A-4

STATE OF NEW JERSEY

In the Matter of Manny Lourenco
City of Newark,
Department of Water & Sewer

CSC DKT. NO. 2012-2506
OAL DKT. NO. CSV 03945-12

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 13, 2015 BW

The appeal of Manny Lourenco, Principal Engineering Aide, City of Newark, Department of Water & Sewer, resignation not in good standing effective July 21, 2011, on charges, was heard by Administrative Law Judge Leslie Z. Celentano, who rendered her initial decision on August 27, 2015. Exception were filed on behalf of the appellant. Reply to exceptions were field on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on October 7, 2015, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in resigning the appellant not in good standing was justified. The Commission therefore affirms that action and dismisses the appeal of Manny Lourenco.

Re: Manny Lourenco

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

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

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
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
OAL DKT. NO. CSV 03945-12
AGENCY DKT. NO. 2012-2506

IN THE MATTER OF MANNY LOURENCO, CITY OF NEWARK, WATER AND SEWER UTILITIES.

Sanford R. Oxfeld, Esq., for appellant Manny Lourenco (Oxfeld Cohen, P.C., attorneys)

Kenneth G. Calhoun, Assistant Corporation Counsel, for respondent City of Newark ((Anna P. Pereira, Corporation Counsel)

Record Closed: June 8, 2015 Decided: August 27, 2015

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

STATEMENT OF THE CASE

The appellant was resigned not in good standing, and removed effective July 21, 2011, based upon allegations of failure to comply with leave policy, and absences without leave. N.J.A.C. 4A:2-6.2. The matter was transmitted to the Office of Administrative Law (OAL) on March 23, 2012, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. At issue is whether Mr. Lourenco engaged in the alleged

conduct and, if so, whether it constitutes an action for which a penalty of resignation not in good standing is warranted.

PROCEDURAL HISTORY

By Preliminary Notice of Disciplinary Action (PNDA) dated December 5, 2011, the appointing authority proposed to resign the appellant not in good standing on August 10, 2011, and on December 4, 2011, an amended PNDA was issued correcting a statutory reference. On January 13, 2012, appellant was served with a Final Notice of Disciplinary Action (FNDA) sustaining the charges and resigning the appellant not in good standing. Appellant requested a hearing, and the matter was transmitted to the OAL.

A settlement conference was scheduled for May 3, 2012. After the matter did not resolve, it was rescheduled for October 29, 2012; however, that date was adjourned at the request of counsel for respondent, who had just been assigned to the matter and had another trial commencing on the same date. A case-management conference call was held on October 24, 2012.

The matter was then rescheduled for April 2, 2013; however, that date was adjourned due to the undersigned's conflict, and the matter was rescheduled for hearing on June 17, 2013. That date, however, was adjourned at the request of counsel for respondent, who indicated that he was undergoing surgery on June 4, 2013, and not returning to work until July 15, 2013.

The matter was then rescheduled for hearing on February 14, 2014; however, the hearing was adjourned at the request of appellant's counsel, who had a conflict on that date, and the matter was rescheduled for July 22, 2014, on which date the hearing commenced. The parties requested an additional day for hearing, and on March 4, 2015, the matter continued and was concluded. The parties requested an opportunity to submit post-hearing briefs, and the submissions were received on June 8, 2015.

Based on the administrative law judge's voluminous caseload, an extension of time to complete the initial decision was granted. N.J.S.A. 52:14B-10(c); N.J.A.C. 1:1-18.8.

FACTUAL DISCUSSION

Appellant had been employed by the City of Newark, Department of Water and Sewer Utilities, since August 2000. He took leaves of absence in 2006 for five and a half weeks; in 2007 for six weeks; in 2009 for nine weeks; in 2010 for ten weeks; and in early 2011 for eleven weeks. On July 13, 2011, appellant submitted a note requesting a leave of absence commencing the next day. The note was addressed to his supervisor, Mr. Trusca, and requested a fifty-four-day leave commencing July 14, 2011. Attached to his request was a "declaration" from a fertility center in Brazil and a translation indicating that appellant would be under their professional care for fifty-four days.

