

#### STATE OF NEW JERSEY

In the Matter of Kenneth Johnson

DECISION OF THE CIVIL SERVICE COMMISSION

CSC Docket No. 2014-1695 OAL Docket No. CSV 00506-14

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ISSUED: **JUL 16 2015** (JET)

The appeal of Kenneth C. Johnson, Jr., a Senior Custodian with Newark, School District, of his 45 working day suspension, on charges, was heard by Administrative Law Judge Jeffrey A. Gerson (ALJ), who rendered his initial decision on May 20, 2015. Exceptions were filed on behalf of the appointing authority and cross exceptions were filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on June 17, 2015, did not adopt the ALJ's recommendation to modify the 45 working day suspension to a 20 working day suspension. Rather, the Commission imposed a 30 working day suspension.

#### DISCUSSION

The appellant was suspended on charges of conduct unbecoming an employee, neglect of duty, and other sufficient cause for yelling disruptive, defiant and disorderly comments at his female supervisors. Specifically, the appointing authority alleged that staff had filed numerous complaints regarding the uncleanliness of the workplace and the appellant had neglected his supervisory janitorial duties. Further, the appointing authority alleged that on October 10, 2013, the appellant was observed conversing with a security guard and sitting on a security desk rather than performing his duties and was observed pointing his finger and yelling in a rage at the Vice Principal. Moreover, the appointing authority alleged that the appellant continued to make inappropriate comments

pertaining to the Vice Principal while standing outside the main office at the security desk. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case.

2

In his initial decision, the ALJ found that on October 9, 2013, the appointing authority received nine complaints from various teachers and administrators concerning numerous janitorial issues that existed in the workplace. The appellant and another janitor, A.G., responded to the complaints and corrected the janitorial Further, on October 10, 2013, the appellant was observed sitting at a security desk during a 20-minute timeframe by Vice Principal Tameshome Lewis and Chief Innovation Officer Sabrina Meah. Vice Principal Lewis approached the appellant and suggested that there were better ways for him to be spending his The conversation continued in Vice Principal Lewis' Office, where it escalated into a disagreement that included raised voices. The ALJ noted that the dispute did not concern the appellant's presence at the security desk, but rather, it concerned Vice Principal Lewis' perception of A.G.'s performance of her duties. Based on the appellant's testimony, the ALJ found that the appellant was defending A.G. during the incident in Vice Principal Lewis' office. The appellant did not deny that his voice was elevated or his level of consternation during the incident, and he did not dispute that he became somewhat angry at Vice Principal Lewis' insistence on disciplining A.G. The appellant also testified that he had some degree of frustration as a result of Vice Principal Lewis' discussion with him regarding his presence at the security desk.

Ultimately, the ALJ found that the appellant and A.G. corrected the janitorial complaints. Therefore, the appointing authority had not sustained the charge of neglect of duty. However, the ALJ determined that the appellant's response to Lewis was not verbally abusive or overtly threatening, and thus, was not conduct unbecoming a public employee, as he was charged, but would be more appropriately characterized as insubordination. Based on this charge and since the appellant only had a minor disciplinary history, the ALJ recommended modifying the 45 working day suspension to a 20 working day suspension.

In its exceptions, the appointing authority asserts that the ALJ erred and the 45 working day suspension should be upheld or increased. Specifically, the appointing authority contends that the appellant admitted that he made the inappropriate statements to the Vice Principal, and it cites the actual statements to underline the hostility and disrespect he showed to his superior. Further, the 45 working day suspension is consistent with previous Civil Service decisions that are similar to this matter. See In the Matter of John Lenhardt (CSC, decided February

<sup>&</sup>lt;sup>1</sup> The ALJ noted that Vice Principal Lewis was responsible for the performance of the janitors and, since she was dissatisfied with the appellant's performance, she was authorized to bring her concerns to the appellant's attention.

11, 2009),<sup>2</sup> and *In the Matter of Thomas Mitchell* (CSC, decided July 27, 2011).<sup>3</sup> The appointing authority states that Civil Service employees have been terminated in similar circumstances regardless of their prior disciplinary history. In addition, the appointing authority contends that the offenses were compounded since the appellant is serving in a supervisory title. Moreover, the appointing authority asserts that the ALJ concluded that the appellant's response was "unwarranted and insubordinate," and the appointing authority's witness confirmed that the statements were threatening.

