



STATE OF NEW JERSEY

In the Matter of Juan Rivera
Hudson County,
Department of Roads and Public
Property

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC DKT. NOS. 2018-506, 2018-1571
& 2018-1398
OAL DKT. NOS. CSV 12873-17,
18165-17 & 18185-17
(Consolidated)

ISSUED: AUGUST 3, 2018 BW

The appeals of Juan Rivera, Truck Driver, Hudson County, Department of Roads and Public Property, 10 working day suspension and two 20 working day suspensions, on charges, were heard by Administrative Law Judge Susana E. Guerrero, who rendered her consolidated initial decision on June 26, 2018. No exceptions were filed.

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 August 1, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision to uphold the 10 working day suspension, modify the first 20 working day suspension to a 15 working day suspension and uphold the second 20 working day suspension.

Since the penalty for Juan Rivera's first 20 working day suspension has been modified, he is entitled to five days of back pay, benefits and seniority pursuant to *N.J.A.C. 4A:2-2.10*. However, he is not entitled to counsel fees. Pursuant to *N.J.A.C. 4A:2-2.12(a)*, the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. 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 Rivera's penalty was modified by the Commission, charges were sustained and major discipline was imposed. Thus, Rivera did not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as they have 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 Juan Rivera was justified. The Commission therefore upholds the 10 working day suspension, modifies the first 20 working day suspension to a 15 working day suspension and upholds the second 20 working day suspension. The Commission further orders that Juan Rivera be granted five days of back pay, benefits and seniority. The amount of back pay awarded is to be reduced and mitigated as set forth in *N.J.A.C. 4A:2-2.10*.

Counsel fees are denied pursuant to *N.J.A.C. 4A:2-2.12*.

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 1ST DAY OF AUGUST, 2018



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
(CONSOLIDATED)

**IN THE MATTER OF JUAN RIVERA,
HUDSON COUNTY, DEPARTMENT
OF ROADS AND PUBLIC PROPERTY.**

OAL DKT. NO. CSV 12873-17
AGENCY DKT. NO. 2018-506

**IN THE MATTER OF JUAN RIVERA,
HUDSON COUNTY, DEPARTMENT
OF ROADS AND PUBLIC PROPERTY.**

OAL DKT. NO. CSV 18165-17
AGENCY DKT. NO. 2018-1571

**IN THE MATTER OF JUAN RIVERA,
HUDSON COUNTY, DEPARTMENT
OF ROADS AND PUBLIC PROPERTY.**

OAL DKT. NO. CSV 18185-17
AGENCY DKT. NO. 2018-1398

Samuel B. Wenocur, Esq., for appellant Juan Rivera (Oxford Cohen, attorneys)

John J. Collins, Assistant County Counsel, for respondent Hudson County
(Donato J. Battista, County Counsel)

Record Closed: May 24, 2018

Decided: June 26, 2018

BEFORE SUSANA E. GUERRERO, ALJ:

STATEMENT OF THE CASE

This consolidated proceeding consists of three appeals by Juan Rivera (Rivera or appellant) of three suspensions imposed by the Hudson County Department of Roads and Public Property (Hudson County or respondent). Respondent issued a ten-day suspension and two twenty-day suspensions for three separate instances of alleged misconduct over the course of nearly four months. Rivera challenges the respondent's findings and the severity of the discipline imposed.

PROCEDURAL HISTORY

On or around June 28, 2017, respondent served Rivera, a truck driver, with a Preliminary Notice of Disciplinary Action (PNDA) informing him of the charges made against him for not completing his work assignment and failing to follow County procedures when picking up a county showmobile on June 11, 2017. Rivera was served with a Final Notice of Disciplinary Action (FNDA), dated August 10, 2017, which sustained all charges set forth in the PNDA. Rivera was issued a non-consecutive ten-day working suspension, from August 22, 2017 through October 25, 2017, which has since been served.

On or around October 5, 2017, Rivera was served with two additional PNDAs. One involved an incident that allegedly occurred on September 30, 2017, when appellant failed to appear for a 10:00 p.m. pick-up of a showmobile at Braddock Park. A FNDA was issued on November 30, 2017, which sustained all charges set forth in the September 30, 2017 PNDA, and appellant was assessed a twenty-day suspension to be served between March 6, 2018 and June 5, 2018. The second PNDA dated October 5, 2017, involved an incident that occurred on October 2, 2017, when appellant allegedly failed to return to work contrary to his supervisor's directive. A FNDA was issued on November 30, 2017, sustaining the charges and imposing a twenty-day suspension for the infraction, to be served non-consecutively between December 5, 2017 and March 1, 2018.