Talib Aquil, the assistant director of public works, became aware of the letter, and denied the leave request in a July 13, 2011, memorandum to appellant. Appellant was informed by Mr. Aquil and his supervisor Mr. Trusca that the leave had been denied because appellant did not provide thirty days' notice and the request was not for a "serious health condition" as was required by the policy. A denial letter was drafted by the director, Mr. Greene, detailing the lack of compliance with the policy and reasons the leave was being denied, explaining that thirty days' notice was not provided and that a serious health condition had not been indicated by any doctor, and as such the medical certification was incomplete and the doctor's note insufficient.

The appellant was aware of respondent's policies and procedures regarding leaves of absence, and his letter, provided one day in advance of a fifty-four-day leave, was not in compliance with those policies and procedures. Appellant was specifically denied approval for the leave he requested on July 13, 2011, and was notified and aware that he did not have such approval. Appellant nevertheless did not appear for work on the following day and failed to provide any of the additional information that was necessary in order to even consider his leave request. Appellant was absent until August 16, 2011.

Prior to the July to August 2011 leave, appellant had taken several leaves of absence and was issued warnings associated therewith, as follows.

2006: five and a half weeks (October 10–November 17)
2007: six weeks (July 2–August 14)
2009: nine weeks (August 7–October 10)
2010: ten weeks (August 12–October 18)
2011: eleven weeks (January 18–April 12)

On September 25, 2006, appellant received a written warning for abuse of sick-time benefits and was informed that if the behavior were to continue, disciplinary action would be instituted.

On February 7, 2007, appellant received a written final warning for abuse of sick-time benefits and tardiness, which detailed what the division manager at the time referred to as "egregious" abuse, and reminded appellant of the policies and procedures, including the requirement for submission of medical certification. The warning also reminded appellant that continued abuse of the policies could result in termination.

On March 20, 2007, appellant was given a notice of minor disciplinary action and suspended for one day, and was charged with having ignored the warnings for lateness and absenteeism previously issued and continuing to be excessively absent.

On June 25, 2010, appellant received yet another final warning regarding his chronic or excessive absenteeism, indicating that his pattern of attendance would not be tolerated and that if his behavior continued progressive disciplinary action would be initiated.

On February 14, 2011, appellant was sent a letter regarding his unauthorized absence, indicating that his last working day had been January 18, 2011, and citing to the policy that an absence without notice of five or more consecutive days is considered

to be abandonment of one's job, and that if the Division did not hear from appellant within five business days, action would be commenced to terminate his employment.

On March 30, 2011, appellant was issued a written warning regarding his request for a leave of absence from January 27, 2011, until April 12, 2011, for not having abided by the policy. The memo advises him that requests for leave must be submitted and written approval received prior to the absence, and that if appellant did not strictly adhere to the policy he would be subject to progressive disciplinary action including suspension and/or termination. Appellant was eventually provided with the paperwork and signed the application for a leave of absence in connection with this leave, and, as such, if he had not been fully aware by this time, the provision of the necessary paperwork, albeit after he left, certainly confirms his awareness of the policy and the requirement for written approval prior to taking any leave.

Despite his not having followed the policies and procedures regarding leave, appellant's leaves were ultimately approved after the fact.

TESTIMONY

Andrea Hall Adebowale

Ms. Adebowale has been employed with the City of Newark, Department of Water and Sewer Utilities, for twenty-five years and is currently the acting director. In 2011 she was the acting manager, and managed the sewer and water supply. Her responsibilities also included labor/management relations. She made recommendations for discipline to the director, represented the Department at hearings, and prepared paperwork for any leaves requested for the director to then review. The director at the time was Michael Greene, who reviewed the documents submitted to him, including the Personnel Action Form and the Action Leave Form. Typically, when taking family leave, an individual provides advance notice by submitting a written request for leave, and then the individual is asked for his or her medical certification. Family leave is permitted if a family member is ill, or for the birth of a child, or if the individual is sick. A leave of absence can be taken for sick leave, military service, running for office or filling a

position. If leave is taken because an individual is sick, the individual first takes family leave, which is a twelve-week maximum, and after that, if more time is needed, a leave of absence.

Adebowale relied upon the policy in effect in 2011 according to the handbook (Bates Stamp 027 and Bates Stamp 040) in processing requests for leaves.