In response, the appellant argues that the appointing authority failed to show that his offenses are so egregious as to warrant a 45 working day suspension. The appellant adds that the cases cited by the appointing authority are distinguishable from this matter and should not be applied. In this regard, the cases cited by the appointing authority involve far more egregious offenses that warranted severe penalties. As such, it would be inappropriate in this matter to apply severe penalties for his offenses. The appellant emphasizes that the appointing authority failed to show that he was guilty of neglect of duty and conduct unbecoming an employee, since the contention that the appellant neglected his duties was completely unsubstantiated and there was no substantive evidence to show that he "yelled in a rage" or made threatening statements. The appellant adds that his offenses only constitute insubordination. In addition, the appellant explains that the ALJ's recommendation of a 20 working day suspension is consistent with previous decisions issued by this agency. See In the Matter of Robert Daughtry (MSB, decided May 7, 2008). Moreover, the ALJ correctly utilized the appellant's testimony that he was defending an employee as a mitigating factor, and the appellant's minor disciplinary action was properly considered by the ALJ when applying the penalty.

Upon independent review of the entire record, the Commission agrees with the ALJ that the neglect of duty charge has not been sustained. Further, the Commission agrees with the ALJ that the appellant's behavior toward Vice Principal Lewis was unwarranted. In this regard, such behavior, while insubordinate, was also clearly conduct unbecoming a public employee. However, the Commission does not agree with the ALJ's determination to modify the 45 working day suspension to a 20 working day suspension. Rather, for the reasons discussed below, the Commission imposes a 30 working day suspension.

<sup>&</sup>lt;sup>2</sup> In *Lenhardt*, the appellant made inappropriate comments and retaliated toward a subordinate employee. The Commission considered the appellant's offense coupled with his recent disciplinary actions for similar conduct as sufficiently egregious to warrant a 45 working day suspension.

<sup>&</sup>lt;sup>3</sup> In *Mitchell*, the appellant engaged in the theft of time by falsifying his timesheets and the Commission imposed a 45 working day suspension for the appellant's offense despite that he had no disciplinary record.

<sup>&</sup>lt;sup>4</sup> In *Daughtry*, a 30 working day suspension was imposed where appellant yelled and mocked a supervisor.

In determining the proper penalty, the Commission's review is de novo. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. West New York v. Bock, 38 N.J. 500 (1962). In determining the propriety of the penalty, several factors must be considered. including the nature of the offense, the concept of progressive discipline, and the George v. North Princeton Developmental Center, 96 employee's prior record. N.J.A.R. 2d (CSV) 463. Moreover, 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).

As indicated above, the Commission finds that the appointing authority has sustained its burden of proof establishing that the appellant's conduct constitutes conduct unbecoming an employee. Conduct unbecoming a public employee is conduct that adversely affect morale or efficiency or has a tendency to destroy public respect for governmental employees and confidence in the operation of public See In re Emmons, 63 N.J. Super. 136 (App. Div. 1960). Moreover, unbecoming conduct may include behavior which is improper under the circumstances, may be less serious than a violation of the law, but which is inappropriate on the part of a public employee because it is disruptive of As noted above, the ALJ found that the appellant's government operations. behavior toward Vice Principal Lewis, i.e., raising his voice to her during an elevated disagreement, was unwarranted. The Commission finds that this could have been interpreted as potentially intimidating behavior that constitutes conduct unbecoming an employee. In this case, the appellant's conduct cannot be minimized in light of the fact that he is serving in a supervisory position. It is irrelevant that the appellant was defending a subordinate employee at the time of the incident, as his conduct toward Vice Principal Lewis stepped over the line of what is permissible in the workplace.

A review of the appellant's disciplinary record evidences that he received a one day suspension in 2005, which is the only disciplinary action he has received since his employment began in 2000. Based on the disciplinary history, the appellant's position as a supervisory employee, and given the nature of his conduct in the altercation with Vice Principal Lewis, the Commission finds that a 30 working day suspension is warranted.

Since the 45 working day suspension has been modified to a 30 working day suspension, the appellant is entitled to 15 days of mitigated back pay, benefits and seniority pursuant to *N.J.A.C.* 4A:2-2.10.

