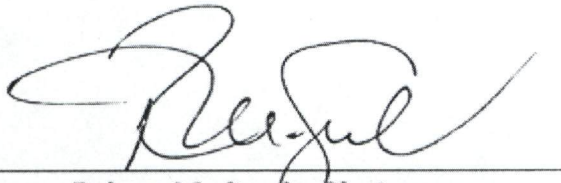




Re: Christopher Spivey

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  
JULY 13, 2017

A handwritten signature in black ink, appearing to read "R. Czech", written over a horizontal line.

Robert M. Czech, Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Christopher S. 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**

OAL DKT. NO. CSV 19740-15

AGENCY DKT. NO. 2016-1610

**IN THE MATTER OF CHRISTOPHER SPIVEY,  
NEWARK PUBLIC SCHOOL DISTRICT.**

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**Christopher Spivey**, appellant, pro se

**Sabrina Styza**, Associate General Counsel, for respondent Newark Public School District (Charlotte Hitchcock, General Counsel, Office of the General Counsel, attorneys)

Record Closed: January 11, 2017

Decided: May 30, 2017

BEFORE **KELLY J. KIRK**, ALJ:

**STATEMENT OF THE CASE**

The Newark Public School District suspended HVAC mechanic Christopher Spivey for fifteen working days for conduct unbecoming a public employee, neglect of duty, and other sufficient cause.

### PROCEDURAL HISTORY

On or about July 30, 2015, the Newark Public School District served Christopher Spivey with a Preliminary Notice of Disciplinary Action (PNDA). (R-4.) A departmental hearing was held on August 21, 2015, and the charges of conduct unbecoming a public employee, neglect of duty, and other sufficient cause were sustained. (R-5.) On or about September 29, 2015, the Newark Public School District served Spivey with a Final Notice of Disciplinary Action (FNDA), suspending him for fifteen working days, beginning October 13, 2015, and ending November 2, 2015. (R-5.)

Spivey appealed, and the Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 to the Office of Administrative Law (OAL), where it was filed on December 1, 2015. The hearing was held on August 3, 2016, and the record remained open for post-hearing submissions. The record closed on January 11, 2017.

### FACTUAL DISCUSSION

Richard Morales testified on behalf of the Newark Public School District. Christopher Spivey testified on his own behalf.

#### Background

Having had an opportunity to consider the evidence and to observe the witnesses and make credibility determinations based on the witnesses' testimony, I **FIND** the following **FACTS** in this case:

Richard Morales is the acting HVAC supervisor for the Newark Public School District. As supervisor, he dispatches work for several schools, and monitors personnel to insure the work is completed in a cost-effective and timely manner. It is important that HVAC personnel promptly be in and out of each school to avoid or minimize disruption to students and teachers.

HVAC personnel are monitored throughout the day. They punch in upon entering a school in the morning, punch out upon exiting a school in the afternoon, and punch in and out for lunch. Morales monitors where the punches are made. Morales advises employees daily where to punch in, either the night before or the morning of, before the employee punches in. District policy requires that the employee punch in at the school assigned, or at the last school where the employee worked. Morales keeps a log, the "Trades Weekly Timesheet" (Log) that reflects where each employee is to report daily in the morning. Typically, the employee calls Morales in the morning and tells Morales his or her location. Morales enters that information daily into the Log, and it should coincide with where the employee is supposed to be. If a location changes overnight because of an emergency that has arisen, the employee will be notified that night or before he or she punches in in the morning, and Morales records the change in the Log.

Morales compares the Log weekly with the computerized Kronos Punch Origin printout (Kronos). Kronos punch clocks are located in the schools throughout the Newark Public School District. Juan Guerrero is Morales's supervisor. A formal request for disciplinary action against Spivey was made by Guerrero on May 20, 2015, for alleged unauthorized punches made outside of assigned locations. (R-3.)

The HVAC shop is located in the Technology High School (Tech) basement. HVAC materials are kept in the shop. Morales does not remain in the shop all day. Morales drives around to various locations to verify that employees are at their assigned locations, that they have the necessary materials, and that their work is completed. He drives around the school district constantly, so he is both in the shop and in the field.

Spivey had been employed by the Newark Public School District for seven years when the PNDA was issued, and had no prior disciplinary history.

