



**STATE OF NEW JERSEY**

**FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION**

In the Matter of Ernest Manning,  
City of Newark, Department of Public  
Works

Request for Reconsideration

CSC Docket No. 2020-1784

**ISSUED: AUGUST 26, 2020 (HS)**

Ernest Manning petitions the Civil Service Commission (Commission) for reconsideration of the attached final decision rendered on December 18, 2019, which upheld his removal and resignation not in good standing. That decision is incorporated herein.

As background, the appointing authority presented the petitioner, a Laborer 1, with a Preliminary Notice of Disciplinary Action (PNDA) and, subsequently, a Final Notice of Disciplinary Action that removed and resigned him not in good standing, effective April 3, 2018, on charges of chronic absenteeism; neglect of duty; and other sufficient cause. Specifically, the appointing authority asserted that the petitioner failed to comply with the terms of his Letter of Conditional Employment (LCE)<sup>1</sup> and failed to present to work.

Upon the petitioner’s appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case. After the hearing, the Administrative Law Judge (ALJ) determined that the appointing authority had met its burden of proof with regard to the charges. In particular, the ALJ found that the petitioner failed to present to work any time after entering into his settlement agreement and LCE and before the issuance of the PNDA, or to even call in to report his absence or whereabouts. Moreover, since he absented himself from duty for five or more consecutive business days, this constituted a resignation not in good standing per *N.J.A.C.* 4A:2-6.2. The ALJ also found that the petitioner failed to comply with

<sup>1</sup> The LCE was part of a settlement agreement the parties entered into in 2018.

the terms of the LCE by failing to enroll in and complete a substance-abuse rehabilitation program within the prescribed timeframes. The ALJ deemed the petitioner's testimony inconsistent and not credible overall. She deemed Valerie Goldston-Key, the former assistant director of the Department of Public Works and witness for the appointing authority, to be a professional and credible witness whose testimony was consistent with the documentary evidence presented. Goldston-Key offered testimony concerning, among other things, the petitioner's prior discipline. She testified that he was charged with resignation not in good standing in 2013, which ultimately resulted in a settlement whereby the petitioner served a suspension and was reinstated. His prior discipline also included a seven-day suspension in November 2015 for chronic or excessive absenteeism; a five-day suspension on or around June 2, 2015 for failing to complete an assignment and leaving the district without authorization; and a two-day suspension in April 2012 for excessive absenteeism, failure to perform duties, and conduct unbecoming. He also served a 74-day suspension as a result of the 2018 settlement agreement. In determining whether removal was the appropriate penalty, the ALJ:

. . . took into account [the petitioner]'s testimony; his disciplinary history, which included prior charges of chronic/excessive absenteeism and a long-term suspension; and [the petitioner]'s failure to comply with the clear and reasonable terms of the [LCE] to enroll in and complete a rehabilitation program. The [LCE] expressly put [the petitioner] on notice that his failure to comply with its terms may result in his termination. The [appointing authority] offered [the petitioner] an opportunity to keep his job, but he failed to hold up his end of the agreement by failing to attend and complete the program for no justifiable reason. I CONCLUDE, therefore, that the [petitioner]'s conduct warrants discipline and that his removal from employment is consistent with both the concept of progressive discipline and the terms of the settlement reached by the [the parties]. The [appointing authority] acted appropriately in removing [the petitioner] from his position as a laborer given the totality of the circumstances, and I, therefore, CONCLUDE that termination is the appropriate penalty.

Upon its *de novo* review of the record, the Commission accepted and adopted the ALJ's initial decision in full.

In his request for reconsideration, the petitioner states, among other things, that in the disciplinary matter that ultimately led to the settlement agreement and LCE, the departmental hearing was not timely held. He acknowledges, however, that he agreed to sign the LCE. The petitioner asserts that the appointing authority embellished the facts of this case and that "90% of [his past] disciplinary actions are false or wrongful."

In response, the appointing authority, represented by Tiffany A. Friend, Assistant Corporation Counsel, maintains that the ALJ assessed the credibility of the witnesses and properly applied the law. It argues that the petitioner has not put forth any meaningful new evidence or established that a clear material error occurred. The appointing authority also contends that the petitioner waived any claim that the departmental hearing in the prior disciplinary matter was not timely held when he signed the settlement agreement and LCE. It is noted that the settlement agreement provided, in part:

[The petitioner] further waives any and all rights or claims which he has or may have to a hearing on the merits of the disciplinary action taken under this Agreement and/or to challenge the suspension penalty imposed as a result of same, including, but not limited to, any right to a departmental hearing concerning the charges in the PNDA.

