STATE OF NEW JERSEY

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| In the Matter of Clement Collins, Newark School District | FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION |
| | Request for Counsel Fees |
| CSC Docket No. 2018-348 | |

**ISSUED: JUNE 11, 2018** (ABR)

Clement Collins, a Supervisor of Custodians with the Newark School District, represented by Kevin P. McGovern, Esq., requests counsel fees in accordance with the attached Civil Service Commission (Commission) decision rendered on April 5, 2017.

By way of background, the appointing authority charged the petitioner with conduct unbecoming a public employee, misuse of public property, including motor vehicles, and other sufficient cause, suspending him for a period of 45 days.[1] Upon the petitioner's appeal to the Commission, the matter was referred to the Office of Administrative Law (OAL) for a hearing as a contested case. Following a hearing and the Commission's *de novo* review, the charges were dismissed and the Commission ordered that the petitioner be awarded the equivalent of 45 days of back pay, benefits and seniority. The Commission also awarded counsel fees. However, the parties have been unable to agree on the amount of counsel fees due to the petitioner and the petitioner has requested Commission review.

In support of the petitioner's request, the petitioner's counsel filed an application for counsel fees and provided a certification of services from David M. Bander, Esq. dated June 2, 2017, requesting $22,172.00 for 126.7 hours at a rate of $175 an hour for Bander, an associate in the law firm, $3,150.00 for 18 hours of

[1] The 45 day suspension was processed as a 25 working day suspension, effective December 2, 2014, and a fine equivalent to 10 working days.

work at a rate of $175.00 for McGovern, a supervising partner, plus $75.35[2] in compensable shipping and related costs, for a total of $25,395.35. Bander provides an itemized statement for services performed by the firm from November 12, 2014 to April 28, 2017. Bander certified that he had been employed as an associate attorney in McGovern's law firm since 2014[3] and was admitted to the New Jersey Bar in 2007, while McGovern is a partner who was admitted to the New Jersey bar in 1994. The petitioner's counsel states that the $175.00 hourly rate is based upon the current fee agreement with the petitioner's union, OPEIU Local 32 (Local 32) and is a "blended fee." In further support of the request, the petitioner's counsel provides a certification and a copy of an unsigned Fee Agreement and Retainer dated September 26, 2006. The agreement memorializes the firm's representation of Local 32, with an hourly billing rate of $150.00. In his certification, the petitioner's counsel states that his firm periodically raised its rates after September 2006. When the firm did so, clients were advised of rate increases, but were not asked to sign new fee agreements.[4] He proffers that Local 32 was advised of and had agreed to pay an hourly rate of $175.00 for his firm's representation the instant matter.

In response, the appointing authority, represented by Ramon E. Rivera, Esq., asserts that the petitioner's counsel has not demonstrated its entitlement to its requested rate of $175.00 per hour set forth in the firm's retainer agreement with Local 32, as the matter involves a routine disciplinary action of limited complexity, the record lacks sufficient detail regarding the level and length of experience for both Bander and McGovern and most of the work was performed by Bander, an associate. Moreover, it identifies billing entries that it claims should not be paid because they are vague, clerical, duplicative or administrative in nature. For example, it notes that the firm invoiced for "obtaining copies of a transcript," "receipt of transcript," "call to Johnson," "[r]eview email from Johnson and attachment," and a "telephone call with opposing counsel; text exchange with Tucker; text exchange with Clem; telephone call from Judge's chambers; receipt and review of email from opposing counsel...telephone call with Clem and his supervisor." In support, the appointing authority cites case law where tribunals reduced prevailing parties' counsel fee awards in civil rights cases after finding some of the attorneys' billing entries to be impermissibly vague, administrative or clerical in nature.

In response, the petitioner's counsel argues that the instant matter was a complicated case and should be reimbursed accordingly and in a manner consistent

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[2] The itemized statement of services indicates that $61.72 was expended for UPS shipping and $13.63 was expended for certified mail.

[3] Bander is no longer employed by the firm.

