A-8

STATE OF NEW JERSEY

In the Matter of Peter Zampella
Hudson County,
Department of Roads and Public Property

CSC DKT. NO. 2017-1329
OAL DKT. NO. CSV 18314-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: SEP 07 2017 **BW**

The appeal of Peter Zampella, Senior Maintenance Repairer, Hudson County, Department of Roads and Public Property, 90 working day suspension, on charges, was heard by Administrative Law Judge Thomas R. Betancourt, who rendered his initial decision on August 10, 2017. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on September 6, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

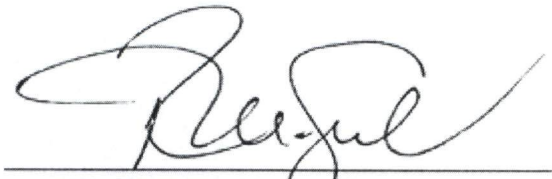
ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Peter Zampella.

Re: Peter Zampella

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
SEPTEMBER 6, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 18314-16

PETER ZAMPELLA, JR.,
Appellant,
v.
HUDSON COUNTY, DEPARTMENT OF ROADS AND PUBLIC PROPERTY,
Respondent.

John Brannigan, Esq., for Appellant (Oxfeld Cohen, attorneys)

Angelo Auteri, Esq., for Respondent (Scarinci Hollenbeck, attorneys)

Record Closed: July 26, 2017 Decided: August 10, 2017

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Peter Zampella, Jr., appeals a Final Notice of Disciplinary Action, dated October 18, 2016, which imposed a penalty of ninety-day suspension for conduct unbecoming a public employee, neglect of duty, and chronic and excessive lateness.

The Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, to the Office of Administrative Law (OAL), where it was filed on December 5, 2016.

A prehearing conference was held on January 6, 2017, and a prehearing order was entered by the undersigned on the same date.

A hearing was held on July 26, 2017, whereupon the record was closed. Appellant, Peter Zampella, Jr., did not attend the hearing. Appellant also did not attend the hearing scheduled for June 14, 2016, which was then adjourned. Appellant's counsel was offered the option to either have the matter listed as a failure to appear, or to proceed to a hearing without Appellant present. Counsel chose to proceed with the hearing.

ISSUES

Whether there is sufficient credible evidence to sustain the charges set forth in the Final Notice of Disciplinary Action; and, if sustained, whether a penalty of a ninety-day suspension is warranted.

SUMMARY OF RELEVANT TESTIMONY

John Madigan testified as follows:

He is employed by the Hudson County, Department of Roads and Public Property as the clerk to the office manager of the Brennan Courthouse. His job entails giving out work assignments and maintain employee timesheets. Employees are required to sign in when they arrive at work. The sign-in sheets are located directly across from his desk. He allows for a ten-minute grace period before he checks the timesheets. If anyone is late he makes a notation on the time sheet. He has been employed in this capacity for five years and four months. He is familiar with Appellant, though he no longer works for Hudson County. Appellant was a senior maintenance

repairer and worked in the Brennan Courthouse. Appellant's shift was from 3:00 p.m. to 11:00 p.m. Monday through Friday. Appellant was the "head man" and would assign work to other employees.

Mr. Madigan reviewed the Appellant's timesheets and noted that Appellant was late twenty-one times between the dates of January 23, 2016, and July 27, 2016.

Mr. Madigan, and Appellant's supervisor discussed Appellant's tardiness numerous times with him. Each time Appellant would advise that he would correct his tardiness.

Mr. Madigan reviewed Appellant's prior disciplinary history, which consisted of two written warnings; minor discipline with a one-day suspension; minor discipline with a three-day suspension; a verbal warning; and, major discipline with a forty-five-day suspension.

Mr. Madigan noted that when Appellant was at work he performed his job satisfactorily. When Appellant was late he rarely called in advance. Mr. Madigan recalled two times that Appellant called to advise he would be late. Mr. Madigan also noted that even if an employee called in advance, the employee was still late for work.

FINDINGS OF FACT

I **FIND** the following **FACTS**:

1. Appellant, Peter Zampella, Jr., was employed by Hudson County, Department of Roads and Public Property as a senior maintenance repairer.