The New Jersey Civil Service Commission, Division of Appeals and Regulatory Affairs, (Commission) transmitted the first matter with the FNDA dated August 10, 2017, to the Office of Administrative Law (OAL), where it was filed on September 5, 2017, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to B-15 and N.J.S.A. 52:14F-1 to F-13. This matter was initially assigned to the Honorable Joan Bedrin Murray, Administrative Law Judge, and the matter was reassigned to the undersigned after Judge Bedrin transferred to Tax Court.

The Commission transmitted the second and third matters, with the August 30, 2017 FNDAs to the OAL, which were filed on December 12, 2017. These matters were initially assigned to the Honorable Elissa Testa, ALJ.

On February 7, 2018, pursuant to N.J.A.C. 1:1-17.1 and 17.3, the undersigned consolidated the three matters in the interest of efficiency and economy, and pursuant to respondent's request and appellant's consent.

The consolidated hearing was held on April 19, 2018. The record closed on May 24, 2018, upon receipt of information from the parties concerning appellant's disciplinary history.

CHARGES

The sustained charges in each of the three FNDAs include: Conduct Unbecoming a Public Employee; Neglect of Duty; Insubordination; and Other Sufficient Cause.

The incident(s) giving rise to the charges listed in the August 10, 2017 FNDA, for which Rivera received a ten-day suspension, reads as follows:

On June 11, 2017 you were scheduled to drop off and pick up the County Showmobile at Lincoln Park. This is a two man operation, the County procedure is that you are to go to the County Garage[,] pick up the showmobile with the other driver

who is scheduled with you, then follow the same procedure when picking it up. Instead of picking the showmobile back up with the driver, you went directly to Lincoln Park in your personal car, dressed in a suit with your family, hitched the showmobile to the truck and got back in your personal car and drove off, leaving the driver by himself to return the showmobile. You submitted an overtime sheet for 4 hrs for the pickup of the Showmobile which was denied. This is a safety issue to the public and the other driver, and you did not follow procedure.

The incident(s) that allegedly took place on September 30, 2017, giving rise to the charges in a FNDA dated November 30, 2017, for which Rivera received a twenty-day suspension, reads:

On September 30, 2017, you were assigned to pickup and transport the County Showmobile, you were advised to arrive at work at 10pm for an 11pm pickup, you failed to show up on time. Gregory McMillan at 10:30pm called Supervisor John Saar to inform him that you hadn't showed up. Sup[ervisor] Saar contacted you and you informed him you would be there in 10 mins. At 11pm you still weren't at work and Mr. McMillan was told to go home.

The transport had to be rescheduled for the next day. During the winter and fall seasons the use of the Showmobiles are in high demand and the time scheduling is precise for delivery and pickup for multiple events that are on a time table. This is not acceptable. You are currently serving a 10 day suspension for another incident with Showmobile.

The incident(s) that allegedly occurred on October 2, 2017, giving rise to the charges in the second FNDA dated November 30, 2017, for which Rivera received a twenty-day suspension, reads:

On October 2, 2017, your Supervisor was doing his rounds, drove up to your work area, where 4 employees were assigned to cut weeds and clean debris. Two of the employees were [sic] and two remained in the truck. After about 10 minutes your Supervisor approached the truck to inform you to get out of the truck and back to work. You [sic] found you on your personal cell phone while your coworkers were out working on their assigned jobs. You were told to get back to work, you told your Supervisor to wait a minute

[and] you remained in the truck still on your cell phone for a [sic] least another 10 minutes before getting out of the truck. You have been written up several times for being insubordinate to your Supervisors.

Summary of Testimony

June 11, 2017 Incident (CSV 12873-2017)

Wally Wolfe (Wolfe), the Division Chief with the County of Hudson, Roads Division, testified on behalf of the respondent. Wolfe explained that the County owns a thirty-foot long showmobile that is used for shows and events around the County. The showmobile is hitched to a County truck for transporting, and County Guidelines require that, for safety reasons, two County employees transport and set up the showmobile (referred to as the "two-man safety rule"). The drop-off and pick-up of the showmobile constitutes overtime when it occurs outside regular business hours. These overtime assignments are voluntary, and are offered to employees on the basis of seniority. If an employee declines the assignment, it is offered to the next employee on the seniority list. Prior to accepting the overtime assignments, employees are informed of the showmobiles drop-off and pick-up times, and location. When transporting the showmobile outside regular business hours, overtime is typically compensated in increments of four hours.