Adebowale learned of appellant's request of July 13, 2011, for a Family and Medical Leave Act (FMLA) leave of absence from Talib Aquil, who was the assistant director of public works, and who brought her a letter that appellant had submitted to him (Bates Stamp 006). The letter was dated July 13, and appellant was asking for family leave commencing the next day. This concerned her because it was twenty-four hours' notice for a fifty-four-day leave. She spoke to Mr. Aquil, who indicated that the leave request was being denied. Ms. Adebowale testified that an individual requesting FMLA leave is required to provide medical documentation to support the request indicating the dates of absence and the reason(s) for the request.

Appellant submitted a doctor's note with his letter (Bates Stamp 007) and the doctor's note written in Portuguese (Bates Stamp 008) for a fertility center in Brazil.[1]

Appellant left on July 14 after being told that his leave request was denied. Both Mr. Aquil and Mr. Trusca, who was appellant's immediate supervisor, informed him that the leave was denied. A memo dated July 29, 2011, was prepared (Bates Stamp 011) advising appellant that the leave request was denied. The leave was denied because appellant did not provide thirty days' notice and the request was not for a "serious health condition," as was required. Adebowale was asked by the Department director, Mr. Greene, and the Division of Personnel to draft the denial, detailing the lack of compliance with the policy and the reasons the leave was being denied. She testified that planned treatment requires thirty days' notice and a "serious health condition," and

[1] The doctor's note, both the Portuguese version and the translation, are dated July 14, 2011, and are noted as having been translated and notarized July 13, 2011, one day earlier.

no such information was provided by any doctor. The last paragraph of the memo indicates that the medical certification is incomplete and the doctor's note insufficient.

Ms. Adebowale testified that appellant emailed her on August 22, 2011 (Bates Stamp 012) asking for a hearing and asserting that he told her he would be continuing with the treatment he had started in January; however, she testified that this is absolutely wrong, and that he never told her any such thing. She knew he had previously taken a leave to go to Brazil, although she had not learned about it in advance, and had no documents or information for review; she had not even been told that he was leaving. Accordingly, on February 14, 2011, she addressed a letter to appellant (Bates Stamp 013) advising him that as he had not been at work since January 18, 2011, he would be terminated. On February 16, 2011, she received an email from appellant (Bates Stamp 016) purporting to attach a medical certification and "leave of absence form" advising her that he was on leave. Included with the email was a letter in Portuguese from a fertility center, later followed by a translated declaration that he was being treated at the clinic indefinitely. (Bates Stamp 017–023). None of these documents had previously been submitted to anyone. Ms. Adebowale testified that the application for a leave of absence (Bates Stamp 017) is exactly what it says, that is, an application to ask for leave. In this case, the document is dated January 27, 2011, and asks for leave as of January 27, 2011; however, it was submitted February 16, 2011, three weeks after appellant was gone. Ms. Adebowale testified that Nereida Montalvo, the management specialist, indicated that she had not received any of these documents, and it was her job to complete them and give them to the witness. Ms. Adebowale testified that Nereida said she told appellant to get the documents in before he left, and he did not. Ms. Montalvo had no authority to grant the leave, in any event; only the department director can approve a leave.

On March 30, 2011, a written warning about his absence was sent to appellant (Bates Stamp 024) advising him of the policy for leave and warning him that failure to adhere to the policy in the future will result in disciplinary action, including suspension and/or termination. This warning was handed to him by the witness, who never spoke to him about either his leave or the "treatments" he was undergoing. Ultimately, however, the City approved the leave retroactively (Bates Stamp 025). The approval

form (Bates Stamp 026) was signed by the then-director, Michael Greene, the then-personnel director, Keisha Daniels, and the business administrator, Julia Neal. Ms. Adebowale testified that Mr. Greene had to authorize a leave before it was approved. Appellant's immediate supervisor, Mr. Trusca, had no authority to grant leaves of absence, nor did Ms. Montalvo.

Ms. Adebowale stated that her office does the paperwork and reviews it for completeness and then submits it to the director's office, to Personnel and to the business administrator. Water and Sewer Utilities cannot approve leaves of absence for its employees. Moreover, appellant had taken the prior leave without following the policy and had been admonished, and now did it again in July, blatantly ignoring the policy.

