STATE OF NEW JERSEY

In the Matters of Salik Wilcher and Billy Grimsley, Newark School District CSC DKT. NOS. 2021-995 and 2021-996 OAL DKT. NOS. CSV 01581-21 and 01582 (Consolidated)	**DECISION OF THE CIVIL SERVICE COMMISSION**

ISSUED: JUNE 20, 2022 (NFA)

The appeals of Salik Wilcher and Billy Grimsley, Custodial Workers, Newark School District, removals, effective October 23, 2020, on charges were heard by Administrative Law Judge Susana E. Guerrero (ALJ), who rendered her initial decision on April 12, 2022. Exceptions and a reply were filed on behalf of the appellant and exceptions were filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, including a thorough review of the exceptions and reply, the Civil Service Commission (Commission), at its meeting of June 15, 2022, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision to modify the removals to 45 working day suspensions.

DISCUSSION

The Commission has thoroughly reviewed the exceptions and reply and finds them unpersuasive and mostly unworthy of comment as the ALJ's findings and conclusions in dismissing some charges, upholding others and modifying the removals to 45 working day suspension based on her thorough assessment of the record are not arbitrary, capricious or unreasonable. The Commission makes only the following comments. In their exceptions, the appellants argue that they are entitled to counsel fees. In this regard, they argue that both *N.J.A.C.* 4A:2-2.12 and *In the Matter of L.S., Middle Township, Board of Education,* Docket No. A-0139-20 (App. Div. March 7, 2022) support the award of counsel fees in this matter. The

Commission disagrees.

For many decades, in nearly all cases where a disciplinary removal has been modified to anything more significant than a suspension or fine greater than a minor discipline (defined as anything less than a six working day suspension per *N.J.A.C.* 4A:2-3.1), the Commission has denied counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.[1] In this regard, *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). This standard, interpretation and application of *N.J.A.C.* 4A:2-2.12 was, in fact, affirmed by the Appellate Division in *L.S., supra.*[2] However, while *L.S., supra,* seems to suggest that an appellant can get a "second bite" at the counsel fees apple by utilizing *N.J.A.C.* 4A:2-1.5 in a disciplinary appeal, the Commission disagrees.[3] While that rule pertains to remedies, including counsel fees, it is interpreted by the Commission to **only** pertain to such remedies for matters **that do not arise from a disciplinary appeal.** This is a reasonable interpretation of this regulation, as remedies for disciplinary matters are subject to specific rules, such as *N.J.A.C.* 4A:2-2.10 (back pay) and *N.J.A.C.* 4A:2-2.12.[4] Accordingly, it is the Commission's position that an appellant can only obtain an award of counsel fees for a disciplinary matter via *N.J.A.C.* 4A:2-2.12. Even assuming, *arguendo,* that an appellant could utilize *N.J.A.C.* 4A:2-1.5 in a disciplinary appeal, the Commission cannot fathom where the standard in that rule could be met, where it was otherwise not met in *N.J.A.C.* 4A:2-2.12. For example, *N.J.A.C.* 4A:2-1.5 states that remedies, such as counsel fees can be granted "where the Commission finds sufficient cause" such as where the appellant "demonstrates that the appointing authority took adverse action against an employee in bad faith or with invidious motivation." In a disciplinary matter, where an appellant is completely exonerated by the Commission, one reason could be that the

---

[1] In past cases where a removal has been modified to a minor disciplinary action, the Commission has awarded partial counsel fees pursuant to *N.J.A.C.* 4A:2-2.12 where an appellant has prevailed on the most serious charge leaving only incidental charges, which give rise to a significantly reduced penalty, such as a minor discipline. *See Thomas Grill and James Walsh v. City of Newark,* Docket No. A-6224-98T3 (App. Div., January 30, 2001); *In the Matter of Diane Murphy* (MSB, decided June 8, 1999); *In the Matter of Joanne Chase* (MSB, decided June 24, 1997); *In the Matter of James Haldeman* (MSB, decided September 7, 1994); *In the Matter of Donald Fritze* (MSB, decided January 26, 1993).

[2] It is also noted that *L.S., supra,* has been stayed by the Appellate Division as L.S. has filed a petition for certification with the New Jersey Supreme Court.

[3] In *L.S., supra,* the Court indicated that the appellant in that matter was properly denied counsel fees under *N.J.A.C.* 4A:2-2.12.

[4] Moreover, *N.J.A.C.* 4A:2-1.5 is contained in subchapter 1 of Chapter 2 of title 4A. That subchapter is titled "Appeals" and provides for the general rules regarding all forms of appeals to the Commission. Conversely, subchapter 2 of Chapter 2 is titled "Major Discipline" and outlines the **specific rules** to be utilized in such appeals, including the remedies available.

"adverse action" was in "bad faith or with invidious motivation."[5] Even where a disciplinary matter is reduced by the Commission from the ultimate disciplinary penalty of removal to what is considered a minor discipline, the above standard *could* be argued. However, in both examples, those appellants are entitled to full counsel fees in the first instance and would likely be awarded partial counsel fees by the Commission pursuant to *N.J.A.C.* 4A:2-2.12 in the second instance. However, the Commission would not find, as here, where a disciplinary removal is modified to a major disciplinary action, that the action taken was in bad faith or with invidious motivation sufficient to award any counsel fees under *N.J.A.C.* 4A:2-1.5. Logically, to make such a showing, an appellant would have to demonstrate that the discipline should have never been pursued, was otherwise invalid, or was a gross overestimation of the severity of the misconduct leading to a significantly overinflated penalty imposed originally by the appointing authority. If any of those conditions are true, the appellant would already be entitled to an award of counsel fees under *N.J.A.C.* 4A:2-2.12 since he or she would have had the action reversed, or modified to such an extent to warrant partial counsel fees. In other words, the Commission is stating that, even if *N.J.A.C.* 4A:2-1.5 were available in a disciplinary appeal, there would be no circumstance where counsel fees could be awarded outside of the standards already outlined in *N.J.A.C.* 4A:2-2.12. As such, in the case at hand, while the penalty was modified by the Commission, charges were sustained, and major discipline was imposed. Consequently, as the appellants have failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12, counsel fees must be denied.

Since the removal has been modified, the appellants are entitled to be reinstated with mitigated back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10 from 45 working days after the first date of separation until the date of actual reinstatement.