Wolfe had received complaints that employees transporting the showmobile were not following operating procedures by failing to report on time, wear the County uniform and adhere to the two-man safety rule, which caused safety concerns and risk of damage to the equipment. In response, Wolfe asked Robert Spinello (Spinello), a Traffic Supervisor, to check up on the showmobile transport scheduled for June 11, 2017.

Spinello observed the showmobile pick-up on June 11, 2017 at Lincoln Park in Jersey City, and reported his findings to Wolfe. Wolfe documented the information provided to him by Spinello in a memo to his supervisor, who then prepared the PNDA. (R-2.) In his June 13, 2017 memo, Wolf indicates that Spinello observed the

transportation of the showmobile following the completion of an event in Lincoln Park on June 11, 2017, and that:

At approximately 11:50pm, Spinello observed a Class A operator D. Feliciano to drive from the Roads Duncan facility alone into Lincoln Park At approximately 12:00, Spinello observed the other Class A driver Juan Rivera to arrive shortly thereafter in a personal vehicle with a female within the car.

He was observed out of uniform to assist Feliciano in hitching up the showmobile to the truck and then he re-entered the personal vehicle and drove away Subsequent to that, Spinello observed the single Class A driver to transport the showmobile back to Duncan/Roads and back . . . into the storage area in the yard alone without the required safety guide, (Rivera). Lastly, CDL Driver Rivera submitted a request for 8 hours overtime which is being held and denied.”

Wolfe testified that County procedures require that both the driver and the guide ride in the County truck together when hauling the showmobile to and from an event. When transporting a County showmobile, County employees are also required to wear their County uniform. This is reflected in a memorandum dated June 10, 2015 to all Supervisors and Staff which states in part that Class A drivers, including operators and guides, “are to arrive on time, in uniform and operate the showmobile in a safe matter [sic] . . .” This memo was available to all employees, and it memorialized what was already Standard Operating Procedure (SOP).

Robert A. Spinello, Supervisor of Traffic Maintenance for Hudson County Roads and Bridges, also testified on behalf of the respondent. He was asked by Wolfe to check on the employees picking up the showmobile in Lincoln park at approximately noon on June 11, 2017, and he observed the pick-up at that time. The employee driving the County truck to the park to pick-up the showmobile, Feliciano, wore his County uniform. Rivera, however, was dressed in slacks and a dress shirt, not his County uniform. After they finished hitching the showmobile to the truck, Rivera got back into his minivan and drove away.

A request for eight hours of overtime was completed for the June 11, 2017 assignment, which Rivera signed. (R-5.) Spinello denied Rivera's request for overtime because Rivera did not complete his task, and violated SOP, when picking up the showmobile out of uniform and failing to accompany the driver back to the garage. An overtime sheet was later approved for Rivera, for four hours, to cover the drop-off of the showmobile at Lincoln Park. (R-6.)

Rivera has been employed by respondent since December 2005. He testified that prior to picking up the showmobile on June 11, 2017, he attended service from eleven to noon at a church near Lincoln Park. He conceded that he did not wear his County uniform when he presented to pick-up the showmobile, but that his supervisor, Saar, was aware that Rivera would attend church immediately before pick-up. Saar, did not, however, authorize Rivera to complete his assigned overtime in his church clothes or using his personal vehicle. Rivera was aware that he was required to wear his County uniform during these overtime assignments, but testified that he did not have time to change. He was also aware that, for safety reasons, two employees are required to pick-up and return the showmobile to the County garage. Rivera testified that he intended to go back to the County garage after hitching the showmobile to the County truck, but when he returned to his car after hitching the showmobile to the truck, his wife was crying in pain and he decided to take her home. Rivera never communicated with anyone at any time that he did not return to the garage because of his wife's condition.

Respondent imposed a ten-day suspension in light of his past behavior and prior discipline.

