

was modified by the Commission, charges were sustained. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C. 4A:2-2.12(a)*, counsel fees must be denied.

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore modifies the 30 working day suspension to a 25 working day suspension. The Commission further orders that appellant be granted five days of back pay, benefits, and seniority. The amount of back pay awarded is to be reduced and mitigated as set forth 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*.

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
THE 9TH DAY OF JULY, 2019



Deirdre L. Webster Cobb
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 15863-16

AGENCY REF. NO. 2017-1096

**IN THE MATTER OF FRANKIE
WALLS, NEWARK PUBLIC SCHOOLS.**

Samuel Wenocur, Esq., for appellant Frankie Walls (Oxford Cohen, attorneys)

**Sabrina Styza, Associate General Counsel, for respondent Newark Public Schools
(Brenda Liss, General Counsel)**

Record Closed: May 16, 2019

Decided: May 24, 2019

BEFORE GAIL M. COOKSON, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter involves the suspension of appellant, Frankie Walls, a custodial worker employed by respondent Newark Public Schools (Newark), for a period of thirty (30) days on charges of excessive absenteeism in violation of N.J.A.C. 4A:2-2.3(a)(4), neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7), and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11). By Preliminary Notice of Disciplinary Action dated August 24, 2016, respondent advised appellant of the charges. By Final Notice of Disciplinary Action dated September 15, 2016, appellant was suspended from his position for thirty working days effective October 3, 2016, through November 11, 2016,

with a return to work date of November 14, 2016. The appellant filed a timely request for a hearing.

The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on October 18, 2016, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The plenary hearing was delayed several times at the request of respondent due to the unavailability of its primary witness, who had been promoted after the incidents at issue to a position which placed greater demands on his time. On May 16, 2019, an evidentiary hearing was held on this disciplinary action. The record closed on that date.

FACTUAL DISCUSSION

The essential facts that form the foundation of the charges against the appellant are, for the most part, not disputed. Based upon due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

Respondent Newark did not present a witness on its case in chief on these disciplinary charges due to the continued unavailability of the former principal of the school at which appellant worked during the relevant period because of his promotion to Assistant Superintendent. Newark relied, therefore, upon just its documentary evidence and acknowledged that a gap in its factual presentation, if any, would be properly attributed to it. As set forth below, I **FIND** that respondent's documentary evidence adequately supported its affirmative case.

Both appellant and his union representative, Lorenzo Hall (Hall), testified in his defense to these charges. Hall has been a custodial worker for the Newark Public School district for approximately twenty-seven years. He is also the shop steward and business agent for Local 617 of the Service Employees International Union, representing, inter alia, all custodial workers in contract negotiations, and individual

hearings and investigations. In fact, Hall stated that there are over two thousand employees represented by Local 617.

Hall testified that he sometimes meets informally with Mamie Osei-Bonsu, a Newark employee in Labor Relations, on individual workers having issues if he happens to be in the vicinity of her office. He stated that he met with her on June 23, 2016, on appellant's behalf who he knew had a potential issue with excessive sick leave. Hall said that appellant was not present when he spoke with Osei-Bonsu that day. According to Hall, she assured Hall that appellant would not be brought up on disciplinary charges so long as he did not use another sick day, meaning an absence after June 23.

Hall identified and explained the provisions in the Local 617 – Newark Public Schools Labor Agreement relating to bereavement leave for custodial workers. While noting that the language says bereavement leave commences "immediately following death" of an immediate family member, Hall said that circumstances of notification of a death and/or distant travel have been taken into consideration as a matter of practice, even if not often.

Appellant also has been a custodial worker for many years, having commenced his employment with Newark on June 19, 1989. During the 2015-2016 school year, appellant was assigned to Eastside High School. Appellant stated that he is entitled to eighteen sick days per school year, which runs from July 1 through June 30. Custodial workers are twelve-month employees for the district.