2. Appellant's work shift was 3:00 p.m. to 11:00 p.m. Monday through Friday.

3. Appellant was late for work a total of twenty-one times between January 23, 2016, and July 27, 2016, as follows:

    a. February 3, 2016 – 15 minutes

b. March 2, 2016 – 35 minutes

c. March 9, 2016 – 1 hour

d. March 10, 2016 – 1 hour

e. March 31, 2016 – 45 minutes

f. April 8, 2016 – 50 minutes

g. April 29, 2016 – 45 minutes

h. May 3, 2016 – 30 minutes

i. May 13, 2016 – 1 hour

j. May 23, 2016 – 40 minutes

k. June 13, 2016 – 1 hour

l. June 14, 2015 – 15 minutes

m. June 15, 2016 – 40 minutes

n. June 17, 2016 – 1 hour

o. June 28, 2016 – 1 hour, 10 minutes

p. June 30, 2016 – 30 minutes

q. July 6, 2016 – 1 hour

r. July 8, 2016 – 1 hour

s. July 11, 2016 – 1 hour, 10 minutes

t. July 26, 2016 – 30 minutes

u. July 27, 2016 – 22 minutes

4. Of the twenty-one times Appellant was late during this period he called in advance at most two times.

5. Appellant has six incidents of prior discipline, as follows:

a. Written warning dated February 1, 2006, for lateness and neglect of duty;

b. Written verbal warning dated March 30, 2006, for chronic and excessive absenteeism;

c. Notice of Minor Disciplinary Action dated July 19, 2012, with a one-day suspension for neglect of duty and excessive lateness;

d. Notice of Minor Disciplinary Action dated March 5, 2013, with a three-day suspension for not going to work and not calling in;

e. Verbal warning dated March 3, 2014, for leaving work early;

f. Notice of Major Disciplinary Action dated July 15, 2015, with a forty-five-day suspension for conduct unbecoming a public employee, neglect of duty, and chronic and excessive lateness.

LEGAL ANALYSIS AND CONCLUSION

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a civil service employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointments and broad tenure protection. See 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 County Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). In order to carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

A public employee who is protected by the provisions of the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2 2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-

1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). 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 (1958). Therefore, the judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). This burden of proof falls on the agency in enforcement proceedings to prove violations of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987).

This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, in accordance with a reasonable probability of truth. Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). 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). The burden of proof falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The respondent must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson, supra, 37N.J. 143. The evidence needed to satisfy the standard must be decided on a case-by-case basis.

Appellant is charged in the Final Notice of Disciplinary Action (FNDA) with conduct unbecoming a public employee; neglect of duty; and, chronic and excessive lateness.

"Conduct unbecoming a public employee" encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect for government employees and confidence in the operation of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998). It is sufficient that the complained-of conduct and its attending circumstances "be such as to

offend publicly accepted standards of decency." Id. at 555 (citation omitted). Such misconduct need not necessarily "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 as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (citation omitted).

As to the charges of conduct unbecoming a public employee, Respondent has met its burden of proof by a preponderance of the credible evidence. In reaching this conclusion it is important to note that it is unacceptable for an employee to be habitually late for work. This conduct "adversely affects the morale or efficiency of a governmental unit." See Karins, supra, 152 N.J. at 554.

Neglect of duty is not defined in the New Jersey Administrative Code. However, the charge has been interpreted to mean that "[a]n employee has neglected to perform an act as required by his or her job title or was negligent in its discharge." Avanti, supra, 97 N.J.A.R.2d (CSV) 564; Ruggerio v. Jackson Twp. Dep't of Law and Pub. Safety, 92 N.J.A.R.2d (CSV) 214. The ALJ in Glenn v. Twp. of Irvington, CSV 5051-03, Initial Decision (February 25, 2005), http://njlaw.rutgers.edu/collections/oal/, reasoned:

> The term "neglect" connotes a deviation from normal standards of conduct. Matter of Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). The term "duty" means conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957). Neglect of duty can arise from omission to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955) (police chief violated his sworn duty by failing to enforce criminal laws).

Although a finding of neglect does not require an intentional or willful act, there must be some evidence that an employee somehow breached a duty of care owed to his employer.

In the present case Respondent has carried its burden by a preponderance of the credible evidence at to the charge of neglect of duty. Appellant, if not at work, cannot perform the job. He has neglected his duty as he was not at work.

As to the final charge of chronic and excessive tardiness, Respondent has also carried it burden by a preponderance of the credible evidence. The timesheets in evidence speak for themselves. Appellant was late twenty-one times between the dates of January 23, 2016, and July 27, 2016.

An appeal to the Merit System Board requires the Office of Administrative Law to conduct a de novo hearing and to determine Appellant's guilt or innocence as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). In determining the reasonableness of a sanction, the employee's past record and any mitigating circumstances should be reviewed for guidance. W. New York v. Bock, 38 N.J. 500 (1962). Although the concept of progressive discipline is often cited by appellants as a mandate for lesser penalties for first time offenses,

> that is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> [In re Herrmann, 192 N.J. 19, 33-34 (2007) (citing Henry, supra, 81 N.J. 571).]