...

[The petitioner] and the Union further acknowledge that this Agreement further precludes either of them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to the PNDA.

## CONCLUSION

*N.J.A.C.* 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding. A review of the record reveals that reconsideration is not justified.

At the outset, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). “[T]rial courts’ credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record.” *See also, In re Taylor*, 158 *N.J.* 644 (1999) (quoting *State v. Locurto*, 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately

gives due deference to such determinations. In the instant matter, the ALJ found the appointing authority's witness more credible than the petitioner. The petitioner has presented no substantive evidence which establishes that the ALJ's assessment of the credibility of the witnesses or her findings and conclusions based on those assessments were in error. The Commission declines to entertain the petitioner's attempt to now re-litigate the merits of his past disciplinary actions. Those actions, or at least those the petitioner chose not to settle, should have been timely challenged when they occurred using the appropriate disciplinary appeal procedure. The instant request is not the proper forum to do so. The Commission adds only the following comments.

The use of the LCE is solely for the purpose of determining the appropriate penalty. While the OAL and the Commission are not strictly bound by the terms set forth in the LCE, since neither entity was a party to the settlement, the Commission is nonetheless cognizant of the fact that the parties voluntarily agreed to the penalty of removal for any subsequent violation. Consequently, an LCE can be used by the Commission as a significant factor to be considered, along with the employee's prior disciplinary history, when determining the appropriate penalty in an appeal. Additionally, last chance agreements such as the LCE are construed in favor of appointing authorities because to do otherwise would discourage their use by making their terms meaningless. *See Watson v. City of East Orange*, 175 N.J. 442 (2003) (The Supreme Court found an employee's termination was warranted when that employee did not perform in compliance with a last chance agreement as contemplated by the parties. The Court added that a contrary conclusion would likely chill employers from entering into such agreements to the detriment of future employees.); *In the Matter of Phillip Montgomery* (MSB, decided May 9, 2000) (In denying a request for reconsideration of an employee's removal, in addition to the employee's extensive history of infractions and the concept of progressive discipline, significant weight was given to the fact that the employee signed an agreement acknowledging that further instances of certain infractions would result in further disciplinary action up to and including removal). *See also*, *In the Matter of Tina Kirk* (CSC, decided January 27, 2010); *In the Matter of Brian Whittle* (MSB, decided May 28, 2003); *In the Matter of Ann Marie Collins-Cole* (MSB, decided December 18, 2002) and *In the Matter of Donald Hickerson* (MSB, decided September 10, 2002). Here, in determining the penalty, the ALJ appropriately took into account the petitioner's testimony; his disciplinary history, which included prior charges of chronic or excessive absenteeism and a lengthy suspension; *and* his failure to comply with the LCE. She properly determined that the petitioner's removal was consistent with *both* the concept of progressive discipline *and* the terms of the settlement reached between the parties.

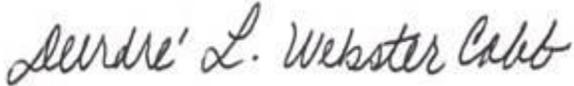
Accordingly, the petitioner has not presented a sufficient basis for the Commission to reconsider its prior decision.

**ORDER**

Therefore, it is ordered that this request for reconsideration be denied.

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 19<sup>TH</sup> DAY OF AUGUST 2020



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Deirdré L. Webster Cobb  
Chairperson  
Civil Service Commission  
Inquiries  
and  
Correspondence

Christopher S. Myers  
Director  
Division of Appeals and Regulatory Affairs  
Written Record Appeals Unit  
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Trenton, New Jersey 08625-0312

Attachment

- c. Ernest Manning  
Kenyatta K. Stewart, Corporation Counsel  
Tiffany A. Friend, Assistant Corporation Counsel  
Division of Agency Services  
Records Center



## STATE OF NEW JERSEY

In the Matter of Ernest Manning  
 City of Newark, Department of Public  
 Works

FINAL ADMINISTRATIVE ACTION  
 OF THE  
 CIVIL SERVICE COMMISSION

CSC DKT. NO. 2018-3715  
 OAL DKT. NO. CSV 08096-19

ISSUED: DECEMBER 18, 2019 BW

The appeal of Ernest Manning, Laborer 1, City of Newark, Department of Public Works, removal and resignation not in good standing effective April 3, 2018, on charges, was heard by Administrative Law Judge Susana E. Guerrero, who rendered her initial decision on November 12, 2019. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed 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 December 18, 2019, 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 removing and resigning the appellant not in good standing was justified. The Commission therefore affirms those actions and dismisses the appeal of Ernest Manning.

