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STATE OF NEW JERSEY

In the Matter of Elmore Gaines

CSC Docket No. 2014-220

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

Request for Reconsideration

SEP 05 2014

ISSUED: (JH)

Elmore Gaines requests reconsideration of the final administrative determination in *In the Matter of Elmore Gaines* (CSC, decided June 5, 2013), in which the Civil Service Commission (Commission) increased the penalty from a four-month suspension to a six-month suspension. A copy of that decision is attached hereto and incorporated herein.

By way of background, the appellant, a Code Enforcement Officer with the Department of Neighborhood and Recreational Services, City of Newark, was charged with incompetency, inefficiency or failure to perform duties, insubordination, conduct unbecoming a public employee, and other sufficient cause. Specifically, the appointing authority asserted that on February 28, March 29, April 29, May 3 and 31, 2011, the appellant refused to perform his assigned job duties and responsibilities; on April 29, 2011, the appellant refused a reassignment to a different unit; in May 2011, the appellant failed to submit 20 timely inspection reports and the reports he did submit were deficient; on May 11, 2011, the appellant failed to report back to work after his scheduled lunch break; on May 13, 2011, the appellant refused to participate in a teamwork project to prepare reports; and on June 1, 2011, the appellant stated to Dorothy Townes, a Senior Code Enforcement Officer, that he wanted to throw someone out of the window and "it may be you." Further, the appointing authority asserted that the appellant refused to answer his City-issued cellular phone when called during regular work hours and did not return voice mail messages.

In his initial decision, the ALJ indicated that the only conflicting testimony that was presented involved whether the appellant threatened Ms. Townes. In this regard, the ALJ noted that given that the appellant was unable to provide any reasonable explanation as to why Ms. Townes would fabricate the threat together with the testimony from the appointing authority's witnesses regarding Ms. Townes' distress at that time, the ALJ determined that the testimony offered by the appointing authority's witnesses was more credible than the appellant's testimony. Accordingly, the ALJ upheld all of the charges. Regarding the penalty, the ALJ determined that the appellant's conduct warranted the four-month suspension imposed by the appointing authority.

In its final decision, the Commission agreed with the ALJ's assessment of the charges but did not agree with his recommendation to uphold the four-month suspension. Rather, the Commission determined that the appellant's ten prior disciplinary infractions in the past ten years presented a very poor disciplinary record. Further, the Commission found that the subject infractions reflected the appellant's disregard for rules and regulations and the basic obligations of his position. The Commission noted that were it not constrained from substituting removal for a lesser penalty pursuant to *N.J.S.A.* 11A:2-19, it would have done so in the instant matter. Accordingly, the Commission determined that it was appropriate to impose the maximum penalty short of removal, *i.e.*, a six-month suspension.[1]

In his request for reconsideration, the appellant contends that he did not file exceptions to the ALJ's initial determination because he did not receive a copy. He presents that he disagrees "with the Civil Service ruling that the appointing authority's action in imposing a four month suspension was justified and then for the Commission to add two more months without a valid reason is a miscarr[iage] of justice and an insult especially when I did not get a fair hearing at the OAL [Office of Administrative Law] level and denial of all my rights under your guideline[s]." In this regard, he argues that he subpoenaed witnesses but the ALJ "refused to make them available after I had brought it to his attention that the attorney for the [C]ity had sent them back to work." He notes that the ALJ determined that the only conflicting testimony that was presented involved whether he threatened Ms. Townes "due to the fac[t] that my witnesses w[ere] sent away by the appointing authority['s] attorney and not allowed to testif[y], which was not fair as it was not fair by making me take two weeks off without pay to attend the hearing, but the witness[es] for the [C]ity did not have to take off from work." He maintains that he is not the only employee that has a problem with Ms. Townes. He urges the Commission to read the hearing officer's report "but I know that they will not even

[1] It is noted that subsequently, the appellant was removed, effective September 3, 2013, on charges of conduct unbecoming a public employee, misuse of public property and other sufficient cause. At its July 30, 2014 meeting, the Commission upheld the removal. *See In the Matter of Elmore Gaines* (CSC, decided July 30, 2014).

entertain this because they are set on removing a veteran from the workforce, because I have spoke[n] out on the wrong doing of the [C]ity in regard to the Chief Code Enforcement Officer position (PM0737[M]) which is still held illegal[ly] by Amos Crudup [w]hile the Commissioner look[s] the other way." In support of his request, he submits additional documentation including: copies of 11 subpoena forms dated February 25, 2013 signed by the appellant; a memorandum dated August 24, 2006 from Tajji Williams to Dorothy Townes regarding "Continued Problems with Ms. Townes"; and a copy of the hearing officer's report dated December 13, 2011.[2]

It is noted that the appointing authority was notified of this matter and did not file a response.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which the Civil Service Commission may reconsider a prior decision. This rule provides that a party must show that a clear material error occurred or present new evidence or additional information which would change the outcome of the case and the reasons that such evidence was not presented during the original proceeding.

In the present matter, the appellant has failed to meet the standard for reconsideration. The appellant does not present new evidence or additional information which was not presented at the original proceeding which would change the outcome of the original decision, nor has the appellant proven that a clear material error occurred in the original decision. Accordingly, based on the record presented, the appellant has failed to support his burden of proof in this matter.

With respect to the appellant's claim that he did not file exceptions because he did not receive a copy of the ALJ's initial decision, it is noted that the appellant is being provided with the opportunity to present any arguments he may have in the instant request.