[4] McGovern submits, as an example of the notice provided to clients regarding billing rate increases, a memorandum from partner James M. Mets, Esq. to Local 32, dated August 1, 2017, which stipulates that the firm would bill the union at an hourly rate of $193.

with similar cases, particularly given the experience of both attorneys, as noted above. The petitioner's counsel submits that the fee agreement with Local 32 provides for a blended rate of $175.00 per hour, rather than different rates for work performed by partners and associate attorneys. The petitioner's counsel contends that an hourly rate of $150.00 for Bander and $200.00 for McGovern were previously established in *In the Matter of Paul Williams* (CSC, decided January 18, 2017). The petitioner's counsel maintains that the blended hourly rate of $175.00 in its agreement with Local 32 is consistent with the rates approved for Bander and McGovern by the Commission in *Williams* and below the amount the Commission has authorized for other attorneys in the in the past. The petitioner's counsel maintains that the Commission has awarded the $200.00 per hour maximum rate provided under *N.J.A.C.* 4A:2-2.12, even in the absence of a fee agreement, for partners with similar levels of experience to his own. Furthermore, the petitioner's counsel argues that the appointing authority has not cited any decision that would provide the Commission with a compelling reason to refuse to honor the fee agreement that his firm has with Local 32.

## CONCLUSION

*N.J.S.A.* 11A:2-22 provides that reasonable counsel fees may be awarded to an employee as provided by rule. *N.J.A.C.* 4A:2-2.12(a) provides that the Commission shall award partial or full reasonable counsel fees incurred in proceedings before it and incurred in major disciplinary proceedings at the departmental level where an employee has prevailed on all or substantially all of the primary issues in an appear of major disciplinary action before the Commission. *N.J.A.C.* 4A:2-2.12(c) provides as follows: an associate in a law firm is to be awarded an hourly rate between $100.00 and $150.00; a partner in a law firm with fewer than 15 years of experience in the practice of law is to be awarded an hourly rate between $150.00 and $175.00; and a partner in a law firm with 15 or more years of experience practicing law, or notwithstanding the number of years of experience, with practice concentrated in employment or labor law, is to be awarded an hourly rate between $175.00 and $200.00. *N.J.A.C.* 4A:2-2.12(e) provides a fee amount may also be determined or the fee ranges in (c) above adjusted based on the circumstances of a particular matter, in which case the following factors (see the Rules of Professional Conduct of the New Jersey Court Rules, at RPC 1.5(a)) shall be considered: the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; the fee customarily charged in the locality for similar legal services, applicable at the time the fee is calculated; the nature and length of the professional relationship with the employee; and the experience, reputation and ability of the attorney performing the services. *N.J.A.C.* 4A:2-2.12(g) provides that reasonable out-of-pocket costs, such as costs associated with expert witnesses, subpoena fees and out-of-state travel, shall be awarded. However, costs associated with normal office overhead shall not be awarded. *N.J.A.C.* 4A:2-2.12(d) provides that, if an attorney

has signed a specific fee agreement with the employee or the employee's negotiations representative, the fee ranges set forth above may be adjusted. *N.J.A.C.* 4A:2-2.12(e) provides that the fee amount or fee ranges may be adjusted based on the circumstances of the particular matter, and in consideration of the time and labor required, the customary fee in the locality for similar services, the nature of length of the relationship between the attorney and client and the experience, reputation and ability of the attorney.

In the instant matter, the petitioner's counsel requests a blended rate of $175.00 for the combined services of McGovern and Bander. However, the signed fee agreement submitted by the petitioner indicates an hourly rate of $150.00 for the firm's services. As noted above, when a specific fee agreement exists with an employee or the employee's negotiations representative, *N.J.A.C.* 4A:2-2.12(d) requires the petitioner's counsel to present that agreement to the appointing authority and it provides that an "attorney shall not be entitled to a greater rate than that set forth in the agreement." Here, the only contemporaneous documentation of such an agreement between the firm and Local 32 is the Fee Agreement and Retainer dated September 26, 2006, which provides for an hourly rate of $150.00. While the Commission notes that both the petitioner's counsel and Bander have certified that $175.00 was the hourly rate during the relevant period and the petitioner's counsel submits a memorandum issued to Local 32 stipulating an hourly rate of $193.00 as of August 1, 2017, these items do not constitute a "signed...specific fee agreement" required under *N.J.A.C.* 4A:2-2.12(d).