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 18<sup>TH</sup> DAY OF DECEMBER, 2019

*Deirdre L. Webster Cobb*

Deirdré L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Christopher S. Myers  
Director  
Division of Appeals and Regulatory Affairs  
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Attachment



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. CSV 08096-19

AGENCY DKT. NO. 2018-3715

**IN THE MATTER OF ERNEST MANNING,  
CITY OF NEWARK, DEPARTMENT OF  
PUBLIC WORKS.**

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**Arnold S. Cohen, Esq.,** for appellant Ernest Manning (Oxfeld Cohen, attorneys)

**Tiffany A. Friend,** Assistant Corporation Counsel, for respondent City of Newark  
(Kenyatta K. Stewart, Corporation Counsel)

Record Closed: September 25, 2019

Decided: November 12, 2019

**BEFORE SUSANA E. GUERRERO, ALJ:**

**STATEMENT OF THE CASE**

Appellant, Ernest Manning (Manning or appellant), appeals his removal from his position as a laborer with the City of Newark (the City or respondent) for failing to comply with the terms of his Letter of Conditional Employment and for failing to present to work.

## **PROCEDURAL HISTORY**

On or around May 15, 2018, the respondent served Manning with a Preliminary Notice of Disciplinary Action (PNDA) which informed him of the charges made against him, including: chronic absenteeism, neglect of duty, other sufficient cause, and resignation not in good standing. Manning was served with a Final Notice of Disciplinary Action (FNDA) dated June 1, 2018, which sustained the charges set forth in the PNDA.

The New Jersey Civil Service Commission (the Commission) transmitted the matter to the Office of Administrative Law (OAL), where it was filed on June 13, 2019, for determination 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 hearing took place on August 22, 2019, and the record closed on September 25, 2019, upon receipt of the post-hearing summations.

## **FACTUAL DISCUSSION**

There is no dispute as to the following:

The appellant has worked as a laborer in refuse collection with the City of Newark's Department of Public Works (Department) for over twenty years. In December 2017 he was served with a PNDA for excessive absenteeism, conduct unbecoming, and other sufficient cause after he was allegedly observed drinking beer on the back of a City refuse truck, and for refusing a urinalysis and failing to appear for work without authorization. The City sought to terminate Manning from his position with the City, and Manning filed an appeal. Ultimately, Manning and the City entered into a Settlement Agreement and General Release on or about March 22, 2018, whereby the City agreed to amend the disciplinary action in the PNDA from termination to a seventy-four-day suspension from December 12, 2017, through March 25, 2018, and Manning agreed to comply with the terms of a "Letter of Conditional Employment." Both Manning and his union representative signed the Settlement Agreement and General Release. On or around March 20, 2018, Manning also signed the Letter of Conditional Employment.

The Letter of Conditional Employment indicates that Manning agreed to the following conditions as terms for his continued employment with the City of Newark:

1. You must participate in and successfully complete an alcohol and/or substance abuse rehabilitation program ("Program") and present confirmation of completion of same in writing to the Department and to the City's Personnel Department within seven (7) calendar days of completion. You will comply with all conditions set forth by the Program for your continued rehabilitation. Further, you will describe the conditions for continued rehabilitation set forth by the Program. You must submit written proof of your enrollment in said Program to the Department within seven (7) calendar days of your execution of this document.

2. Failure to provide proof of enrollment and successful completion of substance abuse rehabilitation program, as stated above, shall be deemed sufficient reason for terminating the employment of . . . [Manning] with the City.

....

8. You will continue to perform your job to satisfactory levels expected of all City employees. Any irregular work behaviors; failure to notify your supervisor of an absence (no call/no show); abuse of sick time (chronic/excessive absenteeism) without medical excusal; intoxication during work hours will result in termination.

....

11. . . . If there is any evidence that you have returned to the cause of your problem or you violated the conditions stated above, you will be subject to immediate discharge.

