



A-7

STATE OF NEW JERSEY

In the Matter of Javier Morales
City of Newark,
Department of Engineering

CSC DKT. NO. 2015-1048
OAL DKT. NO. CSV 13663-14

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DECISION OF THE
CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 20, 2015 BW

The appeal of Javier Morales, Mechanic, City of Newark, Department of Engineering, removal effective August 19, 2014, on charges, was heard by Administrative Law Judge Leland S. McGee, who rendered his initial decision on October 7, 2015. No exceptions were filed.

Having considered the record and the Administrative Law Judge's (ALJ) initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on November 18, 2015, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the removal has been modified, the appellant is entitled to mitigated back pay, benefits and seniority from the date after the imposition of the 10 working day suspension to the date of his resignation in good standing. As noted by the ALJ, that resignation shall coincide with the date of the appellant's hire as a firefighter.

N.J.A.C. 4A:2-2.12(a) provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in the disciplinary appeal is the merits of the charges. See *Johnny Walcott v. City of Plainfield*, 282 N.J. Super. 121,128 (App. Div. 1995); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, the charges were sustained. Consequently, as appellant has failed to meet the standard set forth at N.J.A.C. 4A:2-2.12, counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, unpublished, Docket No. A-5581-01T2F (App.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.

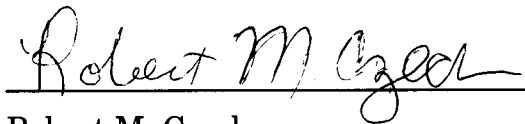
ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore modified the removal to a 10 working day suspension. The appellant is to receive back pay from the date after the imposition of the 10 working day suspension to the date of his resignation in good standing, which coincides with the date of his hire as firefighter. The amount of back pay awarded is to be reduced and mitigated as specified 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 shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
NOVEMBER 18, 2015



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 13663-14
AGENCY DKT. NO. 2015-1048

**IN THE MATTER OF JAVIER MORALES,
CITY OF NEWARK,
DEPARTMENT OF ENGINEERING.**

Darryl M. Saunders, Esq., for appellant (Darryl M. Saunders, attorney)

Kenneth G. Calhoun, Assistant Corporation Counsel, for respondent City of Newark (Willie L. Parker, Corporation Counsel, attorneys)

Record Closed: August 25, 2015

Decided: October 7, 2015

BEFORE **LELAND S. MCGEE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On August 19, 2014, Javier Morales (Morales) was personally served with a Preliminary Notice of Disciplinary Action (PNDA) alleging violations of New Jersey Civil Service Rules, namely, 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)(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; N.J.A.C. 4A:2-2.3(a)(8), misuse of public property, including motor vehicles; and N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause.

The Appellant waived his right to a hearing and appealed to the Office of Administrative Law (OAL). On September 25, 2014, Morales was properly served with a Final Notice of Disciplinary Action (FNDA). The FNDA upheld the charges in the PNDA and terminated appellant from his position as a mechanic in the Motors Division within the Department of Engineering. On October 3, 2014, appellant filed a timely appeal and on October 22, 2014, the matter was transmitted to the Office of Administrative Law (OAL) 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. A prehearing conference was held on November 10, 2014, at which time a hearing was scheduled for March 12, 2015. This date was adjourned to April 30, 2014, at the request of respondent. This date was adjourned at the request of respondent to May 27, 2015. This date was again adjourned at the request of respondent and a hearing was held on June 17, 2015. On July 6, 2015, appellant filed a Motion for In Camera Review of the personnel file of another employee of the City of Newark. On July 8, 2015, the undersigned issued an Order denying the motion. The final day of hearings was held on July 10, 2015. Post-hearing submissions were filed on August 7, 2015, and August 25, 2015, respectively and the record closed.

