



interfered with a police officer who was in the course of arresting the appellant's husband for DUI in front of their home. In June 2016, the appellant's criminal trial resulted in a hung jury and the appellant subsequently agreed to enter a pre-trial intervention program (PTI) rather than participate in another trial. On February 15, 2017, her PTI was terminated and the criminal charges were dismissed.

In his initial decision, the ALJ found that the criminal charges against the appellant "stemmed from an incident that occurred after school hours and not on school property or while conducting any school business" and was "not related in any way to her job as a Keyboarding Clerk 1." Additionally, the ALJ stated:

In this case, it is true that the charges against appellant, if proven, were egregious, particularly in (sic) given that she was a school employee. However, appellant was never convicted of the charges. The matter was tried to a conclusion which resulted in a hung jury. To impute the egregiousness of a crime to an individual not convicted of that crime circumvents the criminal process. To do so would require a finding of fact that appellant actually committed the crime for which she was charged. There has been no evidence provided in the case before me upon which I can rely to come to that conclusion.

For the foregoing reasons I **CONCLUDE** that the Appointing Authority has not met its burden of proof that appellant violated *N.J.A.C. 4A:2-2.3(a)(12)*, "Other Sufficient Cause." Her conduct of being charged with Obstruction of Justice, without having been convicted of that or any other charge did not violate the implicit standard of good behavior . . . .

Based on these conclusions, the ALJ recommended reversing the removal. As to back pay, the ALJ stated that since her pending criminal charges were not resolved until February 15, 2017, she was entitled to back pay from that date forward.

In its exceptions, the appointing authority argues that it proved by a preponderance of the evidence that the appellant's underlying conduct in the incident clearly violated the implicit standard of good behavior governing public employees. It further argues that the ALJ erred in finding that the appellant could not be found guilty of "other sufficient cause" since she was not convicted of the criminal charges. In this regard, it contends that the appellant ultimately entered a PTI program and thus, there was not an ultimate finding that she was not guilty of the criminal charges. Finally, it argues that the appellant had signed a one-year contract that was to expire on June 15, 2015.

In reply, the appellant argues that the ALJ's conclusions regarding the charges were correct as the ALJ found no evidence that she committed a crime. She

also argues that her testimony regarding the incident that she did not actually touch the police officer was found to be credible by the ALJ and that his ultimate conclusion was that there was a lack of evidence that she engaged in the underlying behavior. Finally, she contends that she is entitled to back pay from the inception of her indefinite suspension since she should have never been initially suspended pursuant to *N.J.A.C. 4A:2-2.5(a)2* as the criminal charges were not related in any way to her employment.

Upon its *de novo* review of the entire record, the Commission cannot agree with the ALJ's determination to dismiss the charges and reverse the removal. The Commission finds that the ALJ's premise that the appellant should not be found guilty of the administrative charges since she was not found guilty of the criminal charges is in error. Similarly, the Commission is not persuaded by the appellant's argument in her reply to the exceptions that the ALJ dismissed the charges since he found her testimony credible about the incident. Initially, there is nothing in the ALJ's initial decision indicating that he found the appellant's testimony credible. Regardless, the ultimate disposition of the criminal charges in this case is determinative. In this regard, the appellant was never found not guilty of the criminal charges. Rather, she ultimately entered a PTI program to dispose of the charges. The Commission is mindful that while the participation in a PTI program is neither a conviction nor an acquittal, it has not been construed to constitute a favorable termination of criminal charges. See *In the Matter of Clifton Gauthier, Rockaway Township*, \_\_\_ *N.J. Super.* \_\_\_ (App. Div. 2019); *N.J.S.A. 2C:43-13(d)*. See also, *Grill and Walsh v. City of Newark Police Department*, Docket No. A-6224-98T3 (App. Div. January 30, 2001). Thus, it would be improper to impute innocence as to the criminal charges to such a disposition. Regardless, in this case, the appellant was removed on administrative charges based on the conduct underlying the criminal charges. As the appellant entered PTI as to the criminal charges underlying the administrative charges, she now cannot expect the Commission to find that she did not engage in any of the underlying conduct. Moreover, and contrary to her assertions, the ALJ did not find in the initial decision that she did not engage in any inappropriate conduct, only rather, that she did not engage in any criminal conduct. Accordingly, the Commission finds that the appointing authority had sustained its burden of proof that the appellant engaged in conduct sufficient to uphold the charge of "other sufficient cause" underlying the disciplinary action.