Further, the petitioner's counsel has not established entitlement to reimbursement at a higher rate, as the legal issues were not novel and extraordinary time and labor were not expended in this matter. The underlying disciplinary matter was clearly not novel in any way and was no more complex than any of the thousands of disciplinary appeals involving major disciplinary action decided over the years by the Commission. In this regard, an appeal of a suspension from employment inherently lacks the legal complexity necessary to justify a higher hourly rate and no unique legal experience was required by counsel. Moreover, while the rules on counsel fees do not provide for blended rates, the $150.00 hourly rate is appropriate for work performed by both Bander, an associate since 2014, and the petitioner's counsel based upon a review of the record in accordance with *N.J.A.C.* 4A:2-2.12(c) and *N.J.A.C.* 4A:2-2.12(e). Therefore, the foregoing demonstrates that the firm is entitled to a $150.00 hourly rate.

The Commission disagrees with the appointing authority's contention that several billing entries are vague, clerical, duplicative or administrative in nature, such that they warrant a reduction of the petitioner's counsel fee award in this matter. The Commission notes that the appointing authority cites case law involving counsel fee awards in civil rights cases in support of that proposition. However, the Commission's review is not controlled by that body of case law, as the

instant matter involves a counsel fee award under *N.J.S.A.* 11A:2-22 and *N.J.A.C.* 4A:2-2.12, rather than a civil rights statute. Here, the Commission is satisfied that the billing entries disputed by the appointing authority, including communications with the petitioner, Local 32 and opposing counsel and the review of documents associated with such correspondence, was necessary in order to provide the petitioner with an adequate legal defense.

Moreover, is noted that while the petitioner is entitled to counsel fees regarding his enforcement request for his counsel fee award since New Jersey courts have recognized that attorneys should be reimbursed for the work performed in support of any fee application *See H.I.P. (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc.*, 291 *N.J. Super.* 144, 163 (Law Div. 1996) [quoting *Robb v. Ridgewood Board of Education,* 269 *N.J. Super.* 394, 411 (Ch. Div. 1993)], he is not entitled to counsel fees for any work performed pursuing his claim for back pay. In that regard, *N.J.A.C.* 4A:2-1.5(b) provides, in pertinent part, that counsel fees may be awarded where the appointing authority has unreasonably failed or delayed to carry out an order of the Commission where the Commission finds sufficient cause based on the particular case. In the instant matter, the record does not evidence that the appointing authority unreasonably delayed implementing the Commission's order. The record also fails to indicate that the appointing authority's actions were based on any improper motivation. Thus, the record does not reflect a sufficient basis for an award of counsel fees for time spent on back pay issues. *See In the Matter of Lawrence Davis* (MSB, decided December 17, 2003); *In the Matter of William Carroll* (MSB, decided November 8, 2001).

Therefore, counsel fees shall be paid as follows:

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| McGovern 18 hours x $150 = | $ 2,700.00 |
| Bander 126.7 hours x $150 = | 19,005.00 |
| (Less 1.9 hours x $150 for back pay issues) = | ($ 285.00) |
| Total | $21,420.00 |

With regard to the requested costs, it is noted that the costs associated with printing, copying, postage and delivery charges are classified as normal office overhead and are therefore, non-reimbursable. *See N.J.A.C.* 4A:2-2.1(g). *See also In the Matter of William Brennan* (MSB, decided January 29, 2002); *In the Matter of Monica Malone* (MSB, decided August 21, 2003). In the itemized statement of services, it is indicated that $61.72 was expended for UPS shipping and $13.63 was expended for certified mail. Consequently, the petitioner is not entitled to the amount requested in costs.

## ORDER

Therefore, it is ordered that the appointing authority pay counsel fees in the amount of $21,420.00 within 30 days of receipt of this decision.

