



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Kristian Kirchner

CSC Docket No. 2016-2303
OAL Docket No. CSR 789-16

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ISSUED: **NOV 16 2016** (NFA)

The appeal of Kristian Kirchner, a Police Officer with the City of Vineland, of his removal effective January 1, 2016, on charges, was considered by Administrative Law Judge John S. Kennedy (ALJ), who rendered his initial decision on September 20, 2016, upholding the removal. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of November 10, 2016, did not adopt the ALJ's recommendation to uphold the removal. Rather, the Commission acknowledged the settlement between the parties.

DISCUSSION

The pertinent facts of this matter are as follows: The appellant was charged with incompetency, inefficiency or failure to perform duties, inability to perform duties and other sufficient cause. Specifically, it was alleged that the appellant was psychologically unable to perform his duties. Upon his appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing.

On September 20, 2016, the ALJ issued his initial decision recommending upholding the removal. In its exceptions and reply to exceptions, both the appellant and appointing authority indicate that the parties had subsequently entered into a

“consent order” where they agree to settle the matter and to characterize the appellant’s separation from employment as a resignation in good standing.

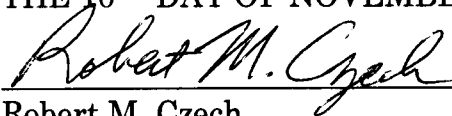
Initially, it is noted that the Commission, has, in numerous previous matters, modified a disciplinary removal from employment to a resignation in good standing where it is indicated that, through no fault of his or her own, an employee is no longer medically or psychologically fit to perform on the job. A review of this matter indicates such circumstances. Further, the Commission regularly acknowledges settlements where such settlements are in compliance with Civil Service law and rules. In this regard, the policy of the judicial system strongly favors settlement. *See Nolan v. Lee Ho*, 120 N.J. 465 (1990); *Honeywell v. Bubb*, 130 N.J. Super. 130 (App. Div. 1974); *Jannarone v. W.T. Co.*, 65 N.J. Super. 472 (App. Div. 1961), *cert. denied*, 35 N.J. 61 (1961). This policy is equally applicable in the administrative area. A settlement will be set aside only where there is fraud or other compelling circumstances. *See Nolan, supra*. Thus, it is appropriate in this matter to reject the ALJ’s recommendation to uphold the appellant’s removal and to acknowledge the settlement indicating the appellant’s resignation in good standing.

ORDER

The Commission rejects the ALJ’s recommendation to uphold the removal and acknowledges the settlement agreement.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 10TH DAY OF NOVEMBER, 2016



Robert M. Czech
Chairperson
Civil Service Commission

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and
Correspondence

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Attachment

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In the Matter of KRISTIAN KIRCHNER, <div style="text-align: center;">Appellant</div> v. CITY OF VINELAND, <div style="text-align: center;">Respondent</div>	: STATE OF NEW JERSEY : CIVIL SERVICE COMMISSION : : OAL DKT. NO. CSR 00789-16 : : : : CONSENT ORDER :
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THIS MATTER being opened by Stuart J. Alterman, Esquire, of Alterman and Associates, L.L.C., attorneys for the Appellant, Kristian Kirchner, and Michael E. Benson, Esquire, of Buonadonna & Benson, attorney for the Respondent, City of Vineland, and the Hon. Judge John S. Kennedy, ALJ, having found that the Appellant is unfit for duty and unable to perform the duties of a Police Officer; and the parties having agreed to enter into this Consent Order providing for the Appellant to be deemed as having resigned in good standing;

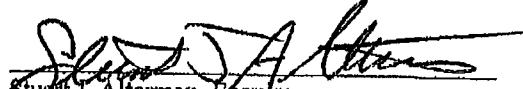
IT IS on this _____ day of _____, 2016, ORDERED:


1. That Appellant, Kristian Kirchner, shall be deemed as having Resigned in Good Standing from his position as a Police Officer with the City of Vineland.

We hereby consent to the Form and Entry of the above Order.

ALTERMAN AND ASSOCIATES, L.L.C.