September 30, 2017 Incident (CSV 18185-2017)

John Saar (Saar), a General Roads Supervisor for Hudson County Roads Department, testified on behalf of respondent. He is charged with supervising Rivera, and prepared and signed the October 5, 2017 PNDA for an incident that allegedly occurred on September 30, 2017. At approximately 10:30pm on September 30, 2017,

Saar received a telephone call from a driver, Gregory McMillan (McMillan), who reported that he had been waiting for Rivera at the Jersey City Duncan Avenue garage for about half an hour. Rivera was scheduled to meet McMillan at the garage at 10:00 p.m. for an 11:00 p.m. pick-up of a showmobile in Braddock Park in North Bergen. This was an overtime assignment that Rivera voluntarily accepted. McMillan asked Saar to reach out to Rivera concerning his whereabouts, and when Saar called Rivera at approximately 10:30 p.m., Rivera indicated that he was on his way to the garage and that he would be there in about ten minutes.

When Rivera failed to arrive at the garage, McMillan called Saar back at approximately 11:00 p.m. and Saar gave McMillan permission to go home since Rivera had not arrived. Rivera arrived at the garage shortly after McMillan had left, and called Saar a few minutes past 11:00 p.m. Since Rivera did not present on time that evening to pick up the showmobile, the pick-up had to take place the next day (Sunday). The showmobile, which remained in Braddock Park overnight, was scheduled to be used in Kearny the following day, and since the showmobile was not returned to the Duncan Avenue garage in Jersey City on Saturday evening, respondent asserts that there was a delay in getting the showmobile to the event in Kearny the next morning.

Rivera conceded that he was aware that he was to appear at the Duncan Avenue garage at 10:00 p.m. for a scheduled showmobile pick-up on September 30, 2017. He testified that he was at his mother's house in Philadelphia that evening, and left her house at approximately 8:00 p.m. to go to the Duncan Avenue garage. He testified that it takes approximately an hour and forty-five minutes to get to Jersey City from Philadelphia, however, there was an accident on the road that evening that caused him to be late. He also testified that when Saar called him the first time, Rivera told him that he would be 15-20 minutes late. He then called Saar at approximately 10:55 when he arrived at the garage and offered to pick-up the showmobile alone but Saar told him that it would be picked up the next day. Rivera also testified that he dropped off the showmobile in Kearny the following day and that it did not arrive late to the event.

October 2, 2017 Incident (CSV 18165-2017)

Juan Rafael Vazquez (Vazquez), Assistant Supervisor at the Hudson County Roads Department, testified on behalf of respondent. Vazquez supervises Rivera and he completed and signed the statement in the PNDA dated October 5, 2017 relating to an alleged incident that took place on October 2, 2017. On October 2, 2017, Vazquez drove to a job site at Paterson Plank Road to ensure that the workers returned to the job site after lunch, which ended at noon. The truck with the four workers, including Rivera, arrived at the site from their lunch break sometime between 12:10 and 12:15 p.m. Two workers exited the truck and returned to work, however, Rivera and another employee, Keith Mortensen (Mortensen), remained in the truck. After another ten to fifteen minutes from when the truck returned to the job site, Vazquez walked over to the truck and asked Rivera and Mortensen to exit the truck and get to work. Mortensen was sleeping and Rivera was on his personal cell phone, according to Vazquez. Vazquez then watched the truck for approximately another ten minutes until Rivera and Mortensen finally exited the truck. Even after exiting the truck, Rivera remained on his phone for a few minutes before returning to work.

Vazquez wrote up Rivera and Mortenson for failing to comply with his direct order to return to work. He did not discipline the four employees for returning fifteen minutes late from lunch.

Rivera denied that he returned to work late. He testified that on October 2, 2017 he was assigned to Paterson Plank Road to clean sidewalks. Their lunch break ended at noon, and Rivera testified that they returned from lunch at 11:55 a.m., and that he stayed in the County truck while he spoke with his wife on the telephone for two to four minutes. Rivera testified that he called his wife at 11:55 a.m., and that he remained in the truck with Mortensen after the other two employees existed the truck. Rivera denies that Vazquez ever spoke to him at the job site. He asserts that he returned to work on time, and specifically at 11:59 a.m.