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 6TH DAY OF JUNE, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

c: Clement Collins
Kevin P. McGovern, Esq.
Larisa Shambaugh
Ramon E. Rivera, Esq.
Records Center

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STATE OF NEW JERSEY

In the Matter of Clement Collins
Newark School District

DECISION OF THE
CIVIL SERVICE COMMISSION

CSC DKT. NO. 2015-1743
OAL DKT. NO. CSV 17044-14

ISSUED: APRIL 6, 2017 BW

The appeal of Clement Collins, Supervisor of Custodians, Newark School District, 45 working day suspension (10 days in the form of a fine), on charges, was heard by Administrative Law Judge Joan Bedrin Murray, who rendered her initial decision on January 6, 2017 reversing the 45 working day suspension. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

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 April 5, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the penalty has been reversed, the appellant is entitled to the equivalent of 45 days of back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10. Further, since the appellant has prevailed, he is entitled to counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

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. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay and counsel fees are finally resolved.

## ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Clement Collins. The Commission further orders that appellant be granted the equivalent of 45 days 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 and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of services in support of reasonable counsel fees 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 and *N.J.A.C.* 4A:2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay or counsel fees.

The parties must inform the Commission, in writing, if there is any dispute as to back pay or counsel fees 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 shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION
APRIL 5, 2017

Dolores Gorzcyca

Dolores Gorzcyca
Member
Civil Service Commission

Inquiries
and
Correspondence

Director
Division of Appeals and Regulatory Affairs
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attachment

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

**INITIAL DECISION**
OAL DKT. NO. CSV 17044-14
AGENCY DKT. NO. 2015-1743

**IN THE MATTER OF CLEMENT COLLINS,**
**NEWARK PUBLIC SCHOOL DISTRICT.**

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**David Bander**, Esq., for appellant Clement Collins (Mets Schiro & McGovern, LLC, attorneys)

**Christina Abreu**, Esq. and **Ramon E. Rivera**, Esq., for respondent Newark Public School District (Scarinci Hollenbeck, attorneys)

Record Closed: July 25, 2016 Decided: January 6, 2017

BEFORE **JOAN BEDRIN MURRAY**, ALJ:

## STATEMENT OF THE CASE

Respondent Newark Public School District (the District) suspended appellant Clement Collins, who is employed as a Supervisor of Custodians, for a period of forty-five days, which was effectuated by imposing a twenty-five day suspension beginning

December 2, 2014, and a fine equivalent to ten working days.[1] The suspension stemmed from a determination that appellant had a duty to report to the District that his driving privileges had been suspended for a period of two years, a fact that became known to the District after appellant's driving privileges were restored. Appellant contends that there was no policy, written or otherwise, that required him to report the loss of his driving privileges.

## PROCEDURAL HISTORY

On August 19, 2014, the District issued a Preliminary Notice of Disciplinary Action (PNDA) informing appellant of the charges of conduct unbecoming a public employee, misuse of public property, including motor vehicles, and other sufficient cause against him. N.J.A.C. 4A:2- 2.3(a)(2), (8), (12). A revised PNDA issued on August 29, 2014, with a Rider attached containing revised specifications to each charge set forth in the initial PNDA. Along with failing to report his driver's license revocation, the revised specifications charged appellant with driving his assigned vehicle while his license was suspended, thereby exposing the District to liability and compromising the well-being of students, staff, and others. In addition, the revised specifications alleged that driving was a necessary element of appellant's job duties, and that he was required to have a driver's license.

After a departmental hearing, the District issued a Final Notice of Disciplinary Action (FNDA) dated November 24, 2014, dismissing all charges in the PNDA except for the charge of other sufficient cause, "insofar as [appellant] had a duty to report his suspension." (J-3.) The FNDA provided for appellant's suspension for twenty-five working days, along with a fine equivalent to ten working days. Appellant requested a hearing, and the Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL), where it was filed on December 19, 2014 for hearing and determination as a contested matter. The initial hearing date was adjourned at the request of the District with the consent of appellant, and the matter was heard on July 15, 2015. The parties filed briefs and reply briefs. The record closed on July 25, 2016.