Regarding the penalty, as it is with the charges, the Commission's review of the penalty is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In assessing the penalty in relation to the employee's conduct, it is important to emphasize that the nature of the offense must be balanced against mitigating circumstances, including any prior disciplinary history. 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. *See Henry v. Rahway State Prison*, 81 N.J. 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 N.J. 474 (2007). In this matter, the Commission finds that the appellant's misconduct was very serious, but does not warrant removal from employment for the following reasons. While the appellant was a short-term employee at the time of the incident, the misconduct occurred outside of her employment and the appellant completed the PTI program successfully which served to get the criminal charges dismissed. Additionally, the appellant had no prior disciplinary history. Further, the appellant, while working in a school setting, is not a law enforcement or public safety employee, and as such, is not subject to the higher standard imposed on those public employees. Given these considerations, the Commission finds that the proper penalty is a 20 working day suspension. This reduction in penalty should not be construed in any way as the Commission condoning the appellant's behavior. Moreover, the 20 working day suspension should serve as a warning to the appellant that such misconduct will not be tolerated and any future misconduct may lead to a more severe penalty up to and including removal.

Since the removal has been modified to a 20 working day suspension, the appellant is entitled to back pay, seniority and benefits. However, as found by the ALJ, the award of back pay can begin no earlier than February 15, 2017, when the appellant completed PTI pursuant to *N.J.A.C. 4A:2-2.10(c)1*. *See also, Gauthier, supra*. In this regard, the Commission rejects the appellant's argument that she should have never been indefinitely suspended since the original fourth degree criminal charges were not related to her employment. In this regard, the appellant never challenged her initial indefinite suspension from employment to the Commission. As such, the Commission will not entertain such an argument at this juncture as the timeframe to challenge the initial indefinite suspension has long since passed. Moreover, it is clear that the appellant could have been initially immediately suspended under *N.J.A.C. 4A:2-2.5(a)1* since keeping an employee on the job pending serious criminal charges clearly could affect the safety, health, order or effective direction of public services. Accordingly, the Commission grants back pay pursuant to the provisions of *N.J.A.C. 4A:2-2.10* from February 15, 2017 until the date of actual reinstatement.<sup>1</sup>

---

<sup>1</sup> The Commission notes that the 20 working day suspension should be recorded as beginning on the appellant's first day of separation, November 19, 2015. *See N.J.A.C. 4A:2-2.10(c)*. It further notes that it rejects the appointing authority's argument regarding the appellant's contract. As a permanent career service employee, the appellant is not subject to a provision in a contract limiting her term of office. In this regard, such an employee has a property interest in his or her position and can only be involuntarily removed for disciplinary reasons or via a layoff.

However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C. 4A:2-2.12(a)*, an award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. 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); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. Mar. 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this case, the Commission sustained the charges and only modified the penalty. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C. 4A:2-2.12(a)*, counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. In light of the Appellate Division's decision in *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. However, under no circumstances should the appellant's reinstatement be delayed by any dispute as to back pay.

### ORDER

The Commission rejects the Administrative Law Judge's recommendation to reverse the removal and instead imposes a 20 working day suspension. Additionally, the Commission orders that the appellant granted back pay, benefits and seniority beginning on February 15, 2017. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2-2.10*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed by any dispute as to back pay.

