



penalty was modified by the Commission, charges were sustained and major discipline was imposed. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C. 4A:2-2.12(a)*, counsel fees must be denied.

### ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore modifies the 44 working day (24-hour) suspension to a 32 (24-hour day) working day suspension. The Commission further orders that appellant be granted 12 working days (24-hour 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.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 20<sup>TH</sup> DAY OF JUNE, 2018



Deirdré L. Webster Cobb  
Chairperson  
Civil Service Commission

**Inquiries  
and  
Correspondence**

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

**attachment**



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

**INITIAL DECISION**

OAL DKT. NO. CSV 07694-16

AGENCY DKT. NO. 2016-3805

**IN THE MATTER OF MICHAEL POLIZZI,  
CITY OF PASSAIC DEPARTMENT OF  
PUBLIC SAFETY.**

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**Colin M. Lynch, Esq.**, for appellant Michael Polizzi (Zazzali, Fagella, Nowak,  
Kleinbaum & Friedman, attorneys)

**Philip G. George, Esq.**, for respondent City of Passaic Department of Public  
Safety

Record Closed: April 16, 2018

Decided: April 24, 2018

**BEFORE RICHARD McGILL, ALJ:**

Michael Polizzi ("appellant") appeals from a 144-day suspension on charges from the position of Firefighter with the City of Passaic Department of Public Safety ("respondent").<sup>1</sup> The charges against appellant are chronic and excessive absenteeism, conduct unbecoming a public employee, neglect of duty and other sufficient cause in the form of violation of departmental rules and regulations. The

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<sup>1</sup> 144 eight-hour days are equivalent to 44 24-hour days or approximately six months.

specification states that appellant was late for his shift on January 9, 2016, and he failed to report his tardiness to his Battalion Chief.

### **PROCEDURAL HISTORY**

Respondent notified appellant of the charges by Preliminary Notice of Disciplinary Action dated January 13, 2016. Thereafter, respondent informed appellant by Final Notice of Disciplinary Action dated April 6, 2016, that the charges were sustained and that the disciplinary action was a suspension for a period of 144 eight-hour working days.

Appellant requested a hearing on April 21, 2016, and the matter was transmitted to the Office of Administrative Law on May 23, 2016, for determination as a contested case. Hearings were conducted on January 29 and 30, 2018, at the Office of Administrative Law in Newark, New Jersey, and the record closed on April 16, 2018, upon receipt of written summations.

### **ISSUES**

The issues in this proceeding are whether the charges should be sustained and, if so, whether the disciplinary action imposed by respondent is warranted. Appellant's main contention is that the suspension for a period of 144 working days is excessive.

### **FACTS**

Based upon the evidence presented at the hearing, I **FIND** as follows. Appellant has been employed by respondent for nine years as a Firefighter. On January 9, 2016, appellant was scheduled to work a 24-hour shift beginning at 8:00 a.m. Appellant's daughter, who was just under two years old, was seen by a doctor on January 5 and 7, 2016, and was diagnosed with a double ear infection, clinical pneumonia and an exacerbation of her asthma. As a result, appellant's daughter missed school from

January 4 to January 8, 2016, and she was in a hospital emergency room from late January 6, 2016, to early January 7, 2016. Appellant was awake until approximately 5:00 a.m. on January 9, 2016.

Prior to 8:00 a.m. on January 9, 2016, there was a fire in a three-story house in Passaic. Appellant usually arrived before 7:30 a.m. for a shift to begin at 8:00 a.m. When appellant had not arrived by 7:30 a.m., Lt. Stephen Mastroberte called appellant on the phone to find out where he was. Appellant had fallen asleep, and the telephone call woke him up. Appellant said that he would call his Battalion Chief and come to work as soon as possible. Lt. Mastroberte said that he would notify the Battalion Chief, and appellant arrived at work at 8:30 a.m.

At the time, appellant was assigned to Engine 4 at the West Side Fire Department. By the time appellant got to work, Engine 4 had responded to the fire alarm shorthanded.