**Testimony**

Richard Morales

At the end of the week Morales compares the Log with Kronos to verify that employees are punching in at their assigned locations. An employee could tell Morales by phone that he or she was at a particular school, but Morales was able to thereafter verify that with Kronos. Any discrepancy would be noted, and Morales would personally speak to an employee about a discrepancy, and he would advise the employee that he or she was required to punch in at his or her assigned location. Multiple discrepancies would be referred for disciplinary action. At times, Morales's Log/Kronos checks are prompted by a "drive-by," where Morales sees an employee at a location other than his or her assigned location. Morales sometimes received complaints that Spivey was not where he was supposed to be.

At most of the schools the HVAC employees must go to, the classrooms are shut down. Thus, they must arrive and complete the work timely so that the teachers and students may return. Failure to punch in timely or at the appropriate location affects and significantly delays the work. By way of example, at times boilers shut down overnight and employees are dispatched immediately to correct the problem. Clocking in at another location delays the work, as sometimes it can take an hour to get from one location to another, by which time pipes may be frozen.

Morales supervised Spivey for approximately three years, and dispatched work orders and assignments to Spivey. Spivey was to be at his assigned location to complete his assigned work, and to meet other workers to assist in completing the work. Very rarely, if an emergency occurred in the middle of the night, Morales would contact Spivey before 8:00 a.m. and instruct him to go to a different location than the one he was assigned the night before. This change would be reflected on the Log.

Morales compared the Log to Kronos for Spivey and determined that there were numerous discrepancies, as follows:

Date and Time	Log Location	Kronos Location
1/5/2015 8:01:00 AM	Tech	W – Ivy Hill Main Office
1/8/2015 7:58:00 AM	Avon	N – Barringer 3rd floor
1/9/2015 7:56:00 AM	Barringer	N – Dr. William H. Horton
1/21/2015 7:50:00 AM	Ivy	S – Tech High Main 2
1/22/2015 7:54:00 AM	Tubman	N – Dr. William H. Horton
1/23/2015 8:00:00 AM	Tubman	S – Tech High Main Office 1
1/26/2015 7:53:00 AM	Newton	N – Dr. William H. Horton
1/28/2015 7:52:00 AM	Newton	N – Barringer Steam Main Office
1/29/2015 7:56:00 AM	Ivy	S – Tech High Main Office 1
1/30/2015 7:57:00 AM	Ivy	N – Franklin
2/2/2015 7:58:00 AM	MXS	N – Dr. William H. Horton
2/5/2015 7:56:00 AM	South St.	S – Tech High Main 2
2/6/2015 7:50:00 AM	South St.	W – Ivy Hill Main Office
2/9/2015 7:56:00 AM	South St.	N – Dr. William H. Horton Outside Main O
2/10/2015 7:57:00 AM	[E. A]lma Flag	S – Tech High Main 2
2/12/2015 7:49:00 AM	Clinton Ave.	S – Tech High Main 2
2/13/2015 7:52:00 AM	Clinton Ave.	N – Dr. E. Alma Flagg
2/17/2015 7:04:00 AM	Peshine/Eastside	S – Tech High Main 2
2/18/2015 7:47:00 AM	Eastside	S – Tech High Main 2
2/20/2015 7:58:00 AM	Eastside	S – Tech High Basement
3/3/2015 8:02:00 AM	Weequahic	S – Tech High Main 2
3/4/2015 7:59:00 AM	Weequahic	S – Tech High Main 2
3/6/2015 8:00:00 AM	Weequahic	N – Dr. William H. Horton
3/10/2015 7:59:00 AM	Weequahic	N – Dr. E. Alma Flagg
3/11/2015 8:02:00 AM	Dr. Horton	S – Tech High Main Office 1
3/17/2015 7:50:00 AM	Cleveland <sup>1</sup>	S – Tech High Main 2
3/19/2015 8:00:00 AM	Tubman <sup>2</sup>	S – Tech High Main 2
3/20/2015 7:55:00 AM	Abington	S – Tech High Main 2

<sup>1</sup> "Tech" was crossed out.

<sup>2</sup> "Tech" was crossed out.

Sometime in mid-to-late January 2015, after Morales noticed the discrepancies, he spoke to Spivey. Spivey should not have been punching in anywhere but the assigned location reflected in the Log. Morales spoke to Spivey at least four or five times, but despite the verbal warnings, Spivey's conduct did not change, so Morales referred him for disciplinary action. Spivey was referred for more than twenty discrepancies, but disciplinary referrals are made for as few as fifteen discrepancies. Morales notified his supervisor, Juan Guerrero, of the discrepancies, and Guerrero prepared the disciplinary action request.