FINDINGS OF FACT

The parties stipulated that the following consists of Rivera's prior disciplinary history and I, therefore, **FIND** them as **FACTS**:

1. On February 28, 2012, Rivera received a three-day suspension for refusing to do work; refusing to hang up cell phone; and for not being able to be found by his supervisor. This was upheld on a mediation award.
2. On June 9, 2015, Rivera received a one-day suspension. This was upheld through an arbitrator's award.
3. On October 25, 2015, Rivera received a written warning for his failure to appear for pre-scheduled overtime.
4. On June 16, 2017, Rivera received a five-day suspension for his failure to pick-up a showmobile on pre-scheduled overtime.¹

ADDITIONAL FINDINGS OF FACT

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also must be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the

¹ This was processed prior to, but close in time to, the ten-day appeal here, and respondent considered this five-day suspension when imposing the ten-day suspension.

credibility of an interested witness, in disbelieving his testimony.” State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

While the underlying facts of what occurred on June 11, 2017 are largely uncontested, Rivera’s testimony that he intended to return to the garage with his co-worker, but decided to drive his wife home when he saw her crying in pain, lacks credibility. This was not information that he shared with his co-worker or supervisor at the time, and his explanation did not appear truthful. Similarly, Rivera’s explanation as to why he arrived approximately an hour late to his scheduled assignment on September 30, as well as his timing of the telephone calls with Saar and his arrival at the garage, strained credibility as contrasted with Saar’s account of the events that evening.

Finally, with respect to the incident of October 2, 2017, Vazquez testified convincingly concerning his recollection of the events that afternoon when he observed Rivera and his co-workers at the job site. Rivera’s account, on the other hand, and particularly his timing of the events, including his testimony that he returned to work at 11:59, exactly one minute before the end of his lunch break, appeared entirely fabricated and farfetched.

Based on the documentary and testimonial evidence presented, and having had the opportunity to observe the demeanor of the witnesses and to assess credibility, I make the following additional **FINDINGS of FACT**:

With respect to the June 11, 2017 incident (CSV 12873-2017), the underlying facts of what occurred are largely uncontested. Rivera arrived at the job site, at Lincoln Park, to pick-up the showmobile wearing his personal clothing, not his County uniform,

as Rivera concedes was required when dropping off and picking up the showmobile. Rivera also concedes that he did not accompany his co-worker (driver) back to the garage after hitching the showmobile to the truck. At the time, Rivera was aware of the "two man safety rule" which required him to accompany his co-worker to return the showmobile safely to the County garage. Rivera also signed and submitted an overtime sheet for the four hours of overtime when he did not complete his assignment by failing to return the showmobile to the garage with the driver.

With respect to the September 30, 2017 incident (CSV 18185-2017), Rivera volunteered to work overtime on that evening, and he knew that he was required to meet his co-worker at the County garage at 10:00 p.m. for an 11:00 p.m. pick-up of a showmobile. Rivera did not arrive at 10:00 p.m. At approximately 10:30 p.m., as Rivera had still not arrived, he received a telephone call from Saar, his supervisor, inquiring as to his whereabouts. Rivera indicated to Saar that he would be there in approximately ten minutes, but he failed to arrive until approximately 11:00 p.m. Due to Rivera's tardiness that evening, his co-worker was permitted to leave at approximately 11:00 p.m., and the pick-up could not be accomplished that evening since the job required two workers. Rivera arrived at the garage approximately an hour late and since his co-worker had been relieved, the pick-up had to take place the following morning and this created a disruption to the pick-up and drop-off schedules.

With regard to the October 2, 2017 incident (CSV 18165-2018), Vazquez testified credibly that while all four employees arrived at the job site approximately ten to fifteen minutes late, Rivera remained in the truck on his personal cell phone while Mortensen, a co-worker, slept in the truck. After approximately ten minutes after their arrival at the job site, Vazquez instructed them to exit the truck and get back to work. Rivera, however, remained on his cell phone and did not return to work for another ten minutes, approximately. While the four employees were not disciplined for returning to work fifteen minutes late, Rivera and Mortensen were disciplined for failing to comply with their supervisor's directive.

LEGAL ANALYSIS AND CONCLUSIONS

Public employees' rights and duties are governed and protected by the provisions of the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, and the regulations promulgated pursuant thereto, N.J.A.C. 4A:1-1.1 to 4A:2-6.2. However, public employees may be disciplined for a variety of offenses involving their employment, including the general causes for discipline as set forth in N.J.A.C. 4A:2-2.3(a). An appointing authority may discipline an employee for sufficient cause, including failure to obey laws, rules and regulations of the appointing authority. N.J.A.C. 4A:2-2.3(a)(11).