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

---

[5] Of course, in such a circumstance, even if the adverse action was not taken in bad faith or with invidious motivation, the appellant would be entitled to counsel fees pursuant to *N.J.A.C.* 4A:2-2.12. In other words, if an appointing authority does not sustain its burden of proof in proving the charges in a disciplinary matter, **no matter the reason for its failure to do so**, the successful appellant would be entitled to counsel fees under *N.J.A.C.* 4A:2-2.12. For example, even in an otherwise meritorious disciplinary matter, charges may not be sustained, and a removal may be reversed since evidence is no longer available, witnesses are unavailable, or for myriad other reasons, **none of which would constitute the appointing authority taking the adverse action originally in bad faith or with invidious motivation**. Nevertheless, those appellants are still awarded counsel fees under *N.J.A.C.* 4A:2-2.12, where they would not be under *N.J.A.C.* 4A:2-1.5.

immediately reinstate the appellants to their permanent positions.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellants was not justified. The Commission therefore modifies those actions to 45 working day suspension. The Commission further orders that the appellants be granted back pay, benefits, and seniority from 45 working days 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 appellants 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 appellants' 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

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Allison Chris Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
(CONSOLIDATED)

IN THE MATTER OF SALIK WILCHER,	OAL DKT. NO. CSV 01581-21
NEWARK PUBLIC SCHOOL DISTRICT.	AGENCY DKT. NO. 2021-995

IN THE MATTER OF BILLY GRIMSLEY,	OAL DKT. NO. CSV 01582-21
NEWARK PUBLIC SCHOOL DISTRICT.	AGENCY DKT. NO. 2021-996

John H. Norton, Esq., and **Linda Day**, Esq., for appellants Salik Wilcher and Billy Grimsley (Law Office of John H. Norton, attorneys)

John J. D. Burke, Esq., for respondent Newark Public School District (Scarinci & Hollenbeck, attorneys)

Record Closed: March 3, 2022 Decided: April 12, 2022

BEFORE **SUSANA E. GUERRERO**, ALJ:

STATEMENT OF THE CASE

Appellants Salik Wilcher and Billy Grimsley (collectively "appellants") appeal their terminations by the respondent Newark Public School District ("respondent" or "District") and seek reinstatement to their positions as custodial workers. They deny the charges against them. The respondent maintains that the appellants were engaged in an

unlawful drug transaction and consumed drugs on District property; that they improperly refused to undergo a District-ordered drug test; that they abandoned their duties by neglecting to work for at least two hours; and that they violated various District policies and procedures when they smoked on District property, failed to socially distance, and created a safety hazard by leaving a door to the school open.

PROCEDURAL HISTORY

Respondent served Salik Wilcher ('Wilcher") and Billy Grimsley ("Grimsley") with Preliminary Notices of Disciplinary Action ("PNDA") in November 2020 informing them of charges made against them in connection with their positions as custodians for the District. An internal disciplinary hearing took place on November 23, 2020, for Wilcher, and on November 24, 2020, for Grimsley. They were both served with Final Notices of Disciplinary Action ("FNDA"), dated December 23, 2020, which sustained all charges set forth in the PNDAs. The disciplinary action taken against them was removal, effective October 23, 2020.

The New Jersey Civil Service Commission, Division of Appeals and Regulatory Affairs, transmitted the within matters to the Office of Administrative Law ("OAL") 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 matters were received at the OAL on or around February 10, 2021, and Wilcher's appeal (CSV 01581-21) was assigned to the undersigned, while Grimsley's appeal (CSV 01582-21) was assigned to another Administrative Law Judge. A telephone conference was held on March 24, 2021, during which a hearing was scheduled for July 19, 2021, but the hearing was adjourned at the joint request of counsel due to incomplete discovery. Counsel filed a motion to consolidate these matters, and I issued an order dated August 3, 2021, consolidating OAL docket numbers CSV 01581-21 and CSV 01582-21.

Appellants filed for Summary Decision, which was opposed by respondent. A hearing was scheduled for September 28, 2021, but converted to oral argument on the motion, at the request of counsel. The undersigned denied the Motion for Summary

Decision on September 30, 2021, and the hearing scheduled for September 30, 2021, and October 1, 2021, was adjourned at the request of counsel for appellants. The hearing was ultimately held over the course of five days: October 6, November 12, November 15, November 19, and November 29, 2021. Proceedings were conducted via Zoom due to the COVID-19 pandemic. The record closed on March 3, 2022, following receipt of post-hearing submissions.

FACTUAL DISCUSSION AND FINDINGS

I **FIND** as **FACT** the following uncontroverted facts:

Grimsley was hired by the District in December 1998 as a per-diem custodial worker and became a full-time custodial worker on May 2, 2001. Wilcher was hired by the District in November 2002 and became a custodial worker for the District in January 2008. Both Grimsley and Wilcher were assigned to the District's Elliott Street School on October 19, 2020. Their supervisor, Mark Duncan ("Duncan"), was also assigned to work at the school at that time.

On the evening of October 19, 2020, the school Principal, Karisa DeSantis ("DeSantis"), was informed by the Vice Principals that when they were leaving the school that evening, Duncan, Grimsley, and Wilcher were sitting in the school parking lot and not working. DeSantis called Duncan, instructed him to go inside, and asked him to meet with her the next day. The following day, DeSantis reviewed surveillance footage taken on October 19, 2020, of the school parking lot and inside the school building and observed what she considered to be suspicious activity. She observed Duncan, the appellants, and an unidentified man engaged in what she believed could be an illegal drug transaction. DeSantis shared the surveillance footage with the District Labor-Relations Office for assistance.

On October 21, 2020, pursuant to instruction provided by the District's Labor-Relations Office, Wilcher, Grimsley, and Duncan were directed to undergo drug testing based on what was observed by District staff on the surveillance video of October 19.

The charges filed against the appellants stem from the District's review of the video footage of October 19, 2020, and Wilcher and Grimley's refusal to undergo drug testing on October 21, 2020.

Charges

The charges in the FNDAs include violations of: 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)(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause.

The specifications of the charges sustained are set forth in a rider to the PNDAs, and quoted, in relevant part, as follows:

> A. As to the charge of violation of N.J.A.C. 4A:2-2.3(a)6 – Conduct Unbecoming a Public Employee, you are hereby charged based on the following:
>
> > On October 20, 2020, DeSantis reviewed the video surveillance footage of the school and observed that around 6:00 p.m., Grimsley and Wilcher were seen entering the building from the loading dock area, where Grimsley sat for over thirty minutes smoking and conversing with Wilcher. They then left the building through the emergency exit, and as they were leaving, Wilcher placed a piece of cardboard in the door to keep it open, which is a safety violation. They then got into Grimsley's car and drove away at approximately 6:01 p.m. A few minutes later (6:04 p.m.), they returned to the parking lot and remained in the car. About fifteen (15) minutes later, Duncan pulled up alongside them. Duncan remained in his car and at around 6:27 p.m., an unidentified male who is not a District employee approached Duncan's car. Shortly thereafter, Wilcher and Grimsley exited the car and walked over to Duncan's car and greeted the unidentified male. During the greeting, the unidentified male placed an object into Wilcher's palm. Wilcher looked at the object in his palm, spoke to Duncan, and returned the item to the unidentified

male.

The unidentified male spoke to Duncan, who was looking at his cell phone, and Duncan handed the unidentified male his phone. The unidentified male interacted with the phone, and with what the District believes was a CASHAPP money transaction. The phone was then returned to Duncan, and Duncan and the unidentified man shook hands. During the handshake, the unidentified male gave an item to Duncan, which Duncan inspected and put to his mouth and nose. As this was taking place, Grimsley and Wilcher were actively present and engaged in the conversation about the transaction, thus making them accomplices to this illegal activity on District property. Grimsley was also seen smoking, which is a clear violation of District policy.