Ms. Adebowale testified that appellant has taken multiple leaves before, including in 2006, for five weeks from October 10, 2006, until November 17, 2006, indicating that his grandfather was ill. (Bates Stamp 064–066). He also took leave in 2009 following a car accident and injury (Bates Stamp 067–071), and from August 7, 2009, to September 5, 2009. Both of the above leaves were approved. He then took leave again between August 12, 2010, and September 29, 2010, and again from September 30, 2010, through October 18, 2010, indicating that the latter leave was to take care of his grandfather after his grandmother died. Then in January 2011 he was out again.

Ms. Adebowale agreed that the car accident obviously was not planned, and a relative getting sick could not be planned, and that emergencies do come up where thirty days' notice cannot be given. However, the leaves in this case were not emergent.

On June 25, 2010, appellant was issued a final warning (Bates Stamp 051) as a result of his chronic, excessive absenteeism. The warning came from Ms. Montalvo, the management specialist, and reflected that based upon the number of days appellant had been out sick, absent and late, his attendance needed to improve or disciplinary action would be taken. In 2007, appellant had been disciplined for excessive absenteeism. Mr. Aquil issued a memorandum to appellant dated July 13, 2011 (Bates

Stamp 009) detailing the policy and procedures for requesting family leave and listing prior leaves taken by appellant, ultimately denying his pending request for leave; Mr. Aquil wrote, "[based on] your blatant disregard for providing your superiors with reasonable prior notice and the burden your pattern of extend [sic] absences has put on the department your family leave has been denied." The memo directed appellant to report to work on Thursday, July 14, 2011, or face progressive disciplinary action, including suspensions and/or termination.

The witness reasserted that appellant absolutely never told her he was "going back for treatment," and that if he claims he told Mr. Aquil he had let her know, that was absolutely a lie. Ms. Adebowale testified that her March 30, 2011, memo to appellant (Bates Stamp 024) tells him in no uncertain terms that there are no leaves of absence without the approval of the appointing authority.

Ms. Adebowale also testified that she did not know about the email from appellant to Ms. Montalvo dated October 6, 2010 (Bates Stamp 075) asking to extend his leave, which Ms. Montalvo had no authority to grant.

D. Talib Aquil

Mr. Aquil has been employed by the City of Newark, Water and Sewer Utilities Department, for five and a half years. He has been employed with the City for eleven years. He is currently the assistant director of public works and was the assistant director of Water and Sewer Utilities in 2011. At that time his duties included responsibility for attendance, tardiness, employee behavior and any disciplinary matters. He was not the decision maker, but rather followed the policies in place, and the director made the final decisions in matters of discipline. The director at the time was Mr. Greene.

Appellant was a Water and Sewer Utilities employee at the time and was the provisional chief water inspector. In 2011 an issue arose regarding a leave request and appellant came to him. Mr. Aquil informed appellant that he needed documentation, that one day was not enough notice according to the policy, and that FMLA leave

required thirty days' notice unless it was an emergency. He prepared a memo on July 13, 2011, addressed to appellant (Bates Stamp 009) advising appellant that the policies and procedures require thirty days' written notice before the commencement of leave and that appellant had provided no notice, no documentation and nothing that would indicate that there were emergent circumstances to justify a family-leave request one day before departing for fifty-four days. The memo also referenced prior warnings issued to appellant for unapproved leave, including on March 30, 2011; and for leaves taken August 11, 2009, to October 9, 2009; and another one taken August 12, 2010, to October 15, 2010, all without the required notice. The memo also referenced appellant's blatant disregard of the policy and his pattern of extended absences, and advised him that he was to report to work or subject himself to progressive disciplinary action, including suspension and/or termination. Mr. Aquil indicated that appellant had come to him and indicated he was leaving the next day and did not indicate where he was going or for what. Appellant had also spoken to Mr. Trusca, who has no authority to authorize leave and plays no role in the decision; only the director can approve leaves. Aquil testified that Ms. Montalvo also has no authority to approve leaves. Aquil then informed appellant that he could not just leave, but must adhere to the policy and have his leave approved, to which appellant responded, "I'm leaving." Appellant provided no notice and insufficient documentation, and Aquil testified that the documents Bates Stamped 007 and 008 were wholly insufficient. He informed appellant that the policy requires notice so that leave can be approved, and also the FMLA forms need to be done before the personnel director can even review the leave request. The personnel director at the time was Ms. Keys, and appellant indicated that he would speak to her after he returned from his leave, which Aquil informed him was not what he needed to do. When appellant left the next day someone had to cover his position, and he had an important job at the time as a water inspector, overseeing the inspection unit, which included two inspectors for hundreds of miles of water lines. Mr. Aquil spoke to Mr. Greene regarding appellant leaving the next day and told Greene all that he had told appellant. They were many previous issues regarding appellant leaving to go to Brazil and taking family leave, and he had been warned previously, more than once, regarding excessive leave. Aquil agreed that some of appellant's prior leaves were approved after the fact, after appellant had returned.