STATEMENT OF FACTS

Appellant, Javier Morales, was employed as a mechanic in the Motors Division (Division) of the Department of Engineering (Department) for the City of Newark. On August 7, 2014, while employed and serving as the senior mechanic,¹ Morales was found working on a non-City-owned vehicle. During the course of the investigation, it was discovered that the vehicle Morales worked on during his shift belonged to a family friend and Morales agreed to be paid one hundred thirty dollars (\$130) for the work performed. It was also revealed that Morales allowed the same family friend to use Morales' employee discount, reserved **only** for City of Newark employees, to purchase parts for the friend's vehicle at a substantial discount. When the investigators arrived at the Division on August 7, 2014, Morales was in the middle of installing the parts

¹ Morales served as a senior mechanic from August 2, 2014 through August 14, 2014, because his immediate supervisor, Van Crossen, was away on vacation. As a senior mechanic, Morales supervised

purchased by the family friend into the vehicle of that same family friend. Again, Morales did not punch out and was not on an approved break; he did this while on the clock and serving as the senior mechanic.

Detective Portia Allen (Detective Allen) testified on behalf of the City. On August 7, 2014, she received an anonymous tip from a telephone call that Morales was working on a non-City-owned vehicle and he was doing it while on City time. Detective Allen is a detective with the City of Newark Police Department was assigned to the City's Office of the Inspector General in August of 2014. Detective Allen testified that when she arrived to the Division of Motors, she observed appellant working on a silver Honda Civic and it appeared to her that the appellant was in the midst of changing the brakes and brake pads on the Civic.

Detective Allen also testified that Morales used an air gun and jack (used to raise the vehicle); both of those items were owned by the City of Newark and were only to be used by Morales when he worked on City-owned vehicles. It was the policy and practice of the City and Department to not allow its Division mechanics to use City-owned property to repair vehicles for personal, non-City use. This policy was confirmed in testimony from Lester King, a longtime employee assigned to the Division of Motors.

Detective Allen testified that as part of her investigation she reviewed time records provided to her. She concluded, based on her review, that Morales was still on duty when he worked on the Honda Civic belonging to the family friend; that Morales had not punched out for the day; and that he was still on his assigned shift as acting senior mechanic.

Finally, as part of her investigation, Detective Allen had interviewed Morales. This interview was recorded on video. Detective Allen testified at the OAL hearing that Morales made several admissions:

other mechanics within the Division. Morales also purchased and approved auto-part purchases made by mechanics for work performed on city-owned vehicles, i.e., police cars, City trucks and City-owned vans.

1. That he used City-owned property, specifically, a jack and an air gun, to perform work on a personal vehicle belonging to a family friend;
2. The vehicle Morales was observed working on was not a City-owned vehicle;
3. That he (Morales) agreed to be paid one hundred and thirty dollars (\$130) for work performed on the family friend's vehicle;
4. That he (Morales) allowed the family friend to pay for parts used to repair his personal vehicle to be purchased using the employee discount only reserved for City employees; and
5. That Morales was still on the clock and had not punched out for the day.

The only challenge the appellant offered on cross-examination by the City was to assert that was unaware that he "was not allowed to work on other vehicles while on City premises." While the I **FIND** the facts of the case are relatively indisputable, the issue of penalty remains.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The New Jersey Civil Service Law protects classified employees from arbitrary dismissal and other onerous sanctions. Prosecutor's, Detectives and Investigators Ass'n v. Hudson County Bd. of Freeholders, 130 N.J. Super. 30, 41 (App. Div. 1974); Scancarella v. Dep't of Civil Serv., 24 N.J. Super. 65, 70 (App. Div. 1952). The law provides relief to civil service employees from public employers who may attempt to deprive them of their rights. Prosecutor's, supra, 130 N.J. Super. at 41. To this end, the law is liberally construed. Mastrobattista v. Essex Cty. Park Comm'n, 46 N.J. 138, 147 (1965). Consistent with this policy of civil service law, there is a requirement that in order for a public employee to be fined, suspended, or removed, the employer must show just cause for its proposed action. The Merit System Board is charged with the duty of ensuring that the reasons supporting disciplinary action are sufficient and not arbitrary, frivolous, or "likely to subvert the basic aim of the civil service program." Prosecutor's, supra, 130 N.J. Super. at 42 (quoting Kennedy v. Newark, 178 N.J. 190 (1959)).