The interaction between Duncan, Grimsley, Wilcher, and the unidentified male appeared to be a sale of marijuana in violation of District Policy #4119.23. District Policy states in part:

"An unlawful manufacture, distribution, dispensing, possession of use or sale of any narcotic drug, hallucinogenic drug, amphetamine, barbiturate, marijuana or any other controlled substance on or in any worksite is prohibited. Any violation of this policy is grounds for termination of employment and may subject the District employee to prosecution as well as termination."

After congregating and speaking for several minutes in the parking lot, Grimsley, Wilcher and Duncan entered the building through the boiler room door at approximately 6:37 p.m. Shortly thereafter, they exited the building again. At around 6:43 p.m., a black car pulled into the parking lot, and another unidentified non-district employee exited the car and met Grimsley in the parking lot. Grimsley and the unidentified male walked to Grimsley's car and retrieved something, and then both walked off camera into the direction where Wilcher and Duncan had walked off earlier. About 42 minutes later (at 7:27 p.m.), the unidentified male walked back to his car and left. At around 7:50 p.m., Grimsley, Wilcher and Duncan came together in the parking lot and entered the building. Wilcher and Grimsley were in the parking lot for over two hours, which exceeded their

allotted lunch and break. They were not on their scheduled lunch break (which is from 5 p.m. to 5:30 p.m.), and were on the clock. This constitutes theft of time.

Based on what was observed on the surveillance footage, the District had a reasonable suspicion that Wilcher and Grimsley engaged in an illegal act and consumed marijuana on District property in violation of District policy #4219.23, which states "District employees are not permitted on any worksite after having ingested any controlled dangerous substance or drug . . . or after having consumed any alcoholic beverage." As such, Wilcher and Grimsley were directed to be transported by District personnel to undergo a urinalysis pursuant to the aforementioned policy, but they refused.

Upon their refusal to be transported to Concentra, Wilcher and Grimsley were advised by the District's investigators and DeSantis that refusing to go to Concentra to submit to a urinalysis would be deemed a positive test. Their refusal is a presumption of guilt and constitutes conduct unbecoming a public employee.

In addition, on October 19, 2020, Grimsley, Wilcher and Duncan were seen on surveillance without masks while on District property (loading dock, parking lot, etc), in violation of the District's guidelines and procedures. The Newark Board of Education website and the Reopening Plan 2020–2021 stipulates that "Masks are required at all times when entering district facilities, locations and properties." Wearing a face mask is not only recommended by both the Centers for Disease Control and the World Health Organization to reduce the risk of transmission of COVID-19, it is required by the District's Reopening Plan. Grimsley, Duncan and Wilcher were seen conversing within less than 6 feet of each other with non-District employees on District property, who were also not wearing masks. These individuals may not have been tested and were not cleared to be on District property, hence, exposing other employees to COVID-19. Wilcher and Grimsley's lack of consideration constitutes conduct unbecoming a public employee.

Under District Policy #4119.22, when an employee

> either within the schools or outside regular duties, creates conditions under which the proper operation of the schools is affected, the Superintendent, upon recommendation of the Superintendent's designee or Human Resources' designee, and in accordance with the statute, shall determine whether such acts or lack of actions constitute conduct unbecoming a school employee, and if so, will proceed against the employee under the law.
>
> Grimsley's and Wilcher's conduct, as outlined above, was without regard for the professional standards upheld by the Newark Board of Education, and without concern for their own safety and wellbeing, and the safety and wellbeing of others, and constitutes conduct unbecoming a public employee.

B. As to the charge of violation of N.J.A.C. 4A:2-2.3(a)7, Neglect of Duty, Grimsley and Wilcher are charged with the following offenses:

> In addition to the offenses listed above, Grimsley and Wilcher neglected their job duties as custodians on October 19, 2020 when they were sitting and conversing in the loading dock area for approximately thirty minutes, while Wilcher was smoking, and when they were engaged in illegal activities in the parking lot. They were not on authorized breaks or lunch during that time.

C. As to the charge of violation of N.J.A.C. 4A:2-2.3(a)1, Incompetency, Inefficiency or Failure to Perform Duties, Grimsley and Wilcher are charged with the following offenses:

> In addition to the offenses listed above, Grimsley and Wilcher failed to perform their duties on October 19, 2020 to the required standard of the District by habitually abandoning their duties and being in the parking lot, sitting in their car and engaging in illegal activities with non-district employees. Their actions demonstrate an inability and failure to perform the duties of a custodial worker. They demonstrated inefficiency and a failure to perform their duties as a custodial worker when they were conversing on the loading dock rather than performing their required duties.

D. As to the charge of violation of N.J.A.C. 4A:2-2.3(a)2,

Insubordination, they are charged with committing the following offenses:

> In addition to the offenses listed above, Wilcher and Grimsley were insubordinate when they were not wearing a face mask as directed by the District website and the Reopening Plan 2020–2021, on October 19, 2020. Failing to adhere to and comply with all District policies, protocols and directives constitutes insubordination. Further, on October 21, 2020, Grimsley and Wilcher were insubordinate when they refused to be transported to Concentra as directed by District officials (Investigators Koontz and Jackson) and DeSantis. As a direct result of the refusal or non-compliance, they were deemed to be under the influence of alcohol or illegal substances and violated District Policy #4119.23. Their behavior indicates that they have no regard for the District's policy and their position as Custodial Worker for the District.

E. As to the charge of violation of N.J.A.C. 4A:2-2.3(a)12, Other Sufficient Cause, Wilcher and Grimsley are charged with committing the following offenses:

> In addition to the offenses listed above, Wilcher and Grimsley demonstrated a willful disregard for proper policies and protocol by violating District policy #4119.23 and failing to wear a mask while on District property. They have compromised the integrity of Elliott Street School and the Newark Board of Education.

Testimony

Janelle McIntosh-Evans ("Evans") testified on behalf of the respondent. She is the Labor-Relations Specialist with the District, and has worked in the area of Labor Relations with the District for the past twelve years. Evans prepared the charges here.

Evans was not familiar with Elliott Street School, or with those who worked there. She testified that she reviewed the surveillance video on October 20, 2020 and that Principal DeSantis identified the individuals in the video for her. Upon Evans' request, DeSantis prepared an Incident Report outlining what she observed in the video, and

Evans testified that the Incident Report corresponds with what she also observed in the video.

Evans testified that, as part of her investigation, she requested the appellants' work schedules, and DeSantis provided her with the schedules that she believed DeSantis received from Duncan. Evans testified that, based on the schedule provided to her, the appellants were working 1:00–9:00 p.m. at the time, with a lunch break from 5:00–5:30 p.m. and a ten-minute break at 7:00 p.m., and they had a detailed schedule of what to do that day. While the schedules provided are dated October 20,2020, Evans testified that she understood that it was the appellants' schedule for October 19, 2020.

Evans testified in detail about her observations in the videos, including the times when the appellants are observed sitting, walking around, on their personal phones, and smoking rather than working, as required, since they were not on their lunch/dinner break at the time.

Concerning the video taken of the stairwell area leading to the parking-lot area, Evans testified that Wilcher is seen using a piece of cardboard to keep the door leading to the parking lot ajar, which she testified was a safety hazard. She did not know how long the door was left open.

