A-15

STATE OF NEW JERSEY

In the Matter of Hope Tucci
Gloucester County,
Emergency Response Department

CSC DKT. NO. 2014-1148
OAL DKT. NO. CSV 16087-13

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: DECEMBER 21, 2015 BW

The appeal of Hope Tucci, Public Safety Telecommunicator, Gloucester County, Emergency Response Department, removal effective October 23, 2013, on charges, was heard by Administrative Law Judge Elia A. Pelios, who rendered his initial decision on October 29, 2015. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on December 16, 2015, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

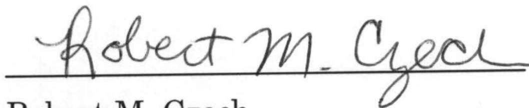
ORDER

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 Hope Tucci.

Re: Hope Tucci

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
DECEMBER 16, 2015



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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 16087-13

AGENCY DKT. NO. 2014-1148

IN THE MATTER OF HOPE TUCCI, GLOUCESTER COUNTY, EMERGENCY RESPONSE DEPARTMENT.

Hope Tucci, appellant, pro se

Eric D. Milavsky, Esq., for respondent (Brown & Connery, LLP, attorneys)

Record Closed: January 28, 2015 Decided: October 29, 2015

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE

The County of Gloucester, Emergency Response Department, removed Public Safety Telecommunicator (PST), Hope Tucci (appellant) for Incompetency, Inefficiency or Failure to Perform Duties. The matter arises from appellant allegedly mishandling a 911 call on March 20, 2013.

PROCEDURAL HISTORY

On April 12, 2013, the County served on appellant a Preliminary Notice of Disciplinary Action removing her. On October 21, 2013, a departmental hearing was held. The County issued a Final Notice of Disciplinary Action removing appellant effective October 23, 2013. Appellant filed an appeal with the Civil Service Commission on or about October 29, 2013. The Office of Administrative Law (OAL) filed the matter as a contested case on November 6, 2013 pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was heard on January 28, 2015, and the record closed on that date. Orders were entered in this matter to allow for an extension of time in which to file the initial decision.

FACTUAL DISCUSSION

Diane Morgan (Morgan) testified on behalf of the respondent. She is employed in the Gloucester County Emergency Response Department as a supervisor of Fire, Emergency Management Systems (EMS) and Police Dispatch. She has served twenty-five years of employment with the County. She has worked as a PST and was promoted to senior PST in 2006 and a supervising PST in 2009. In her current role she constructs the daily schedule, approves leave time and time off from the job and handles discipline. She is very familiar with the job duties of a PST.

She described the PST as serving a critical role in the emergency response department. A PST is expected to receive calls and essentially takes all incoming calls. A PST will take pertinent information such as phone, address, location and the caller's name. Once the information is received they will dispatch the appropriate resource by radio. Dispatch is not to be delayed for the purpose of entering or updating computer information and a paper backup system is maintained. All information is ultimately entered into the Computer Aided Dispatch (CAD). The PST is considered to be the link between a caller and an officer and plays a critical role in public safety.

Morgan stated that appellant started working for the County in 2000, and stayed there until her termination in 2013. She noted that historically appellant has had many problems in

her employment, specifically abuse of sick time, insubordination, a history of being rude to callers and a failure to dispatch. She has received extra training and progressive discipline.

Morgan described the circumstances around the March 20, 2013 incident noting that she did not believe the department was experiencing a particularly high call volume on that afternoon. Reviewing respondent's call record for that day (R-5) between 2:15 p.m. and 6:15 p.m., Morgan noted that Tucci fielded seven calls. There were eighteen incidents noted, but some reflect officers calling in and only required data entry, and do not call for a response. Seven calls in four hours would be considered a less than average call volume according to Morgan and is often much, much heavier.

On the date in question the appellant mishandled one of the seven calls. A call at 4:53 p.m. was not entered into CAD and was not dispatched. One hour later, the caller initially reporting the incident called back complaining that no officer had arrived on the scene. The reporter initially called to report a suspicious person in a potential child-luring situation. Morgan presented an audio recording of the call (R-6) on which the appellant can be heard stating that she did not dispatch due to the fact that the CAD system was down. A second PST received the second call. After the dispatched officer called in, appellant explained that the computer had crashed and she had not entered the call. The first call was reported at 4:53 p.m. and the second call was reported at 6:15 p.m.

Morgan reports that the CAD system did go down on March 20, 2013, but that it went down at 3:20 p.m. for forty-two minutes. The first phone call came fifty minutes after service had been restored. Morgan stated that the County seeks dismissal due to appellant's extensive history of discipline, and notes that the continued recurrence of these issues may serve to endanger lives. Noting appellant's discipline history, Morgan reported that there were five instances of incompetence and four prior mishandled calls, the last of which resulted in a sixty-day suspension.

Dennis Kappler (Kappler) also testified on behalf of the respondent. He has worked for the County since 1996 and has served as the Acting Chief PST since 2007. Since 2003, he has provided and coordinated training for PSTs. Kappler described the training the PSTs receive and discussed what they are trained to do when a suspicious person is reported.

Such a situation requires immediate deployment of police resources. He stated that delayed dispatch diminishes the chance of identifying the suspect. Delayed dispatch also increases the potential of risk to public safety. Kappler is familiar with the appellant's history and agrees that termination is warranted. He believes liability issues exist if she is retained.

Appellant testified on her own behalf. She states that she has been diagnosed with attention deficit disorder (ADD) and suffers from attention span issues. She takes medication that she believes helps her and hopes that it would help to make her a better dispatcher. She notes that she was diagnosed in May 2013 after she was served with discipline, and did not ask for any accommodation. She notes that the call came at a difficult time in a day during which she believes she had a heavy workload and was having trouble at home with her son's depression. She believes the circumstances do not warrant removal from employment and would like to be considered for reassignment as she believes has occurred with other individuals.