Regarding the appellant's contention that the Commission did not present a valid reason for increasing the suspension to six months, as noted above and as clearly explained in the Commission's initial decision, due to the appellant's extensive disciplinary record which reflected his continuing disregard for rules and for his stature as a public employee, the Commission determined that the appropriate penalty was a six-month suspension, *i.e.*, the maximum penalty short of removal. In this regard, the Commission noted that were it not constrained from

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[2] Although the appellant identifies the hearing officer's report as dated August 24, 2011, which was the first day of the departmental hearing, the report was filed by the hearing officer on December 13, 2011.

substituting removal for a lesser penalty pursuant to *N.J.S.A.* 11A:2-19, the Commission would have imposed removal.

Regarding the appellant's assertion that he did not receive a fair hearing at the OAL because certain individuals did not appear as witnesses, it is noted that the appellant had the opportunity to subpoena witnesses at his hearing. *See N.J.A.C.* 1:1-11 *et seq.* Although the appellant provided copies of subpoena forms for 11 individuals, it is noted that none of the submitted forms contain the "Proof of Service" section documenting that the subpoenas were actually provided to the intended witnesses. Moreover, there is no evidence in the record that the ALJ prohibited the appellant from calling any witnesses.

With respect to the hearing officer's report dated December 13, 2011, the appellant does not present any arguments as to how the report would change the outcome of the original decision. Furthermore, the Commission does not review reports issued by hearing officers. Moreover, the appellant was provided with a *de novo* hearing at the OAL at which time he had the opportunity to attempt to present the hearing officer's report as evidence. However, it is noted that the decision of a departmental hearing officer is only admissible in an OAL proceeding when it is relevant "in attempting to determine the charges tried and the charges sustained or dismissed therein." *See In the Matter of Michael Loveland,* Docket No. A6008-07T3 (App. Div. July 27, 2010). *See also In the Matter of James Gillespie* (CSC, decided March 7, 2012).

With respect to the appellant's concerns regarding Chief Code Enforcement Officer (PM0737M), it is noted that the Commission addressed this issue in *In the Matter of Chief Code Enforcement Officer (PM0737M), Newark* (CSC, decided April 3, 2013) *reconsideration* (CSC, decided December 4, 2013), and *In the Matter of Chief Code Enforcement Officer (PM0737M), Newark* (CSC, decided August 1, 2012).

ORDER

Therefore, it is ordered that this request for reconsideration be denied.

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 3RD DAY OF SEPTEMBER, 2014

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries and Correspondence

Henry Maurer
Director
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Civil Service Commission
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Trenton, New Jersey 08625-0312

Attachment

c: Elmore Gaines
Julien X. Neals, Esq.
Kenneth Connolly
Joseph Gambino

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STATE OF NEW JERSEY

In the Matter of Elmore Gaines	:	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket No. 2012-2931 OAL Docket No. CSV 7694-12	:	

ISSUED: JUN 26 2013 (JH)

The appeal of Elmore Gaines, a Code Enforcement Officer with the Department of Neighborhood and Recreational Services, City of Newark, of his four-month suspension, on charges, was heard by Administrative Law Judge Leland S. McGee (ALJ), who rendered his initial decision on May 6, 2013. No exceptions were filed by the parties.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on June 5, 2013, accepted and adopted the Findings of Fact as contained in the initial decision. However, the Commission did not adopt the ALJ's recommendation to uphold the four-month suspension. Rather, the Commission increased the penalty from a four-month suspension to a six-month suspension.

DISCUSSION

The appellant was charged with incompetency, inefficiency or failure to perform duties, insubordination, conduct unbecoming a public employee, and other sufficient cause. Specifically, the appointing authority asserted that on February 28, March 29, April 29, May 3 and 31, 2011, the appellant refused to perform his assigned job duties and responsibilities; on April 29, 2011, the appellant refused a reassignment to a different unit; in May 2011, the appellant failed to submit 20 timely inspection reports and the reports he did submit were deficient; on May 11, 2011, the appellant failed to report back to work after his scheduled lunch break; on

May 13, 2011, the appellant refused to participate in a teamwork project to prepare reports; and on June 1, 2011, the appellant stated to Dorothy Townes, a Senior Code Enforcement Officer, that he wanted to throw someone out of the window and "it may be you." Further, the appointing authority asserted that the appellant refused to answer his City-issued cellular phone when called during regular work hours and did not return voice mail messages. Upon the appellant's timely appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In his initial decision, the ALJ indicated that the only conflicting testimony that was presented involved whether the appellant threatened Ms. Townes. In this regard, the ALJ noted that given that the appellant was unable to provide any reasonable explanation as to why Ms. Townes would fabricate the threat together with the testimony from the appointing authority's witnesses regarding Ms. Townes' distress at that time, the ALJ determined that the testimony offered by the appointing authority's witnesses was more credible than the appellant's testimony. Accordingly, the ALJ upheld all of the charges and determined that the appellant's conduct warranted a four-month suspension.