Evans testified that, at around 6:27 p.m., the appellants were sitting in a silver car, while Duncan's black car was parked next to them, at which time an unidentified individual approached them. She testified that Grimsley, Wilcher, and Duncan greeted the unidentified individual with a handshake/hug, and that it appeared that there was an exchange of something between the man and Wilcher. She testified that a transaction appears to have been made using Cash App, as Duncan is seen showing the unidentified man the phone transaction after receiving the product. Evans testified that she recognized the green phone screen as Cash App because it is a popular application that she uses and is familiar with. Evans testified that based on what is observed in the video, the District assumed that an illegal transaction took place—that

goods and money were exchanged. She testified that the unidentified man is observed handing Duncan something in a clear plastic bag, and Duncan is seen unfolding the plastic bag and examining it, and putting it to his nose.

Evans testified that during this exchange with the unidentified individual, nobody was wearing a face mask, as required, and they were not social distancing. Evans agreed that the social-distancing section of R-18 does not indicate that distancing must be maintained in the parking lot. She testified that the appellants were in the lot for several hours when they were supposed to be working, and that the appellants and Duncan also violated District policy that prohibits anyone from being on the property after consuming alcohol or illegal substances. (R-19.)

Evans testified that the decision to have the appellants undergo a urinalysis was made by her and her supervisor because of the suspicious activity that was observed on the video from October 19, 2020. She testified that they could not tell with certainty what was exchanged or what was being smoked in the lot, and that they wanted to get clarity by having the appellants undergo a urinalysis. She testified that the appellants' behavior was also suspicious by the way they were walking, and because Grimsley appeared to be sweaty even though it was chilly outside. She considered this a form of "manifestation."

On October 21, 2020, the appellants were called to the office and directed to go to Concentra for a drug test. Evans was not present at the time, but the investigators reached out to her by telephone, and she remained on the telephone with them for some time. Evans testified that when they were asked to undergo testing, there was pushback and they wanted union representation. She testified that, as a courtesy, she tried to reach out to the union representatives for them at least three times. She was only able to get through to Duncan's union.

Evans told the investigators that due to "reasonable suspicion," Grimsley, Wilcher, and Duncan could not remain on District property, and they then elected to

leave. She testified that the appellants were told that this was not a union issue, and that they were directed to undergo testing because this was a health and safety issue.

Evans testified that she was unaware whether the appellants were notified of the District's Reopening Plan, but that all policies are found on its website.

Evans clarified that Grimsley and Wilcher were terminated because they refused to undergo drug testing, not because of what was observed in the surveillance video, because, while it appeared to be a drug transaction, the District did not really know what was being exchanged.

Karisa DeSantis ("DeSantis"), the Principal of Elliott Street School, testified on behalf of the respondent. DeSantis testified that her Vice Principals called her when they left the school on October 19, 2020 and asked her why the custodians were sitting in the parking lot. She then called Duncan, and he informed her that their breaks are at 3:00 p.m. and at 7:00 p.m. She instructed him to go back inside and told him that it was unacceptable for them to be outside. She asked him to meet with her at 1:00 p.m. the next day. When DeSantis returned to the school on October 20, 2020, she reviewed the surveillance footage taken of the parking lot for the purpose of determining how long Duncan and the appellants were outside, in order to document a "neglect of duty" charge. She testified that as she reviewed the video, it became apparent to her that there was suspicious activity in the lot, so she reached out to Labor Relations.

DeSantis testified that she met with Duncan on October 20, 2020 and asked him why he had been outside the night before. He did not provide a reason. DeSantis testified that when she asked Duncan for Wilcher's schedule for October 19, 2020, he gave her R-13, and he also provided R-6, which pertained to Grimsley. She testified that these schedules confirm what Duncan said about their breaks being at 3:00 p.m. and 7:00 p.m.

DeSantis drafted an Incident Report documenting her observations and prepared a record of her observations with the assistance of a Vice Principal. (R-15.) DeSantis

testified concerning the videos. On the video, she observed Grimsley smoking near the loading dock, while Wilcher and Grimsley talked and did not work from about 5:33 p.m. to 6:00 p.m. Both were not wearing masks in the stairwells, and Wilcher used cardboard to prop open a door, which she testified was not permitted and was a major safety concern. DeSantis testified that none of this occurred during an authorized break.

DeSantis testified as to her observation of an exchange in the parking lot with an unidentified man. She agreed that the video does not depict Wilcher or Grimsley purchasing or consuming an illegal substance. She testified that the fact that there were people coming onto school property, that there was a suspicious exchange between them, and that the three custodians were not working the entire time was a major concern. She testified that the cleanliness of the building is essential because they were in a pandemic. She raised concerns that the three were not social distancing, nor wearing masks, that they improperly kept a door propped open, and that their conduct created an unsafe environment.

On October 21, 2020, investigators Koonz and Jackson came to the school. DeSantis called Duncan and informed him that the investigators were there to talk to him, Wilcher, and Grimsley. She called Grimsley and Wilcher over the loudspeaker, and they all went to a conference room with the investigators. The investigators informed the appellants that, based on activity seen in the parking lot, all three were being asked to go to Concentra for drug testing. DeSantis testified that Duncan refused right away, and that Wilcher and Grimsley also refused. She testified that they were told that if they refused, it would be considered a positive test. Grimsley asked to call his union representative, and she told him that a union representative was not necessary for this process, but that he could call. DeSantis testified that Evans informed them that they were not required to have a union representative present, and that it was a courtesy to allow it.

DeSantis testified that Grimsley said that he would take the test, but wanted his representative present. DeSantis attempted to call their union representative from the

office phone, but she did not get an answer. She confirmed that Wilcher and Grimsley were not questioned about the incident, and that there was no investigation interview. She testified that the investigator informed them that if they refused to go for testing, they would have to clock out, that they would be considered to have had a positive result, and that this could result in termination.

With regard to the appellants' work schedule, DeSantis testified that if there were a change in detail or schedule, Duncan was required to inform her of this. She testified that when she spoke with Duncan on October 20, 2020, he informed her that he had directed Wilcher and Grimsley to go back inside to work on October 19, 2020 but that this is not what she observed on the video.

Anthony Jackson ("Jackson") is an Investigator for the District. Jackson and his partner Koonz were asked by the Director of the Office of Safety to go to Elliott Street School to review surveillance video. When they reviewed the video on October 21, 2020, they determined that something suspicious had occurred. He considered it suspicious that there was a handshake, that something was passed to Wilcher, that they were on their phones and collaborating, and that they used Cash App, which he uses himself. He also testified that it was suspicious how Duncan manipulated the bag, like it was marijuana, and put it to his nose to examine. After reviewing the footage, he spoke with Evans, who directed that Wilcher, Grimsley, and Duncan be taken to Concentra for drug testing.

In the conference room on October 21,2020, Jackson introduced himself and Koonz to Duncan, Wilcher, and Grimsley, and informed them that they were there because suspicious activity was observed on surveillance video, and that they wanted to escort them to Concentra for testing. Jackson testified that he informed them that any refusal would be considered a positive report. He asked Duncan if he would allow him to escort him to Concentra, and Duncan said "no" and walked out of the room. He then asked Wilcher, who put his head down and shook his head "no" and walked out of the room. He then asked Grimsley, who said, "Let me make myself clear, I am not refusing, I just want to speak with my union rep." Jackson confirmed that the three

were not interviewed, and that he did not ask them any questions. Jackson confirmed that attempts were made to call the union representative.

