version of the events. Two doctors examined B.M., one forty minutes after the incident and the other the following day. Neither doctor found any bruises or other injuries.

After DHS terminated Taylor, she filed a timely appeal with the Merit System Board, which referred the case to the Office of Administrative Law. After a hearing the Administrative Law Judge (ALJ), determined that Taylor had physically abused B.M. The ALJ found Samji's version of events more credible than Taylor's or the other witnesses'.

The Merit System Board adopted the ALJ's findings of fact and conclusions of law. Taylor appealed to the Appellate Division. That court reversed the judgment below and directed the ALJ to reconsider the matter because he had provided an insufficient explanation for his conclusion that Taylor had physically abused the patient. The Court granted DHS's petition for certification.

> **HELD**: The Appellate Division exceeded the proper scope of appellate review of this administrative matter by failing to give appropriate deference to the factual findings of the Administrative Law Judge and by substituting its own assessment of the weight to be accorded to the testimony of the witnesses. The evidence does not support, however, the ALJ's legal determination of physical abuse of the patient.

1. The scope of appellate review of an administrative decision is whether the findings could reasonably have been reached on sufficient credible evidence present in the record considering the proofs as a whole, giving due regard to the opportunity of the one who heard the witnesses to judge their credibility. If the appellate court finds sufficient credible evidence in the record to support the agency's conclusions, the court must uphold the findings even if the court believes that it would have reached a different result. Only when the appellate court determines that the findings are "arbitrary, capricious, and unreasonable" may it appraise the record as if it were making the initial findings and conclusions.

2. The Appellate Division failed to apply the foregoing principles properly in this matter. There was sufficient credible evidence in the record to support the ALJ's findings of fact.

3. Because the Court has upheld the ALJ's factual findings, it must also review the legal conclusion that Taylor's conduct constituted "abuse" as defined by DHS. On this record, the Court concludes that the evidence was insufficient to support the ALJ's legal determination that Taylor committed patient abuse. Taylor's conduct constituted "inappropriate physical contact," a violation for which removal would be an excessive sanction.

The judgment of the Appellate Division is MODIFIED and the matter is REMANDED to the Merit System Board for further proceedings consistent with the Court's opinion.

NOTE: *On remand from the New Jersey Supreme Court, the Merit System Board stated that, in assessing the penalty in relationship to the employee's conduct, the nature of the offense must be balanced against the employee's prior record. The Board indicated that, although appellant had a long record of service with no prior discipline, the finding of inappropriate contact with a patient is very serious and warrants major discipline. Neither the appellant's suggested penalty of an oral reprimand or the appointing authority's suggested penalty of a six-month suspension and a demotion were appropriate penalties in the instant matter. Under the circumstances, the Board considered the imposition of a three-month suspension on the appellant neither unduly harsh nor disproportionate to the offense. Therefore, the Board reinstated her to her position following a three-month suspension, with back pay, benefits and seniority. As she did not prevail on all or substantially all of the primary issues in her appeal, however, the Board denied her application for counsel fees. See N.J.A.C. 4A:2-2.12.*

Appellate Division Requires Case-by-Case Review of Counsel Fees
In the Matter of Eric Flake
A-3612-97T5 (App. Div., April 21, 1999)

Eric Flake, a civil service employee (truck driver) at the New Lisbon Developmental Center, prevailed in a proceeding in which the employer sought to terminate Flake's employment.[1] The Merit System Board (MSB) adopted the findings of the Administrative Law Judge, and it ordered that Flake be reinstated to his position with back pay, seniority and benefits, plus counsel fees. The issue on appeal is the counsel fee award.