The Manual of Rules and Regulations of the Passaic Fire Department states in part as follows:

SECTION 10 Tours of duty for both Superior Officers and members shall be in accordance with the prescribed department's working schedule. All members of the department shall report to their respective company or units no later than **ten (10) minutes** before their prescribed time. Temporary changes to such prescribed departmental tours of duty either for Officers or members shall be made only by permission of the Chief of the Department.

....

SECTION 94 Members shall not absent themselves from quarters, fires, or any assignment without permission of the Officer in command.

....

SECTION 97 Members shall not do anything which may bring discredit to the department.

Respondent's Employee Handbook states in pertinent part as follows:

Causes for discipline include, but are not limited to the following:

....

- Failure to report to work the day or days prior to or following a vacation, holiday and/or leave, and/or any other unauthorized day of absence.

....

- Unauthorized absence from work area, and/or roaming or loitering on the premises during scheduled work hours.

....

- Conduct unbecoming a public employee.

On February 15, 2011, appellant was given a written warning, because equipment was in poor condition when it should be inspected and operational. On October 9, 2012, appellant was given a written reprimand for chronic and excessive absenteeism or lateness, because he was late for duty on October 1 and 5, 2012. On May 20, 2013, appellant was given a written reprimand, because he was late for work on May 17, 2013. On March 12, 2015, appellant was counseled in regard to procedure of calling available after being on sick leave because he had not called to report that he was available for duty. On August 27, 2017, appellant was given a 45.5-day suspension, because he was asleep while on duty and did not respond to three separate announcements with the result that he was left at the Fire Station while other Firefighters responded to the call.

On June 18, 2015, appellant was diagnosed with severe obstructive sleep apnea - hyponea syndrome. The recommendation was use of a CPAP machine nightly with heated humidification. On August 11, 2015, appellant had a fitness for duty evaluation. The determination was that appellant could perform the essential duties of his job as a Firefighter contingent upon his ability to use the CPAP machine during the time that he sleeps while at work.

**LAW AND ANALYSIS**

An appointing authority may discipline an employee for chronic or excessive absenteeism or lateness, conduct unbecoming a public employee, neglect of duty, and other sufficient cause. N.J.A.C. 4A:2-2.3(a). The appointing authority's action is subject to review by the Civil Service Commission, which after a de novo hearing makes an independent determination as to both the charge and the penalty. West New York v. Bock, 38 N.J. 500, 519 (1962). In an appeal concerning a major disciplinary action, the burden of proof is on the appointing authority. N.J.A.C. 4A:2-1.4(a). The appointing authority must prove its case by a fair preponderance of the believable evidence. In re Polk License Revocation, 90 N.J. 550, 560 (1982); In re Darcy, 114 N.J. Super. 454, 458 (App. Div. 1971).

The first charge against appellant is chronic and excessive absenteeism, which is interpreted to include lateness. The importance of a firefighter being present for his shift is apparent, and the fire in this matter underscores the point. Appellant was previously disciplined for lateness on October 1 and 5, 2012, and May 17, 2013. Appellant was late again on January 9, 2016. Under the circumstances, the charge of chronic lateness must be sustained. This lateness also violates Sections 10 and 94 of respondent's Rules and Regulations.

The second charge against appellant is conduct unbecoming a public employee. "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a government unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also, In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). A finding of misconduct 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 as an upholder of that which is morally and legally correct." Hartmann v.



Police Dept. of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dept. of Civil Serv., 17 N.J. 419, 429 (1955)).

Here, appellant was scheduled to be on duty for a shift beginning at 8:00 a.m. on January 9, 2016. Appellant was not present when the other firefighters on his shift had to respond to a fire shorthanded. It seems evident that this situation would tend to undermine morale and public confidence in the Fire Department. Appellant's conduct fell short of the implicit standard of good behavior for a public employee. Therefore, the charge of conduct unbecoming a public employee must be sustained.