Jackson testified that when he takes employees to Concentra, he is required to keep them in sight, and that here they gave the appellants more time before escorting them to Concentra. After some time, he asked Evans what to do, and Evans told him to stand by because she was also trying to call the union herself. Duncan and Wilcher ultimately clocked out and left. Grimsley was outside for a while, and Jackson believed he was trying to reach his union. Ultimately, he also clocked out, and said that he was not refusing, but that he had to get in touch with his union representative and had been unable to. After allowing the appellants an opportunity to call the union, Jackson considered it a refusal when they chose not to go to Concentra.

Salik Wilcher ("Wilcher") testified on his own behalf. Wilcher testified that in the eighteen years that he has worked for the District, he never received an unsatisfactory job-performance evaluation, and has never been suspended or disciplined. He worked at Elliott Street School for over two and a half years.

Wilcher testified that he and Grimsley did not have a work schedule for October 19, 2020 and that the first time he was shown R-13 was on October 20, 2020 when DeSantis and the Vice Principal presented it to the custodial workers at a meeting. He testified that the custodial staff were preparing the school to reopen and that their duties varied from day to day. He testified that since there were no children in school due to COVID-19, they were still doing "summer cleaning" and not following the schedule laid out in R-13. He testified that on October 19, 2020, he clocked in at 12:58 p.m., and clocked out at 9 p.m. Wilcher testified that he typically did not punch out for dinner, and that it was an unwritten rule that they could take an hour for lunch/dinner. He testified that the 5:00–5:30 p.m. lunch on the schedule of R-13 was not accurate, and that it only applied during the regular school year. He testified that, during the pandemic, they would take an hour lunch, which was approved by Duncan, and that the R-13 schedule did not apply. Rather than follow a set cleaning schedule, they would wait for orders from Duncan.

Wilcher testified that on October 19, 2020, he met with Duncan and told him that he was cleaning the first floor that day. He testified that Duncan informed him that he was waiting on directions from DeSantis with a list of classrooms to prepare and clean.

Wilcher testified that on the night of October 19, 2020, he left to go to the corner store to pick up some food with Grimsley. They went to the loading dock to eat, and they finished dinner there at about 5:35 p.m. They then waited on Duncan to give instructions, and he testified that he sat six feet away from Grimsley. Duncan was not there at the time, and he testified that they were asked by Duncan to meet him outside by the custodian door.

Wilcher admits to using cardboard to keep a door to the school open because Wilcher and Grimsley did not have keys and had no way of getting back into the building. He testified that they were to meet Duncan outside near that door, and that he sat with Grimsley in Grimsley's car that was near the door. Wilcher testified that when he was waiting in the car for Duncan, he was smoking Newport cigarettes while Grimsley smoked Black & Mild cigarettes.

With regard to the unidentified man who approached Duncan and the appellants in the parking lot, Wilcher asserts that he had seen the man at the school every couple of months, and that he was Duncan's childhood friend. Wilcher denied knowing that the man would be at the school that evening. He testified that the gate to the school was locked and that the gate could only be opened from the street with a remote, and that his remote did not work. He implied that Duncan opened the gate for the man because he also had a remote. Wilcher testified that Duncan often had friends come by the school.

Wilcher testified that he and Grimsley exited the car when they heard Duncan call them. He testified that he was using his phone to check ESPN scores. He greeted the man, and testified that he was shocked when the man placed something in his hand when he greeted him. He testified that he had not been expecting that, and could not

tell what was handed to him. Wilcher testified that he asked Duncan: "Why did he hand this to me, he must be confused." Wilcher testified that it was a folded-up plastic, and that he did not want to know what it was. He denied recalling anything the man said, and claimed that he had no idea if it was a drug transaction that took place between the man and Duncan. Wilcher also denied seeing what was on Duncan's phone or in the plastic bag.

Wilcher denied purchasing, possessing, or smoking marijuana that day, but he could not say for certain whether Duncan had marijuana.

Wilcher testified that he later walked to his car to retrieve a hoodie when a second unidentified man drove into the parking lot. Wilcher testified that he was not aware that this man was coming to the school, and that it was Duncan who let him in. He testified that the man was a parent who came to say "hello" and stayed for about twenty minutes. When he left, the appellants and Duncan were talking and checking the outside of the school building for about an hour. He also testified that they were cleaning the playground area at the time the man arrived, and that the man stayed with them in the playground area. He testified that it takes about forty to sixty minutes to walk the perimeter of the school building.

Wilcher testified that he later removed the cardboard from the door, and they returned to the school to finish setting up a classroom. Wilcher testified that they had a list from DeSantis that was probably given to Duncan by text.

Wilcher testified that he was not aware of the District's Reopening Plan (R-18). He testified that, during the pandemic, they were required to wear masks when entering the school building, and he was aware that they should socially distance. He testified that the custodial workers complied with this most of the time, but that they were never told that they had to wear masks outside, and he did not think this was required. The vice principals went outside without their masks. He also believed that smoking outside was permitted.

When he was called to DeSantis's office on October 21, 2020, Wilcher testified, he was told that there was suspicion of illegal activity, and they were asked to undergo a urinalysis. He confirmed that they were informed that a failure to consent would result in disciplinary action, although they never said "termination." Wilcher was not sure what was happening, and he was never shown a video. He asked to speak with his union representative because, according to Wilcher, he knew that he had rights, and did not know what to do. He confirmed that everyone tried to call the union representatives for about thirty to forty minutes. The union representative never answered, and he was told that he could not remain on the premises if he did not consent to the drug test.

Billy Grimsley ("Grimsley") testified on his own behalf. After his termination, and as of April 2021, Grimsley has worked as a bus cleaner with New Jersey Transit.

In response to questions about prior discipline, Grimsley testified that he was written up once when he worked at Hawkins Street School for failing to vacuum a rug. He was also disciplined and terminated about twenty years ago, but was reinstated, with back pay, following a hearing.

Grimsley confirmed that he smokes Black & Mild cigarettes, and that he was not smoking marijuana on October 19, 2020.

Like Wilcher, Grimsley testified that he was not aware of the District's drug-testing policy (R-19), nor was he ever made aware of the District's Reopening Plan (R-18). He testified that DeSantis only stressed that they were required to wear masks inside the school building. He testified that he and Wilcher socially distanced inside the school building, and that he was not aware that they were required to wear a mask outside. He testified that he was also under the impression that smoking outside was permitted, as he has smoked outside with other District staff.

Like Wilcher, Grimsley testified that he did not have a written work schedule during the pandemic, and that the schedule at R-6 only applied when school was in session. He testified that his usual work schedule was 3:00–11:00 p.m., but that during

the pandemic, it was 1:00–9:00 p.m. He testified that the appellants took direction from Duncan, and that Duncan gave them an extra half hour for dinner.