Upon its *de novo* review of the record, the Commission, while it agrees with the ALJ's assessment of the charges, does not agree with his recommendation to uphold the four-month suspension. In determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident, the Commission also utilizes, when appropriate, the concept of progressive discipline. *See West New York v. Bock*, 38 *N.J.* 500 (1962). Nevertheless, it is well established that when 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 principle 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 re Herrmann*, 192 *N.J.* 19 (2007). In *In the Matter of Anthony Stallworth*, 208 *N.J.* 182, 198-199 (2011), the Supreme Court stated that:

> . . . the contextual nature of the prior offenses is a relevant consideration when analyzing an employee's disciplinary record . . . As already noted, progressive discipline is a flexible concept, and its application depends on the totality and remoteness of the individual instances of misconduct that comprise the disciplinary record. The number and remoteness or timing of the offenses and their comparative seriousness, together with an analysis of the present conduct, must inform the evaluation of the appropriate penalty. Even

> where the present conduct alone would not warrant termination, a history of discipline in the reasonably recent past may justify a greater penalty; the number, timing, or seriousness of the previous offenses may make termination the appropriate penalty.

In the instant matter, the appellant's prior disciplinary history since his employment in 1999 in the Department of Neighborhood and Recreational Services indicates that he has incurred the following disciplinary actions: two-day and 62-day suspensions in 2003; one-day, two-day, three-day, 10-day and 20-day suspensions in 2004; two-day and 90-day suspensions in 2005, and a 10-day suspension in 2009. *See In the Matter of Elmore Gaines* (CSC, decided February 16, 2011) (Gaines 2) and *In the Matter of Elmore Gaines* (MSB, decided December 6, 2006) (Gaines 1).

These ten prior disciplinary infractions in the past ten years present a very poor disciplinary record, particularly where, as here, the appellant had five major disciplinary infractions preceding the current incident. In *Gaines 1*, *supra*, the former Merit System Board (MSB) expressed its concern regarding the appellant's utter disregard for his stature as a public employee and advised the appellant that his disrespectful and insubordinate conduct would not be tolerated in the future. The current infractions reflect his continuing disregard for rules and the basic obligations of his position. Accordingly, the Commission determines that the appropriate penalty is a six-month suspension. It is appropriate to impose the maximum penalty short of removal, namely, a six-month suspension, given the appellant's continuing misbehavior. The Commission emphasizes that were it not constrained from substituting removal for a lesser penalty pursuant to *N.J.S.A.* 11A:2-19, the Commission would impose a removal in this matter. Accordingly, the Commission strongly urges the appointing authority to consider imposing removal for any future misconduct.

ORDER

The Civil Service Commission finds that the appointing authority's action in imposing a suspension was justified. However, the Commission finds that the appointing authority's action in imposing a four-month suspension is not adequate under the circumstances. Therefore, the Commission increases the penalty to a six-month suspension and dismisses the appeal of Elmore Gaines.

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 5TH DAY OF JUNE, 2013

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
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 07694-12
AGENCY DKT. NO. 2012-2931

IN THE MATTER OF ELMORE GAINES,
CITY OF NEWARK.

Elmore Gaines, pro se

Meredith A. Accoo, Esq., Assistant Corporation Counsel for respondent
(Anna P. Pereira, Corporation Counsel, attorney)

Record Closed: March 25, 2013 Decided: May 6, 2013

BEFORE **LELAND S. MCGEE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The respondent, City of Newark (respondent or City), brings a major disciplinary action against petitioner, Elmore Gaines (petitioner or Gaines), a code enforcement officer, effective March 19, 2012. Respondent alleges that Gaines's conduct was unbecoming an employee; that he was incompetent, inefficient or failed to perform his duties; that he was insubordinate; and other sufficient cause exists. Specifically, respondent alleges that on several occasions, including February 28, March 29, April 29, May 3, and May 31, 2011, petitioner took it upon himself to determine what assignments he would or would not perform. Respondent further alleges that during

May 2011, petitioner failed to turn in approximately twenty inspection reports and those that he did submit were deficient and incomplete. Respondent further alleges that on April 29, 2011, among others dates, petitioner received an assignment, after which, he "announced" that he had to leave work for a doctor's appointment. When advised that he was being reassigned, petitioner refused to make the change and told his supervisor that he was "full of shit."

Respondent alleges petitioner refused to answer his City-issued cellular telephone when called during regular work hours and failed to return the voicemail messages left for him. Respondent deemed this conduct as a "blatant disregard of your supervision's authority, is steadfastly insubordinate, and is a[n] undermining of management's efforts to efficient[ly] deliver governmental services [to] our constituents."

Respondent alleges that on May 11, 2011, petitioner was assigned to work with "Team D." Lunch was scheduled for 1:00 p.m. to 2:00 p.m. and he failed to report back to work after lunch. On May 13, 2011, petitioner was directed to assist with the writing and preparation of work reports. He refused to assist as directed.

Respondent alleges that on July 1, 2011, petitioner threatened one of his co-workers during or at the end of a staff meeting.

On May 31, 2011, respondent issued a Preliminary Notice of Disciplinary Action against petitioner. On July 26, 2011, respondent issued an Amended Preliminary Notice of Disciplinary Action against petitioner. On March 16, 2012, respondent issued a Final Notice of Disciplinary Action upholding the charges. A disciplinary hearing was held on various days including August 24, 2011, September 28, 2011, and October 31, 2011. On June 8, 2012, the Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL), for a hearing as a contested matter pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. This tribunal heard the matter on March 5, 6, and 14, 2013. On March 25, 2013, the record closed.

FACTUAL DISCUSSION

Summary of Testimony and Documentary Evidence

Amos Crudup

Amos Crudup (Crudup) testified on behalf of the City of Newark. He is currently employed by the City of Newark as the Assistant Director of Neighborhood Services (Division). In 2011, he was Manager of Code Enforcement and was responsible for fourteen to sixteen employees, ten of whom were Code Enforcement Officers (CEO).

