

primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

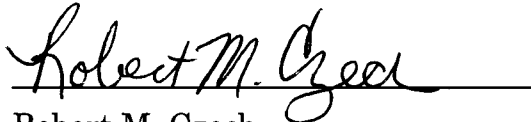
ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore modifies the 4 month suspension to a 10 working day suspension. The Commission further orders that appellant be granted back pay, benefits, and seniority for the period following the imposition of the 10 working day suspension. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

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

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
OCTOBER 7, 2015



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
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attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 04310-15

AGENCY DKT. NO. 2014-2330

**IN THE MATTER OF JOSEPH GANDOLFO,
TOWNSHIP OF WEST ORANGE, DEPARTMENT
OF PLANNING AND DEVELOPMENT.**

Amilcar Perez, Esq., for appellant, Joseph Gandolfo (Perez, Gonzalez and Galleno, attorneys)

Kenneth Kayser, Esq., for respondent, Township of West Orange

Record Closed: August 19, 2015

Decided: September 8, 2015

BEFORE **ELLEN S. BASS, ALJ**:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Township of West Orange (West Orange) suspended Plumbing Sub-Code Official Joseph Gandolfo (Gandolfo) for four months, alleging that he was insubordinate; and that his conduct rose to neglect of duty, conduct unbecoming a public employee, failure to perform his duties, and failure to meet the standards of conduct required by local policy and procedures. At issue is whether Gandolfo violated Civil Service rules and local policy, and, if so, what should be the penalty.

The Department issued a Preliminary Notice of Disciplinary Action (PNDA) on July 23, 2014. The PNDA was re-served on July 31, 2014, to correct typographical errors in the original version. A local hearing was conducted on December 5, 2014, and a decision issued on December 23, 2014, upholding all the charges with the exception of a charge of "Inability to Perform Duties." A Final Notice of Disciplinary Action (FNDA) was issued on January 7, 2015, which provided for a 180-working-day suspension. Gandolfo appealed to the Civil Service Commission on January 16, 2015, and the matter was transmitted to the Office of Administrative Law (OAL) on March 27, 2015. Thereafter, an amended FNDA was forwarded to Gandolfo by letter dated May 14, 2015, reducing the discipline imposed to a four-month suspension.

A hearing was conducted at the OAL on August 19, 2015, at which time the record closed.

THE SPECIFICATIONS

West Orange has filed five charges against Gandolfo, all of which arise from the identical factual allegations, as follows:

On or about Wednesday, July 23, 2014 you failed to perform the duties assigned to you as the Plumbing Sub-Code Official whereby you stormed out of the office and refused to discuss with your immediate supervisor, Tom Tracey, the Construction Code Official, an incident regarding a complaint he received about your demeanor . . . during a plumbing inspection

FACTUAL DISCUSSION AND FINDINGS OF FACT

Gandolfo has held his position as a Plumbing Sub-Code Official with West Orange since 2011. He initially was retained to work part-time, but has been employed on a full-time basis since 2012. Gandolfo's position requires that he ensure that building projects in West Orange are compliant with local and state construction codes; he aptly described his role as one that makes him responsible for the safety and welfare of residents of West Orange, as well as visitors to the community. As a Sub-

Code Official, Gandolfo is licensed and trained to both review construction plans and inspect construction sites in homes and businesses. His typical day involves some time in the office at the start and finish of the day, but the bulk of his day is spent in the field, doing inspections. His supervisor, Construction Official Thomas Tracey, estimated that Gandolfo conducts about 1700 inspections a year. Accordingly, Gandolfo's position requires that he interact extensively with both members of the public, and with the contractors they retain to make improvements to their homes.

It is uncontroverted, and I **FIND**, that Gandolfo is technically quite skilled, and his superiors have never quarreled with his professional judgment relative to the issuance of plumbing approvals. Gandolfo shared letters and emails in which the building department's work, and his efforts in particular, are praised by members of the public. But it is also uncontroverted, and I **FIND**, that members of the public have complained about Gandolfo's demeanor on more than one occasion; and have found him difficult to work with and rude. While Tracey has discussed these complaints with Gandolfo, they have never given rise to any formal disciplinary action. Indeed, Gandolfo has never previously been the subject of formal discipline for any reason whatsoever during the course of his employment with West Orange.