Counsel fees are denied pursuant to *N.J.A.C. 4A:2-2.12*.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R. 2:2-3(a)(2)*. After such time, any further review of this matter should be pursued in the Appellate Division.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 18<sup>TH</sup> DAY OF DECEMBER, 2019

*Deirdre' L. Webster Cobb*

---

Deirdré L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Christopher S. Myers  
Director  
Division of Appeals and Regulatory Affairs  
Civil Service Commission  
P.O. Box 312  
Trenton, New Jersey 08625-0312

Attachment



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. CSV 01156-16

AGENCY DKT. 2016-2055

**IN THE MATTER OF LISA SCHWEIZER,  
MIDDLE TOWNSHIP SCHOOL DISTRICT.**

---

**Louis P. McFadden, Jr., Esq.** for appellant, Lisa Schweizer

**Yolanda N. Melville, Esq.,** for respondent, Middle Township School District  
(Cooper Levinson, attorneys)

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

Record Closed: August 8, 2019

Decided: September 23, 2019

**STATEMENT OF THE CASE**

The appellant, Lisa Schweizer, (Appellant ) (Schweizer) appeals the action of the Middle Township Board of Education (Board) (District) (Respondent) terminating her employment effective November 19, 2015, as a result of criminal charges having been filed against her in February 2015.

**PROCEDURAL HISTORY**

On November 19, 2015, the Board removed appellant from her position for violating N.J.A.C. 4A:2-2.3(a)(11), "Other sufficient cause". On December 10, 2015, the

appellant filed a petition with the New Jersey Civil Service Commission (Commission) seeking back pay, benefits, seniority and other relief. The Commission transmitted the matter to the Office of Administrative Law (OAL), where it was filed on January 20, 2016, as a contested case. N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13. The matter was heard on April 5, 2019, May 15, 2019, and May 28, 2019. The record closed on August 8, 2019, after the parties submitted post hearing briefs.

### **FACTUAL DISCUSSION**

I **FIND** the following **FACTS** to be undisputed:

Appellant was employed by the Board as a Keyboard Clerk on November 21, 2014. On February 23, 2015, appellant was arrested and charged with Obstruction of Justice, pursuant to N.J.S.A. 2C:29-1(a), a crime of the fourth degree. Both the arrest and charge were a result of an incident that occurred on February 14, 2015. On February 26, 2015, the Board suspended appellant indefinitely pending the outcome of her criminal charge. (J-10.) On November 19, 2015, the Board removed appellant from her position for violating N.J.A.C. 4A:2-2.3(a)(11), "Other sufficient cause" due to the pending criminal charge. (J-12.)

Although appellant was employed with the District prior to November 21, 2014, her new position as a Keyboard Clerk subjected her to a ninety-day probationary period which ended on February 21, 2015. The basis of the District's disciplinary action resulted in appellant's involvement with the local police department on the evening of February 14, 2015, when the police arrested appellant's husband for DUI in front of their home. According to the Police, appellant interfered with her husband's arrest by grabbing on one of the officers who was handling the arrest. (R-3.) Appellant was not criminally charged until February 23, 2015, at which time she was charged with a Disorderly Person's Offense. (R-4.) On February 24, 2015, the charge was upgraded to Obstruction of Justice, pursuant to N.J.S.A. 2C:29-1(a), a crime of the fourth degree. (R-5.) On February 25, 2015, appellant advised her union representative of the arrest who notified the District Superintendent the same day. The District issued a Preliminary Notice of Disciplinary Action (PNDA) on February 26, 2015, and placed appellant on immediate



suspension based on the pending criminal charges. Appellant did not request a departmental hearing.

On April 21, 2015, appellant was indicted of Fourth Degree Obstruction of Justice. (R-8.) On April 23, 2015, the Board approved the Superintendent's recommendation to suspend appellant. Appellant did not contact the District during the pendency of the criminal case because she was instructed not to do so. at a school board meeting conducted on November 19, 2015. The Board approved the Superintendent's recommendation to terminate appellant's employment. On November 23, 2015, the District issued a Final Notice of Disciplinary Action (FNDA) sustaining the charge of Other Sufficient Cause as a result of appellant's criminal charges stemming from the February 14, 2015. (J-12.) In June 2016, appellant took her case to trial which resulted in a hung jury. Rather than retry the criminal charge, appellant agreed to enter a pre-trial intervention program (PTI). On February 15, 2017, appellant signed a Consent Order terminating PTI and all charges were dismissed. (P-1.) Her criminal record was expunged in October 2018.