[1] The hearing officer below left it to respondent to impose a fine at a ratio of one day for every two days of suspension for all or part of the suspension. (J-18.)

## FACTUAL DISCUSSION AND FINDINGS

At the hearing, the District presented testimony by Ronald Hale, Nate Harp, and Keith Barton. Appellant testified on his own behalf, and also presented testimony by Mark Tucker. Based on a review of the pertinent testimony and documentary evidence presented, I **FIND** the following **FACTS**.

Appellant began his employment with the District in 1992 as a per diem custodian worker, and rose through the ranks to attain his current position as Supervisor of Custodians. On or about November 15, 2009, appellant was charged with driving while intoxicated (DWI), which led to a two-year suspension of his driving privileges for the period of February 17, 2010 through February 17, 2012. Appellant did not notify the District that his driving privileges had been suspended, nor did the District have a written policy requiring facilities employees to make such notification. Such a policy was promulgated in July 2014, when the District became aware of appellant's suspension.

Appellant testified that he was embarrassed by the DWI conviction, and also believed that news of it would diminish him as a leader in the eyes of his staff. He thought of himself as a role model at work, due to the fact that he began his work with the District as a per diem custodian and worked his way up to Supervisor of Custodians. In not reporting the DWI, he was not motivated by fear. Instead, he stated that he had nothing to fear because he refrained from driving. He also stated that had there been a policy requiring him to notify the District of the DWI conviction, he would have done so. He stated that he never drove the District's vehicles during the period of his suspension. Instead, he made modifications at home and work that enabled him to continue to perform his work duties.

As Supervisor of Custodians, he was assigned to the North Region, which encompassed approximately fifteen schools. The main office for the facilities staff was located at the Rafael Hernandez School. Approximately four months after his driving privileges were suspended appellant moved his family from Bloomfield, New Jersey to

Newark, New Jersey, within walking distance of the Rafael Hernandez School. Another school in the region, Branch Brook, was on the same street as the Rafael Hernandez School. The majority of the other schools in the North Region were within a two-mile radius of appellant's new home. Appellant either walked to work, or relied on family members and friends; occasionally co-worker Mark Tucker drove him to work in the morning.

The facilities staff, including appellant, Carlos Edmundo, a building manager, Mark Tucker (Tucker), a Supervisor of Trades, and his two trades workers would then map out their day, including any plans to travel to the region's schools. If appellant needed to visit a school, he shared a ride with whomever was headed to that destination. In addition, each of the three supervisors, including appellant, was assigned a vehicle. One of the three vehicles was often inoperable, so the team would share the other two vehicles. The trades workers frequently used the vehicle assigned to appellant due to the fact that it had a liftgate, enabling them to move equipment and supplies from one location to another. There were several sets of keys to each vehicle. Appellant and Tucker testified that the atmosphere in the North Region facilities office was very congenial, and that the custodial and trades staffs often crossed over to assist with the other's tasks.

Another factor in appellant's favor was that commencing sometime in 2010, the mode of delivering supplies to the region's schools changed. Previously, all the region's supplies were delivered to the Rafael Hernandez School, requiring appellant to then deliver them to the various other schools. In 2010, these supplies were delivered directly to the recipient school, eliminating the need for appellant to transport them by car. In sum, appellant's job performance during his two-year license suspension period did not come into question by the District.

Regarding the performance of his work duties relative to his loss of driving privileges, the job description for the Supervisor of Custodians position states that:

> Appointees will be required to possess a driver's license valid in New Jersey only if the operation of a vehicle, rather

> than employee mobility, is necessary to perform the essential duties of the position.
> (J-9.)

Appellant testified that as far as he understood, operation of a vehicle was not a necessary part of his job. He further stated that he was able to perform his job efficiently without operating a vehicle. Tucker also differentiated the need for a driver's license from employee mobility as he applied it to his trades workers. He stated that his trades workers needed only to get to the job, and then be able to perform their tasks.