Grimsley testified that he met with Duncan on October 19, 2020 and that Duncan informed him that he was waiting for direction from DeSantis concerning what needed to be cleaned that evening. He testified that after their dinner break, Duncan texted the appellants to meet him outside near the custodian door.

Grimsley testified that when he and Wilcher went out to the car, they smoked cigarettes while awaiting directions from Duncan. He testified that Duncan did not tell him that he was waiting for someone, and that he waited in the car for Duncan because he "didn't want to be insubordinate." He testified that the unidentified man was Duncan's childhood friend, and that he did not know he was coming to the school. He testified that he had seen the man on occasion but had never socialized with him.

Grimsley denied seeing any drug transaction, and testified that he did not think at the time that a drug transaction transpired in his presence. His testimony concerning his observations and exchanges with the unidentified man and with Duncan was largely consistent with Wilcher's testimony.

Grimsley testified that Duncan later asked them to walk the perimeter of the school to secure the building, and that this takes about forty minutes. Grimsley denied that he was stumbling or walking in an erratic fashion in the surveillance video, as Evans alleged, or that he was sweating or intoxicated.

Grimsley also testified that a parent of a student later drove into the lot, and that Duncan allowed him access to the lot. He testified that he did not know why the man came to the school, and that they were just talking.

On October 21, 2020, Grimsley testified that he did not know why they were asked to submit to a urinalysis, and nobody told him why. He testified that nobody told him he was observed on video appearing intoxicated, sweating, or stumbling. He

denied knowing that the District could order him to undergo a urinalysis, and he wanted to speak with his union representative. Grimsley testified that he told District staff that he would take the test but wanted to talk to his union representative. He testified that he ultimately left the building because Investigator Koonz told him to leave. Grimsley testified that she escorted him out of building forcefully, and that she was aggressive and disrespectful, although this is not observed in the video evidence presented.

DeSantis testified as a rebuttal witness. When she spoke with Duncan at around 6:36 p.m. on October 19, 2020, he informed her that the appellants' breaks were at 5:00 p.m. and 7:00 p.m. She instructed Duncan to go back to work, and that they would meet to talk the following day. She testified that Duncan was not waiting for any instructions from her, that she did not give him any instructions, and that she is not supposed to give instructions on cleaning the building. She also had no recollection of emailing him that day. DeSantis testified that the following day, Duncan informed her that they all went back inside to work after she called him.

Although the appellants testified that they were putting shields up on the desks on October 19, 2020 and preparing the classrooms for the students' return to school, DeSantis testified that the shields had already been put up by then and that classrooms were ready for students in September.

Credibility

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 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).

Here, DeSantis and Jackson testified credibly concerning their interactions with the appellants and Duncan, and their observations and handling of this matter. While Evans testified credibly concerning her investigation, and her review of the surveillance footage, her testimony concerning her observation of any "manifestation" of intoxication exhibited by Grimsley was not convincing. Upon close review of the video footage, Grimsley did not appear to be stumbling or walking in a manner that suggested that he was intoxicated or impaired. And the sweat that Evans testified that she observed on Grimsley's forehead appeared more likely to be the effect of the lighting. Even if Grimsley did have some sweat on his forehead that evening, there is insufficient credible evidence to attribute his shiny forehead to the effects of any drug. He was never observed ingesting any, and when he was handed something that appeared to be drugs in a plastic bag, he immediately returned it to the man who handed it to him in the middle of a handshake.

Wilcher and Grimsley's testimony appeared to be largely rehearsed and coordinated. They conveniently placed much of the blame on Duncan. Given my review of the video evidence, the appellants' testimony lacked credibility when they denied having any knowledge that a drug transaction was taking place in their presence, and when they asserted that they were either working or waiting for direction from Duncan the entire time that they were outside. I give little weight to their testimony.

FINDINGS OF FACT

Based upon my review of the evidence, including the surveillance videos, and having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, I **FIND** as **FACT** the following:

1. On October 19, 2020, the appellants worked the 1:00-p.m.-to-9:00-p.m. shift. They had two authorized ten-minute breaks, and a half-hour lunch/dinner break during their shift. The evidence is inconclusive as to what duties or detail they had following their 1:00-p.m. meeting with Duncan on October 19, 2020.

2. The appellants took their dinner break at around 5:00 p.m. From approximately 5:33 p.m. to 6:00 p.m., the appellants sat at the school's loading dock, while Grimsley smoked a cigarette and conversed with Wilcher. For the approximately thirty minutes that they were on the loading dock, the appellants were "on the clock," they were not on a scheduled break, and they were not working. They did not wear face masks during this time.

3. When the appellants exited the school building at around 6:00 p.m., Wilcher used a piece of cardboard to keep the door from closing and locking them out of the building. This created a safety hazard because the building was not properly secured. They were meeting Duncan outside; however, the appellants' testimony that they were awaiting direction from Duncan as to what to work on after their dinner break was not credible.

4. After exiting the school building, the appellants sat in Grimsley's car.

5. At around 6:19 p.m., Duncan pulled up next to Grimsley's car. The school's Vice Principals are seen on surveillance leaving the school about three minutes later. The appellants remain in Grimsley's car during this time, not working.

6. The appellants were smoking cigarettes in the school parking lot. They were not wearing masks and they were not socially distancing outside (maintaining at least a six-foot distance from one another).

7. About three minutes later, a car driven by an unidentified man pulled into the lot and parked near Duncan's car. The man exited his car and walked towards Duncan, who then exited his vehicle and greeted the man.

8. The appellants exited Grimsley's car and greeted the man with handshakes.

9. While greeting Grimsley, the man placed a small object in a small plastic bag into his hand, which Grimsley immediately returned to the man. Grimsley appeared surprised that the man handed this to him, and there is no evidence that Grimsley asked for or expected to receive this.

10. There is no evidence that the appellants invited the man into the school parking lot, or that they opened the gate to let the man into the lot.

11. The unidentified man then handed something to Duncan, who inspected and smelled the object contained in a plastic bag. Using his telephone, Duncan appears to have made an electronic payment to the man. While the content of the plastic bag is unknown, the exchange between Duncan and the man appears to have been a drug transaction.

12. There is no evidence that Wilcher or Grimsley purchased or ingested any controlled dangerous substance, drug, or alcohol on October 19, 2020. While Grimsley smoked in the parking lot and the respondent questioned whether he was smoking marijuana, there is insufficient evidence to find that he smoked anything other than cigarettes that evening. The appellants were present when Duncan received the plastic bag, and they were conversing with Duncan and the man during that time, but there is no evidence that the appellants participated in a drug transaction in any fashion.

13. The appellants did not appear intoxicated or under the influence on the surveillance video, and there is no credible evidence that the appellants displayed reasonable suspicion via physical manifestation that they may have been under the influence on October 19, 2020 or on October 21, 2020.

14. Minutes after the unidentified man left the parking lot, a second unidentified man entered the lot and spoke with the appellants and Duncan. There is no credible evidence that the appellants invited him or opened the gate for him, but they did spend about forty-five minutes with him in or around the playground area.

15. The appellants re-entered the building at around 7:50 p.m., after spending about two hours outside. The appellants were scheduled to be working during those two hours, but the preponderance of the evidence demonstrates that they were not working. When they are seen on camera, they are only seen talking and walking around, but not working.