Crudup testified that petitioner worked for him in 2011, and that Gaines was a Senior Code Enforcement Officer (SCEO) at the time. The Division was organized into teams for each of the five Wards of the City of Newark. Each team had a SCEO and three CEO's. The SCEO took on the duties of a supervisor. The SCEO was responsible for ensuring that the CEO's did their job. Some time prior to 2011, petitioner was a SCEO, but had been demoted.

Crudup initially testified that he prepared the specifications of the Preliminary Notice of Disciplinary Action (PNDA) dated May 31, 2009. (R-2.) He testified that petitioner was belligerent and confrontational. The Division was short-staffed and whenever he gave assignments to Inspectors to cover Continuous Code Compliance (CCC) matters, they might not like the assignments but they did their job. Whenever petitioner was assigned to CCC, he did not go. Specifically, on February 29, 2011, March 29, 2011, April 29, 2011, and May 3, 2011, among other dates, petitioner refused to do CCC assignments that were given to him. Crudup stated that he generally had a good working relationship with petitioner, however, he "took a lot" from Gaines and "it was time to do something about it." Petitioner's refusal to do his assignments caused an "undue burden" on the operation.

In reference to Exhibit R-2, the original PNDA, Crudup changed his testimony and stated that Thomas McDonald (McDonald) prepared the attached specifications. McDonald was the assistant to Crudup when he was Director of Code Enforcement. On

a subsequent hearing date in this proceeding, he corrected his testimony and stated that Jennievese Cohen (Cohen) prepared page 2 of the PNDA using files maintained in Crudup's office and in the Department Director's office. Crudup supervised Cohen, and Dorothy Townes (Townes) was a CEO under his direct supervision in 2011. Crudup stated that he had a good working relationship with her.

Crudup testified that some time in the summer of 2011, there was a staff meeting on the fourth floor of Newark City Hall for all of the Inspectors. He did not recall the date. He left the room for a brief time and when he returned, he found Townes crying. She stated that petitioner had threatened to throw her out of the window. He requested that Townes submit her complaint in writing. Crudup testified that the attachment to Exhibit R-2, the Amended PNDA, was her submission. Crudup transferred petitioner to the Sanitation Inspectors group located at 31 Green Street, effective June 10, 2011. (P-1.)

Crudup testified that Townes was a team leader for a task force to conduct joint inspections. All staff was instructed to meet at Lincoln Park on Broad Street. He directed petitioner to work with Townes to complete the assigned tasks. This was a two-day operation that included staff from the Police, Fire, and Health Departments along with Code Enforcement. He testified that petitioner was late on the first day, then failed to return from lunch, and on the second day, failed to assist Townes in the preparation of reports. As a result, Townes submitted two memoranda dated May 12, 2011, and May 13, 2011, which documented petitioner's failure to perform the tasks assigned. (R-3 and R-4.) The facts cited in these memoranda are contained in the initial PNDA. (R-2.)

Crudup testified that on or about May 9, 2011, he received a memorandum from Tracey Smith, SCEO (Smith) regarding petitioner's refusal to complete twenty-two out of forty-three work assignments. (R-6.) Smith was a supervisor on that date and was responsible for assigning complaints to CEO's for their inspection. Her assignment conflicted with the conversation that he had with McDonald the week before. Crudup stated that, notwithstanding the conflict, petitioner was responsible for following the directive of Smith, his supervisor at the time.

Crudup testified that Cohen was an Analyst for the City of Newark who was responsible for reviewing employee time sheets and reporting abnormalities. She advised Crudup that there were many occasions when petitioner came to work "got sick" and left. Crudup stated that "it became a habit" every time that he was assigned CCC responsibilities.

Crudup testified that he gave petitioner inspections to perform from the Rent Control office. Petitioner was responsible for determining whether the properties were inhabited. Crudup testified that the reports did not contain sufficient information to evidence that he actually completed the inspections. As a result Crudup issued an Employee Warning Notice to petitioner dated April 13, 2011. (R-6.)

Crudup testified that on at least one occasion, he asked petitioner to come into his office to discuss a matter. Petitioner refused unless he had the union president present. Valerie Thomas (Thomas) is a union representative and was available at the time of the request. However, petitioner refused her assistance. The conversation "got a little loud" and Thomas advised petitioner to enter into the office for the discussion; however, he refused. Crudup stated that he then went into another office to talk with two other inspectors and petitioner tried to force his way into the office. He stated that petitioner was often confrontational. He attempted to correct petitioner's behavior through one-on-one conversations but to no avail.

Crudup testified that all inspectors are trained when they are hired. There is no process for keeping track of when the training is completed. There is no additional training after the initial training.

Crudup identified petitioner's Electronic Employee Attendance printout for petitioner for the period of January 1, 2011, to June 12, 2011. (R-11.) He also identified the Monthly Calculation of Time for petitioner for the calendar year 2011. (R-12.)

Crudup testified that the Request for Vacant Apartment Inspection form (RVAI) was generated by the Rent Regulations Office. (R-7.) It was the form that petitioner did not properly prepare. Although it is not a standard form in the Code Enforcement office, there are enough instances in which a CEO is asked to perform inspections at the request the Rent Regulations Office. As a result of Gaines inadequately completing the forms, Crudup requested that he be suspended for three days. This form RVAI is different from the Code Enforcement Form used when preparing a case for court. (P-2.) It is also different from the Notice of Violation forms used by Code Enforcement, which is used at the discretion of the inspector if and when he determines that violations exist. (P-3.) It outlines specific ordinance violations so that details of the violations are made clear for the owner of the property. Both of these forms are used in the normal course of business. Notwithstanding the fact that the RVAI is not a common form used in the Code Enforcement Office, Crudup testified that petitioner had sufficient experience as a CEO, SCEO, and as a supervisor, to know that the form required more details than what he provided.