BUONADONNA & BENSON


Stuart J. Alterman, Esquire
Attorney for Appellant


Michael E. Benson, Esquire
Attorney for Respondent



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. CSR 00789-16

AGENCY DKT. NO. N/A

**IN THE MATTER OF KRISTIAN
KIRCHNER, CITY OF VINELAND.**

Stuart J. Alterman, Esq., for appellant, Kristian Kirchner (Alterman & Associates, attorneys)

Michael E. Benson, Esq., for respondent, City of Vineland (Buonadonna & Benson, attorneys)

Record Closed: August 15, 2016

Decided: September 20, 2016

BEFORE **JOHN S. KENNEDY, ALJ**:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Respondent, City of Vineland, has moved for Summary Decision pursuant to N.J.A.C. 1:1-12.5, asserting that the appellant is unfit for duty as a police officer with the City of Vineland.

The original Petition of Appeal was filed with the Civil Service Commission (CSC) on January 4, 2016. The CSC transmitted the matter to the Office of Administrative Law

(OAL), where it was received on January 8, 2016. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Appellant waived the 180-day hearing requirement on April 25, 2016. Respondent filed a brief in support of the motion to dismiss and after providing appellant an opportunity to respond, the record closed on August 15, 2016.

FACTUAL DISCUSSION

The following facts are not in dispute in this matter and as such I **FIND** them as **FACT**:

Appellant was hired by respondent as a police officer on May 18, 2001. On December 24, 2013, appellant began an extended absence from employment due to mental health issues (see records and report of Dr. Howard Hammer, PSY.D. attached as Exhibits A and B to respondent's Brief in Support of Summary Decision). Dr. Hammer, appellant's treating psychologist, concluded that appellant was disabled due to his "anxieties and depression." Id. Appellant was evaluated by Robert Tanenbaum, Ph.D. on April 14, 2015, and May 8, 2015. Dr. Tanenbaum concluded that appellant was not fit for duty, given his inability to consistently perform his Police Officer job duties in a safe and effective manner (See Dr. Tanenbaum's report dated May 20, 2015, attached as Exhibit C to respondent's Brief in Support of Summary Decision). Appellant's consulting psychiatrist, Dr. Joel Glass, concluded that his mental illness caused him to become "totally vocationally disabled in regard to being a Police Officer in Vineland or anywhere else" (see Exhibit F attached to respondent's Brief in Support of Summary Decision).

On July 2, 2015, appellant was served a Preliminary Notice of Disciplinary Action ("PNDA"), notifying him that he was being removed for Incompetency, inefficiency or failure to perform duties; Inability to perform duties; and other sufficient cause – City of Vineland Policy 3140(3) Incapacity Due to Mental or Physical Disability. A departmental hearing on the charges set forth in the PNDA was held on December 17, 2015, where it was determined that appellant cannot safely and professionally perform the duties of a police officer, specifically, based on the reports submitted by the Vineland Police

Department, Bridgeton Police Department and Robert L. Tanenbaum, Ph.D., evaluation report. The hearing office determined that appellant is not fit for duty. A Final Notice of Disciplinary Action (FNDA) was issued on December 29, 2015. On August 4, 2015, appellant applied for an Ordinary Disability Retirement with the Division of Pension and Benefits. Dr. Glass's report concluding that appellant was "totally vocationally disabled in regard to being a Police Officer in Vineland or anywhere else" was submitted to the Division of Pension and Benefits in support of the application. On January 11, 2016, appellant was approved Ordinary Disability Retirement with an effective retirement date of August 1, 2015.

LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 1:12-5, governing motions for summary decision, permits early disposition of a case before the case is heard if, based on the papers and discovery which have been filed, it can be decided "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:12-5(b). The provisions of N.J.A.C. 1:12-5 mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment. To survive summary decision, the opposing party must show that "there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. Failure to do so entitles the moving party to summary decision. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995).

Moreover, even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536. This tribunal is required to do "the same type of evaluation, analysis or sifting of evidential materials as required by Rule 4:37-2(b) in light of the burden of persuasion that applies if the matter goes to trial." Id. at 539-540. Like the New Jersey Supreme Court's standard for summary judgment, summary decision is designed to "liberalize the standards so as to permit summary [decision] in a larger number of cases" due to the perception that we live in "a time of

great increase in litigation and one in which many meritless cases are filed.” Id. at 539 (citation omitted).