Manny Lourenco

Manny Lourenco testified that he was hired in August 2000 in the Department as a student assistant and has worked continuously for the Department since. He became an engineering aide, and then in approximately 2010, when the Little Falls office closed, he was transferred to Newark and became chief water inspector.

He testified that the leave application for his 2011 leave (Bates Stamp 017) was emailed to him after he was already away, and this was the first time he had ever filled out a leave application. He testified that previously he would just tell his supervisors and "everything was taken care of." His absences were for the purpose of seeing a fertility doctor in Brazil. Appellant testified that he returned to work in mid-March and told his supervisor that the "procedures in Brazil" were not completed and that he might have to return.

Regarding his 2006 leave, appellant was out for five and a half weeks after submitting a leave application indicating "grandfather is ill" and stating that he needed to go to Portugal. The request was dated October 6, 2006, and the leave commenced four days later, on October 10, 2006.

Appellant took leave from July 2 through August 14, 2007, indicating "car accident injury," and also took leave from August 7, 2009, until September 5, 2009, as well as October 2, 2009, through October 10, 2009. Montalvo completed all the forms for him. In addition, appellant was out on leave from August 12, 2010, until September 29, 2010, and again commencing the next day from September 30, 2010, to October 18, 2010, nearly ten weeks in total, indicating that he needed to care for his grandmother after his grandfather had died. Appellant testified that in 2011 he did the same thing he had done for all prior leaves. He testified that in the beginning of July 2011 the doctor called from Brazil and said "come now, I'm going away in August." Appellant testified that he never received a copy of the Family and Medical Leave Policy (Bates Stamp 027) or the Leave of Absence Policy (Bates Stamp 040), but agrees he was suspended once previously.

Appellant agreed that prior to 2011 he had taken several leaves of absences as follows:

2006: five and a half weeks (October 10–November 17)
2007: six weeks (July 2–August 14)
2009: nine weeks (August 7–October 10)
2010: ten weeks (August 12–October 18)
2011: eleven weeks (January 18–April 12)

Appellant stated that as to his most recent leave, he had returned in March, 2011, so he felt he had not used all of his leave, but testified, "they all knew I had to go back." Appellant testified that his supervisors told him in March that his leave carried over for July (notwithstanding the March 30, 2011, memo indicating that he needed approval). He stated that he does not speak with Andrea anymore because of an argument they had, and that he had no idea that Trusca and Montalvo could not approve his leave, and did not know that signatures were required. He agrees he was aware, however, that in January 2011 an application for leave was emailed to him by Andrea, so he knew there was a form required, but "didn't know" other signatures were required, notwithstanding the multiple signature boxes on the form. He indicated that he never saw the form before January 2011 and just signed it and sent it back, asking why he needed to do an application or any paperwork. Appellant testified that all of his prior leaves were emergencies or came up at the last minute. He agreed that the March 30, 2011, memo instructs him that he needs written approval; however, he felt he had approval from January 2011 that carried over to July, and "assumed it was an extension of the January leave." Appellant agreed that his request of July 13, 2011, to take family leave starting July 14, 2011, for fifty-four days does not mention any extension of the January leave, but merely says he needs to continue treatment from January.[2]

Appellant agreed that he received the March 30, 2011, warning (Bates Stamp 024) months before his July leave and that it clearly told him what he needed to do. He received the memo dated July 13, 2011, the date on which he requested leave, which denied him leave and ordered him to report to work the next day, after he returned in

[2] Appellant had used approximately seven weeks of an eleven-week request from January, and yet was now seeking fifty-four days in July, which would have well exceeded the FMLA twelve-week leave time, so this could not have been the same leave under any circumstances.

August 2011 (Bates Stamp 009). He denied that it was handed to him by Mr. Aquil on July 13, 2011.