On or about May 15, 2018, the Department issued another PNDA to Manning seeking to remove him from his employment with the City in part for failing to comply with the terms of the Letter of Conditional Employment executed on March 20, 2018. An FNDA dated June 1, 2018, sustained the charges in the May 15, 2018, PNDA of chronic absenteeism, neglect of duty, other sufficient cause, and resignation not in good standing. Specifically, the basis for the charges and Manning's removal was stated in the FNDA as:

Mr. Manning failed to comply with the terms of the Letter of Conditional Employment in which he entered with [the] City of Newark on 3.20.18, which, in part required him to provide proof of enrollment/completion of a substance abuse rehabilitation program & aftercare; Manning has failed to communicate with the Department concerning his absence; Manning has absented himself from work beginning 3.26.18 without authorization (following completion of a 74-day suspension for a previous disciplinary matter).

### Testimony

#### For Appellant

Manning maintains that he complied with the terms of the Settlement Agreement and did not absent himself from work. He testified that he completed a rehabilitation program at New Directions Behavioral Health Center (New Directions) on February 12, 2018 (i.e., prior to the March 2018 settlement and Letter of Conditional Employment) but never submitted the Certificate (A-1) to anyone with the City.

Manning testified that when he delivered the Letter of Conditional Employment to Director Thomas in March 2018, the director informed Manning that his assignment in the Department was being changed to the Asphalt Division. This reassignment would change his work hours from 6:00 a.m. to 2:30 p.m., to 7:30 a.m. to 4:00 p.m. Manning expressed his concern that this would affect his ability to care for his mother and pick up his child from school. His union representative was made aware of this and, according to Manning, he thought that his union representative would deal with the issue concerning his reassignment and Manning would continue to work for a temporary agency where he had been working full time.

In mid-April 2018, Director Thomas and Assistant Director Goldston-Key informed Manning that he could only return to work after completing a rehabilitation program, as they had agreed. Manning testified that he then informed them that he had completed a program in February, but was told that he had to complete another program. Goldston-Key gave him a pamphlet with a phone number that would connect him to rehabilitation programs in the area. Manning testified that he was concerned about attending a new

rehabilitation program because it would interfere with his work schedule at the temporary agency. He then returned to New Directions to complete four rehabilitation sessions on weekends. He never informed the City that he had enrolled in this program, and he never completed the program, completing only three of the sessions. Manning maintains that he complied with his agreement with the City by completing the New Directions program in February 2018.

**For Respondent**

Valerie Goldston-Key (Goldston-Key) testified on behalf of the City, where she has been employed for over thirty years. She served as the assistant director of the Department of Public Works from April 2016 to March 2019. As assistant director, her responsibilities involved assisting the director with the overall operations of the Department, including dealing with disciplinary and attendance matters.

The Settlement Agreement required Manning to attend a substance-abuse rehabilitation program, notify the City of his enrollment in and completion of the program, and return to the City upon completion of the program. She testified that the Department did not hear from Manning at all to report that he had enrolled in or completed a rehabilitation program. He also never submitted any certification or documentation confirming his completion of a substance-abuse program. The City, therefore, issued the May 15, 2018, PNDA for Manning's failure to comply with the terms of the Settlement Agreement and Letter of Conditional Employment, and specifically for failing to provide proof of enrollment in and completion of a substance-abuse rehabilitation program and aftercare, for failing to communicate with the Department concerning his absence, and for absenting himself from work beginning March 26, 2018, without authorization (following the seventy-four-day suspension). She referred to paragraph "h" of the Letter of Conditional Employment, which indicates that failure to comply with its terms would result in termination.

Goldston-Keys testified that she had never seen Exhibit A-1<sup>1</sup> until a few days prior to the hearing, and she was not made aware that Manning had participated in a New Directions program. Also, Manning never filed a grievance concerning his reassignment to the Asphalt Division.

Goldston-Key also testified as to the practice at the Department concerning calling out of work. When calling out, employees are required to report the absence by calling the "general call-out number" within a half hour of the employee's start time. Between March 26 and May 4, Manning did not present to work and never called to report his absence. The controlling union contract and City policy required Manning to report his absence from work, and his failure to do so constitutes a resignation not in good standing. Five or more days of failing to present to work without authorization constitutes a resignation not in good standing. Goldston-Key later testified on cross-examination that Manning was actually not expected to return to work on March 26, 2018, the date that his period of suspension ended, because when they entered into the Settlement Agreement a few days earlier, Manning had agreed to complete a rehabilitation program before returning to work. The FNDA lists March 26, 2018, as the first day Manning absented himself because his seventy-four-day period of suspension ended on March 25, 2018, and selecting another date would be arbitrary since it is unknown precisely when Manning would have completed the rehabilitation program and returned to work, as he never enrolled in or completed a program within the time frame contained in the Letter of Conditional Employment.