Crudup confirmed that, in reference to Exhibits R-2, R-11, and R-12, petitioner punched out, and was credited with a sick day on February 28, 2011, March 29, 2011, April 29, 2011, May 3 and May 31, 2011. These were the days that he actually came to work and was assigned CCC duties. He was allowed to take sick days, "giving him the benefit of the doubt," if he had the leave time available until it became clear that this was a pattern of conduct. It became clear because, petitioner came to work and stayed just long enough to get his assignment. Petitioner then said that he was going to the Veteran's Hospital because he was sick and took time as a sick day.

Dorothy L. Townes

Dorothy L. Townes has been an inspector for the City of Newark for twenty years. She currently works as a CEO. In May 2011, Townes was a SCEO working for the Division of Neighborhood Services. Her duties were to assist the supervisor, conduct interior and exterior inspections in her designated section of the City, and lead team tours for inspections. She was a SCEO for ten years and participated in training when she was first hired that included tours, inside inspections, ordinances governing

restaurants, commercial establishments, and garbage storage. She received training in all of the different forms used by the Division.

Townes is familiar with the Notice of Violation form (P-3), which had been revised within the last three to four years. These forms are similar to the CCC forms that the office uses. CCC Inspections are conducted when a building is being sold. It is to let the buyer know what the condition of the building is. She performs inspections alone except for large buildings, which she does in groups. Townes testified that she is also familiar with the RVAI. She recognized the format as a Rent Control Report and is familiar with the form from conducting inspections of vacant apartments. She has not had to complete one herself.

Townes identified a memorandum that she wrote to Crudup because she was "annoyed" by the actions of petitioner. (R-4.) She stated that she was a part of a group tour inspection as a team leader. Each team had a different area to inspect and was given their respective assignments the day before by Crudup. Each team was comprised of a representative from the police department, the fire department, the health department and code enforcement. All of the teams met in the park and petitioner was late on the first day. His excuse was that his keys were locked in his vehicle. It was almost lunch time when he arrived. She scheduled the team's lunch break at 1:00 p.m. After lunch everyone was supposed to meet at 2:00 p.m. However, petitioner did not come back.

Townes identified the memorandum that she prepared to Crudup to advise him of problems that she had with petitioner during the tour inspections and preparation of the reports after the tour. (R-3.) The problem was that when petitioner came to work on the first day, he commenced debris inspections as directed and failed to return after lunch on May 11. When she tried to call him on the City-issued cell phone, it went straight to voicemail. Townes stated that she informed Crudup verbally on that day. He instructed her to prepare the memorandum. Petitioner was directed to provide his findings for inclusion in a report. Petitioner failed to assist in the preparation of the reports.

Townes described the incident which occurred during the summer 2011 staff meeting at 31 Green Street. She did not recall the dated of the meeting—only that it was warm and after spring. Following the staff meeting, some people stayed around for pizza. She went over to a window to get some air where petitioner was sitting. She asked him how he was doing because he had a "strange look" on his face. She stated that petitioner's response was "I feel like killing someone today, it might be you. I might throw you out the window." Townes stated that she became upset by petitioner's statement and went to tell Tracey Smith, a supervisor who instructed Townes to tell Crudup.

Tracey Smith

Tracey Smith has been employed by the City of Newark for twenty-nine years. She has been a Supervisor of Code Enforcement Inspections in the Division of Inspections and Enforcement for eighteen years. She assigns work and is responsible for the clerical unit called Command and Control.

Between May and July 2011, Smith supervised six or seven employees including petitioner. Although she supervised Townes at different point in her tenure, she did not supervise Townes during this time.

Smith testified that she had a working relationship with petitioner; it was "okay." He did his work "most of the time," but they disagreed on complaints from the public that she gave him to investigate. On or about May 5, 2011, McDonald, her supervisor, gave her assignments to distribute. She gave petitioner forty-three of the complaints and he refused to investigate twenty-two of them. He felt that because those complaints were in the Central Ward of Newark, they were not his responsibility. Smith testified that she tried to reason with petitioner and advised him that the Central Ward was divided into different areas, and the complaints assigned to him were his responsibility to investigate. As a result of petitioner's refusal to investigate the complaints, she "wrote him up" by preparing a memorandum to Crudup. (R-5.)

Smith testified that she attended the staff meeting in the summer of 2011 at 31 Green Street at which the incident involving Townes occurred. The meeting was around lunch time and Townes came to her stating that petitioner threatened to throw her out of the window. She advised Townes to report it to Crudup.

Thomas McDonald

Thomas McDonald (McDonald) has been an employee of the City of Newark for twenty-three years. He has served as a CEO for twenty-one years. When he initially began working with petitioner they were on the same level with the same title. His experience with petitioner was that he is "a good guy" who "knows his job." There have been times when petitioner has told McDonald that "he's heard voices" and doesn't feel well at times. Generally, petitioner was not threatening. On May 5, 2011, McDonald was acting manager while Crudup was on vacation.