Appellant recalled two meetings during the 2015-2016 school year regarding his use of sick days. He thought one was in January and the other later in the school year. He seemed to recall at the hearing that the meeting with Hall and Osei-Bonsu took place on Friday, June 24, 2016, a day on which he used a sick day in order to take a physical examination for potential employment with a police department. He also claimed that she said that there would be no disciplinary action so long as he did not use any more days after June 24.

Appellant also testified about the circumstances surrounding his claim of bereavement leave for the period that began June 30, 2016, and included several days thereafter, which by definition are part of the next school year. Appellant's grandmother passed away on June 20, 2016, but the family did not learn of her death until June 24 because she lived alone. On June 27, 2016, he notified his immediate supervisor Roxie Morales (Morales) that he would be attending his grandmother's funeral to be held later that week. Appellant started driving with other family members in the very early hours of Thursday, June 30, stopping in south Jersey to pick up his sister and her children. He drove straight through as the funeral was Friday, July 1. Upon his return, he provided Morales with the obituary, funeral program, and a note from the funeral home as proof of the appropriate reliance on bereavement. Only at the departmental hearing for these charges did appellant learn that Morales might not have provided that documentation to the district.

On cross-examination, appellant acknowledged that the absence of a custodial worker can burden the remaining workers. Nevertheless, it does not make sense to grant workers leave time on paper but then to argue that resort to a per diem replacement for a regular worker who take authorized leave creates a deficit in the overall quality of custodial services provided to the school.¹ However, it is a burden if excessive sick leave is utilized.

The applicable labor contract between the union representing custodial workers and Newark sets forth that all employees shall receive full pay for bereavement absences, over and above sick leave and personal days, and for the amount of time as follows:

Death in the immediate family or household – five (5) consecutive working days immediately following the death. Employees absent, as a result of the death of an immediate family member shall submit verification of relationship. Verification shall include mortician affidavit, newspaper obituary or funeral program. Death in the immediate family is defined as follows:

¹ Newark has an automatic dial-in system called the "sub-finder" that staff is required to use before their shift starts.

Spouse, Children, Mother (Stepmother, Foster Mother, Guardian, Mother-in-Law), Father (Stepfather, Foster Father, Guardian, Father-in-Law), Domestic Partner, Sister, Brother, Grandmother, Grandfather, Grandchild. Any other relative residing in the household.

[Exhibit A-1.]

As he testified, appellant produced all three methods of verification specified above to his immediate Roxie Morales.

Respondent produced Mamie Osei-Bonsu as a witness to rebut the testimony of both Hall and Walls that she had communicated to them about essentially waiving the last two sick days appellant took in June. Osei-Bonsu is a Labor-Relations Analyst for Newark, in the Department of Labor-Employment Relations. She described the general manner in which an employee's supervisor forwards to her office a disciplinary packet or request for disciplinary action. Osei-Bonsu explained that once such a request is received, the background of the matter will be reviewed and investigated, if necessary. Thereafter, a departmental hearing will be scheduled if discipline is found to be warranted. She will never meet informally with the employee during any part of this process.

Osei-Bonsu described the Attendance Improvement Policy (AIP) that governs all Newark employees, as well as the district's strict interpretation of the bereavement leave policy. Employees receive fifteen (15) days of sick leave each year and can carry over to the next year unused sick days. The AIP includes a protocol that requires supervisors to send warning letters to an employee upon that employee's use of his or her fifth (5th), eleventh (11th), and eighteenth (18th) sick day. This protocol is neutral as to when in the school year those triggering dates are reached. In other words, it is irrelevant whether the fifth sick day is used within the first two weeks of a school year or not until ten months into the school year. In this matter, appellant's supervisor issued those AIP notices to appellant consistent with the policy. [Exhibits R-2; R-5; R-7.] Exhibit R-7 was the cover memorandum of appellant's supervisor forwarding a packet requesting disciplinary action. Accordingly, I **FIND** that appellant's supervisor did not

use his discretion to waive use of any sick days by him in excess of the AIP protocols. He submitted his request for disciplinary action under cover of June 23, 2016.