In disciplinary cases, the appointing authority has both the burden of persuasion and production and must demonstrate by a preponderance of the competent, relevant and credible evidence that it had just cause to discipline the employee and lodge the charges. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). 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 first issue in this proceeding is whether a preponderance of the credible evidence establishes that the appellant's actions constitute a violation of the charges set forth in the three FNDAs. If so, the second issue is whether the violations warrant the discipline imposed.

Rivera is charged with Conduct Unbecoming a Public Employee, Neglect of Duty, Insubordination, and Other Sufficient Cause in the three FNDAs. "Conduct Unbecoming" is an "elastic" phrase that encompasses conduct that "adversely affects the morale or efficiency of a governmental unit . . . [or] which has a tendency to destroy public respect in the delivery of governmental services." Karins v. City of Atl. City, 152 N.J. 532, 554 (1998) (citing In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960)). 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) (quoting Asbury Park v. Dep’t of Civil Serv., 17 N.J. 419, 429 (1955)).

June 11, 2017 Incident (CSV 12873-2017)

On June 11, 2017, Rivera failed to follow County protocol by appearing at the job site out of County uniform. More importantly, after hitching the showmobile to the County truck, he failed to complete his work assignment by allowing his co-worker to return the showmobile to the County garage without him. Rivera was aware of the “two-man safety rule,” which he failed to follow, causing a safety risk to the other driver. Based on my findings, including my credibility determinations, I **CONCLUDE** that respondent has demonstrated, by a preponderance of credible evidence, that appellant’s conduct on June 11, 2017 constitutes Conduct Unbecoming a Public Employee, Neglect of Duty, Insubordination, and Other Sufficient Cause, and that such charges must be **SUSTAINED**.

September 30, 2017 Incident (CSV 18185-2017)

On September 30, 2017, Rivera volunteered to arrive at the County garage at 10:00 p.m. for an 11:00 p.m. pick-up of a showmobile. He failed to arrive at the scheduled time, offered no plausible or justifiable reason for arriving late, and did not complete the assigned task due to his tardiness. Rivera’s arriving at the job site an hour late also impacted his co-worker’s ability to complete his work, it caused a delay in the delivery of the showmobiles, and it impacted the work assignments the following day. Therefore, based on my findings, I **CONCLUDE** that respondent has demonstrated, by a preponderance of credible evidence, that appellant’s conduct on September 30, 2017 constitutes Conduct Unbecoming a Public Employee, Neglect of Duty, Insubordination, and Other Sufficient Cause, and that such charges must be **SUSTAINED**.

October 2, 2017 Incident (CSV 18165-2017)

On October 2, 2017, Rivera, together with his co-workers, returned to the job site fifteen minutes late. Discipline was not sought for this fifteen-minute delay, however, Rivera delayed his return to work even longer. He remained sitting in the truck, on a personal phone call, for another ten minutes before Rivera's supervisor directed him to exit his truck and return to work. Rivera ignored this instruction, and remained on the phone for another ten minutes before returning to work. Based on my factual and credibility findings, I **CONCLUDE** that respondent has demonstrated, by a preponderance of credible evidence, that appellant's conduct on October 2, 2017 constitutes Conduct Unbecoming a Public Employee, Neglect of Duty, Insubordination, and Other Sufficient Cause, and that such charges must be **SUSTAINED**.

PENALTY

When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); W.N.Y. v. Bock, 38 N.J. 500 (1962). In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 1996 N.J. AGEN LEXIS 467 (April 16, 1996). Pursuant to Bock, concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). Depending upon the incident complained of and the employee's past record, major discipline may include suspension, removal, etc. Bock, 38 N.J. at 522-24

Here, respondent maintains that appellant should receive discipline greater than that issued pursuant to the FNDAs, given his disciplinary history and his record of not being where he is scheduled to be and doing what is expected of him. Appellant argues that the twenty-day suspensions are excessive, particularly since they were

issued at around the same time and Rivera had no opportunity to correct his behavior before being disciplined with the second twenty-day suspension. Rivera argues that he caused no actual harm when he failed to deliver the showmobile on the evening of September 30, 2017, and the September 30 and October 2 incidences should be treated as one since they occurred so close in time and the PNDAs for both were issued on the same day. I do not agree with this position. Rivera was charged with two separate infractions on September 30 and October 2, and the fact that they occurred within two days of each other should not mitigate what would otherwise be considered an appropriate discipline for each offense.