### Testimony

#### Dr. David Salvo, Ed.D.

Dr. Salvo testified on behalf of the District. He is the Superintendent of the District and had been at all times relevant to this matter. Dr. Salvo explained that appellant's position of Keyboarding Clerk was subject to ninety-day working test period which ended on February 21, 2015. After the working test period, the employee is deemed permanent. He was not aware of any evaluations conducted during appellant's working test period.

Appellant was assigned to the High School Guidance Department where her duties included filing papers, clerical work, greeting the public as they come into the office area, and assisting the administration and staff. Dr. Salvo asserted that appellant's job performance had nothing to do with her discipline which stemmed solely from the criminal charges. He believed that appellant suspension was appropriate because the charge of Obstruction of Justice did not meet the District's staff conduct code and was inappropriate

for a District employee. She was suspended for violating District Policy 4215 – Code of Ethics. (J-3.)

Dr. Salvo learned of appellant's indictment some time in April 2015, and apprised the Board of Education at a meeting on April 23, 2015. He does not recall if appellant was provided notice of this meeting. Dr. Salvo sent appellant interim correspondence on May 26, 2015, advising of her continued suspension. (J-11.) Appellant remained suspended without pay through November 2015. By November 2015, school administration advised Dr. Salvo that the high school office was short staffed. Dr. Salvo discussed appellant's employment with the Board of Education at its meeting held on November 19, 2015. He is unaware if appellant received notice of this meeting. She was terminated at that meeting based upon Dr. Salvo's recommendation to the Board of Education. There was no discussion regarding the termination either in open session or closed session at the November 19, 2015, meeting.

Appellant was issued a FNDA on November 23, 2015. Dr. Salvo noted that certain information on the FNDA was incorrect. Namely, appellant did not request a hearing after the PNDA and no hearing was conducted on March 6, 2015. Appellant was terminated due to the Obstruction of Justice charge. Dr. Salvo opined that appellant's termination conformed to the District's policies because the District has a standard code of conduct for staff and as a civil service employee, there is a ninety-day probationary period. There was a violation within that ninety-day period. Dr. Salvo also felt that appellant's conduct violated the trust of the public.

### **Dennis Roberts**

Mr. Roberts is the District's School Board President and has been since 2012. According to Roberts, a school board member's duty is to make sure the school is run properly. Board members do not get involved in the day-to-day operation of the school and the superintendent makes recommendations regarding an employee's discipline and employment. The board votes either to accept the recommendations or reject them.

Roberts first learned of appellant's charges through Dr. Salvo. Roberts did not communicate with appellant during her suspension and did not speak to her after she was terminated. According to Roberts, both appellant's suspension and termination were in compliance with the District's policies because the board takes the recommendations of the superintendent very seriously. Dr. Salvo follows the guidelines of the District policy and there was no reason to doubt Dr. Salvo's decision regarding an employee's employment. There was no discussion on the motion to terminate appellant at the November 2015, board meeting.

**Diane Fox**

Ms. Fox is the District Business Administrator and Board Secretary and has been since 2012. She signs all Civil Service disciplinary actions on behalf of the District. No other disciplinary notices were issued to appellant other than the February 26, 2015, PNDA and the November 23, 2015, FNDA. Fox confirmed the new hire date and working test period dates with District records. (R-9.) Appellant was still serving a ninety-day probationary period when the criminal incident occurred even though she was not charged until after the probationary period ended.

**Lisa Schweizer**

Appellant testified on her own behalf. During her time at the District as a Keyboarding Clerk, she was assigned to the guidance office at the high school. The guidance office is not part of the main office and the public does not typically visit the guidance office.