Since the appellant has not prevailed on all or substantially all of the primary issues on appeal, he is not entitled to an award of counsel fees. See N.J.A.C. 4A:2-2.12. 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. March 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 the case at hand, although the penalty imposed against the appellant was modified by the Commission, certain charges were sustained and major discipline has been imposed. 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. However, in light of the Appellate Division's decision, *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.

#### ORDER

The Civil Service Commission finds that the action of the appointing authority in imposing a 45 working day suspension was not justified. Therefore, the Commission modifies the 45 working day suspension to a 30 working day suspension. The Commission further orders that the appellant be granted 15 days of back pay, benefits and seniority. 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 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.

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 Superior Court of New Jersey, Appellate Division.

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 17<sup>th</sup> DAY OF JUNE, 2015

Robert M. Czech

Chairperson

Civil Service Commission

Inquiries

and

Correspondence

Henry Maurer

Director

Division of Appeals & Regulatory Affairs

Civil Service Commission

P.O. Box 312

Trenton, New Jersey 08625-0312

Attachment



### **INITIAL DECISION**

OAL DKT. NO. CSV 00506-14 AGENCY DKT NO. 2014-1695

I/M/O OF KENNETH C. JOHNSON, JR., NEWARK PUBLIC SCHOOL DISTRICT.

Vipin Varghese, Esq., for petitioner Kenneth C. Johnson, Jr. (Pitta & Giblin, LLP, attorneys)

Bernard Mercado, Esq., for respondent, Newark Public School District)

Record Closed: March 20, 2015 Decided: May 20, 2015

BEFORE: **JEFFREY A. GERSON**, ALJ:

## STATEMENT OF CASE

Kenneth C. Johnson, Jr., a Senior Custodian employed by the State Operated School District of the City of Newark was assigned to the Brick Peshine Academy to perform his custodial functions.

On or about October 15, 2013, a Preliminary Notice of Disciplinary Action was served on Mr. Johnson alleging that he engaged in conduct unbecoming a public employee and that he neglected his supervising janitorial duties.

Mr. Johnson contested these allegations and a hearing was conducted on October 25, and November 20, 2013 at the Municipal level resulting in a Final Notice of Disciplinary Action suspending Mr. Johnson for 45 days.

On or about December 18, 2013, Mr. Johnson appealed his suspension resulting in two days of hearing at the Office of Administrative, the first on November 5, 2014 and the second on February 27, 2015. The record closed on March 20, 2015 after receipt of briefs from both sides.

#### **TESTIMONY**

Several witnesses testified for both sides in this matter including the following:

- 1. Sabrina Meah, Chief Innovations Officer
- 2. Wali Thomas, Interim Supervisor of Custodians
- 3. Principal Barnes
- 4. Pedro Massieu, Building Manager
- 5. Janelle Francios, Senior Labor Relations Specialist
- 6. Kenneth C. Johnson, Jr.

Despite the contentious nature of the litigation the essence of the offenses alleged against Mr. Johnson are not in significant factual dispute.

The testimony of the witnesses establish that on October 9, 2013, nine written requests for custodial service were submitted by various teachers and administrators with respect to janitorial problems being confronted on the third floor of the Brick Peshine building. A review of those nine complaints, most of which were quite minor, was apparently directed at the specific janitor responsible for the area in question.

On October 9, 2013, Mr. Johnson, along with Janitor A. G. addressed all of the complaints.

On the following day, October 10, 2013, Vice Principal Tameshome Lewis and Chief Innovations Officer Sabrina Meah observed Mr. Johnson at the Security desk for a period of time approximating twenty minutes. Vice Principal Lewis approached him suggesting that there were better ways to be spending his time. Although that was the initiation of the conversation, it apparently continued in Vice Principal Lewis' office and evolved into a voices raised disagreement.

It was not the time being spent at the Security desk that actually created the dispute, but apparently a revisiting of what Ms. Lewis perceived as the inadequacy of A.G.'s janitorial performance. It was clear from Mr. Johnson's testimony that from his perspective, he believed that he was defending an employee. The undersign's impression of Mr. Johnson's defense of A.G. was that he had adopted a paternalistic view of A.G. and since her tenure in the job was only weeks old, he believed she should be accorded some more leeway.

Mr. Johnson did not dispute that his conversation with Vice Principal Lewis resulted in his voice being elevated and that he became somewhat angry at both Vice Principal Lewis' approach to the problem and her insistence on disciplining A.G.