16. Two days later, on October 21, 2020, the appellants and Duncan were directed by District staff to undergo a drug test based on what District staff observed on the surveillance video taken on October 19. The appellants did not consent, and they requested to speak with their union representatives. The appellants were not questioned about the events of October 19. Multiple attempts were made over the course of at least thirty minutes by Grimsley and District staff to reach the union representatives, but they were unsuccessful. The appellants were informed that the failure to undergo the urinalysis would be considered a positive test, and that this could lead to termination.

17. The appellants were asked to leave the building when they refused to be transported for a drug test. They were subsequently terminated for refusing to undergo drug testing.

18. There is no evidence that the District ever provided the appellants with a copy of District Policy #4119.23. There is also no evidence that the District ever provided the appellants with, or informed them of, the District Reopening Plan for 2020–2021, or of any policy requiring them to wear face masks and socially distance in the school parking lot.

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)(12).

In disciplinary cases, the appointing authority has 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 the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Therefore, the first issue in this proceeding is whether a preponderance of the credible evidence supports the charges set forth in the FNDA. If so, the second issue to be addressed is whether termination is the appropriate disciplinary action.

Here, the appellants are charged with: Conduct Unbecoming a Public Employee; Neglect of Duty; Incompetency, Inefficiency, or Failure to Perform Duties; Insubordination; and Other Sufficient Cause. The appellants are also alleged to have

violated District Policy #4119.23,[1] Prohibiting the Use or Distribution of Drugs at the Work Site and Prohibiting Smoking in School Buildings; and the District's 2020–2021 Reopening Plan,[2] requiring face masks.

District Policy #4119.23 also contains the District's policy governing drug testing of District employees. It specifically provides: "Any employee that displays reasonable suspicions via physical manifestation that they may be under the influence will be subject to a test of a board approved certified cite [sic]. Failure of an employee to undergo a test will be considered a positive test and may be subject to disciplinary action." Here, as Evans testified, the appellants were terminated by the District because they refused to undergo drug testing on October 21, 2020, when the District asserts it had reasonable suspicion that they were under the influence. While the appellants failed to be tested, they did not display reasonable suspicions "via physical manifestation" as the policy requires that they may have been under the influence of any drug or alcohol on October 19, or October 21, 2020. While Wilcher and Grimsley were present when Duncan and the unidentified man were engaged in what appears to be a drug transaction, there is no evidence in the record that the appellants ingested any drugs or appeared to be under the influence. While the appellants may have been smoking cigarettes, there is insufficient evidence to suggest that they were smoking marijuana. Evans's testimony that Grimsley manifested that he was under the influence because he was sweating and stumbling was farfetched and inconsistent with my own assessment of the surveillance video. Absent any physical manifestation that they may have been under the influence, District Policy #4119.23 does not support subjecting an employee to mandatory drug testing or terminating them for failing to comply with an

[1] District Policy #4119.23 states, in relevant part:

"District employees are not permitted on any worksite after having ingested any controlled dangerous substance or drug . . . or after having consumed any alcoholic beverage. Violations of these provisions shall result in disciplinary action. The unlawful manufacture, distribution, dispensing, possession of, use of or sale of any narcotic drug, hallucinogenic drug, amphetamine, barbiturate, marijuana or any other controlled substance in/on worksites is prohibited. Any violation of this policy is grounds for termination of employment and may subject the District employee to criminal prosecution as well as termination." The Policy also states: "Smoking by District employees in/on District school buildings is prohibited."

[2] In October 2020, instruction was provided remotely to students at Elliott Street School due to the COVID-19 pandemic. The 2020–2021 District Reopening Plan, which was posted on the District's website at the time, provides health and safety procedures to address pandemic concerns. It requires "all

improper directive. I, therefore, **CONCLUDE** that the District wrongfully terminated the appellants on the basis that they did not comply with the District's Order to undergo drug testing.

The respondent asserts that the appellants violated District Policy #4119.23, which prohibits District employees on any worksite after having ingested any controlled dangerous substance or drug, as well as the "unlawful manufacture, distribution, dispensing, possession of, use of or sale of any narcotic drug, . . . marijuana or any other controlled substance in/on worksites." The respondent, however, has not demonstrated by a preponderance of the evidence that the appellants ingested any drug, or that they were engaged in the unlawful manufacture, distribution, dispensing, use or willful possession of any drug or controlled substance. In fact, when Grimsley was handed something that appears to have been an illegal substance, he appeared surprised and immediately returned it. Moreover, while in its post-hearing brief the respondent faults the appellants for not reporting the transactions, they were actually never charged with failing to report any illegal activity.

District Policy #4119.23 also expressly prohibits smoking by employees "in/on District school buildings," but this prohibition, per the Policy, does not appear to extend to school parking lots. On October 19, 2020, Grimsley smoked inside the school building, near the loading dock for several minutes, and both Wilcher and Grimsley smoked in the school parking lot. I **CONCLUDE** that Grimsley only violated District Policy #4119.23 when he smoked inside the school building, but that the appellants did not violate this policy in any other fashion.

The District's Reopening Plan requires employees to wear face masks when entering school buildings or District grounds, and it encourages social distancing. It does not expressly require employees to maintain a six-foot distance from one another or visitors to the school. While the appellants were not wearing face masks when they were in the loading dock area or outside, and while this may not have complied with the District's Reopening Plan, I **CONCLUDE** that this was only a de minimis violation of the

---

employees, . . . visitors and anyone entering school or district buildings/grounds" to wear a face mask, and

District's mask-wearing policy that does not warrant major discipline. There is no evidence that the appellants were even informed of any policy requiring masks and social distancing outside, and there is no evidence that any student or other employee was ever placed in danger by the appellants' failure to wear a mask or socially distance.

The District charged appellants with conduct unbecoming a public employee, pursuant to N.J.A.C. 4A:2-2.3(a)(6). "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 for [government] employees and confidence in the operation of [governmental] services." Karins v. City of Atl. City, 152 N.J. 532, 554 (1998) (quoting 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)).

The appellants are also charged with neglect of duty, N.J.A.C. 4A:2-2.3(a)(7). "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, 2009 N.J. AGEN LEXIS 112 (February 5, 2009) (citation omitted), adopted, Civil Service Commission (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. 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.

---

it states, "we must ensure social distancing."

Grimsley and Wilcher are also charged with violating N.J.A.C. 4A:2-2.3(a)(1) for incompetency, inefficiency, or failure to perform their duties. In this type of breach, an employee performs his or her duties, but in a manner that exhibits insufficient quality of performance, inefficiency in the results produced, or untimeliness of performance, such that his or her performance is substandard. See Clark v. N.J. Dep't of Agric., 1 N.J.A.R. 315 (1980), http://njlaw.rutgers.edu/collections/njar/. Incompetence means that an individual lacks the ability or the qualifications to perform the duties required of him or her. Rivera v. Hudson Cty. Dep't of Corr., 2016 N.J. AGEN LEXIS 869 (October 24, 2016), adopted, Civ. Serv. Comm'n (November 28, 2016), http://njlaw.rutgers.edu/collections/oal/.