In his opposition, appellant asserts that there is a genuine issue of material fact concerning his lack of fitness for duty. Appellant, however has not provided any evidence to dispute the conclusions of the doctors that have examined him and rendered the medical determination that he is unable to perform the duties of a police officer. Based upon the above, I **CONCLUDE** that there is no genuine issue of material fact that precluded this tribunal to decide this matter by way of Summary Decision.

In a disciplinary action, the burden of proof is on the appointing authority, which must prove its case by a preponderance of the believable evidence. In re Polk, 90 N.J. 550, 560 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). In order for evidence to meet that threshold, it must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). That is to say, the tribunal must “decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth.” Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). Greater weight of credible evidence in the case – preponderance – depends not only on the number of witnesses, but “greater convincing power to our minds.” State v. Lewis, 67 N.J. 47, 49 (1975). Similarly, credible testimony “must not only proceed from the mouth of a credible witness, but it must be credible in itself.” In re Perrone, 5 N.J. 14, 522 (1950).

Under the Civil Service Act, a public employee may be subject to major discipline for various employment-related offenses, including inability to perform duties, N.J.A.C. 4A:2-2.3(a), and other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12). N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. On appeal from the imposition of such discipline, the appointing authority has the burden of proving justification for the action and the employee’s guilt by a preponderance of competent, credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson, supra, 37 N.J. 143; Polk, supra, 90 N.J. 550. The general cause for this discipline is set forth in N.J.A.C. 4A:2-2.3(a)(3).

In this matter, appellant was charged with a violation of N.J.A.C. 4A:2-2.3(a)(3), inability to perform duties. This was based on an examination of appellant's own medical records as well as the determination of Dr. Tanenbaum in his fitness evaluation wherein appellant was consistently found unfit for duty. No medical evidence to the contrary has been submitted by either party.

In this instant matter, it is undisputed that appellant was subjected to a fitness for duty examination, and the doctor conducting the examination determined that he was unfit for duty. Furthermore, appellant presented no credible evidence contradicting that position.

I **CONCLUDE** that respondent has proven by a preponderance of the competent, credible evidence, the charge of inability to perform duties.

PENALTY

With regard to penalty, consideration must generally be given to the concept of progressive discipline, involving penalties of increasing severity. W. New York v. Bock, 38 N.J. 500 (1962). However, progressive discipline is not a "fixed and immutable rule to be followed without question." Carter v. Bordentown, 191 N.J. 474, 484 (2007). It is well-established that 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, progressive discipline need not apply. In re Herrmann, 192 N.J. 19, 28 (2007); In re Stallworth, 208 N.J. 182 (2011).

It has been held that termination without progressive discipline is appropriate in circumstances where an employee cannot competently perform the work required of his position. Klusaritz v. Cape May Cty., 387 N.J. Super. 305, 317 (App. Div. 2006), certif. denied, 191 N.J. 318 (2007). In Klusaritz, the panel upheld the removal of a principal accountant on charges of inability to perform duties, among other things, based on proof that the employee had consistently failed to perform the duties of his position in a timely

and proper manner, and had also failed or refused to accept direction with respect to performance of these duties.

In this case, the appellant's inability to perform his duties was based on an examination by a doctor who conducted a fitness for duty test as well as his own medical records that come to the same conclusion. I am compelled to **CONCLUDE** that the respondent has proven, by a preponderance of credible evidence, that appellant is unfit for duty and thus does not have the ability to properly perform his duties and has presented the basis for his removal from employment.

ORDER

Based upon the above facts and applicable law, I further **CONCLUDE** that appellant's employment was properly terminated on the charge of inability to perform duties, N.J.A.C. 4A:2-2.3(a)(3).

Accordingly, it is **ORDERED** that:

1. Respondents' motion for summary decision is **GRANTED**; and
2. The petition in this matter is **DISMISSED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

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.

9/20/16
DATE



JOHN S. KENNEDY, ALJ

Date Received at Agency:

September 20, 2016

Date Mailed to Parties:

September 20, 2016.

/dm