Valerie Gholston-Key

Ms. Gholston-Key has been employed by the City of Newark for more than twenty-six years and has been the assistant personnel director since 2007. Her duties included reviewing documentation and paperwork regarding family leave and absence leave and interpretation of the policies, including family-leave and leave-of-absence policies. She testified that the policy for medical leave has been in place since 1990 and was revised in 1994 (Bates Stamp 027–045). If an employee requests family leave the supervisor reviews the request and sends it to the director of the department for review. The deputy director at the time was Michael Greene. An individual's supervisor cannot approve a request for leave, but the department director can approve or deny it, and final approval comes from Personnel. Family leave requires a request in writing, and a medical certification that supports the leave, i.e., one signed by a doctor stating that the employee is under the doctor's care, that the employee cannot work, and the period of time that the employee cannot work. Leave can be denied if the medical certification is not sufficient to support the request or if the person has exhausted family leave. Advance notice is required, and failure to give notice could be a reason to deny the leave. Regarding the leave-of-absence policy, there is also an application required and the same medical certification as is needed for family leave, with the same standards. There are no intermittent leaves allowed, which there are with family leave. She agreed that some circumstances constitute emergencies where there is no advance notice, and they would not deny leave in those circumstances.

Ms. Gholston-Key was familiar with appellant's requests for leave in January to February 2011 and in July 2011. In January it was a leave of absence, so intermittent leave does not apply. She became aware of the July request when the department head, Mr. Aquil, called her and they spoke of the family-leave policy requirements and the fact that the medical certification presented by appellant was not in English. The notice requirements also had not been met. The director was informed of the request. Ms. Gholston-Key informed the appellant in writing about the family-leave policy and the

notice requirements and indicated that they had not been met (Bates Stamp 009). She testified that appellant came to her office concerned that his leave was denied, and she explained the request-and-approval process and indicated that leave needs to be approved before it's taken. She spoke to appellant before the memo went out and specifically stated to him, "a request for leave is not equivalent to an approval for leave," and indicated that he had better wait for the approval before he left. She made clear to him that his leave was denied because the timeframe was not met and because the medical certification did not meet the requirements of a serious health condition, as outlined in the family-leave policy. She indicated that employees are given a copy of the handbook on their first day, and the leave-of-absence policy is discussed generally. The January 2011 leave was a leave of absence, and no intermittent leave is permitted, and so that request does not carry over to July 2011. When appellant returned in April 2011 the "declaration" from the fertility center made no mention of treatment being "ongoing."

Viorel Trusca

Mr. Trusca has been the principal engineer (hydraulics) for the Water and Sewer Utilities Department since 1988. Most of the engineering is done at the Little Falls facility, which is the main office of the water system. He testified that the appellant worked in Little Falls, but then was transferred to Newark, and that he had supervised appellant at the Central Avenue, Newark, location and had asked for appellant to be on his team when he heard they were transferring him to Newark. In 2011 he supervised ten or eleven people on a technical support staff. He does not recall when appellant was transferred to Newark, but does recall appellant telling him twice about taking leave for fertility issues. He told appellant to follow the procedures, and that he had no objection if he went. Trusca does not know what the proper procedures are, as he does not handle that, but told appellant to follow those procedures.

He recalls appellant returning from leave and then asking to go a second time, saying he had to get a ticket and go. Appellant never informed him after the January trip that he would have to go back to Brazil on a moment's notice, but then in July he said that he had to leave. Trusca told him, "well, if you have to go, but follow the

procedures." He is not aware why the medical note does not mention an emergency; however, he does not sign leave requests and is not involved in the process at all. His duties include technical support only, and he is not familiar with the procedures for family leave or general leave, but knows there are procedures that have to be followed to get leave approved. Trusca did not know what family leave is.

Nereida Perez-Montalvo

Ms. Montalvo was employed by the City of Newark from June 13, 1977, until January 1, 2015, when she retired. She was a management specialist when she retired and was the administrator of purchasing and personnel for the Water and Sewer Utilities Department. She knew appellant had gone to Brazil in January 2011 for fertility treatments. She said that when appellant returned he told her that the treatment did not work and that he would have to go back, and that it might be "on the spur of the moment." He had indicated that his wife needed injections and that he had to play some role in that, but she did not get the details and did not know why it would be the spur of the moment if it was his wife who would be receiving injections. She believes appellant learned on a Friday that he had to be there Monday, and that he had spoken to Mr. Trusca, who said it was okay. Montalvo testified that appellant did not do an FMLA application, but rather supplied a doctor's note, although she had no idea why he did not have a note that indicated it was an emergency. She instructed him that the note had to be translated, and it was (Bates Stamp 007, 008).

