

its review, the Commission agrees that the upheld charges against the appellant merit a significantly penalty. It also agrees that based on the nature of the infractions, and the appellant's history of only minor discipline, that removal is not warranted. Accordingly, the Commission agrees with the ALJ that a six-month suspension, the longest suspension permitted, should serve as sufficient warning to the appellant that any similar misconduct in the future may subject him to removal from employment.

Since the removal has been modified, the appellant is entitled to be reinstated with mitigated back pay, benefits, and seniority pursuant to *N.J.A.C. 4A:2-2.10* from six months after the first date of separation until the date of actual reinstatement. However, he is not entitled to counsel fees. *N.J.A.C. 4A:2-2.12(a)* provides for the award of counsel fees 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 the disciplinary appeal is the merits of the charges. See *Johnny Walcott v. City of Plainfield*, 282 *N.J. Super.* 121,128 (App. Div. 1995); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, charges were sustained, and major discipline was imposed. Consequently, as appellant has failed to meet the standard set forth at *N.J.A.C. 4A:2-2.12*, counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore modifies that action to a six-month suspension. The Commission further orders that the appellant be granted back pay, benefits, and seniority from six months after the first date of separation to the actual date of reinstatement. 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. 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. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

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 shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF JUNE, 2022



Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Allison Chris Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 16555-19

AGENCY DKT. NO. 2020-616

**IN THE MATTER OF LORENZO THOMPSON,
TOWNSHIP OF HILLSIDE, DEPARTMENT OF
PUBLIC WORKS.**

Leonard C. Schiro, Esq., for appellant (Mets, Schiro, McGovern, LLP, attorneys)

Charles R. G. Simmons, Esq., for respondent (Rainone, Coughlin, Michello,
attorneys)

Record Closed: March 18, 2022

Decided: March 30, 2022

BEFORE, **LESLIE Z. CELENTANO, ALJ**:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant Lorenzo Thompson (appellant or Thompson), appeals the decision of respondent Township of Hillside (respondent or Hillside), removing him effective June 25, 2019 due to alleged incompetency, inefficiency or failure to perform duties; insubordination; inability to perform duties; conduct unbecoming a public employee; neglect of duty; and other sufficient cause pursuant to N.J.A.C. 4A:2-2.3(a). By Preliminary Notice of Disciplinary Action dated June 24, 2019, respondent advised appellant of the following charges:

N.J.A.C. 4A:2-2.3(a)1 – Incompetency, inefficiency or failure to perform duties

N.J.A.C. 4A:2-2.3(a)2 - Insubordination

N.J.A.C. 4A:2-2.3(a)3 – Inability to perform duties

N.J.A.C. 4A:2-2.3(a)6 – Conduct unbecoming a public employee

N.J.A.C. 4A:2-2.3(a)7 – neglect of duty

N.J.A.C. 4A:2-2.3(a)12 – Other sufficient cause

A departmental hearing was scheduled for July 17, 2019 however appellant had not requested a hearing. By Final Notice of Disciplinary Action dated July 24, 2019, appellant was removed effective June 25, 2019.

The matter was transmitted to the Office of Administrative Law (OAL) on November 21, 2019, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The hearing was scheduled for June 5, 2020, however on or about March 18, 2020 the OAL was closed pursuant to Executive order #104 issued by Governor Murphy, closing all schools and government offices. By virtue of multiple further Orders, the closure continued and all cases were adjourned due to COVID. Telephone conferences were held on August 14, 2020 and October 20, 2020, and the matter proceeding to a virtual hearing via Zoom on December 16, 2020. The transcript was received on October 20, 2021. The parties requested an opportunity to submit post-hearing briefs. Multiple extensions of time were granted, and petitioner's submission was received on February 25, 2022. The parties were advised that the record would close on March 18, 2022. Respondent did not submit a post-hearing brief.

ISSUES

1. Whether respondent has proven the charges by a preponderance of the credible evidence.

2. Whether the penalty of removal effective June 25, 2019, was justified and reasonable if a charge or charges are sustained.

FACTUAL DISCUSSION AND SUMMARY OF TESTIMONY

What follows is not a verbatim accounting of the testimony, but rather a summary of the testimonial and documentary evidence I found to be relevant to resolving the issues in this matter. Based upon consideration of the testimonial and documentary evidence presented, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following as facts:

Hanifa Johnson has been the Executive Director of the Joint Meeting of Essex and Union Counties since January 1, 2020. Prior to that she was the Director of Public Works (DPW) in the Township. She managed a staff of 25 individuals who were responsible for keeping the Township clean, maintaining the buildings, repairing the roads, as well as snow removal and leaf pick up.

Johnson prepared the Preliminary Notice of Disciplinary Action (PNDA) (R-1) of June 24, 2019. Petitioner had been absent for three consecutive days and she requested a doctor's note which he provided, indicating he was able to return the date before he actually did. Employees are required to provide a doctors' note when they've been absent for three consecutive days. The doctor's note dated May 21, 2019 (R-3) from Overlook Medical Center was received on May 24, 2019. Petitioner had been asked to return to work on May 22nd and did not but returned on May 23rd.