Appellant had never been arrested prior to February 2015. On February 14, 2015, a police officer drew a gun on her husband and pulled him out of his vehicle in front of her family. Her children were screaming, and appellant was trying to explain to the officers that her husband had recently undergone shoulder surgery. She was not arrested that evening and first learned of the charges on February 23, 2015, when a police officer contacted her. She went to the police department the next day to pick up the charges.

On February 25, 2015, appellant advised her union representative of the charges and that individual advised Dr. Salvo. She and the union representative met with Dr. Salvo on February 26, 2015, and she was advised that she would keep her benefits but she was being suspended without pay. She was advised to have no contact with the school during the suspension. She had no communication with anyone from the District between March 2015, and November 2015. Appellant received no notice that her employment was going to be discussed at any board meeting. On November 19, 2015, Dr. Salvo spoke to appellant's union representative and advised that the District had to move forward and the court process was taking too long. She received the FNDA in the mail a few days later.

Appellant's criminal status had not changed in any way between March and November 2015. She received no FNDA sustaining the suspension and received no PNDA advising that the Board intended to terminate her employment. Appellant was not provided an opportunity to have a departmental hearing to challenge her termination. Appellant feels that she did not do anything on February 14, 2015, that would have violated school ethics policies or procedures.

In an effort to mitigate the loss of her employment, appellant applied for a few jobs but would not pursue a position if a criminal background check was required. She received an offer to work in a dental office in March 2019, after her record had been expunged, but she wants to return to the District because her family needs the benefits.

Based upon the testimonial and documentary evidence, and having had the opportunity to observe the appearance and demeanor of the witnesses, I **FIND** the additional **FACTS**:

1. Appellant was assigned to the high school guidance department where her duties included filing papers, clerical work, greeting the public as they come into the office area, and assisting the administration and staff.
2. Appellant's job performance had nothing to do with her discipline which stemmed solely from the criminal charges.

3. No evaluations were performed upon appellant during her ninety-day probationary period.
4. Appellant was suspended for violating District Policy 4215 – Code of Ethics.
5. Appellant was terminated at a November 19, 2015, meeting based upon Dr. Salvo's recommendation to the Board of Education. There was no discussion regarding the termination either in open session or closed session at that meeting.
6. On February 14, 2015, a police officer drew a gun on appellant's husband and pulled him out of his vehicle in front of her family. She was not arrested that evening and first learned of the charges on February 23, 2015, when a police officer contacted her. She went to the police department the next day to pick up the charges.
7. On February 25, 2015, appellant advised her union representative of the charges and that individual advised Dr. Salvo.
8. She had no communication with anyone from the District between March 2015, and November 2015.
9. Appellant received no notice that her employment was going to be discussed at any board meeting.
10. Appellant received no FNDA sustaining the suspension and received no PNDA advising that the Board intended to terminate her employment.
11. Appellant was not provided an opportunity to have a departmental hearing to challenge her termination.

## LEGAL ANALYSIS AND CONCLUSION

Appellant alleges that respondent's actions amount to major discipline and violated the procedural rules and requirements outlined in N.J.A.C. 4A:2 et seq. Appellant further asserts that respondent's actions were arbitrary and capricious because their decision to suspend and later terminate appellant were done so without discussion with the Superintendent.

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex MVC Park Comm'n, 46 N.J. 138, 147 (1965). Governmental employers also have delineated rights and obligations. The Act sets forth that it is State policy to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

The primary working test period regulation is N.J.A.C. 4A:4-5.3, which requires the employer or appointing authority to prepare a progress report on the employee at the end of two months and a final report at the conclusion of the working test period, with a copy of all reports being furnished to the employee. The purpose of the working test period under the merit system is to enable the appointing authority to evaluate an employee's fitness through observed job performance under actual working conditions. Cipriano v. Dep't of Civil Serv., 151 N.J. Super. 86, 89 (App. Div. 1977).