Goldston-Key offered testimony concerning Manning's prior discipline. She testified that there were a number of disciplinary matters relating to Manning's attendance, and that he was also charged with "resignation not in good standing" in 2013, which ultimately resulted in a settlement whereby Manning served a suspension and was reinstated. His prior discipline included a written warning in January 2017 for excessive absenteeism/tardiness; a seven-day suspension in November 2015 for chronic or excessive absenteeism; a five-day suspension on or around June 2, 2015, for failing to complete an assignment and leaving the district without authorization; a two-day

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<sup>1</sup> Counsel for the City objected to the introduction of this exhibit in part because it had only been supplied to respondent by appellant's counsel five days prior to the hearing.

suspension in April 2012 for excessive absenteeism, failure to perform duties, and conduct unbecoming; and a written warning concerning his attendance and his failure to bring in a doctor's note as required in April 2012. He also served a seventy-four-day suspension as a result of the December 2017 PNDA charges.

The charge of "chronic absenteeism" relates to Manning absenting himself from work since March 26, 2018, without authorization. The charge of "neglect of duty" refers to Manning's failure to provide proof of enrolling in and completing the rehabilitation program, as well as his failure to call in as required following the period of suspension. Goldston-Key also testified that the charge of "other sufficient cause" refers to the "resignation not in good standing."

Goldston-Key recalls Director Thomas reassigning Manning to the Asphalt Division when the parties had reached the settlement. She testified that, under Director Thomas, it was routine for laborers to be moved around into difference assignments.

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also must be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "[t]he 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).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Here, Goldston-Key presented as a professional and credible witness and her testimony was consistent with the documentary evidence presented, whereas Manning's testimony was inconsistent and not credible overall.

Based upon my review of the documentary evidence and having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, I **FIND** as **FACT** the following:

1. Manning did not enroll in any substance-abuse rehabilitation program within seven days of signing the Letter of Conditional Employment on or around March 20, 2018.

2. Manning never completed a substance-abuse rehabilitation program after signing the Letter of Conditional Employment and entering into a Settlement Agreement with the City, and he never provided the City with any confirmation of having completed a program.

3. The New Directions program was completed by Manning more than one month prior to entering into the Settlement Agreement and Letter of Conditional Employment with the City in March 2018. The Settlement Agreement and Letter of Conditional Employment required Manning to enroll in and complete a substance-abuse rehabilitation program after signing these documents in March 2018. Manning's completion of the New Directions program prior to March 2018 was outside the scope of the terms contained in the Letter of Conditional Employment.

4. Shortly after Manning signed the Letter of Conditional Employment, Goldston-Key provided him with information, including a phone number, to assist him in enrolling in the appropriate rehabilitation program. Manning, however, chose not to enroll in any of the available programs because, according to his testimony, they conflicted with the full-time job he had started with a temporary agency.

5. While Manning testified that he re-enrolled in a rehabilitation program with New Directions after signing the Letter of Conditional Employment, he never informed the City that he had done so and he never completed the program.

6. Manning's period of suspension lasted from December 12, 2017, to March 25, 2018, and at no time after March 25 did Manning contact the Department, including the hotline, to report his absence from work.

7. Pursuant to City policy and procedure, Manning was required to report any absence from work on the day of his absence. He absented himself from work, without authorization, for several weeks after entering into the March 2018 settlement with the City.

### **LEGAL ANALYSIS AND CONCLUSIONS**

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 10-3.2. 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)(12).

In disciplinary cases, the appointing authority has the burden of both persuasion and production and must demonstrate by a preponderance of the competent, relevant, and credible evidence that it had just cause to discipline the employee and lodge the charges. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962). 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) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958).

The first issue in this proceeding is whether a preponderance of the credible evidence establishes that the appellant's actions constitute a violation of the charges set forth in the June 1, 2018, FNDA. If so, the second issue is whether the violation warrants his removal or a lesser penalty, if any.