McDonald testified that he gave work assignments to Smith for distribution. He did not give specifics with respect to field assignments. He stated that during the week before Crudup went on vacation, he had a conversation with petitioner wherein they discussed that petitioner would be more comfortable with handling inspections in the upper West Ward. At the time of that conversation, McDonald did not have authority to make any assignments; it was in anticipation of McDonald serving as the acting manager the following week.

McDonald testified that petitioner returned twenty-two of the forty-three files that Smith assigned to him, because they were not for inspections within the upper West Ward. Therefore, based upon the previous conversation, petitioner believed that he did not have to do those inspections. McDonald also testified however, that when he gave the work assignments to Smith, he did not give specific instructions with respect to petitioner. Petitioner had an obligation to follow Smith's directive since she was a supervisor. McDonald testified that the proper procedure for addressing conflicts in directives is verbal communication to the superior or a written response if the directive is in writing. In any event, it was not appropriate for petitioner to refuse a directive from a

supervisor. When petitioner refused to do the inspections, McDonald advised Smith to "take it up with Crudup" when he returned from vacation.

Jennievese Cohen

Jennievese Cohen has worked for the City of Newark for twenty-four years and ten months. She has been a senior administrative analyst for the last ten years. She works for Crudup and her duties are to analyze data and compile information, maintain time sheets for all employees, and handle disciplinary actions within the Division of Inspection and Enforcement. In particular, Cohen collects data and information regarding complaints for both minor and major disciplinary actions. She has taken numerous courses for investigating disciplinary action complaints for which she has received certificates.

Cohen testified that she compiled the data/information for the Specification in the Preliminary Notice of Disciplinary Action, Exhibit R-2, at the request of the City of Newark Law Department. She received information from and met with Crudup and McDonald in compiling the Specification. She also received information from Townes. Cohen prepared a "draft Specification" on May 9, 2011. In addition, she attended the summer staff meeting at 31 Green Street and became aware immediately of the incident between petitioner and Townes. The result of the meetings and information gathering was the initial PNDA. (R-2.)

Cohen stated that her draft report was "expanded" to include petitioner's failure to submit the twenty-two inspection reports. Cohen submitted her draft to Elvin Padilla in human resources for review. (R-15.) Since Padilla worked in the Personnel Department, he had access to all of petitioner's personnel files.

Cohen testified as to each of the charges in the PNDA and the conduct that gave rise to each charge by reference to the attached Specifications:

1. Incompetency, inefficiency or failure to perform duties – R-2, page 2, paragraphs 2 and 4; page 3 paragraphs 2, 3, and 4;

2. Insubordination – R-2, page 2, paragraphs 2 and 3; page 3 paragraphs 2 and 3;
3. Conduct unbecoming a public employee – R-2, pages 2 and 3;
4. Neglect of duty – R-2, page 2, paragraphs 1, 2, and 3; page 3, paragraphs 1, 2, and 3; and
5. Other sufficient cause – log of violations which includes petitioner's history of disciplinary action that reflects compliance with progressive discipline requirements.

Cohen further testified that, as a result of the statement submitted by Townes, an Amended PNDA was prepared to include the conduct contained in the Townes memorandum. (R-1.) She was not involved with recommending any particular penalty. Her superiors discussed the case with petitioner.

Cohen testified that progressive discipline includes: a corrective conference, a warning, minor disciplinary action, then major disciplinary action. She stated that petitioner was previously warned of deficiencies; in particular, on March 13, 2011. (R-13.) She also stated that progressive discipline may not be employed under circumstances where an employee is threatening or interferes with the delivery of government services.

Charles Wilder

Charles Wilder (Wilder) testified on behalf of petitioner. He testified that he has been an employee of the City of Newark for twenty-one years, sixteen of which he served as a code enforcement officer. He is familiar with Gaines from working with him at the office located at 44 Mt. Prospect Street. He did not work closely with Gaines. He was stationed on the second floor and Gaines was stationed on the first floor. He never had any problems with Gaines.

Wilder testified that he was a part of a task force to conduct joint inspections. He did not recall the date of the inspection. The task force was comprised of representatives from the following City agencies: fire department, police department,

health department, buildings department, and code enforcement. This was a one-day project where they met at Lincoln Park. There were code enforcement officers assigned to this project other than himself, including petitioner.

Wilder testified that he participated in a staff meeting held at 31 Green Street at some time in July 2011. He was vice president of the union at that time and was asked to "review a letter" but he does not recall the contents of the letter. Crudup asked him to a meeting to be a witness to the conversation with petitioner. He believed that the purpose of the meeting was to reprimand petitioner but does not recall the specific details of the meeting.

Wilder testified that Ms. Townes was another inspector in the division and that he had heard that petitioner had threatened to throw her out of the window but does not recall when he heard it.

Petitioner was always respectful with him, never saw him threaten anyone, and generally came in and did his work. He assisted petitioner whenever he had problems with reports.

Elmore Gaines

In October 1999, petitioner was hired by the City of Newark as a trainee for code enforcement. He became a CEO in December 2000, and was a SCEO from 2003 to 2004. In 2007 petitioner became a supervisor of code enforcement but was demoted to SCEO in 2009. He accepted a demotion to CEO in December 2010, as part of a reduction in force.

In reference to the incident with Townes following the meeting at 31 Green Street, petitioner testified that he never said anything about throwing her out of the window. He stated that, instead, Townes walked over to him while he was looking out of the window and whispered, "Are you thinking about jumping out the window?" This was the same date that he received the removal specifications. He stated that he believed that Townes said that he threatened her because "she didn't get the response

that she wanted" following him being served with "removal papers." He had been called into the office to be served with the disciplinary action on the same day as the staff meeting. He then testified that he doesn't know why she made up the story about him, he "was just assuming" her motive was.