In an appeal from an employee's termination at the conclusion of a working test period, the employee shoulders the burden of proving that the appointing authority's "action was in bad faith." N.J.A.C. 4A:2-4.3(b). If bad faith is found, the employee is entitled to a new full or shortened working test period and, if appropriate, other remedies. N.J.A.C. 4A:2-4.3(c). The basic test is whether the appointing authority exercised good faith in determining that the employee was not competent to perform satisfactorily the

duties of the position. See Briggs v. Dep't of Civil Serv., 64 N.J. Super. 351, 356 (App. Div. 1960); Devine v. Plainfield, 31 N.J. Super. 300, 303-04 (App. Div. 1954); Lingrell v. New Jersey Civil Serv. Comm'n, 131 N.J.L. 461 462 (1944). In general, good faith has been defined as meaning "honesty of purpose and integrity of conduct with respect to a given subject." Smith v. Whitman, 39 N.J. 397, 405 (1963). As stated in Schopf v. New Jersey Department of Labor, 96 N.J.A.R.2d (CSV) 853, 857:

No set rule may be formulated when attempting to determine whether an employee's termination at the end of the working test period was based on opinions of the appointing authority formed in good or bad faith. If the opinion is formed based upon actual observations of the employee's performance of the duties of the position, and is an honest assessment as to whether the employee will be able to satisfactorily and efficiently perform those duties if the appointment becomes permanent, it must be considered to have been made in good faith. If, on the other hand, the decision to terminate is not based upon actual observations of performance, or if it is made based upon dishonest motives, is based on bias, prejudice or self-interest, or is made with ill will toward the employee or because of some furtive design, it must be set aside. The use of the good faith standard also implies that if the employer's decision to terminate is made in good faith, the fact that the Merit System Board may not have decided the question in the same way is of no import. It is only required that the opinion be based on actual observations and that those observations form a rational basis for the opinion.

In addition, "[a] fair evaluation period is further evidenced by the giving of guidance and advice due to a probationer, as well as a notification of any deficiencies in performance." Sokolowsky v. Twp. of Freehold, 92 N.J.A.R.2d (CSV) 155, 157; Davis v. Newark Public Library, 9 N.J.A.R. 84, 87-88. In this regard, the Merit System Board has consistently emphasized the necessity on the part of an appointing authority to comply with the regulatory requirements governing the provision of progress reports. The progress reports required by N.J.A.C. 4A:4-5.3 are a means of notice to an employee in the working test period that his performance is unsatisfactory so that the employee has an opportunity to improve specified performance deficiencies toward completing a successful working test period and attaining permanent appointment. The termination of an employee in situations in which the appointing authority has failed to provide that

mandated notice has been found to be demonstrative of a lack of good faith and a denial of a fair evaluation of the employee's work performance.

In Sokolowsky, the Merit System Board concurred with the ALJ's conclusion that the employee should be afforded a new working test period where the appointing authority failed to fulfill the evaluation requirements. Although the employee had received verbal criticism from his supervisor during his working test period, the employee never had the impression that his supervisor was unsatisfied with his work. While the employee's supervisor had prepared an interoffice memorandum stating that he was dissatisfied with the appellant's work approximately two months into the employee's working test period, the supervisor did not discuss the contents of this memorandum with the appellant and the evidence did not establish that the appellant received it. In concluding that the appellant was entitled to a new full working test period, the ALJ noted that a "fair evaluation period" is "evidenced by the giving of guidance and advice due to a probationer, as well as a notification of any deficiencies in performance." Sokolowsky, 92 N.J.A.R.2d (CSV) at 157. The ALJ held that "the appointing authority failed to fulfill the . . . requirements for a fair evaluation period." Ibid. Specifically, although the appellant "was verbally advised concerning deficiencies in his performance," "he received no written report concerning his progress," and "[t]he consequence of the appointing authority's failure to provide the appellant with timely written notification of deficiencies was denial of a fair evaluation of his work performance." Ibid.