Another charge against appellant is neglect of duty. Here, appellant was not present for his beginning of his assigned shift. Therefore, the charge of neglect of duty must be sustained. Section 93 of respondent's Rules and Regulations also prohibits neglect of duty.

The final charge against appellant is violation of departmental Rules and Regulations. Based upon the prior discussion, appellant's tardiness violated Sections 10, 93 and 94 of respondent's Rules and Regulations. It follows that this charge must be sustained.

Based upon the above, I **CONCLUDE** that the following charges must be sustained: (1) chronic or excessive lateness; (2) conduct unbecoming a public employee; (3) neglect of duty; and (4) violation of the above-mentioned departmental Rules and Regulations.

### **Disciplinary Action**

The factors to consider with respect to the disciplinary action are the nature of the charges sustained and appellant's past record. West New York v. Bock, 38 N.J. at 523-24. Progressive discipline is a recognized and accepted principle in choosing the appropriate disciplinary action. In re Herrmann, 192 N.J. 19, 33 (2007).

In the context of a fire department, lateness can have serious consequences as demonstrated by the facts in this case. In addition, appellant's past record contains five disciplinary actions including a suspension for the equivalent of two and a half months. On the other hand, the record in this proceeding indicates that appellant's lateness on January 9, 2016, was only the fourth in his nine-year career. Further, there were mitigating circumstances in that appellant was awake until 5:00 a.m. on January 9, 2016, caring for his sick daughter.

Based on progressive discipline, the suspension in this matter should be longer than the previous suspension for two and a half months. Balancing the various considerations in this matter, I **CONCLUDE** that the disciplinary action in this matter should be a suspension for a period of four months.

Accordingly, it is **ORDERED** that:

1. The charge of chronic or excessive absenteeism or lateness be sustained.
2. The charge of conduct unbecoming a public employee be sustained.
3. The charge of neglect of duty be sustained.
4. The charge of violation of departmental Rules and Regulations be sustained.
5. The disciplinary action in this matter shall be a suspension for a period of ninety-six eight-hour working days, which would be equivalent to a four-month suspension.

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

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

recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

Apr. 24, 2018  
DATE

Richard McGill  
RICHARD MCGILL, ALJ

Date Received at Agency:

April 24, 2018

Date Mailed to Parties:

ljb

April 24, 2018

**APPENDIX**

**WITNESS LIST**

For appellant:

Stephen Mastroberte

Michael Polizzi

For respondent:

Patrick Trentacost

Vivianna Lamm

**EXHIBIT LIST**

A-4 Letter dated February 2, 2016, from Lt. Stephen Mastroberte

A-5 Letter from Michele R. Segal, M.D.

A-6 Letter dated January 18, 2016, from Michael Polizzi

A-8 Report from The Valley Hospital

A-12 Sleep study records from Department of Veteran Affairs

A-14 Report dated August 11, 2015, from Fitness for Duty Examination

R-1 Excerpt from Manual of Rules and Regulations of the Passaic Fire Department

R-2 Excerpt from the Employee Handbook of the City of Passaic

R-3 Undated letter from Michael Polizzi to Chief Trentacost

R-4 Preliminary Notice of Disciplinary Action dated January 13, 2016

R-5 Hearing Officer's Report dated March 18, 2016

R-6 Final Notice of Disciplinary Action dated April 6, 2016

- R-7 Memorandum dated June 1, 2015, from Lt. James Kovacs to Temp. Battalion Chief Kevin Colavitti
- R-8 Final Notice of Disciplinary Action dated August 27, 2015
- R-9 Memorandum dated May 26, 2009, from Captain K. Payne to Chief P. Trentacost
- R-10 Written Warning dated February 15, 2011
- R-11 Written Reprimand dated October 9, 2012
- R-12 Written Reprimand dated May 20, 2013
- R-13 Notice of Action dated March 12, 2015
- R-14 Department Order dated March 27, 2014
- R-15 Daily Report dated January 9, 2016