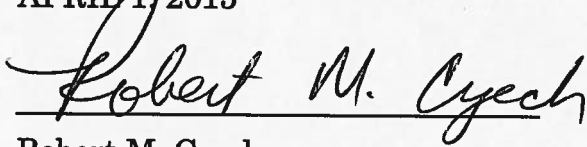


Re: Arnold Alfano

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
APRIL 1, 2015



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. CSR 08930-14

CSC DKT # 2015-122

**IN THE MATTER OF ARNOLD M. ALFANO,
CITY OF HOBOKEN.**

**Bruce Leder, Esq., for appellant (Cohen, Leder, Montalbano & Grossman,
attorneys)**

Steven R. Nervolis, Esq., for respondent (Weiner Lesniak, attorneys)

Record Closed: January 21, 2015

Decided: February 23, 2015

BEFORE **CARIDAD F. RIGO, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Arnold M. Alfano (Alfano), appeals the City of Hoboken Fire Department's decision to remove him from employment as a firefighter alleging that he engaged in conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6) and (12) for other sufficient cause because he had criminal charges pending, as well as violations of Rules and Regulations, chapter 8 section 18 to wit: any violations of the law, chapter 8, section 28, as in possession of drugs.

On or about July 7, 2014, a Final Notice of Disciplinary Action was served upon

Alfano sustaining the charges and removing him effective November 16, 2012. Alfano appealed and the matter was transmitted to the Office of Administrative Law (OAL), where it was filed as a contested case on July 15, 2014. Telephone conferences were held on July 25 and October 17, 2014, at the conclusion of which the parties agreed to enter into a Stipulation of Facts along with Joint Exhibits, and to proceed on a summary decision basis. The parties submitted the Stipulation of Facts and Joint Exhibits on December 15, 2014. The parties filed their respective motions and briefs on January 21, 2015 and the record closed.

SUMMARY DECISION

Under the New Jersey Uniform Procedure Rules, parties may move for summary decision upon all or any of the substantive issues in a case N.J.A.C. 1:1-12.5(b). An Administrative Law Judge (ALJ) may make a ruling in favor of the motion when the papers filed along with any supporting affidavits and exhibits show that there are no material fact issues.

A contested case can be summarily disposed of before an ALJ without a plenary hearing in instances where the undisputed material facts indicate that a particular issue or case can be disposed of as a matter of law. In re Robros Recycling Corp., 226 N.J. Super. 343, 350 (App. Div.) certif. denied, 113 N.J. 638 (1988). A summary decision must be based on an examination of the totality of circumstances, mitigating and aggravating factors, adequate factual findings and conclusions of law. Ibid.

In this case the parties have submitted a joint stipulation of facts and exhibits so there is no question that there are no disputes regarding the facts and the only questions can be answered based on the law. The item marked Joint Exhibit A are herein incorporated as the **STIPULATED FACTS** and Joint Exhibit B are herein incorporated as the supporting documentation. The parties' joint motion seeking Summary Decision is hereby **GRANTED**.

ISSUE

Was petitioner's termination from the Hoboken Fire Department for conduct unbecoming a public employee warranted?

SUMMARY OF THE FACTS

Petitioner was employed by respondent, City of Hoboken, as a fire fighter in the Hoboken Fire Department. He was hired as a firefighter on April 26, 2001. He has no disciplinary history with the respondent.

On November 14, 2012, while off duty and driving in the City of Elizabeth, Union County, New Jersey, petitioner engaged in a hand-to-hand drug transaction. Subsequent to the transaction he attempted to conceal a small black bag of heroin. Upon his removal from his vehicle police officers discovered seventy (70) glassine envelopes of heroin. Petitioner was subsequently arrested and charged with knowingly possessing, with intent to distribute, and with intent to distribute within 1,000 feet of a school, a controlled dangerous substance (CDS) to wit: heroin. He was also charged with possession of suboxone, also a controlled dangerous substance.

Upon his arrest petitioner admitted to the criminal transaction and acknowledged that he had a heroin addiction. He also admitted that he purchased heroin about two to three times a week.

On April 24, 2013, petitioner was accepted into the Union County Pre-trial Intervention program (PTI). Upon the completion of two residential rehabilitative programs, the required community services, and payment of all of the attendant fines and penalties, the criminal charges were dismissed on May 6, 2014. Petitioner successfully completed PTI.

A Preliminary Notice of Disciplinary Action was issued on November 16, 2012, suspending petitioner indefinitely. A departmental hearing was held on July 7, 2014, at which time petitioner was served with a Final Notice of Disciplinary Action sustaining the

departmental charges against him and terminating his employment effective November 16, 2012.

DISCUSSION AND CONCLUSIONS OF LAW

Petitioner argues that respondent's Final Disciplinary Action of termination is erroneous because the criminal charges, the basis of his removal, were dismissed. Petitioner reasons that because the criminal charges were dismissed on May 6, 2014, respondent should not have considered them at the departmental hearing in July 2014. According to petitioner, the criminal charges alleged in the Preliminary and Final Disciplinary Notices were no longer pending and in fact were dismissed. According to petitioner he does not have a conviction or a guilty plea on his record therefore he should not be disciplined for having criminal charges. Petitioner also argues that he successfully completed an in-patient treatment program; complied with everything in the PTI program; and, that he does not have a disciplinary record.