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)(11). If sufficient cause is established, then a determination must be made on what is a reasonable penalty.

In attempting to determine if a penalty is reasonable, the employee's past record may be reviewed for guidance in determining the appropriate penalty for the current specific offense. The concept of progressive disciplinary action is described in West New York v. Bock, 38 N.J. 500, 519 (1962). In Bock, the officer had received a thirty-day suspension and seventeen minor-disciplinary actions during eight years of service. The prior disciplinary actions and the suspension of thirty days were strongly considered in determining if the thirty-day suspension was warranted. A civil service employee who commits a wrongful act related to his duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). Depending upon the incident complained of and the employee's past record, major discipline may include suspension, removal, etc. Bock, supra, 38 N.J. at 522-24.

In disciplinary cases the appointing authority has both 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 officer and lodge the charges. See Coleman v. E. Jersey State Prison, CSV 1571-03, Initial Decision (February 25, 2004), <http://njlaw.rutgers.edu/collections/oal/> (citations omitted); see also 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, 560 (1982); In re Darcy, 114 N.J. Super. 454, 458 (App. Div. 1971); N.J.S.A. 11A:2-6(a)(2), -21; N.J.A.C. 1:1-2.1, "burden of proof"; N.J.A.C. 4A:2-1.4. A preponderance of evidence has been defined as that which "generates belief that the tendered hypothesis is in all human likelihood the fact." Martinez v. Jersey City

Police Dep't, CSV 7553-02, Initial Decision (October 27, 2003), <http://njlaw.rutgers.edu/collections/oal/> (quoting Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959)).

Conduct Unbecoming a Public Employee, N.J.A.C. 4A:2-2.3(a)(6)

“Conduct unbecoming” a public employee is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances “be such as to offend publicly accepted standards of decency.” Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (Pa. 1959)). Such misconduct need not necessarily “be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.” Hartmann v. Police Dep’t of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep’t of Civil Serv., 17 N.J. 419, 429 (1955)). I **CONCLUDE** that appellant admitted to working on the vehicle during the work day and believed that he was working on his own time. Further, appellant believed that he was working on the “sidewalk” and not on the City’s property. I further **CONCLUDE** that appellant did willfully use some tools that were the property of the City of Newark for the purpose of repairing a vehicle for a friend and for a fee. For the foregoing reasons I **CONCLUDE** that Appellant engaged in conduct unbecoming a public employee.

Other Sufficient Cause, N.J.A.C. 4A:2-2.3(a)(12)

Respondent failed to prove that other sufficient causes existed pursuant to N.J.A.C. 4A:2-2.3(a)(12). There is no definition in the New Jersey Administrative Code for other sufficient cause. Other sufficient cause is generally defined in the charges against appellant. The charge of other sufficient cause has been dismissed when

“respondent has not given any substance to the allegation.” Simmons v. City of Newark, CSV 9122-99, Initial Decision (February 22, 2006), adopted, Comm’r (April 26, 2006), <<http://njlaw.rutgers.edu/collections/oal/final/csv9122-99.pdf>>. The FNDA does not identify or sustain charges for other sufficient cause. Therefore, respondent has not proven by any competent and credible evidence that appellant should be terminated for other sufficient cause, and I **CONCLUDE** that the charge of other sufficient cause should be dismissed.

PENALTY

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)(11). If sufficient cause is established, then a determination must be made on what is a reasonable penalty.