In the case of Niosi v. Department of Public Works, 95 N.J.A.R. (CSV) 238, 240, the appointing authority's failure to issue the required two-month and final progress reports "in and of itself constitutes bad faith, the requirement that the employee must have an opportunity to correct any deficits," warranting a new working test period). Smith v. N. State Prison, 92 N.J.A.R.2d (CSV) 342 (ordering an extended working test period where employee did not receive progress reports); Richardson v. Dep't of Corr., 92 N.J.A.R.2d (CSV) 63 (concluding the employee demonstrated that the appointing authority reached its determination that his performance was unsatisfactory is bad faith where the employee did not receive the required progress reports on his performance, warranting a new four-month working test period).



It is clear in this case that appellant received no progress reports as no evaluations were performed upon appellant during her ninety-day probationary period. It is also clear that appellant's suspension and termination were based solely upon the criminal charges she received that stemmed from the February 14, 2015, incident. Appellant was not charged with any offense until February 23, 2015, after her probationary period had ended. Both the PNDA and the FNDA charge appellant with violating N.J.A.C. 4A:2-2.3(a)(11), "Other sufficient cause". Nowhere in any document presented or testimony elicited during this hearing, was it indicated appellant was given notice that her suspension and termination were a result of her not satisfactorily completing her working test period. To the contrary, Dr. Salvo stated that the disciplinary actions taken against appellant were not based on job performance. Whether appellant was properly terminated cannot be analyzed as a test period case under N.J.A.C. 4A:4-5.3. If it were to be so analyzed it is clear that the District failed to comply with the progress reporting requirements of N.J.A.C. 4A:4-5.3. Therefore, I **CONCLUDE** that this matter is not controlled by the working test period requirements.

Appellant has been charged with violating N.J.A.C. 4A:2-2.3(a)(11), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. The Appointing Authority shoulders the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

In this matter, the District asserts that appellant's pending criminal charges violated District Policy 4215 – Code of Ethics. It must be noted, however, that neither the PNDA nor the FNDA makes any reference to the policy. That policy provides, in pertinent part, that all support staff will uphold all rules and regulations as set by the Board, the Superintendent, and the Principals and that they adhere to all conditions of a contract.

The Superintendent asserts that appellant violated this policy because her conduct violated the trust of the public. There has been no evidence other than Dr. Salvo's testimony that appellant getting arrested, not convicted of Obstruction of Justice violated the trust of the public.

N.J.A.C. 4A:2-2.5(a)(2) states that an employee may be suspended immediately when the employee is formally charged with a crime of the first, second or third degree, or a crime of the fourth degree on the job or directly related to the job. Respondent asserts that since appellant's actions violated the trust of the public, and her job description required interaction with the public, that her being charged with a crime of the fourth degree is directly related to the job. I **CONCLUDE** that appellant's charge of Obstruction of Justice, a crime of the fourth degree, which stemmed from an incident that occurred after school hours and not on school property or while conducting any school business is not related in any way to her job as a Keyboarding Clerk. Appellant did not challenge her suspension and testified that she agreed to the suspension without pay with the understanding that her benefits would continue. She did not request a hearing after receiving the PNDA. Nor did she appeal the suspension to the Civil Service Commission. As such, I have no jurisdiction over and therefore make no determination regarding the validity of appellant's suspension.

Respondent contends that the FNDA terminating appellant was appropriate in consideration of the seriousness of the underlying incident. Where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. Henry v. Rahway State Prison, 81 N.J. 571 (1980). In this case, it is true that the charges against appellant, if proven, were egregious, particularly in given that she was a school employee. However, appellant was never convicted of the charges. The matter was tried to a conclusion which resulted in a hung jury. To impute the egregiousness of a crime to an individual not convicted of that crime circumvents the criminal process. To do so would require a finding of fact that appellant actually committed the crime for which she was charged. There has been no evidence provided in the case before me upon which I can rely to come to that conclusion.