District policy requires that the employee punch in at the school assigned, or at the last school where the employee worked. A memorandum is given to the employees, and it is available online. Spivey was notified of the policy, and there would be no reason for him to not be aware of the policy.

Once Morales assigns a job and the employee contacts him that morning to advise of his or her location, he writes it on the Log. Thereafter he checks Kronos for discrepancies. Morales estimated the Log to be "very accurate" or "95 percent." At times entries are made by another supervisor, but Morales estimated that 90 percent of the entries were his handwriting. A slash mark with another school reflected on the Log most likely reflects an emergency.

Normally, Morales gives Spivey his assignments the night before. Very rarely would Spivey be given an assignment in the morning, as that would be for an emergency. Morales has also gone to a school and given Spivey an assignment. The Log is accurate and is used to document where all his employees are during the day, what jobs were completed, and what they get paid for. Spivey's profile reflects every single school he worked at, based on work orders. There would not be a situation where an employee would not have a new assignment before punching out for the day. Morales notifies the employees before they punch out of their assigned location for the following morning, and if he does not, the employee is to return to the last job location.



If Spivey has finished an assignment in the morning, Morales would know from Spivey calling in. There are times when Spivey has finished a job assignment in the morning and been in a different location in the afternoon. Typically, he would be in one school per day, but has occasionally been in up to three schools in one day. If Spivey had to pick up parts at the shop, he would be assigned to Tech.

Spivey is due in at work at 8:00 a.m. Morales's understanding of why employees have clocked in at locations other than their assigned location was that it is done when the employee is late; the employee pulls over at another school and punches in to avoid being marked as late.

Regarding January 21, 2015, and January 23, 2015, Morales testified that Tech is their shop, but the shop is downstairs. There was no reason for Spivey to have been punching in at the main offices, which are upstairs and have nothing to do with the shop. A punch-in at either of the main offices would be a violation, as the proper location is the shop and that is why there is a separate Kronos downstairs. Additionally, the only time Spivey can punch in at Tech would be if they were having a meeting at the shop. Morales testified that a punch in at the Tech main office is a violation. That is upstairs where the children attend school, and there is too much "people traffic."

Morales did not recall specifically what was discussed during the telephone calls with Spivey. If Morales had ever called Spivey to change his location, it would have been recorded on the Log. Calls from Spivey could have been for any number of reasons, including that Spivey needed material, got stuck, or was not coming in.

#### Christopher Spivey

Spivey's telephone records reflect seven telephone calls, relevant to the twenty-eight days in question, as follows: On January 5, 2015, at 8:36 a.m., Spivey called the shop; on January 20, 2015, at 3:58 p.m., Morales called Spivey from his cell phone; on January 21, 2015, at 2:01 p.m., Spivey received a call from the shop; on January 28,

2015, at 2:54 p.m., Spivey called Morales; on February 5, 2015, at 10:11 a.m., Spivey called Morales; and on March 19, 2015, at 3:20 p.m., Spivey called Morales<sup>3</sup>.

Sometimes Morales called Spivey the day before to give him his assignments. Morales called Spivey on January 20, 2015, at 3:58 p.m. and instructed him to report to Tech the following morning. Morales called Spivey on January 21, 2015, at 2:01 p.m. and instructed him to report to Dr. William H. Horton the following morning. Morales called Spivey on January 28, 2015, at 2:54 p.m. and instructed him to report to Tech the following morning. Morales called Spivey on February 4, 2015, at 2:30 p.m. and instructed him to report to Tech the following morning. Spivey called Morales at 10:11 a.m. on February 5, 2015, to let him know that he would be leaving early that day, at which time Morales instructed him to go to Ivy Hill the following day. Spivey left work at 11:36 a.m. on February 5, 2015.

Spivey initially testified that Morales called him at 3:20 p.m. on March 19, 2015, and instructed him to report to Tech the following morning. Spivey thereafter testified that he called Morales to tell him he was done at the site, and Morales instructed him to punch in at Tech the following morning.

Spivey denied that any of the cell-phone calls between Spivey and Morales were about work matters other than where Spivey was assigned to report the following day. Morales might call him during the day for an update on a job, at which point Spivey would tell Morales whether he was done or not, and Morales would give him an assignment, as needed. Spivey denied that he had conversations with Morales about the scope of a job and not about the next day's assignment. When they speak, it is about how the job is going, when it will be completed, and assignments for the next day.