The appellants are charged with insubordination, pursuant to N.J.A.C. 4A:2-2.3(a)(2). The Civil Service Act does not provide a definition for this charge. The term, however, is generally interpreted to mean the refusal to obey an order of a supervisor. In re Shavers-Johnson, 2014 N.J. AGEN LEXIS 439 (July 30, 2014), adopted, Civ. Serv. Comm'n (September 3, 2014), https://njlaw.rutgers.edu/collections/oal/. According to Webster's II New College Dictionary (1995), "insubordination" refers to acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. In In re Rudolph, 2000 N.J. AGEN LEXIS 765 (October 23, 2000), adopted, Merit Sys. Bd. (December 18, 2000), http://njlaw.rutgers.edu/collections/oal/, the Merit System Board upheld the removal of a public-works repairer for refusing to respond to the reasonable orders of his supervisor to complete an assignment.

Finally, the appellants are charged with violating N.J.A.C. 4A:2-2.3(a)(12), "other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standards of good behavior which devolve upon one who stands in the public eye as an upholder of that which is morally and legally correct. In re MacDonald, 2014 N.J. AGEN LEXIS 236 (May 19, 2014), adopted, Civil Serv. Comm'n (September 3, 2014), http://njlaw.rutgers.edu/collections/oal/.

Based on my findings of fact, and specifically that Grimsley and Wilcher failed to work for about two and a half hours on October 19, 2020, without any reasonable explanation, when they were required to do so, I **CONCLUDE** that the appellants' conduct constitutes a violation of 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; and N.J.A.C. 4A:2-2.3(a)(1), for failing to perform their duties as custodial workers. I also **CONCLUDE** that Grimsley's smoking inside the school building constitutes unbecoming conduct, in violation of N.J.A.C. 4A:2-2.3(a)(6). Moreover, I **CONCLUDE** that Wilcher leaving the door to the school ajar, which created a safety hazard, also constitutes unbecoming conduct, in violation of N.J.A.C. 4A:2-2.3(a)(6). Therefore, I **CONCLUDE** that charges against Wilcher and Grimsley for violating 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), and N.J.A.C. 4A:2-2.3(a)(1) (incompetency, inefficiency or failure to perform duties) must be **SUSTAINED**. The respondent, however, has failed to demonstrate by a preponderance of the credible evidence that the appellants' conduct was insubordinate in violation of N.J.A.C. 4A:2-2.3(a)(2), or that it violated N.J.A.C. 4A:2-2.3(a)(12). Therefore, the charges of violating N.J.A.C. 4A:2-2.3(a)(2) (insubordination), and N.J.A.C. 4A:2-2.3(a)(12) (other sufficient cause) as to Wilcher and Grimsley must be **DISMISSED**.

When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to re-evaluate 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.

Progressive discipline may only be bypassed when the misconduct is severe, when it renders the employee unsuitable for continuation in the position, or when the application of progressive discipline would be contrary to the public interest. In re Herrmann, 192 N.J. 19, 33 (2007). Termination of employment is the penalty of last resort reserved for the most severe infractions or habitual negative conduct unresponsive to intervention. Rotundi v. Dep't of Health & Human Servs., OAL Dkt. No. CSV 385-88, Initial Decision (September 29, 1988).

Here, the appellants' conduct and sustained charges are insufficiently severe to warrant termination, and I **CONCLUDE** that the penalty of removal is excessive, and that progressive discipline should apply. While the appellants were physically present when their supervisor was engaged in what appears to be a drug transaction, the preponderance of the evidence does not show that they bought, sold, or used drugs, or that there was any physical manifestation that they may have been under the influence on the evening of October 19, 2020. They did, however, socialize at the school for about two and a half hours when they should have been working, and their misuse of State time, or "theft of service," warrants discipline. While Wilcher created a safety hazard when he kept the door to the school open while he was outside, luckily no unauthorized person entered the school, and nobody was harmed. Also, while Grimsley violated school policy by smoking in the building for a few minutes after having dinner, nobody other than Wilcher was present, and nobody was harmed.

Finally, it is undisputed that Wilcher has never been suspended or disciplined in the eighteen years of service at the Newark Public School District, and that Grimsley's disciplinary history only consists of being written up once for not vacuuming properly. Although he was disciplined and terminated twenty years ago, that discipline was reversed following a hearing.

Given the sustained charges and absence of any significant disciplinary history, I **CONCLUDE** that a forty-five-day suspension is a more appropriate and proportionate penalty.

ORDER

It is **ORDERED** that the determination of respondent to remove Billy Grimsley and Salik Wilcher is **REVERSED**.

It is further **ORDERED** that Billy Grimsley and Salik Wilcher be suspended for forty-five days and receive the return of appropriate benefits.

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.

Susana E. Guerrero

April 12, 2022

DATE

SUSANA E. GUERRERO, ALJ

Date Received at Agency: April 12, 2022

Date Mailed to Parties: April 12, 2022

jb

APPENDIX

WITNESSES

For Appellant:

Salik Wilcher

Billy Grimsley

For Respondent:

Jannelle McIntosh-Evans

Karisa DeSantis

Anthony Jackson

EXHIBITS

Joint:

J-1	Video footage (formerly labeled J-40)

For Appellant:

A-1	Printout of Newark Board of Education website

For Respondent:

R-1	Preliminary Notice of Disciplinary Action for Grimsley dated October 22, 2020
R-2	Amended Preliminary Notice of Disciplinary Action for Grimsley, with Rider containing specifications dated November 23, 2020
R-3	Cover page of Loudermill Hearing Decision and Order for Grimsley
R-4	Letter to Grimsley with Final Notice of Disciplinary Action dated December 23, 2020
R-5	Not in evidence
R-6	Work schedule given to Evans by DeSantis for Grimsley

R-7	Pay-period printout for Grimsley
R-8	Preliminary Notice of Disciplinary Action for Wilcher dated October 22, 2020
R-9	Amended Preliminary Notice of Disciplinary Action for Wilcher, with Rider containing specifications dated November 13, 2020
R-10	Cover page of Loudermill Hearing Decision and Order for Wilcher
R-11	Letter to Wilcher with Final Notice of Disciplinary Action dated December 23, 2020
R-12	Not in evidence
R-13	Custodial Worker Schedule for Wilcher on October 20, 2020
R-14	Pay-period printout for Wilcher for October 2020
R-15	Report of Incident dated October 19, 2020
R-16	Investigation Report dated October 21, 2020
R-17	Civil Service job description for Custodial Worker
R-18	Reopening Plan for District, 2020–2021
R-19	Policy, File Code 4119.23 for District
R-20	Policy on Conduct for District
R-21	Surveillance video—17-20-00-988
R-22	Surveillance video—18-00-00-314
R-23	Not in evidence
R-24	Not in evidence
R-25	Surveillance—18-27-00-389-2
R-26	Not in evidence
R-27	Not in evidence
R-28	Surveillance—15-35-00-110
R-29 to R-35	Not in evidence
R-36	Surveillance—17-00-00-047
R-37	Surveillance—18-05-16-545
R-38	Surveillance—18-50-06-708
R-39	Surveillance—19-35-46-196