Respondent acknowledges that the penalty imposed at the disciplinary proceeding must be reasonable and appropriate under the facts of the case. In attempting to determine if a penalty is reasonable, the employee’s past record may be reviewed for guidance in determining the appropriate penalty for the current specific offense. The concept of progressive disciplinary action is described in West New York v. Bock, 38 N.J. 500, 519 (1962). In Bock, the officer had received a thirty-day suspension and seventeen minor-disciplinary actions during eight years of service. The prior disciplinary actions and the suspension of thirty days were strongly considered in determining if the thirty-day suspension was warranted. A civil service employee who commits a wrongful act related to his duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). Depending upon

the incident complained of and the employee's past record, major discipline may include suspension, removal, etc. Bock, supra, 38 N.J. at 522-24.

In disciplinary cases the appointing authority has both 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 officer and lodge the charges. See Coleman v. E. Jersey State Prison, CSV 1571-03, Initial Decision (February 25, 2004), <http://njlaw.rutgers.edu/collections/oal/> (citations omitted); see also 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, 560 (1982); In re Darcy, 114 N.J. Super. 454, 458 (App. Div. 1971); N.J.S.A. 11A:2-6(a)(2), -21; N.J.A.C. 1:1-2.1, "burden of proof"; N.J.A.C. 4A:2-1.4. A preponderance of evidence has been defined as that which "generates belief that the tendered hypothesis is in all human likelihood the fact." Martinez v. Jersey City Police Dep't, CSV 7553-02, Initial Decision (October 27, 2003), <http://njlaw.rutgers.edu/collections/oal/> (quoting Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959)).

In the present case, there is no evidence of, and respondent acknowledges that appellant has no disciplinary history. He has been employed by the City since 1995. The testimony confirms that the initial recommendations were suspension of appellant. It is not clear why or at what point the decision was made to change that recommendation to termination.

Respondent argues that "some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record" and that appellant's conduct warrants removal because it was such a serious offense. However, two weeks following the subject incident, respondent hired appellant as a fire fighter. The undersigned is not persuaded that respondent truly believes that appellant's conduct was so egregious that it warranted termination or it would not have hired him to a better-paying position that requires a higher level of responsibility and duty to the public. I **CONCLUDE** that the appropriate penalty in this matter is a ten-day suspension.

ORDER

Based upon the foregoing and the Notice of Final Disciplinary Action, it is hereby **ORDERED** that the charges of conduct unbecoming an employee, be **SUSTAINED**. It is further **ORDERED** that the charges of inability to perform duties and other sufficient cause be **DISMISSED**.

It is further **ORDERED** that the determination of respondent, City of Newark, to remove appellant, effective August 19, 2014, be **REVERSED** and a suspension of ten days be imposed.

It is further **ORDERED** that respondent award payment to appellant for the period from August 19, 2014, to the date of hire as a City of Newark Firefighter, less ten days.

It is further **ORDERED** that respondent change appellant's personnel records to reflect a suspension effective August 19, 2014, and a resignation in good standing as of the date of rehire.

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.

October 7, 2015
DATE

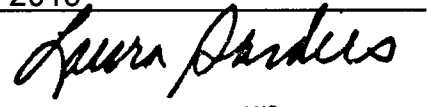

LELAND S. MCGEE, ALJ

Date Received at Agency:

October 7, 2015

Date Mailed to Parties:

OCT 14 2015



DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

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APPENDIX

WITNESSES

For Appellant:

Javier Morales

For Respondent:

Mehdi Mohamadish

Lester King

Portia Yvonne Allen

EXHIBITS

For Appellant:

P-1 Marked but not admitted

P-2 Memorandum dated August 18, 2014

For Respondent:

R-1 FNDA dated September 25, 2014

R-2 PNDA dated August 19, 2014

R-3 Purchasing documents

R-4 Investigation Report dated August 16, 2014

R-5 Photograph of vehicle

R-6 Photograph of vehicle

R-7 Photograph of vehicle

R-8 Photograph of vehicle

R-9 Vehicle Registration

R-10 Invoice