Spivey admitted he was aware of the Newark Public School District Policy requiring him to "Kronos in" on time at his assigned location. He also admitted that not following the policy could affect the efficiency of the schools. Spivey denied punching it at locations

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<sup>3</sup> On February 4, 2015 at 2:30 p.m., Spivey called Morales, but the telephone records reflect "CALL WAIT".

other than his assigned locations. The Kronos is accurate, but the Log is not. Spivey knows where to punch in, which is either the last school he worked at or where Morales instructs him to go when he calls. Spivey never received a verbal or written warning for the allegations in the PNDA. Spivey denied ever being advised that his Kronos punches did not match the Log. Sometimes Morales showed up at jobs and gave out work assignments for the following day.

Spivey punched in on January 28, 2015, at a location other than his assigned location because of snow and the inability to get to his assigned location at all that day. Spivey also testified that he had "absolutely no access to get to the school" on March 6, 2015, because of a snow storm on March 5, 2015.

### **Additional Findings of Fact**

A credibility determination requires an overall evaluation of the testimony in light of its rationality or internal consistency and the manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Testimony to be believed must not only proceed from the mouth of a credible witness, but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 555 (1954). It must be such as the common experience and observation can approve as probable in the circumstances. Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961). "The 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).

Appellant's testimony with respect to several of the dates in question was inconsistent with and overborne by the record, including the documentary evidence and the concise, consistent, and credible testimony of Morales. By way of example, appellant claims that on January 5, 2015, he called to get a school assignment, but he had punched in at the Ivy Hill Main Office at 8:01 a.m. and did not call the shop until 8:36 a.m. If he had no assignment for that day, it is not clear why he would have waited more than half an hour to find out where he should be working.

Appellant also claims that Morales called him on January 20, 2015, at 3:58 p.m. and advised him to report to Tech in the morning on January 21, 2015. However, Morales testified that the Log would reflect the morning punch-in location—Ivy Hill—and it is observed that Spivey's subsequent two punches that day were Ivy Hill. Appellant claims that he received a call from Morales, from the shop, on January 21, 2015, at 2:01 p.m., and was advised to report to Dr. William H. Horton in the morning. However, Morales likewise testified that the Log would reflect the morning punch-in location—Tubman—and it is observed that Spivey's subsequent three punches that day were Harriet Tubman, and all but his morning punch the following day were also at Harriet Tubman.

Appellant claims that on February 5, 2015, he called Morales at 10:11 a.m. and was advised to report to Ivy Hill the following morning. Morales testified that the employees were generally contacted the night before or before punching out for the day, and it does not seem logical that an assignment would have been made with more than five hours remaining in the work day. Further, the morning punch-in location on the Log—South St.—was Spivey's last punch on February 5, 2015, and his two punches subsequent to his morning punch at Ivy Hill the following morning were also at South Street. Thus, the evidence suggests that Spivey was working at South Street the prior day, and was to continue working at South Street on February 6, 2015.

Spivey also testified that he was unable to get to his assigned location at all on January 28, 2015, because the roads were impassable due to snow. However, other than the morning punch at N – Barringer Steam Main Office, his other three punches were all from the Log-assigned school (Newton). Additionally, Morales pointed out that if Spivey could make it to Barringer by 7:52 a.m., there was no reason he could not have made it to Newton.

Spivey repeatedly claimed that Morales contacted him and told him to report to an assigned location other than the location reflected in the Log, but it is observed that on many of those occasions, Spivey ended up at the Log-assigned location by 11:30 a.m. Specifically, of the twenty-eight discrepancies in the period from January 5, 2015, through March 20, 2015, it is observed that on seventeen occasions (January 21, 2015, January

22, 2015, January 23, 2015, January 28, 2015, February 2, 2015, February 5, 2015, February 6, 2015, February 9, 2015, February 10, 2015, February 12, 2015, February 13, 2015, February 17, 2015, March 3, 2015, March 4, 2015, March 17, 2015, March 19, 2015, and March 20, 2015), Spivey punched out for lunch at his Log-assigned location, despite having punched in for the day elsewhere, which suggests that Spivey was indeed assigned to a different location than the one where he punched in.

Additionally, of the twenty-eight days reflected above, Spivey punched in at “S – Tech High Main 2” eleven times, and “S – Tech High Main Office 1” three times, none of which is the “S – Tech High Basement” location where the shop is, and Morales testified there would be no reason for him to punch in outside the shop.