Keith Barton (Barton), Executive Managing Director of Operations for the District, disagreed that appellant did not require a driver's license pursuant to the above job description. He based his opinion on the fact that visiting the region's schools was a basic function of appellant's job. During the period of appellant's license revocation, Barton served as a special assistant to an assistant superintendent in a different region. He stated that based on his knowledge of the facilities department, the supervisors of custodians and trades would not be regularly traveling to the same schools. However, in the case of emergencies, which are frequent in the District, both would likely be needed on the scene. Barton had no firsthand knowledge of the daily operations of the North Region between February 2010 and February 2012, and was unable to speak to appellant's job performance during that time period.

Ronald Hale (Hale), the District's risk manager since November 1996, testified that he assumed responsibility for its commercial automobile insurance program from Joe Somaie (Somaie) in July 2014. He testified that Somaie had obtained motor vehicle abstracts for all employees who drove District vehicles, but he relied on the notice on the abstract that the person's driving privileges were in good standing rather than review the entire document. Hale reviewed appellant's driver's abstract sometime in July 2014, and although his privileges were in good standing, the report listed a DWI suspension for the two-year period noted above. (See R-12.) Hale notified the District's legal department and Laurette Asante, Esq. (Asante), Director of Labor Relations, that appellant should no longer be allowed to drive its vehicles. Asante sent a letter dated July 25, 2014, to appellant advising him that he would be immediately prohibited from doing so. (R-5.) The letter also noted that the district had received a Named Driver

Coverage Limitation Endorsement (the Endorsement) effective July 1, 2014, that listed appellant among other employees whose liability coverage would be limited to statutory minimum limits for claims arising from accidents or losses. (R-6.) Hale stated that full liability coverage under the policy was $1,000,000, whereas the endorsement limits were $15,000 for bodily injury and $30,000 for property damage. Hale testified that while appellant never notified him that his license was suspended, he may have had a conversation with him about the DWI. Six months after Asante's July 25, 2014 letter issued, she sent him a notice that he was again permitted to operate the district's motor vehicles. (R-7.)

Hale corroborated appellant's testimony that the District had no written policy requiring facilities employees to notify a supervisor if they were facing a license suspension or other driving-related problem. He testified that such a policy went into effect in July 2014. The policy is fourteen pages long, and lists approximately one dozen specific motor vehicle infractions that will result in disciplinary action. Each employee is required to acknowledge that he or she has read the policy by signing the document.

Other testimony was offered by the District; however, it was not pertinent to the issue at bar and, as such, cannot be afforded weight in formulating the **FINDINGS** of **FACT**.

## LEGAL ANALYSIS AND CONCLUSIONS

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6, -20; N.J.A.C. 4A:2-2.2, -2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied 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. Metropolitan Bottling Co., 26 N.J. 263 (1958). 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).

Appellant has been charged with other sufficient cause insofar as he had a duty to report the DWI-related suspension of his driving privileges. However, it is undisputed that the District had no such policy in place at any time during the subject period. The District only promulgated a policy requiring notification in response to Risk Manager Hale's review of appellant's motor vehicle abstract, and discovering the prior license suspension. The policy currently in place is lengthy, as one might expect, and sets forth with specificity the violations that will result in disciplinary proceedings. Further, employees are required to acknowledge receipt of the policy.

The District relies on Herbert Holman v. Newark Board of Education, 92 N.J.A.R. 2d 454, 1992 N.J. AGEN LEXIS 4576 (1992), as its case on point in support of its argument that a written policy is not required in order for the charge against appellant to be sustained. Holman was a mechanic who failed to report to the Newark Board of Education that his license had been suspended due to his involvement in a fatal accident while on vacation. However, the facts in Holman are distinguishable from those at bar. First, the ALJ found that Holman drove his assigned vehicle on several occasions while suspended, which is not the case in the instant matter. Also, Holman, a Union member, was subject to a negotiated contract with the Newark Board of Education that required him to have a driver's license in good standing. No such proof has been offered in this matter. In light of the absence of any conclusive evidence to the contrary, the equivocal wording of the job description for Supervisor of Custodians, and divergent testimony as to its meaning, I **CONCLUDE** that the operation of a vehicle was not a necessary element of appellant's job. Moreover, lack of a driver's license did not prevent him from performing his regular and emergency duties in the North Region, nor was any such proffer made by the District to that effect.