The DPW handbook (R-5) governs all DPW employees and under the section "Reporting to Work," excessive absenteeism or lateness is a violation. Leaving early is also a violation and not coming in is as well. If appellant had an emergency, he needed to have someone call his supervisors to let them know, in this case either Danny Pinto or Greg Vasara.

There were daily sheets for attendance and duties, and Pinto gave her those daily. If an employee was going to be absent for three consecutive days, they needed to provide a note and petitioner did not.

Johnson testified she also received complaints from the recreation department, the librarian and from town hall regarding lack of cleanliness of those areas on days appellant worked. She told him of these complaints and his response was to leave a handwritten two-page note in her office (R-4) which she received on June 5, 2019. She considered the note to be insubordinate and thus issued the PNDA. Specifically, the manner in which she received it was a concern because her door is closed when she is not in the office and so he went in without her permission. If someone wants to see her, they're supposed to tell the clerk in the front that they want to see her, or, if she is there to just knock on the door. The other concern she had was the language he used, including the word "bullshit," and that he was "sick of this shit," because she felt he was referring to her. This language is grounds for dismissal pursuant to the Handbook (R-5, page 15), which include insubordination and using insulting or abusive language to a supervisor or another employee. She found the language to be both abusive and insulting.

Johnson testified that on June 7, 2019, Thompson left work early and his supervisors, Danny Pinto and/or Greg Basara could not find him. He was not answering his radio and it was reported to her that he could not be located. He left at 2:55 p.m. without permission. His hours are 7:30 to 4:00.

On June 10, 2019, lunch was from 12:00 to 1:00 p.m. for DPW employees and he returned at 2:00 p.m., one hour late and notified no one. His supervisor did not know he was returning late.

She testified that the PDNA indicates the July 17, 2019, date for preliminary hearing however, petitioner never requested a departmental hearing. She reviewed the prior disciplinary history before recommending removal. Appellant had a January 19, 2019 neglect of duty incident, where 24 hours prior, DPW employees had told him to report for snow removal duties and he did not show up. She issued a memo (R-7) dated February 6, 2019, relative to that incident. Johnson called petitioner and the Union

representative to her office to present the FNDA to him in person and she handed it to him. He was suspended for one day for the January 19, 2019, incident.

There was also an incident the week of October 1, 2018, where he had excessive tardiness, resulting in a verbal disciplinary action. (R-8). He had a pattern of being late which she stated had been observed by her and by Thompson's supervisors.

On October 31, 2017 appellant failed to provide notification that he would be out, and November 1, 2017, he "attempted to call out." He was suspended for five days. This was before she was the DPW director. She reviewed and relied upon the memorandum (R-10) of November 9, 2017 before initiating discipline in this matter.

On October 21, 2015, (R-11) there was a memo to appellant prepared by the building maintenance supervisor detailing a profanity laced insubordination incident on October 21, 2015, and a neglect of duty incident on October 19, 2015, also referenced in his file and for which he received a one-day suspension. Johnson reviewed and relied upon this memo before determining the discipline here.

Based upon his disciplinary file she felt termination was appropriate. His file reveals petitioner for years has had issues with insubordination, attendance, vulgar abusive and threatening language even though he has had prior discipline.

On cross-examination she acknowledged that the doctor's note says he "may" return on the 22nd but he did not. She also agreed she did not ask for a second note indicating the 23rd. Regarding the complaints from the department directors related to June 5, 2019, she did go over with petitioner what the claimed deficiencies were in his work the same day he left the note for her (R-4). She agreed that she directed appellant to not discuss the complaints made about alleged deficiencies in his work with the people who made those complaints.

Appellant testified he was hired in January of 2013, to work as a laborer in maintenance. He testified that on May 20, 2019, he had vertigo and that the doctor said he could return to work on May 22 (R-1) but he was still dizzy so he called out. He was

not asked to bring in a note for the additional day. On June 5, 2019, he was told they were getting complaints from other department directors but he also received compliments at time and felt that those directors nitpicked and harassed him. There were no specific shifts at town hall, and maintenance workers would rotate. Many times he would get there and the person or people before him had not done their jobs, and so he took pictures on those occasions. He had tried to meet with Ms. Johnson.

When he left the note on Johnson's desk, the door was unlocked and open. He used the language he did (R-4) because he was fed up and tired of false complaints and of getting blamed for others not doing their work properly. Thompson testified that he always did his work.

On June 7 he agreed he left at 2:55 instead of his usual 4:00 p.m. and had been vacuuming. He testified that he did not take lunch and told his supervisor Greg Vassaro that he would be leaving early because of that and was told that was okay. He said when you do not take lunch you get "comp time."

On June 10 he had a flat tire and had a problem changing his tire because he did not have a jack. He returned at 2:00 pm and told his supervisor Danny Pinto who did not answer his radio but agreed that he returned late. He also agrees he went to a few departments to talk to people who had complained about him and that "he was never told not to." Thompson testified that he has two kids and is trying to get back to work. He said he showed up for the departmental hearing which had been scheduled, but that the Township did not show up.