Having had an opportunity to consider the evidence and to observe the witnesses and make credibility determinations based on the witnesses’ testimony, I **FIND** the following additional **FACTS** in this case:

On at least seventeen occasions from January 5, 2015, through March 20, 2015, Spivey knowingly punched in at a school other than the school at which he had been assigned to report to work. Spivey was verbally warned by Morales not to punch in at a location other than his assigned location. Spivey was aware that punching in at a school other than the school at which he was assigned to work was a violation.

### **LEGAL ANALYSIS AND CONCLUSIONS**

N.J.S.A. 11A:1-1 through 12-6, the “Civil Service Act,” established the Civil Service Commission in the Department of Labor and Workforce Development in the Executive Branch of the New Jersey State government. N.J.S.A. 11A:2-1. The Commission establishes the general causes that constitute grounds for disciplinary action, and the kinds of disciplinary action that may be taken by appointing authorities against permanent career-service employees. N.J.S.A. 11A:2-20. N.J.S.A. 11A:2-6 vests the Commission with the power, after a hearing, to render the final administrative decision on appeals concerning removal, suspension or fine, disciplinary demotion, and termination at the end of the working test period, of permanent career-service employees.

N.J.A.C. 4A:2-2.2(a) provides that major discipline includes removal, disciplinary demotion, and suspension or fine for more than five working days at any one time. An employee may be subject to discipline for reasons enumerated in N.J.A.C. 4A:2-2.3(a), including conduct unbecoming a public employee, neglect of duty, and other sufficient cause. N.J.A.C. 4A:2-2.3(a)(6), (7) and (12). In appeals concerning such major disciplinary actions, the burden of proof is on the appointing authority to establish the truth of the charges by a preponderance of the believable evidence. N.J.A.C. 4A:2-1.4; N.J.S.A. 11A:2-21; Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

Spivey is charged with conduct unbecoming a public employee, neglect of duty, and other sufficient cause. The burden of proof is on Newark Public School District to prove the charges by a preponderance of the credible evidence.

N.J.A.C. 4A:2-2.3(a)(6) does not define conduct unbecoming. However, the Appellate Division has held that conduct unbecoming a public employee is "any conduct . . . which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). In Emmons, which involved a police officer charged with conduct unbecoming, the Appellate Division also held that conduct unbecoming is "any conduct which adversely affects the morale or efficiency of the bureau." Ibid. What constitutes conduct unbecoming a public employee is primarily a question of law. Karins v. Atl. City, 152 N.J. 532, 553 (1998).

Spivey on at least seventeen occasions failed to timely report to his assigned job location, and instead punched in at another, presumably closer, location to avoid punching in late for work. He thereafter, while already on Newark Public School District time, would travel to his assigned location, delaying completion of work in the schools. Accordingly, I **CONCLUDE** that the charges of conduct unbecoming a public employee and neglect of duty are sustained.

The penalty imposed by Newark Public School District was a fifteen-working-day suspension. The Civil Service Commission may increase or decrease the penalty

imposed by the appointing authority, though removal cannot be substituted for a lesser penalty. N.J.S.A. 11A:2-19. When determining the appropriate penalty, the Commission must utilize the evaluation process set forth in West New York v. Bock, 38 N.J. 500 (1962), and consider the employee's reasonably recent history of promotions, commendations, and the like, as well as formally adjudicated disciplinary actions and instances of misconduct informally adjudicated.

Spivey has no prior disciplinary history, but the credible evidence reflects that Spivey, on at least seventeen occasions, punched in at a location other than his assigned job location, including after he was warned, knowing that doing so was a violation. Accordingly, I **CONCLUDE** that a fifteen-working-day suspension is an appropriate penalty in this matter.

### **ORDER**


I **ORDER** that the charges of conduct unbecoming a public employee and neglect of duty are **SUSTAINED**, and that the penalty of a fifteen-working-day suspension is **AFFIRMED**.

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

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

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

5/30/17  
DATE

  
KELLY J. KIRK, ALJ

Date Received at Agency:

5/30/17  
  
DIRECTOR AND  
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties:  
dlc

MAY 31 2017



**APPENDIX**

**WITNESSES**

For Appellant:

Christopher Spivey

For Respondent:

Richard Morales

**EXHIBITS IN EVIDENCE**

For Appellant:

- P-1 Kronos Reminders
- P-2 AT&T Records

For Respondent:

- R-1 Trades Weekly Timesheets
- R-2 Punch Origin
- R-3 Request for Disciplinary Action
- R-4 PNDA
- R-5 FNDA