The essential facts in this matter are not in dispute. Accordingly I **FIND** the following:

On March 20, 2013 appellant was employed by the County of Gloucester Emergency Response Department as a PST. On that date the CAD system went down at 3:20 p.m. for forty-two minutes. At 4:53 p.m. appellant fielded a phone call for emergency services reporting a suspicious person and a potential child-luring incident. Appellant did not enter the call into the CAD system and police resources were not dispatched as would normally be the case in such a situation. Over one hour later at 6:15 p.m., a second call was received from the same individual noting that no officers arrived in response to her call. Once that matter was dispatched, appellant volunteered that she had not done so because the computer was down, even though it was had been restored for nearly an hour at the time the first call was received. Appellant's disciplinary history reflects five instances of incompetence and four instances of mishandled 911 calls. Appellant was diagnosed with ADD after she was served with charges in this matter.

CONCLUSIONS OF LAW

In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:-2.21; N.J.A.C. 4A:2-1.4(a). The authority must show by a preponderance of the competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal, based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

Under N.J.A.C. 4A:2-2.3(a)(1), an employee may be subjected to major discipline for "incompetency, inefficiency, or failure to perform duties." Although progressive discipline is the general rule, sheer incompetency can be the grounds for firing without progressive discipline.

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. See, In re Herrmann, 192 N.J. 19, 32 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline).

"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). (Note: Gaines had a substantial prior disciplinary history, but the case is frequently quoted as a threshold statement of civil service law.)

"In addition, there is no right or reason for a government to continue employing an incompetent and inefficient individual after a showing of inability to change." Klusaritz v. Cape May County, 387 N.J. Super. 305, 317 (App. Div. 2006) (termination was the proper remedy for a county treasurer who couldn't balance the books, after the auditors tried three times to show him how).

> In reversing the MSB's insistence on progressive discipline, contrary to the wishes of the appointing authority, the Klusaritz panel stated that '[t]he [MSB's] application of progressive discipline in this context is misplaced and contrary to the public interest.' The court determined that Klusaritz's prior record is 'of no moment' because his lack of competence to perform the job rendered him unsuitable for the job and subject to termination by the County.
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> [In re Herrmann, 192 N.J. 19, 35-36 (2007) (citations omitted).]

There is no definition in the administrative code of the term "inefficiency," and therefore, it has been left to interpretation.

In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980).

The fundamental concept that one should be able to perform the duties of the position is stated in Briggs v. Department of Civil Service, 64 N.J. Super. 351, 356 (App. Div. 1960), which happens to be a probationary period case involving a nurse:

> Manifestly, the purpose of the probationary period is to further test a probationer's qualifications. Neither the Legislature nor the Commission has given the courts any guidance in determining the extent of assistance or orientation which a probationer must receive. Undoubtedly her duties must be explained to her and she must be given reasonable opportunity to perform the duties expected of her. But this does not mean she is entitled to on-the-job training in the manner of performing her duties. This is what she must be qualified for—the proper performance of her duties as outlined by the appointing authority.

The record reflects and appellant does not dispute that appellant failed to dispatch a response after taking a 911 call. This is the fundamental requirement of her job and no other interpretation may be entertained than that she clearly and fundamentally failed to perform the duties of her job. I **CONCLUDE** that the charge of Incompetence, Inefficiency for Failure to Perform Duties is **SUSTAINED**.

PENALTY

N.J.S.A. 11A:2-19 and N.J.A.C. 4A:2-2.9(d) specifically grant the Commission authority to increase or decrease the penalty imposed by the appointing authority. Typically, the Board considers numerous factors, including the nature of the offense, the concept of progressive discipline and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463.

"Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Bock, 38 N.J. 500, 523 (1962), that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990).

Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

In re Carter, 191 N.J. 474, 484 (2007), citing Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197-98 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense); see also, In re Herrmann, 192 N.J. 19, 33 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline):

> . . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

N.J.S.A. 11A:2-19 provides that the Civil Service Commission may increase or decrease the penalty imposed by the appointing authority, but removal shall not be substituted for a lesser penalty. See, Sabia v. City of Elizabeth, 132 N.J. Super. 6, 15-16 (App. Div. 1974), certif. denied, Elizabeth v. Sabia, 67 N.J. 97 (1975).

The record reflects that appellant's position involves public safety and that nature of her misconduct causes a risk of harm to persons or property. As a 911 operator, appellant served as a conduit between citizens in need of emergency services and those charged with providing emergency and public safety services to the community. Her failure to dispatch after receiving a call involving a potential threat to young children is simply inexcusable and serves to undermine the confidence of people that the community will provide its public safety services efficiently, effectively, and timely. Clearly this constitutes an act of severe misconduct, one which she has performed several times prior and continues to repeat. In consideration of the foregoing, along with appellant's disciplinary records, I **CONCLUDE** that the respondent's action in removing the appellant was justified.

ORDER

I **ORDER** that the charge of Incompetency, Inefficiency or Failure to Perform Duties be **SUSTAINED**. I further **ORDER** that respondent's removal of employee also be **SUSTAINED**.

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.

October 29, 2015
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: 10/30/2015

Date Mailed to Parties: 10/30/2015

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APPENDIX

LIST OF WITNESSES

For Appellant:

Hope Tucci

For Respondent:

Diane Morgan

Dennis Kappler

LIST OF EXHIBITS

For Appellant:

None

For Respondent:

R-1 Job Specification

R-2 In-House Computer System Policies

R-3 Emergency Backup Procedures

R-4 Disciplinary Memorandum

R-5 CFS Records

R-6 CD Audio of 911 Calls

R-7 Request for Discipline