Petitioner acknowledged that there were days that he "punched in" for work and then an hour later "punched out" for sick leave. He also acknowledged that there were assignments that he refused to do.

In reference to the Task force assignment, petitioner stated that he was late and reported to Crudup on the first day. After receiving instructions he was late getting to his assignment location. Petitioner "broke off" from his group and went on his own because "they were taking too long in the buildings." He did not get instructions about where to meet after lunch so when he returned from lunch, he "walked around a little bit and went back to the park." Petitioner acknowledged that his crew and superiors had reason to believe that he did not return to work after lunch. Petitioner stated that the next time that he saw anyone involved with the task force was at the park at 3:00 p.m. He reported to Kevin Waivers and asked if he saw Townes. Petitioner acknowledges that he did not report to any of his supervisors or anyone who could verify that he came back to work.

Petitioner testified that on the second day he was late for work again. The day's assignment was for vendor inspections. He did not report in to Townes as he was supposed to. Petitioner testified that he reported to Washington Park, however, when he arrived "there weren't many people there." He then drove down to Lincoln Park where the bulk of the employees were; they had already received their assignments and were disbursing. He reported to McDonald who told him to catch up with the crew that was on Branford Place. He finished his assignment at 1:30 p.m., went to lunch and then back to his office. He stated that McDonald "gave him the rest of the day off" but he "couldn't just go home."

Petitioner testified that on the third day, Townes told him that he was supposed to help her write up the investigation reports for the task force activities. He stated that

he did not assist her because "he only took pictures and didn't write anything." He stated that when the assignments were given on the first day, Townes only assigned him to take pictures. As such, he refused to assist her.

Petitioner testified that he started out getting along with Townes and "all of a sudden she stopped talking to me." He did not know why. Petitioner also testified that both he and Townes took the supervisor test. When he passed, and she failed, he said to her "you're not the sharpest knife in the drawer."

With respect to the instructions that Smith gave him to investigate complaints in the West Ward, petitioner acknowledged that he was insubordinate when he refused to follow her instructions.

Credibility Determinations

In assessing a witness's credibility, an Administrative Law Judge must consider his/her testimony in "light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). A fact finder may reject a witness's testimony "when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521-22 (1950); see Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958) (rejecting testimony "inconsistent with other testimony or with common experience" or "overborne by other testimony."); D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). An ALJ may consider the "interest, motive, bias, or prejudice of a witness" but "where such choice is reasonably made, it is conclusive on appeal." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952); Renan Realty Corp. v. State, Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

Here, the only conflicting testimony was as to whether petitioner threatened Dorothy Townes. Conflicting and irreconcilable testimony requires credibility determinations, based on the totality of the evidence, prior to making findings as to the

disputed facts. In re Final Agency Decision of Bd. of Exam'rs of Elec. Contractors, 356 N.J. Super. 42 (App. Div. 2002). Based upon petitioner's inability to provide any basis for why Townes would make up the story that he threatened her, together with respondent's witnesses who testified about the distress that Townes was in at the time of the incident, I **FIND** the testimony of respondent's witnesses to be more credible than that of petitioner. Respondent's evidence is more consistent in the manner in which it collectively "hangs together." Petitioner's testimony "contains inherent contradictions which alone or in connection with other circumstances in evidence excite suspicion" as to its veracity. Perrone, supra, 5 N.J. at 521-22. For the foregoing reasons, I **FIND** that petitioner did threaten Townes and engaged in the conduct set forth in the Specifications of the Preliminary Notice of Disciplinary Action and the Amended Preliminary Notice of Disciplinary Action.

ANALYSIS AND CONCLUSIONS OF LAW

Applicable Standard

The Civil Service Act and the implementing regulations govern the rights and duties of public employees. N.J.S.A. 11A:1-1 to 12-6; N.J.A.C. 4A:1-1.1 to 4A:10-3.2. An employee who commits a wrongful act related to his or her duties or who gives other just cause may be subject to major discipline. N.J.S.A. 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). In a civil service disciplinary case, the employer bears the burden of sufficient, competent and credible evidence of facts essential to the charge. N.J.S.A. 11A:2-6(a)(2), -21; N.J.S.A. 52:14B-10(c); N.J.A.C. 1:1-2.1, "burden of proof", N.J.A.C. 4A:2-1.4. That burden is to establish 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).

An appointing authority may discipline an employee on various grounds, including inability to perform duties, conduct unbecoming a public employee and other sufficient cause. N.J.A.C. 4A:2-2.3(a). Such action is subject to review by the Merit System Board, which after a de novo hearing makes an independent determination as to both guilt and the "propriety of the penalty imposed below." W. New York v. Bock, 38

N.J. 500, 519 (1962). In an administrative proceeding concerning a major disciplinary action, the appointing authority must prove its case by a "fair preponderance of the believable evidence." N.J.A.C. 4A:2-1.4(a); Polk, supra, 90 N.J. at 560; Atkinson, supra, 37 N.J. at 149.

The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958.) 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." Perrone, supra, 5 N.J. at 522.