Osei-Bonsu also testified that she has no discretion to waive discipline or to grant extra days of sick leave. She acknowledged that the employee's supervisor does have some discretion to be lenient before sending in a disciplinary packet but as found above, that did not occur here. Osei-Bonsu denied ever meeting with Hall or Walls concerning use of sick leave during the 2015-2016 school year, but did recall a meeting in February 2016 that concerned appellant's sick leave during the prior school year only. She regularly attends the departmental hearing but her only role is to make sure the employee understands the process and the charges.

The testimony of Osei-Bonsu conflicted directly with that of Hall and Walls with respect to whether there was an informal meeting on June 23 or 24, in which she assured appellant that so long as he did not use another sick day, he would not face disciplinary action. Accordingly, I must determine which witness I found to be more credible. For evidence to be credible it must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Credibility, or, more specifically, credible testimony must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954). It is not a scale on which one counts the simple number of witnesses on each side.

I **FIND** that appellant's witnesses were less credible than respondent's rebuttal witness. Credibility means the testimony as a whole hangs together and makes sense. After listening carefully to every witness, it was clear to me that no meeting took place except the February one relating to appellant's absences during the previous school year. This is buttressed by the lack of any authority on the part of Osei-Bonsu to waive further sick days. Further, the day of this alleged meeting appears to be the same day that appellant's supervisor sent in the AIP Request for Disciplinary Action, a policy with which he had studiously complied, although even Hall and Walls disagreed on when this meeting took place.

Thus, based on the credible testimonial and documentary evidence, I **FIND** that appellant had utilized eighteen (18) sick leave days by June 22, 2016, with June 24, 2016, being his nineteenth (19th) sick day of the 2015-2016 school year. I also **FIND** that June 30, 2016, was a day utilized by appellant for travel to his grandmother's funeral in Florida, to be held the next day.

ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, 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 (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 states 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.A.C. 4A:2-2.3(a) provides that a public employee may be subject to major discipline for various offenses. The burden of proof is always on the appointing authority in disciplinary matters to show that the action taken was justified. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). The employee's violating conduct must be established by a preponderance of the competent, relevant and credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk License Revocation, 90 N.J. 550 (1982). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of the credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Credibility, or, more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it

must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954). Both guilt and penalty are determined de novo on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

“Neglect of duty” is not defined under the New Jersey Administrative Code but the charge has been interpreted to mean that an employee has failed to perform and act as required by the description of their job title. Neglect of duty can arise from an omission or failure to perform a duty, such as excessive use of leave time. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). Thus, the charges of neglect of duty and excessive absenteeism in the within disciplinary notice essentially are duplicative and must merge. In this case, respondent alleges that appellant was excessively absent, which caused him to neglect his duty and negatively impact the custodial staff at Eastside High School because other workers had to complete his detail and their own. There is also the financial impact of resorting to per diem custodial workers.

In the within matter, I **CONCLUDE** from the preponderance of the evidence admitted at the hearing and found to be credible that the appellant had used nineteen sick days in the 2015-2016 school year. I also **CONCLUDE** that the principal did not utilize his discretion to not seek disciplinary action on the occurrence of the eighteenth (18th) day; nor did Osei-Bonsu, even if she met with Hall which I do not believe occurred, had the authority to assure appellant that he would not be disciplined. Thus, I **CONCLUDE** that Newark proved its case of excessive absenteeism against appellant in accordance with its AIP protocols.

There is a second issue of whether the day appellant took to drive to his grandmother’s funeral in Florida, ten days after her actual death, should have been considered an excused bereavement day rather than his twentieth (20th) sick day. As set forth above, the applicable labor contract provided that all employees shall receive full pay for bereavement absences, over and above sick leave and personal days, and for the amount of time as follows:

Death in the immediate family or household – five (5) consecutive working days immediately following the death. Employees absent, as a result of the death of an immediate family member shall submit verification of relationship. Verification shall include mortician affidavit, newspaper obituary or funeral program. Death in the immediate family is defined as follows:

Spouse, Children, Mother (Stepmother, Foster Mother, Guardian, Mother-in-Law), Father (Stepfather, Foster Father, Guardian, Father-in-Law), Domestic Partner, Sister, Brother, Grandmother, Grandfather, Grandchild. Any other relative residing in the household.