In sum, there simply is no evidence that the District gave appellant any type of notice, written or otherwise, that he had a responsibility to report a DWI-related suspension. Still, a major discipline ensued. Appellant cites Nicholas Condito v. County of Essex, 2007 N.J. AGEN LEXIS 117 (March 8, 2007), for the proposition that a

civil service employee cannot be held responsible for an action in the absence of a policy or regulation to guide him. In Condito, a corrections officer was held not to be responsible for allowing subordinate officers to leave their posts without proper relief. There, the respondent had no rules or regulations in place to guide Condito. The ALJ noted that in the absence of a policy, differing interpretations ensue as to what is appropriate.

Based on the foregoing, I **CONCLUDE** that the District has not met its burden of proving, by a preponderance of the credible evidence, that appellant's failure to report the suspension of his driving privileges constitutes other sufficient cause pursuant to N.J.A.C. 4A:2-2.3(a)(12).

## ORDER

It is hereby **ORDERED** that the charge by the appointing authority of other sufficient cause be and hereby is **DISMISSED**.

It is further **ORDERED** that the forty-five day suspension against appellant be and hereby is rescinded.

It is also **ORDERED** that back pay and other benefits be issued to appellant as may be dictated by N.J.A.C. 4A:2-2.10.

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.

January 6, 2017
DATE

**JOAN BEDRIN MURRAY**, ALJ

Date Received at Agency: 1-6-17

Date Mailed to Parties: 1-6-17

dr

## APPENDIX

## WITNESSES

For Appellant:

Clement Collins

Mark Tucker

For Respondent:

Nate Harp

Ronald Hale

Keith Barton

## EXHIBITS

Joint:

J-1 Revised Preliminary Notice of Disciplinary Action and Rider, dated August 29, 2014 (Bate No. 106-11)

J-2 Original Preliminary Notice of Disciplinary Action and Rider, dated August 19, 2014 (Bate No. 1-4)

J-3 Revised Final Notice of Disciplinary Action, dated November 24, 2014 (Bate No. 130-135)

J-4 Original Final Notice of Disciplinary Action, dated November 6, 2014 (Bate No. 120-129; 114-119; 112-113)

J-9 NPS Job Bid Application Re: Supervisor of Custodians (Bate No. 9-10)

J-11 Printout of vehicles operated by Facilities Management personnel (three registered vehicles and five named drivers) (Bate 8)

J-13 Copy of Gasoline Receipt, Division of Motor Transportation re: "Vehicle license plate # MG67618" assigned to Clement Collins, dated February 24, 2010 through February 14, 2012 (Bate No. 14-80)

J-18 Hearing Officer Decision and Order (TBD) (Bate No. 136-161)

For Respondent:

R-5 July 25, 2014 Correspondence from Laurette K. Asante, Director of Labor Relations to Clement Collins Re: removal of Mr. Collins name from Motor Vehicle insurance endorsement and prohibition of operating all District vehicles (Bate No. 5)

R-6 July 11, 2014 Copy of Named Driver Coverage Limitation Endorsement effective July 1, 2014 (DISTRICT 6-7)

R-7 January 8, 2015 Correspondence from Laurette K. Asante, Director of Labor Relations to Clement Collins Re: Restriction from prohibition on operating all District vehicles lifted (Bate No. 162)

R-8 Gasoline Storage/Purchase/Usage Policy, dated March 2011 (DISTRICT 234-237)

R-10 Map of Newark Public Schools Region (Bate No. 211)

R-12 N.J. Motor Vehicle Commission Driver History Abstract printout dated May 13, 2014 (Bate No. 11-13)

R-16 Timecard for Mark A. Tucker for period February 1, 2010 (Bate No. 212-233)