Montalvo agreed that she prepared the paperwork for the medical leave, but did not have the authority for final approval. She gathered the information and then passed it up the chain, although part of her job was to determine whether the paperwork met the requirements. She agreed that the rules and regulations stated what the doctor's note needed to say and that the type of medical care and reason for the care needed to be articulated. She did not know that appellant had received a warning after his January trip and had not seen the March 30, 2011, memo to appellant from Ms. Adebowale (Bates Stamp 024), although she agreed that she had discussed everything regarding appellant's leave with Ms. Adebowale.

Around this time, Ms. Montalvo's job duties were changed, and she was no longer handling personnel matters, but focused on purchasing. Ms. Adebowale handled most of the personnel matters herself. Ms. Montalvo was never informed why she was completely removed from any involvement in personnel matters, which happened on the same day that appellant submitted his request for leave commencing the next day.

LEGAL DISCUSSION

The Civil Service Act, N.J.S.A. 11A:1-1 et seq., governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576, 581 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act sets forth that State policy is to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). To carry out this policy, the Act authorizes the discipline (and termination) of public employees. N.J.S.A. 11A:2-6.

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, -2.3. The general causes for such discipline are set forth in N.J.A.C. 4A:2-2.3(a). 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, 149 (1962); In re Polk, 90 N.J. 550, 561 (1982).

The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 275 (1958). Therefore, the judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Delaware, Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). 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) (citations omitted). Precisely what is needed to satisfy this burden must be judged on a case-by-case basis.

The reasons supporting disciplinary action must be sufficient and not arbitrary, frivolous or "likely to subvert the basic aims of the civil service program." Prosecutor's Detectives and Investigators Ass'n v. Hudson County Bd. of Freeholders, 130 N.J. Super. 30, 42 (App. Div. 1974) (quoting Kennedy v. Newark, 26 N.J. 178, 189–90 (1959)).

N.J.A.C. 4A:2-6.2 provides in salient part:

> (b) Any employee who is absent from duty for five or more consecutive business days without the approval of his or her superior shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing. Approval of the absence shall not be unreasonably denied.

The City of Newark's Operating Policies and Procedures, PDP-45 (Bates Stamp 027–040), set forth the procedure to be followed by an employee requesting leave as a result of a serious health condition of the employee or family member:

> The employee shall submit to his/her Department Director a written request for Family Leave at least thirty (30) working days prior to the proposed date of commencement of leave, except where emergent circumstances warrant shorter notice. A request for Medical Leave shall be made 15 days prior to the proposed commencement date, except where emergent circumstances warrant shorter notice.

The Department resigned Mr. Lourenco not in good standing for being absent from duty for more than five consecutive business days without approval, thereby deeming him to have abandoned his position, N.J.A.C. 4A:2-6.2(b), and for habitual abuse of the family-and-medical-leave policy and leave-of-absence policy (City of Newark, Division of Personnel, Department of Administration, Operating Policies and Procedures, procedure numbers PDP-45 and PDP-24).

Appellant, who had received multiple warnings, including more than one "final warning," was well aware of the requirements of the policies, and despite the knowledge that his leave request of July 13 to commence July 14, 2011, was denied, nevertheless abandoned his position when he was absent for a month from July 14, 2011, until August 16, 2011. As such, the termination of his employment was warranted; indeed, it is unclear why he was not terminated after any of the other "final warnings" he received. In the current instance, it is undisputed that on July 13, 2011, he informed his supervisor that he was taking leave commencing the next day, even though he had followed none of the policies or procedures, and had not provided sufficient notice or sufficient documentation for his leave request to even be considered.

Appellant was warned on multiple occasions that his violations/abuse of the leave policy could result in termination, yet he continued to violate and abuse that policy. Thus, in this case, even after multiple warnings, and one suspension, he did not change his behavior in order to comport with the policies and procedures of the Department, and his testimony that he was unaware of those policies and procedures (even to the point of claiming he did not know they existed) was disingenuous, at best.