It is against this backdrop that Tracey was alerted on July 22, 2014, that a resident of West Orange had complained about Gandolfo's demeanor that morning during an inspection of a hot water heater. Tracey called Gandolfo at about three o'clock. He was still out in the field. Tracey shared that the resident had complained that Gandolfo was rude and had failed to adequately explain why her heater had failed inspection. Tracey and Gandolfo had a civil conversation, during which the resident's concerns and Gandolfo's version of the events were discussed.

But later that day, Tracey was informed that the resident had complained on the mayor's Facebook page about the plumbing inspection. Via an email from Mayor Robert Parisi, Tracey learned that the resident had complained that she received only a "handwritten in chicken scratch 'failure list' on the back of permit approval stickers," and that she had questioned the professionalism of this approach to informing residents

why construction work had failed inspection.¹ Tracey had not discussed the Facebook complaints with Gandolfo during their telephone conversation, so he asked him to come into his office on the morning of July 23, 2014. Tracey anticipated he would have to contact the resident and update his superiors, and he wanted the complete story. He was correct. The concerns surrounding this inspection were indeed the subject of emails on both July 23, 2014, and July 24, 2014; to include exchanges between the disgruntled resident and the mayor, together with emails directing Tracey to investigate.

The parties met in Tracey's office behind closed doors. The meeting started off amicably enough; although Gandolfo admitted he did not understand why he was being asked to discuss this plumbing inspection yet again. But when Tracey mentioned the complaints lodged on the mayor's Facebook page the meeting took a negative turn. The parties suggested that their versions of the events were diametrically opposed, but after hearing their testimony, it is clear that there are only minor disagreements as to what occurred. According to Tracey, Gandolfo raised his voice; said he had no additional information regarding the controverted inspection; expressed ignorance about social media outlets like Facebook; and stormed out of the room, arms flailing. Gandolfo admitted leaving the meeting, but urged his departure was justified, since he had better things to do than engage in a conversation about social media. Once Facebook was mentioned, he assumed that the substantive conversation was over, and testified that he simply, and calmly, walked out of Tracey's office.

But when I asked Gandolfo directly whether he inquired if the meeting was over, or asked if he could be excused before departing Tracey's office, he admitted that he did neither. Accordingly, it is clear, and I **FIND**, that Gandolfo's supervisor asked him to meet about an important work-related issue; Gandolfo walked out of the meeting before Tracey told him the meeting was over; and before Tracey could obtain the information he needed to complete his investigation. Gandolfo glibly urged that he should not be required to discuss social media, but his testimony simply buttressed Tracey's contention that his departure from the meeting was abrupt and inappropriate. Indeed,

¹ That email was sent earlier in the day, but Tracey testified with credibility that he did not access the email until later, and after he had reviewed the matter initially with Gandolfo via telephone.

had Gandolfo extended his supervisor the courtesy and respect he deserved, he would have stayed long enough to learn that the conversation was not about Facebook, but about the complaints that were posted there. I **FIND** that Gandolfo's departure was sudden, lending credibility to Tracey's description of that departure as done in anger. Indeed, Gandolfo admitted that he was exasperated by a conversation that he felt was repetitive, and had digressed to a topic of no interest to him. I thus **FIND** that Gandolfo raised his voice and demonstrated that exasperation with his supervisor via hand gestures, as Tracey testified.

Tracey followed Gandolfo out of his office, and would have called out after him to return and finish their meeting, but for the fact that the outer office by this time was filled with people, including members of the public. Instead, Tracey consulted his superiors for advice as to next steps relative to taking disciplinary action against Gandolfo.

West Orange has a Policy and Procedures Manual (Manual), which is supplied to new employees; Gandolfo acknowledged receiving the Manual on July 1, 2013. The Manual lists some seventeen examples of nonprofessional conduct, noting that the list is not intended to be exhaustive. At Section 6:1-2(c)(4), the Manual provides that the following may be the subject of disciplinary action: "Insubordination or the refusal by an employee to follow a supervisor's instruction concerning a job-related matter."