[Exhibit A-1.]

Appellant produced all three methods of verification specified above to his immediate Roxie Morales. I **CONCLUDE** that Newark erred in its interpretation and application of the bereavement policy with respect to appellant's use of June 30 (and contiguous days into July or next school year). It is arbitrary and unreasonable to strictly construe bereavement leave as mandatorily starting the date of death or not at all. Appellant's grandmother lived alone in Florida. He testified credibly that it took the family time to become aware of her death, to make funeral arrangements, and then to travel to Florida to attend same.² Thus, this matter must be restricted to the use of sick days prior to appellant's travel to Florida.

Newark argues that appellant has been disciplined previously for excessive use of sick leave and that a suspension of thirty days is an appropriate exercise of progressive discipline. In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. George v. North Princeton Developmental Center, 96 N.J.A.R. 2d 463, 465 (CSV) 1996.

An employee's past disciplinary record may be reviewed to determine the appropriate penalty for the current specific offense. See W. New York v. Bock, 38 N.J.

² In this modern world of far-flung families, it is hardly uncommon for families to defer funeral or memorial arrangements in the future in order to accommodate travel and other considerations. It does not undermine the purpose of honoring an employee's right to mourn the loss of an immediate family member to permit of this interpretation.

500 (1962). The concept of "progressive discipline," the imposition of penalties of increasing severity, is an appropriate consideration in determining the reasonableness of the penalty. Id. at 523-24. In addition to considering an employee's prior disciplinary history when imposing a disciplinary penalty, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid.

Here, I **CONCLUDE** that progressive discipline does warrant a suspension greater than the twenty (20) days appellant had been given for use of an excessive number of sick days during the prior school year. I **CONCLUDE** that the public's genuine interest in having civil servants fulfill the duties of their employment with the requisite degree of seriousness and responsibility is adequately protected in this case by the imposition of a twenty-five working day suspension, primarily because of the erroneous application by Newark of the contractual bereavement leave policy.

ORDER

Accordingly, it is **ORDERED** that the charges set forth in the Final Notice of Disciplinary Action of the Newark School District against Frankie Walls are hereby **MODIFIED**. It is further **ORDERED** that the penalty of a thirty (30) day suspension be and the same is hereby **REDUCED** to a twenty-five (25) day suspension which is deemed appropriate and warranted as a penalty for the incidents charged, with commiserate return of pay and any benefits for this reduction.

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, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, 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.

May 24, 2019

DATE



GAIL M. COOKSON, ALJ

Date Received at Agency:

Date Mailed to Parties:

id

APPENDIX

LIST OF WITNESSES

For Appellant:

Lorenzo Hall
Frankie Walls

For Respondent:

Mamie Osei-Bonsu

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

- A-1 Newark School District - Local 617 SEIU Agreement, dated March 1, 2010 to February 28, 2013 (relevant portions)
- A-2 Funeral Program for Cora Lee Walls, July 1, 2016
- A-3 Obituary and Funeral Program (continued)
- A-4 Funeral by T.S. Warden Letter re Frankie Walls Attendance, dated July 1, 2016

For Respondent:

- R-1 Final Notice of Disciplinary Action, dated September 15, 2016
- R-2 AIP Conference, Earl Davis, dated September 28, 2015
- R-3 [not in evidence]
- R-4 [not in evidence]
- R-5 AIP Written Warning, Mr. Davis, dated January 13, 2016
- R-6 [not in evidence]
- R-7 AIP Request for Disciplinary Action, Dr. Mario Santos, dated June 23, 2016
- R-8 Time Detail Report, Frankie Walls, 2015-2016 School Year
- R-9 Disciplinary History for Frankie Walls