An affidavit of services in support of reasonable counsel fees was submitted to the Department of Human Services. It indicated that Flake's attorney had been admitted to practice for three years, was a member of the New Jersey State and American Bar Associations, and for the year before her admission, she served as law clerk to a Judge of the Superior Court. Further, she had been employed as an associate at Balk, Oxfeld, Mandell & Cohen where approximately seventy-five percent of her practice "has been in the labor and employment law field." She indicated that she had appeared on numerous occasions before state and federal courts and administrative tribunals, and she had authored an article published in the *New Jersey Labor and Employment Law Quarterly*. Finally, the attorney stated that her firm bills clients for her services at the hourly rate of $135, as do other firms in the same field, and that a Judge of the Superior Court had granted an attorneys fee awarded at that rate. The total time spend was 10.6 hours, for which she sought $1,431.

[1] He was also charged with simple assault and endangering the welfare of an incompetent, but he was acquitted of all charges by the Woodland Township Municipal Court.

The Department of Human Services offered to pay for the attorney's services at the rate of $100 per hour. Stating that it considers "the time and labor required of an attorney, the customary hourly rate, the novelty or difficulty of the questions involved in the matter, and the skill required to properly perform the legal services, the Department cited to *In the Matter of Willie Rease*, an unpublished decision of the MSB dated December 22, 1992. In *Rease*, the MSB said that it had a "policy" concerning awards of attorneys fees "so as to develop a standard that will be uniformly applied," and it set rates for such awards at $125 per hour for attorneys with the status of partner and $100 for those with the status of associate. At oral argument, we were advised that sole practitioners are considered to be partners.

Flake filed a motion with the MSB for an award of $1,431 for counsel fees in accordance with the original affidavit of services (plus an additional $459 for preparing the motion), and cited to an earlier, but published, MSB opinion that awarded an attorney a fee at the rate of $150 for a partner and $125 for an associate. In that case, the MSB noted that "$150 per hour is well within the range of what attorneys are now charging just about anywhere in this state. Rates are even higher in North Jersey. As to the associates, the MSB said that $150 per hour was "above the range for other associate attorneys working in law offices in New Jersey," and awarded a fee at $125 per hour. *Gill v. State Dept. of Health*, 92 *N.J.A.R.2d* (CSV)142 (1991).

Customarily, each party pays his or her own attorney's fees unless the matter comes under the fee-shifting provisions of *R.* 4:42-9. The applicable provision here is subsection (8), which shifts fees "[i]n all cases where counsel fees are permitted by statute." *N.J.S.A.* 11A:2-22, provides that "[t]he [MSB] may award back pay, benefits, seniority and reasonable attorney fees to an employee as provided by rule," and applies to all civil service employees who successfully challenge disciplinary proceedings. The rule adopted by the MSB is *N.J.A.C.* 4A:2-2.12, and it provides:

> (a) The Merit System Board shall award partial or full reasonable counsel fees where an employee has prevailed on all or substantially all of the primary issues.
> (b) When the Board awards counsel fees, the actual amount shall be settled by the parties whenever possible.
> (c) In determining the amount of counsel fees, the following factors should be considered:
> 1. The time and labor required; and
> 2. The customary hourly rate.
> (d) The attorney shall submit an affidavit and any other documentation to the appointing authority.
> (e) If settlement on an amount cannot be reached, either party may request, in writing, Board review.

The problem here is twofold: review of the reasonableness of the fee and the establishment of a policy.

Applications for counsel fees are reviewed by judges and agencies for reasonableness. That entails a delicate exercise of discretion by the reviewing tribunal. *Rendine v. Pantzer*, 141 *N.J.* 292, 337 (1995). Substantive review is guided by consideration of *RPC* 1.5(a) which provides:

> (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer:
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relations with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
> (8) whether the fee is fixed or contingent.