For the foregoing reasons I **CONCLUDE** that the Appointing Authority has not met its burden of proof that appellant violated N.J.A.C. 4A:2-2.3(a)(12), "Other Sufficient Cause." Her conduct of being charged with Obstruction of Justice, without having been convicted of that or any other charge did not violate the implicit standard of good behavior. Having concluded that that the Appointing Authority has not met its burden of proof that appellant violated N.J.A.C. 4A:2-2.3(a)(12), there is no need to discuss appellant's contention that the District disciplinary actions were procedurally deficient.

Appellant's criminal charges remained pending in this matter until February 15, 2017, at which time a Consent Order Terminating PTI was signed. (P-1.) As such, her suspension pending criminal charges could not have been resolved until after she completed PTI. Therefore, I **CONCLUDE** that appellant is entitled to be reinstated and due any other benefits or back pay that would have otherwise accrued after February 15, 2017.

### **ORDER**

Accordingly, it is **ORDERED** that the disciplinary action noted in the FNDA, dated November 23, 2015, against appellant is hereby **REVERSED** consistent with the decision set forth above. It is further **ORDERED** that appellant is entitled to be reinstated and due any other benefits or back pay that would have otherwise accrued after February 15, 2017.

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.

9/23/19  
DATE

  
\_\_\_\_\_  
JOHN S. KENNEDY, ALJ

Date Received at Agency:

September 23, 2019

Date Mailed to Parties:

September 23, 2019  
(Sent via E-Mail)

JSK/dm

**APPENDIX**

**LIST OF WITNESSES**

**For appellant:**

Lisa Schweizer

**For respondent:**

Dr. David Salvo, Ed.D.

Dennis Robert

Diane Fox

**LIST OF EXHIBITS IN EVIDENCE**

**Joint Exhibits:**

- J-1 Major Disciplinary Appeal Form and supporting documentation
- J-2 District Policy 4281 – Inappropriate Staff Conduct
- J-3 District Policy 4125 – Code of Ethics
- J-4 District Policy 4159 – Support Staff Member/ School District Reporting Responsibilities
- J-5 District Policy 4124 – Employment Contract
- J-6 District Policy 4140 – Termination
- J-7 District Policy 4150 – Discipline
- J-8 School Board Meeting Minutes for meeting held on April 23, 2015
- J-9 School Board Meeting Minutes for meeting held on November 19, 2015
- J-10 PNDA, dated February 26, 2015
- J-11 Letter from Dr. Salvo to appellant, dated May 26, 2015
- J-12 FNDA, dated November 23, 2015

**For appellant:**

- P-1 Consent Order Terminating PTI
- P-2 Initial Interrogatories, dated December 16, 2016, and supplemental responses, dated January 3, 2017
- P-3 Supplemental responses to interrogatories, dated February 8, 2017
- P-4 Request for Admissions and Responses, dated March 1, 2017
- P-5 Supplemental Interrogatories, dated February 14, 2017, and responses, dated March 1, 2017
- P-6 Supplemental Interrogatories, dated February 28, 2017, and responses, dated March 1, 2017
- P-7 Respondent's letter supplementing responses to interrogatories, dated January 26, 2017
- P-8 Supplemental Interrogatories and responses, dated February 2, 2017

**For respondent:**

- R-1 Civil Service Job Description – Keyboarding Clerk 1
- R-2 Press of Atlantic City Article, dated May 25, 2016
- R-3 Investigation Report, dated February 15, 2015
- R-4 Complaint – Summons, dated February 23, 2015
- R-5 Complaint – Summons, dated February 24, 2015
- R-6 Complaint – Summons, dated February 24, 2015
- R-7 Handwritten note of Dr. Salvo, dated February 25, 2015
- R-8 Indictment filed April 21, 2015
- R-9 CAMPS New Hire Transaction for appellant
- R-10 Appellant's Employee absence history from February 19, 2015, through October 1, 2015
- R-11 Agreement between Middle Township Education Association and Middle Township Board of Education effective July 1, 2012, through June 30, 2015
- R-12 Appellant's employment contract
- R-13 2014-2015 school calendar
- R-14 Not admitted

R-15 Agreement between Middle Township Education Association and Middle Township Board of Education, effective July 1, 2015, through June 30, 2018