LEGAL DISCUSSION AND CONCLUSIONS

The Civil Service Act and regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:2-1.1 to 4A:2-6.2. A civil service employee who commits a wrongful act related to his or her duties or who 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 such as this from a disciplinary action that resulted in the termination of employment, the appointing authority has 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); In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Preponderance may also be described as the greater weight of the 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). Credibility, or, more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554–55 (1954). Both guilt and penalty are re-determined on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

Conduct Unbecoming a Public Employee

“Conduct unbecoming” a public employee is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that 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); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances “be such as to offend publicly accepted standards of decency.” Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (Pa. 1959)). 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)).

I **CONCLUDE** that respondent has met its burden of proving by a preponderance of the credible evidence that appellant's conduct supports the charge of conduct unbecoming, N.J.A.C. 4A:2-2.3(a)(6).

Neglect of Duty; Incompetency, Inefficiency or Failure to Perform Duties; Insubordination

Neglect of duty has been interpreted to mean that "an employee . . . neglected to perform an act required by his or her job title or was negligent in its discharge." In re Glenn, CSV 5072-07, Initial Decision (February 5, 2009) (citation omitted), adopted, Civil Serv. Comm'n (March 27, 2009), <http://njlaw.rutgers.edu/collections/oal/>. The term "neglect" means a deviation from the normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "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) (citation omitted). Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job. In the within matter, I **CONCLUDE** that the appointing authority has failed to prove by a preponderance of the credible evidence, the remaining charges of incompetency, inefficiency or failure to perform duties, N.J.A.C. 4A:2-2.3(a)(1); of insubordination, N.J.A.C. 4A:2-2.3(a)(2); of inability to perform duties, N.J.A.C. 4A:2-2.3(a)3, and of neglect of duty, N.J.A.C. 4A:2-2.3(a)(7), and all those remaining charges should be dismissed.

Other Sufficient Cause

I **FURTHER CONCLUDE** that appellant has given other sufficient cause for disciplinary action, and that the appointing authority has demonstrated by a preponderance of the credible evidence that the charge of a violation of N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, must be sustained.

When dealing with the question of penalty in a de novo review of a disciplinary action against a civil service employee, the Civil Service Commission is required to

reevaluate the proofs and "penalty" on appeal based upon the charges. N.J.S.A. 11A:2-19; Henry, supra, 81 N.J. 571; Bock, supra, 38 N.J. at 519.

In a disciplinary proceeding, an employee's past record may be resorted to "for guidance in determining the appropriate penalty for the current specific offense." Bock, supra, 38 N.J. at 523. This past record includes "formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously called to the attention of and admitted by the employee." Id. at 524. Prior disciplinary actions against Thompson consisted of minor discipline. The discipline imposed must be reflective of the gravity of the current specific offense. Appellant's conduct towards his superior was offensive, and "mouthing off" in the manner he did was conduct unbecoming a public employee. Based upon the totality of the circumstances and consistent with the concept of progressive discipline and the seriousness of the offenses, I **CONCLUDE** that removal is too harsh a penalty. Nonetheless, the sustained charges against appellant are serious in nature and major disciplinary action is warranted. I therefore **CONCLUDE** that a six month suspension is more appropriate and proportionate to the offenses.

This suspension should serve as a warning to appellant that any future infractions may result in removal. Appellant must conform his conduct in all respects to the standards required.

ORDER

It is hereby **ORDERED** that appellant be suspended for six months and receive the return of appropriate benefits and seniority. As the appointing authority has not met its burden of proving the charges of insubordination; incompetency, inefficiency or failure to perform duties; inability to perform duties; and neglect of duty by a preponderance of the competent and credible evidence, it is **ORDERED** that those charges be and are hereby dismissed.

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.

March 30, 2022

DATE



LESLIE Z. CELENTANO, ALJ

Date Received at Agency:

March 30, 2022

Date Mailed to Parties:

March 30, 2022

dr

APPENDIX

Witnesses

For Appellant:

Lorenzo Thompson

For Respondent:

Hanifa Johnson

Exhibits

For Appellant:

None

For Respondent:

- R-1 Preliminary Notice of Disciplinary Action dated June 24, 2019
- R-2 Final Notice of Disciplinary Action dated July 24, 2019
- R-3 Letter from Sheena John, DO dated May 21, 2019
- R-4 Letter from Mr. Thompson to Hanifa Johnson stamped received June 5, 2019
- R-5 Township of Hillside Department of Public Works Employee Handbook
- R-6 Preliminary Notice of Disciplinary Action dated February 6, 2019
- R-7 Memorandum from Hanifa Johnson to Lorenzo Thompson dated February 6, 2019
- R-8 Memorandum from Hanifa Johnson to Lorenzo Thompson dated October 17, 2018
- R-9 Preliminary Notice of Disciplinary Action dated November 9, 2017
- R-10 Memorandum from Danny Pinto, Acting General Supervisor to Lorenzon Thompson dated November 9, 2017
- R-11 Memorandum from Mario Costa, Building Maintenance Supervisor to Lorenzon Thompson dated October 21, 2015
- R-12 Payroll Instruction Form