With so many factors to consider, it seems obvious that each case merits individual review. We perceive here such review of the extent of legal services, meaning the hours billed, but the rates applied seem to be fixed and unbendable. At oral argument, counsel for the MSB advised that the work is uncomplicated and undeserving of a higher rate of compensation. Moreover, in its final decision, the MSB stated that it had recently declined to raise rates when it re-adopted *N.J.A.C.* 4A:2, and that "specific rates should not be codified in the rule, since it was more sensible to review appeals regarding counsel fees based on the facts presented in a given matter." The question is: does the MSB conduct individual reviews of all the facets of a counsel fee award or does it implement an unwritten policy "applied as a general standard and with widespread coverage and continuing effect?" *Metromedia, Inc. v. Director, Div. of Taxation*, 97 *N.J.* 313, 329 (1984). It is clear to us that the MSB only grants counsel fees at the rate of $125 for a partner and $100 for an associate. As such, that constitutes *de facto* rulemaking, which, in order to be valid, must comply with the Administrative Procedure Act, *N.J.S.A.* 52:14B-1 to 15 (APA). This "policy" of the MSB was never subjected to the notice and hearing requirements of *N.J.S.A.* 14B-4, and thus is not a validly promulgated rule.

As a matter of reasonableness, the MSB purported to review the counsel fee application and found it "presented a standard challenge of disciplinary action and no novel or unique issues." We cannot fault that conclusion as an abuse of "quasi-judicial" discretion. However, the MSB then simply said that although counsel indicated that her regular hourly rate was $135, "[her] time should be reimbursed at the hourly rate of an associate of $100." Thus the MSB applied its long-standing policy of applying fixed hourly rates dependent on the attorney's status as a partner or an associate. The MSB completely disregarded any independent consideration of "the fee customarily charged in the locality for similar legal services" or "the experience, reputation, and ability of the lawyer or lawyers performing the services" as required by *N.J.A.C.* 4A:2-2.12 and RPC 1.5(a). It also failed to mention the reported decision, directly on point, in *Gill v State Dept. of Health, supra,* which recognized "the range of what attorneys are now charging just about anywhere in this state." 92 *N.J.A.R.2d* at 142.

The *Gill* decision was made in 1991, and it took notice of a survey of hourly rates charged by attorneys that appeared in the *New Jersey Law Journal*. A more recent survey reveals that for commercial litigation, the category closest to this type of legal services, the hourly rates range from $143 per hour to $237 per hour, and for this attorney's geographical area the rates range from $161 to $237 per hour. *How Much Do You Charge?*, 152 *N.J.L.J.* 89, 105 (April 13, 1998). We conclude that a counsel fee award based on an hourly rate of $100 for an associate attorney with three years concentrated experience in the field, with a background that includes a judicial clerkship and a published article, is unreasonable.

Accordingly, we reverse the counsel fee award made by the MSB on January 16, 1998, because it was based on an hourly rate that was unreasonable and was part of a *de facto* rule that was not adopted pursuant to the requirements of the APA. The matter is remanded to the MSB for reconsideration of the counsel fee award, and the MSB is directed to consider the attorney's representation at the disciplinary hearing and all MSB proceedings, including the motion for reconsideration of the inappropriate counsel fee award.

Reversed and remanded. We do not retain jurisdiction.

NOTE: *On remand, the Merit System Board found Eric Flake's attorney's request for $135 per hour unreasonably high for an associate, as the matter, which required only a one-day hearing, concerned a single charge of client abuse. Moreover, the Board noted that Flake's attorney had agreed to a union-negotiated hourly rate of $105 per hour. Therefore, the Board concluded that Flake's attorney should not be compensated at a rate greater than the rate which was negotiated simply because counsel fees were awarded by the Board. Accordingly, the Board awarded Flake's attorney an additional $5 per hour.*

Sheriff Exceeds Authority in Promising Back Pay

In the Matter of Francisco Martin v. Sheriff James A. Forcinito, Cumberland County Sheriff's Department and County of Cumberland

A-4461-97T5 (App. Div., March 3, 1999)

After being indicted for second degree official misconduct (*N.J.S.A.* 2C:30-2), third degree conspiracy to distribute heroin in the Cumberland County Jail (*N.J.S.A.* 2C:35-5b(1)) and fourth degree conspiracy concerning distribution of marijuana in the Cumberland County Jail *(N.J.S.A.* 2C:35-5b(12)*)*, plaintiff was suspended from his position as a corrections officer in the Cumberland County Jail. He was admitted to the PTI program with the consent of the County Prosecutor, and upon completion of PTI, the indictment was dismissed and a judg-

ment of acquittal entered on December 21, 1995. The suspension was effective from the time of the indictment on April 14, 1994 to the day he returned to work on May 22, 1995. During that period he did not receive either pay or benefits.