Petitioner also presents that his drug addiction should be considered a disability that requires a reasonable accommodation, not because illegal drug addiction is a disability but because public policy says employers should give illegal drug addicts the chance to overcome their addiction. Petitioner states he should be given a "last chance" opportunity that is consistent with his rehabilitative efforts. Petitioner also claims he is in the process of expunging his record because other than this incident he has a clean criminal and work record.

Respondent argues that petitioner's successful completion of PTI does not preclude respondent from seeking petitioner's termination because of his underlying criminal actions. Respondent asserts that the burden of proof in a departmental disciplinary hearing is established by a preponderance of the evidence and not beyond a reasonable doubt; that is the standard in a criminal matter. Therefore in this case, in a departmental disciplinary action the respondent only needs to establish the truth of the charges by a preponderance of the evidence. And, in this case, petitioner admitted to purchasing heroin not only on November 14, 2012, but on numerous other times, several times a week, while employed as a firefighter. Respondent also asserts that the

standard varies when the disciplinary charge involves a public employee that violated a criminal law or involves conduct that offends common decency. Respondent furthers that petitioner has violated the public's trust.

Petitioner's argument that he does not have a conviction because he did not plea guilty nor was he found guilty of a crime has no bearing on this matter. The fact that the charges were dismissed because he successfully completed a PTI program is irrelevant. Petitioner is being dismissed from his job not because of the criminal charges but because of his underlying conduct that brought forth his arrest, the charges, and his subsequent admission into a PTI program. The purpose of the PTI program is to provide eligible defendants with the opportunity to avoid prosecution by receiving early rehabilitative services. Even an acquittal of criminal charges against a public employee does not bar disciplinary proceedings against the employee because the disciplinary proceedings were based on the misconduct underlying those charges. Sabia v. City of Elizabeth, 132 N.J. Super. 6, 12 (App. Div. 1975) ("the absence of a conviction, whether by reason of non-prosecution or *even acquittal*, bars neither prosecution nor finding of guilt for misconduct in office in the disciplinary proceedings (emphasis added).").

The commission of a crime is conduct unbecoming a public employee and in violation of N.J.A.C. 4A:2-2.3(a)(6), although the regulation does not expressly define what is conduct unbecoming. Conduct unbecoming a public employee is an elastic standard that includes any conduct that adversely affects morale or efficiency or has a tendency to destroy public respect for governmental employees and confidence in the operation of public services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998). Conduct unbecoming a public employee is defined on a case-by-case basis. Misconduct needs to "be as such as to offend publicly accepted standards of decency." Id. at 555. The misconduct need not be based upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior by one who stands in the public eye as an upholder of what is morally and legally correct. Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992). Firefighters like police officers are considered special kind of public employees whose duty is to uphold the law. Moorestown v. Armstrong, 89 N.J. Super.

560 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966).

Petitioner argues that because his work history after ten years is devoid of any discipline that termination is too harsh. A civil servant who commits a wrongful act may be subject to major discipline. N.J.S.A. 11A:2-20, N.J.A.C. 4A:2-2.2, 2.3(a). In certain situations immediate termination is appropriate and does not have to be preceded by less severe penalties. Depending on the incident or the employee's past record, major discipline may include termination. W. New York v. Bock, 38 N.J. 500, 522-24 (1962). However, the circumstances herein show that petitioner's conduct was severe. There is no dispute that petitioner purchased seventy glassines of heroin and that that was the basis for his arrest. After his arrest, petitioner admitted that he made the purchase and that he had an addiction to heroin.

Petitioner's last argument is that his long-standing drug addiction should be considered a disability therefore he is entitled to an accommodation. However, the use of an illegal substance is not a handicap under the New Jersey Law Against Discrimination (LAD). The LAD defines "handicapped" as,

suffering from physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or from any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. Handicapped shall also mean suffering from AIDS or HIV infection.

[N.J.S.A. 10:5-5(q).]

Despite their generally broad interpretation of the term "handicapped," courts have not extended the interpretation to include conduct which is otherwise criminal. See A.B.C. v. XYZ Corp., 282 N.J. Super. 494, 508 (App. Div. 1995). The possession

of heroin is a crime of third degree. N.J.S.A. 2C:35-10(a)(1). It follows therefore that the use of heroin is a crime and not a handicap under the LAD.

I therefore **FIND** and **CONCLUDE** that petitioner's actions in purchasing and using heroin on November 14, 2012, constitutes conduct unbecoming a public employee that warrants his removal as a firefighter for the City of Hoboken.

ORDER

It is hereby **ORDERED** that petitioner's appeal of his removal is **DISMISSED** in its entirety;

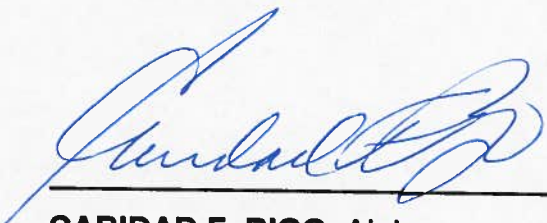
And, it is **FURTHER ORDERED** that petitioner's termination pursuant to the Final Notice of Disciplinary Action dated July 7, 2014, is hereby **UPHELD**.

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, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 23, 2015
DATE



CARIDAD F. RIGO, ALJ

Date Received at Agency:

February 23, 2015


Date Mailed to Parties:

FEB 24 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

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