There was not a scintilla of evidence offered to suggest that this leave request was for medical treatment of an urgent nature; indeed, appellant testified that the doctor in Brazil instructed him, "come now; I'm going away in August." The doctor's vacation schedule hardly makes this trip an emergency for the appellant. Curiously, all but one of the appellant's extended leaves of absence were over the summer or early fall months.

There is also no evidence that the request for leave was unreasonably denied; indeed, appellant had multiple warnings making abundantly clear what the policy was, and appellant failed and refused to comply each and every time, providing insufficient notice and insufficient medical documentation, and ignoring the warnings. The fact that the leaves were approved after the fact does not justify his conduct.

By not following the policy with respect to providing the requisite notice and medical documentation, appellant blatantly disregarded the policies and procedures of the Department, and his conduct justified the Department resigning him not in good standing. As such, I **CONCLUDE** that the Department has met its burden in sustaining the charges.

PENALTY

Once a determination is made that an employee has violated a statute, regulation or rule concerning his employment, the concept of progressive discipline must be considered. W. New York v. Bock, 38 N.J. 500 (1962). However, it is well-established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate regardless of the individual's disciplinary history. Henry v. Rahway State Prison, 81 N.J. 571 (1980). Progressive discipline is not a "fixed and immutable rule to be followed without question." Carter v. Bordentown, 191 N.J. 474, 484 (2007).

The Department imposed a resignation not in good standing. Appellant's past disciplinary record reflects that he had received numerous warnings, including multiple "final warnings" for sick-leave abuse, yet he ignored all of those warnings and continued to disregard the policies and procedures.

Based upon all of the foregoing, I **CONCLUDE** that the Department appropriately applied progressive discipline in this matter and that a resignation not in good standing is appropriate.

ORDER

It is hereby **ORDERED** that the charges against appellant are **SUSTAINED**. Appellant's appeal is hereby **DISMISSED.**

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 27, 2015
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: 8-27-15

Date Mailed to Parties: AUG 31 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

dr

APPENDIX

Witnesses

For Appellant:

Manny Lourenco

Viorel Trusca

Nereida Perez-Montalvo

For Respondent:

Andrea Hall Adebowale

D. Talib Aquil

Valerie Gholston-Key

Exhibits

For Appellant:

None

For Respondent

001–004	PNDA, August 10, 2011
005–005	FNDA, January 13, 2012
006–008	Letter dated July 13, 2011, from Manny Lourenco to Viorel Trusca requesting leave of absence to begin July 14, 2011, with attached doctor's note
009–010	Memorandum dated July 13, 2011, from D. Talib Aquil to Manny Lourenco
011–011	Memorandum dated July 29, 2011, from Andrea Adebowale to Manny Lourenco
012–012	Letter dated August 22, 2011, from Manny Lourenco to Andrea Adebowale
013–013	Letter dated February 14, 2011, from Andrea Adebowale to Manny Lourenco

015–015	Incident Report dated February 18, 2011, by Andrea Adebowale
016–016	Email dated February 16, 2011, by Manny Lourenco to Andrea Adebowale
017–023	Application for Leave of Absence, with Doctor's Notes (Lourenco Signature Only)
024–024	Memorandum dated March 30, 2011, from Andrea Adebowale to Manny Lourenco
025–025	Leave of Absence dated April 13, 2011
026–026	Application for Leave of Absence, with Doctor's Notes (City Approval)
027–040	City of Newark, Policy ID Number PDP-45, "Family and Medical Leave," dated February 5, 1994
040–045	City of Newark, Policy ID Number PDP-24, "Leave of Absence," dated June 1, 1998 (RV'D)
048–050	Memorandum dated July 5, 2006, from John Tarasuk to Manny Lourenco re: Accountability and Time Clock
051–054	Memorandum dated June 25, 2010, from Nereida Perez-Montalvo to Manny Lourenco re: Excessive Absenteeism
055–063	Notice of Minor Disciplinary Action dated March 20, 2007 (Chronic or Excessive Absenteeism)
064–066	FMLA Request, October 10, 2006, to November 17, 2006
067–071	FMLA Request, August 7, 2009, to October 10, 2009
073–077	Leave of Absence, August 12, 2010, to October 18, 2010