Though there is little doubt that Mr. Johnson, at minimum raised his voice to Vice Principal Lewis, there was no substantiation of any verbal threat towards Vice Principal Lewis nor was there any substantiation that there was some possibility of further degeneration of conduct.

Mr. Johnson's testimony was forthright and credible. He did not deny his consternation nor did he deny that his voice was elevated. He indicated that there was some degree of frustration on his part as a result of Vice Principal Lewis' initial approach to him about his spending time at the Security desk. According to Mr.

Johnson, time spent at the Security desk was necessary to ensure the safety of the students and to confirm that all doors entering and leaving the facility were properly secured at the end of the school day. He utilized the facilities at the Security desk and also assisted the Security Officer when necessary. Though these activities may not have been specifically addressed in Mr. Johnson's job description, they were clearly part of his every day activities and Vice Principal Lewis' approach to him on the day in question could have very easily been misinterpreted by Mr. Johnson as a pretext to rehash the inadequacy of A.G.'s performance.

Regardless of the intent of the Vice Principal's approach to Mr. Johnson on the day in question, his loud and marginally tempered response though not conduct unbecoming was rather more appropriately characterized as insubordination. Vice Principal Lewis was in fact responsible for the performance of janitors and if dissatisfied with the performance of the janitorial staff would actually be obligated to bring it to Mr. Johnson's attention. Mr. Johnson's verbal response, though not verbally abusive or overtly threatening, was unwarranted and insubordinate.

The written charges in this matter are inartfully drawn and unduly personal in nature. Mr. Johnson's conduct was clearly more of an insubordinate nature than conduct unbecoming.

The contention that Mr. Johnson neglected his duties as a janitor was completely unsubstantiated and in fact, the testimony established that all the janitorial complaints registered against A.G. had been addressed and corrected. That is exactly what Mr. Johnson's job was and he performed it adequately. According to Mr. Johnson, since he had become a Senior Custodian sometime in 2008, he had never received so many written complaints about one custodian in one day. Nonetheless, regardless of the basis for those complaints, they were adequately addressed and do not give rise to a charge of neglect of duty.

### **PENALTY**

Over the course of Mr. Johnson's fifteen year history as a janitor, he had only one incident of prior discipline resulting in a minor suspension almost ten years ago. The spectrum of conduct running from minor to egregious sets the parameters for disciplinary action. Mr. Johnson's conduct in this matter was more than a minor transgression, but less than what could be characterized as egregious. This appears to be Mr. Johnson's first offense of insubordination and since his charge of neglect of duty has not been proven, his penalty should not be the forty-five days levied. Insubordination is always serious, but in this case it should be tempered by the surrounding circumstances and the forty-five day suspension should be reduced to twenty days. A twenty-day suspension reflects the negative conduct exhibited by Mr. Johnson and sets the foundation for a more serious penalty in the event similar incident occurs.

### <u>ORDER</u>

It is **ORDERED** that Kenneth C. Johnson, Jr. be suspended for twenty days as a result of insubordination.

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.

## OAL DKT. NO. CSV 00506-14

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, 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.

May 20, 2015	Jeffen Sam
DATE	JEFFREY A. GERSON, ALJ
Date Received at Agency:	May 20, 2015
Date Mailed to Parties:	5/20/15

# **APPENDIX**

# **WITNESSES**

# For Appellant

Kenneth C. Johnson, Jr.

Gaynell Hockaday

# For Respondent

Sabrina Meah

Wali Thomas

Principal Barnes

Pedro Massieu

Janelle Francios

# **EXHBITS**

# For Appellant

None

## For Respondent

Final Notice of Disciplinary Action dated 6/28/05	
Final Notice of Disciplinary Action dated 12/16/13	
Reporting Custodial Concerns dated 10/9/13	
Memo from Sabrina Meah, School Chief Innovation Officer regarding Incident	
Involving Mr. Johnson dated 10/10/13	
Memorandum to Kenneth Johnson from Wali Thomas regarding Request for	
Disciplinary Action dated 10/11/13	
Letter to Whom It May Concern from Kenneth C. Johnson detailing janitorial	
concerns of 10/9/13	
Warning Notice Aquillah Gray from Kenneth Johnson dated 10/10/13	
Senior Custodian Job Specification	
Job Specification/Definition for Security Guard	
Description of Conduct and Dress Code for Newark Public Schools	
Employees	