"Unbecoming conduct" is broadly defined as "'any conduct which adversely affects the morale or efficiency of the [governmental unit] [or] which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services.'" Karins v. City of Atl. City, 152 N.J. 532, 554 (1998) (citations omitted); In re Nicosia, A-5285-04T5 (App. Div. May 17, 2007), <http://njlaw.rutgers.edu/collections/courts/>. The conduct need not be "predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

Conduct Unbecoming a Public Employee

Under N.J.A.C. 4A:2-2.3(a)(6), an employee may be subject to major discipline for conduct unbecoming a public employee. Although not strictly defined by the Administrative Code, "conduct unbecoming" has been described as that "which adversely affects the morale or efficiency" of the public entity or tends "to destroy public respect for . . . [public] employees and confidence in the operation of . . . [public] services." Emmons, supra, 63 N.J. Super. at 140 (citation omitted); see Karins, supra, 152 N.J. 532. Petitioner's threatening behavior towards Townes, his admitted refusal to do work assigned to him, and his taking sick leave when given certain assignments, falls below the standard of conduct expected from a public employee.

Insubordination and Neglect of Duty

Black's Law Dictionary 802 (7th Ed. 1999) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Such dictionary definitions have been utilized by courts to define the term where it is not specifically defined in contract or regulation.

> "Insubordination" is not defined in the agreement. Consequently, assuming for purposes of argument that its presence is implicit, we are obliged to accept its ordinary definition since it is not a technical term or word of art and there are no circumstances indicating that a different meaning was intended.
>
> [Ricci v. Corp. Express of the E., 344 N.J. Super. 39, 45 (App. Div. 2001) (citation omitted).]

Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person. Insubordination is always a serious matter, especially in a paramilitary context. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

Neglect of duty is one of the grounds for disciplinary action in a civil service matter under N.J.A.C. 4A:2-2.3(7). Although not defined by the regulation, it generally means that a person is not performing his or her job. The person may have failed to perform an act that the job requires or may have been negligent in the discharge of a duty. The duty may arise by specific statute or from the very nature of the job itself.

Considering the foregoing, I **CONCLUDE** that petitioner engaged in conduct unbecoming a public employee; that he engaged in conduct that constituted insubordination and a failure to perform his duties; that he neglected his duties; and that

there is other sufficient cause for respondent to have taken disciplinary action against petitioner. I am persuaded by the testimony of Jennievese Cohen wherein she specifically related each action in the Specification by reference to each of the charges against petitioner.

Appropriateness of Penalty

It is well-established that the employee's past record and any mitigating circumstances may be reviewed in assessing a penalty. See Bock, supra, 38 N.J. 500. The severity of the infractions must also be balanced against "whether removal or something less is appropriate under the circumstances." In re Figueroa, CSV 3819-01, Initial Decision (October 10, 2003), http://njlaw.rutgers.edu/collections/oal/; see Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980). Progressive discipline may be "bypassed when an employee engages in severe misconduct," especially where the offense involves "public safety" and risks "harm to persons or property." In re Herman, 192 N.J. 19, 33-34 (2007). In assessing penalties, "[t]he overriding concern" is the "public good." George v. N. Princeton Developmental Ctr., 49 N.J.A.R.2d (CSV) 463, 465.

"[W]here the underlying conduct is of an egregious nature," an individual may be removed regardless of disciplinary history. In re Glenn, CSV 5051-03, Initial Decision (May 23, 2005), http://njlaw.rutgers.edu/collections/oal/; see Henry, supra, 81 N.J. at 571. Counseling, warnings, meetings, etc., do not constitute discipline under merit system rules. See N.J.A.C. 4A:2-2.2 and N.J.A.C. 4A:2-3.1. Here, as the charges resulted from offenses occurring from August to September of 2010, "it was incumbent upon [respondent] to follow the concept of progressive discipline" and advise petitioner that "failure to change [her] behavior could result in termination from employment." Glenn, supra, CSV 5051-03.

Petitioner's underlying conduct warranted the four-month suspension imposed.

ORDER

It is **ORDERED** that petitioner, Elmore Gaines, be given a suspension of four months.

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, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, 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.

DATE

LELAND S. MCGEE, ALJ

Date Received at Agency: May 6, 2013

Date Mailed to Parties: MAY - 7 2013

lr/df/sej

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

LIST OF WITNESSES

For Petitioner:

Elmore Gaines

Charles Wilder

For Respondent:

Amos Crudup

Dorothy L. Townes

Tracey Smith

Thomas McDonald

Jennievese Cohen

LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

P-1 Memorandum from to petitioner from Amos Crudup dated June 9, 2011

P-2 Division of Inspection and Enforcement Court Case Inspection form

P-3 Division of Inspection and Enforcement Notice of Violation form

For Respondent:

R-1 PNDA dated May 31, 2011

R-2 Amended PNDA dated July 26, 2011

R-3 Memorandum to Amos Crudup from Dorothy Townes dated May 13, 2011

R-4 Memorandum to Amos Crudup from Dorothy Townes dated May 12, 2011

R-5 Memorandum to Amos Crudup from Tracey Smith dated May 9 2011

R-6 Employee Warning Notice dated April 13, 2011

R-7 Request for Vacant Apartment Inspection memorandum dated March 23, 2011

R-8 Marked but not admitted

R-9 Marked but not admitted

R-10 Marked but not admitted

R-11 Payroll preparation of time clock data from January 1 to June 12, 2011

R-12 Attendance Record for Elmore Gaines for 2011 and Certification

R-13 Disciplinary History of Elmore Gaines

R-14 Final Administrative Action of the Merit System Board dated December 22, 2006

R-15 Email and attachment from Cohen