Although the focus is generally on the seriousness of the current charge as well as the prior disciplinary history of the appellant, consideration must also be given to the purpose of the civil service laws. Civil service laws "are designed to promote efficient public service, not to benefit errant employees . . . The welfare of the people as a whole, and not exclusively the welfare of the civil servant, is the basic policy underlining the statutory scheme." State-Operated Sch. Dist. v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). "The overriding concern in assessing the propriety of the penalty is

the public good. Of the various considerations which bear upon that issue, several factors may be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record." George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463, 465.

In Bock, supra, 38 N.J. at 522, which was decided more than fifty years ago, our Supreme Court first recognized the concept of progressive discipline, under which "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct." Herrmann, supra, 192 N.J. at 29 (citing Bock, supra, 38 N.J. at 522). The Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary proceeding, and held that an employee's "past record" includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee." Bock, supra, 38 N.J. at 523-24.

As the Supreme Court explained in Herrmann, supra, 192 N.J. at 30, "[s]ince Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct." According to the Court:

> . . . First, principles of progressive discipline can support the imposition of a more severe penalty for a public employee who engages in habitual misconduct . . . .
>
> The second use to which the principle of progressive discipline has been put is to mitigate the penalty for a current offense . . . for an employee who has a substantial record of employment that is largely or totally unblemished by significant disciplinary infractions . . . .
>
> . . . [T]hat is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when . . . the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for

> continuation in the position, or when application of the principle would be contrary to the public interest.
>
> [Herrmann, supra, 192 N.J. at 30-33 (citations omitted).]

In the matter of In re Stallworth, 208 N.J. 182 (2011), a Camden County pump-station operator was charged with falsifying records and abusing work hours, and the ALJ imposed removal. The Commission modified the penalty to a four-month suspension and the appellate court reversed. The Court re-examined the principle of progressive discipline. Acknowledging that progressive discipline has been bypassed where the conduct is sufficiently egregious, the Court noted that "there must be fairness and generally proportionate discipline imposed for similar offenses." Id.at 193. Finding that the totality of an employee's work history, with emphasis on the "reasonably recent past," should be considered to assure proper progressive discipline, the Court modified and affirmed (as modified) the lower court and remanded the matter to the Commission for reconsideration.

In deciding what penalty is appropriate, the courts have looked toward the concept of progressive discipline. In Bock, supra, 38 N.J. at 523-24, The New Jersey Supreme Court held that evidence of a past disciplinary record, including the nature, number, and proximity of prior instances of misconduct, can be considered in determining the appropriate penalty. Also, where an employee's misconduct is sufficiently egregious, removal may be warranted and need not be preceded by progressive penalties. In re Hall, 335 N.J. Super. 45 (App. Div. 2000), certif. denied, 167 N.J. 629 (2001); Golaine v. Cardinale, 142 N.J. Super. 385, 397 (Law Div. 1976), aff'd, 163 N.J. Super. 453 (App. Div. 1978), certif. denied, 79 N.J. 497 (1979). The penalty imposed must not be so disproportionate to the offense and the mitigating circumstances that the decision is arbitrary and unreasonable.

In the instant matter, Appellant has a substantial disciplinary history. He has received three warnings, two for lateness, and one for leaving work early; two minor disciplinary actions, one for chronic lateness and one for missing work and not calling in (he received a one-day suspension and a three-day suspension, respectively); and, one

major disciplinary action for chronic lateness resulting in a forty-five-day suspension. Much of his disciplinary history revolves around his inability to arrive at work in a timely manner.

Based upon the above authorities, I **CONCLUDE** that progressive discipline should apply. The question remains whether a ninety-day suspension is warranted, or that a lesser penalty be imposed.

I further **CONCLUDE** that the penalty of a ninety-day suspension is appropriate given Appellant's prior disciplinary history, most of which entails excessive tardiness, and therefore should be upheld.

ORDER

It is hereby **ORDERED** that Appellant's appeal is **DENIED**;

It is further **ORDERED** that the Final Notice of Disciplinary Action providing for a penalty of ninety-day suspension, effective October 11, 2016, is **AFFIRMED**.

I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 10, 2017
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: August 10, 2017

Date Mailed to Parties: August 10, 2017

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APPENDIX

List of Witnesses

For Appellant:

None

For Respondent:

John Madigan, Clerk

List of Exhibits

For Appellant:

None

For Respondent:

R-1 Preliminary Notice of Disciplinary Action dated August 12, 2016

R-2 Appellant's timesheets

R-3 Final Notice of Discplinary Action dated October 18, 2016

R-4 Appellant's prior disciplines