The Sheriff believed that plaintiff was not guilty of the charges and he had discussed the possibility of PTI with plaintiff. He has certified that he told plaintiff "so long as the prosecutor agreed with his admission to PTI, that I would promise him that he would be paid for back pay, benefits and whatever else he should have gotten because of the suspension." Further, the Sheriff certified that he discussed this directly with plaintiff and "told him I promised and knew at all times that I was speaking with him that I was the Sheriff, I was the individual in charge, (sic) hiring, firing and disciplinary matters. I did indeed expect that Francisco would rely upon (sic) promise and seek back pay." When he returned to work, plaintiff sought payment of back pay and benefits or seniority for the period of suspension, but the demand was denied. Plaintiff then brought an action to recover what he had demanded. Summary judgement was granted to defendants and this appeal ensued.

Defendants denied the demand because *N.J.A.C.* 4A:2-2.10(c)1 specifically prohibits payment of back pay when a criminal complaint is disposed of by admission into the PTI program. The pertinent part of the Administrative Code states:

> (c) Where an employee, other than a municipal police officer, has been suspended based on a pending criminal complaint or indictment, following disposition of the charges the employee shall receive back pay, benefits and seniority if the employee is found not guilty at trial, the complaint or indictment is dismissed, or the prosecution is terminated.
>
> 1. Such items shall not be awarded when the complaint or indictment is disposed of through Conditional Discharge, *N.J.S.A.* 2C:36A-1, or Pre-Trial Intervention (PTI), *N.J.S.A.* 2C:43-12 et seq.
>
> *[N.J.A.C.* 4A:2-2.10(c).*]*

On appeal, plaintiff contends that defendants are estopped from denying him back pay by the acts and promises of the Sheriff as the head of the employing agency who had the power to fix the compensation of sheriff's officers pursuant to *N.J.S.A.* 40A:9-117.10. He also asserts that *N.J.A.C.* 4A:2-2.10(c)1 may be relaxed for good cause, pursuant to *N.J.A.C.* 4A:1-1.2(c), and that the Sheriff's desire to provide him back pay was a relaxation of the prohibition for good cause.

We disagree with plaintiff's contentions because the Sheriff lacked authority to award back pay and benefits to an indicted corrections officer when the charges were disposed of through PTI. In *Summer Cottagers' Ass'n. of Cape May v. City of Cape May*, the Supreme Court said:

> There is a distinction between an act utterly beyond the jurisdiction of a municipal corporation and the irregular exercise of a basic power under the legislative grant in matters not in themselves jurisdictional. The former are Ultra vires in the primary sense and void; the latter, Ultra vires only in a secondary sense which does not preclude ratification or the application of the doctrine of estoppel in the interest of equity and essential justice. But there cannot be such relaxation of the conditions laid down in the grant of the power as to defeat the public policy intended to be served. The question is essentially one of the legislative intention. Are the conditions made prerequisite to the very existence of the power – a limitation of the power itself?

[19 *N.J.* 493, 504-05(1955) (citation omitted).]

Clearly, *N.J.A.C. 4A:2-2.10(c)1* is mandatory: back pay "shall not be awarded" to the suspended governmental employee when the indictment is disposed of through PTI. Therefore, the Sheriff's promises are *ultra vires* in the primary sense, and the doctrine of estoppel is inapplicable. The rule states the clear and unambiguous policy of this state that diversion into the PTI program is not the same as an acquittal of the charges at trial. We conclude that the award of summary judgment to defendants was correct.

Affirmed.

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