Given Rivera's past disciplinary history and the nature of these offenses, I **CONCLUDE** that the misconduct warrants progressive discipline.

In light of appellant's prior disciplinary history over the past five years, the fact that Rivera has already been disciplined for similar infractions—i.e., failing to appear for overtime assignments and for failing to work—and because Rivera was subject to discipline on four separate occasions in 2017, I **CONCLUDE** that the ten-day suspension is appropriate and proportionate to the offense that occurred on June 11, 2017. In light of the above, I also **CONCLUDE** that a fifteen-day, rather than a twenty-day, suspension is more appropriate and proportionate in connection with the September 30, 2017 incident. Finally, given the aforementioned discipline and Rivera's documented history of failing to perform his job duties and "refusing to do work," I **CONCLUDE** that a twenty-day suspension is appropriate to the offense that occurred on October 2, 2017.

ORDER

It is **ORDERED** that the charges of Conduct Unbecoming a Public Employee, Neglect of Duty, Insubordination, and Other Sufficient Cause in connection with the June 11, 2017 incident (CSV 12873-17) are **AFFIRMED**.

It is **ORDERED** that the ten-day suspension imposed by the appointing authority pursuant to the June 11, 2017 incident (CSV 12873-17) is **AFFIRMED**.

It is **ORDERED** that the charges of Conduct Unbecoming a Public Employee, Neglect of Duty, Insubordination, and Other Sufficient Cause in connection with the September 30, 2017 incident (CSV 18185-17) are **AFFIRMED**.

It is **ORDERED** that the twenty-day suspension imposed by the appointing authority pursuant to the September 30, 2017 incident (CSV 18185-17) is **MODIFIED**, and it is further **ORDERED** that Rivera be suspended for fifteen days, and receive the return of appropriate benefits, in connection with the September 30, 2017 incident.

It is **ORDERED** that the charges of Conduct Unbecoming a Public Employee, Neglect of Duty, Insubordination, and Other Sufficient Cause in connection with the October 2, 2017 incident (CSV 18165-17) are **AFFIRMED**.

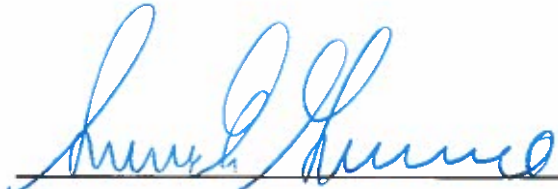
It is **ORDERED** that the twenty-day suspension imposed by the appointing authority pursuant to the October 2, 2017 incident (CSV 18165-17) is **AFFIRMED**.

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, 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.

6/26/18
DATE


SUSANA E. GUERRERO, ALJ

Date Received at Agency:

6/26/18

Date Mailed to Parties:
jb

6/26/18

APPENDIX

WITNESSES

June 11, 2017 Incident (CSV 12873-2017)

Appellant:

Juan Rivera

Respondent:

Wally Wolfe

Robert A. Spinello

September 30, 2017 Incident (CSV 18185-2017)

Appellant:

Juan Rivera

Respondent:

John Saar

October 2, 2017 Incident (CSV 18165-2017)

Appellant:

Juan Rivera

Respondent:

Juan Rafael Vazquez

EXHIBITS

June 11, 2017 Incident (CSV 12873-2017)

For Appellant:

None

For Respondent:

- R-1A PNDA dated June 28, 2017
- R-2A Memorandum from Wally Wolfe to Director D'Alessandro dated June 13, 2017
- R-3A Memorandum from Wally Wolfe dated June 10, 2015
- R-4A Photograph of County vehicle
- R-5A Overtime Sheet for 8 hours of overtime
- R-6A Overtime Sheet for 4 hours of overtime
- R-7A FNDA dated August 10, 2017 (received after the hearing)

September 30, 2017 Incident (CSV 18185-2017)

For Appellant:

None

For Respondent:

- R-1B PNDA dated October 5, 2017 (for September 30 incident)
- R-2B Information Request for Use of County Show Mobile
- R-3B Overtime Sheet (for September 30 overtime hours)
- R-4B FNDA dated November 30, 2017 (received after the hearing)

October 2, 2017 Incident (CSV 18165-2017)

For Appellant:

None

For Respondent:

- R-1C PNDA dated October 5, 2017 (for October 2, 2017 incident)
- R-2C FNDA dated November 30, 2017 (received after the hearing)