LEGAL ANALYSIS AND CONCLUSIONS

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the

case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Both guilt and penalty are redetermined 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).

West Orange has filed five charges against Gandolfo, all of which arise from the same set of facts. In his closing statement, counsel for West Orange readily conceded that at its essence, this is a case about insubordination. I **CONCLUDE** that the remaining charges are subsumed within the charge of insubordination. I moreover **CONCLUDE** that the Department has met its burden of proving by a preponderance of the credible evidence that Gandolfo engaged in an act of insubordination in violation of N.J.A.C. 4A:2-2.3(a)(2).

Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person. Siebold v. Borough of Union Beach, CSV 971-04, Initial Decision, (April 4, 2007), <http://njlaw.rutgers.edu/collections/oal/>; see also Stanziale v. County of Monmouth Bd. of Health and Merit Sys. Bd., A-3492-005 (App. Div. April 11, 2002), <http://njlaw.rutgers.edu/collections/courts/> (where the court expressly adopts the Webster's Dictionary definition).

Here, Gandolfo was asked to meet with his supervisor behind closed doors in the supervisor's office. The location of the meeting, together with the fact that the door was closed, should have signaled to Gandolfo that this was not a casual conversation, and that it pertained to a topic of serious concern to his supervisor. Accordingly, it is inexcusable that Gandolfo exited the meeting before Tracey told him their conversation was over. Gandolfo's abrupt departure was disrespectful; non-cooperative; prevented Tracey from completing his investigation; and I **CONCLUDE** rose to insubordination. For the same reasons, Gandolfo's conduct was violative of Section 6:1-2(c)(4) West Orange Employee Policy and Procedures Manual.

PENALTY

In this de novo review of West Orange's disciplinary action I am required to reevaluate the penalty on appeal. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, suspension or a fine of no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number and proximity of prior disciplinary infractions evaluated by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

I **CONCLUDE** that the four-month suspension imposed by West Orange is too harsh, and entirely disproportionate to the current offense. It is clear to me that West Orange was concerned about Gandolfo's overall demeanor, and for this reason, and this reason alone, imposed this extremely harsh penalty. Counsel for West Orange admitted as much on the record. But the only charge filed against Gandolfo pertains to his demeanor in Tracey's office on July 23, 2014. If West Orange feels that the complaints by members of the public against Gandolfo warrant discipline, it is incumbent upon the appointing authority to properly file and process notices of disciplinary action with these concerns specified. Indeed, while I entertained some limited testimony about the volume of public complaints against Gandolfo, I stressed on the record, and reiterate here, that I permitted this testimony only to allow West Orange to create a setting for Tracey's persistence in discussing the complaint lodged by a citizen on July 22, 2014. The issue of Gandolfo's demeanor with members of the public is not before me, and cannot factor into my determination of a reasonable penalty against him.

The penalty is likewise inconsistent with any notion of progressive discipline. This is an employee who has never before been the subject of any disciplinary action. For these reasons, I **CONCLUDE** that the suspension imposed against Gandolfo should be reduced to ten working days.

ORDER

It is **ORDERED** that the charges by the West Orange Department of Planning and Development against Joseph Gandolfo are **AFFIRMED**, but that the penalty be reduced from a four-month suspension to a ten-working-day suspension.

It is further **ORDERED** that Joseph Gandolfo be awarded back pay in accordance with the guidelines set forth in N.J.A.C. 4A:2-2.10.

I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. 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.

September 8, 2015

DATE



ELLEN S. BASS, ALJ

Date Received at Agency:

September 8, 2015

Date Mailed to Parties:

SEP - 9 2015



DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESSES

For Appellant:

Joseph Gandolfo

For Respondent:

Thomas Tracey

EXHIBITS

For Appellant:

P-1 Packet of letters and emails

For the Department:

- R-1 Preliminary Notice of Disciplinary Action
- R-2 Amended Preliminary Notice of Disciplinary Action
- R-3 Memorandum dated July 23, 2014
- R-4 Standards of Conduct
- R-4a Acknowledgement
- R-5 Emails