Manning is charged with violating the provisions of N.J.A.C. 4A:2-2.3 relating to chronic absenteeism, neglect of duty, and other sufficient cause, and of N.J.A.C. 4A:2-6.2 relating to resignation not in good standing. With respect to the charge of "chronic or excessive absenteeism," factors to consider in assessing whether an employee's absenteeism is chronic or excessive include the number of absences, the time span between the absences, and the negative impact on the work place. See Harris v. Woodbine Developmental Ctr., CSV 4885-02, Initial Decision (February 11, 2003), adopted, Comm'r (March 27, 2003), [njlaw.rutgers.edu/collections/oal](http://njlaw.rutgers.edu/collections/oal); Hendrix v. City of Asbury, CSV 10042-99, Initial Decision (April 10, 2001), adopted, Comm'r (June 8, 2001), [njlaw.rutgers.edu/collections/oal](http://njlaw.rutgers.edu/collections/oal); Morgan v. Union Cty. Runnells Specialized Hosp., 97 N.J.A.R.2d (CSV) 295; Bellamy v. Twp. of Aberdeen, Dep't of Pub. Works, 95 N.J.A.R.2d (CSV) 770. Also, "[e]xcessive absenteeism is not necessarily limited to instances of bad faith or lack of justification on the part of the employee who was frequently away from [his or] her job." Terrell v. Newark Hous. Auth., 92 N.J.A.R.2d (CSV) 750, 752; see also Bellamy, 95 N.J.A.R.2d (CSV) at 772.

Here, Manning never presented to work after entering into the Settlement Agreement with the City, serving his suspension, and signing the Letter of Conditional Employment. While the testimony is inconclusive as to precisely when Manning would have been required to return to work had he enrolled in a rehabilitation program within seven days of signing the Letter of Conditional Employment (as the Letter expressly required), his failure to enroll in a program does not excuse his obligation to contact the Department and report his absence. Not once after signing the Settlement Agreement on March 25, 2018, and before the City issued the May 15, 2018, PNDA did Manning reach out to the Department to inform them of his whereabouts. Rather, during that period of time, Manning was not attending a rehabilitation program, but working full time at another job. The City policy and procedure required Manning, as a Department employee, to report to work or to report his absence on a daily basis, both of which

Manning failed to do. I **CONCLUDE**, therefore, that respondent has demonstrated, by a preponderance of the credible evidence, that appellant's failure to present to work any time after signing the Settlement Agreement on March 25, 2018, and before the issuance of the May 15, 2018, PNDA, or to even call in to report his absence or whereabouts to the Department, constitutes excessive absenteeism, and that such charge must be **SUSTAINED**.

"Neglect of duty" has been interpreted to mean that an employee "neglected to perform an act required by his or her job title or was negligent in its discharge." In re Glenn, CSV 5072-07, Initial Decision (February 5, 2009), adopted, Civil Service Commission (March 27, 2009), [njlaw.rutgers.edu/collections/oal/](http://njlaw.rutgers.edu/collections/oal/). The term "neglect" means a deviation from the normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" means conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted). Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing. State v. Dunphy, 19 N.J. 531, 534 (1955). Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job.

Here, the Letter of Conditional Employment which Manning signed on March 20, 2018, expressly requires him to enroll in a substance-abuse rehabilitation program within seven days of his signing of the Letter, and to complete the program and report this to the City within seven days of its completion. The Letter of Conditional Employment expressly states that failure to provide proof of enrollment and successful completion of the program "shall be deemed sufficient reason" to terminate the employee. Manning's failure to enroll in a program within seven days of signing the Letter of Conditional Employment and his failure to inform the City that he had completed such a program after March 20, 2018, constituted a violation of the agreed-upon terms of the Letter, as well as a neglect of Manning's duties as a City employee. I **CONCLUDE**, therefore, that respondent has demonstrated, by a preponderance of the credible evidence, that Manning's failure to comply with the terms of the Letter of Conditional Employment by failing to enroll in and complete a substance-abuse rehabilitation program within the time

frames prescribed in the Letter constitutes neglect of duty, and that such charge must be **SUSTAINED**.

The charge of "other sufficient cause" refers to an offense for conduct that violates the implicit standards of good behavior which devolve upon one who stands in the public eye as an upholder of that which is morally and legally correct. In re MacDonald, CSR 9803-13, Initial Decision (May 19, 2014), adopted, Civil Service Commission (September 3, 2014), <http://njlaw.rutgers.edu/collections/oal/>. Respondent maintains that the "other sufficient cause" charge relates to the "resignation not in good standing." An employee is resigned not in good standing if he either: (a) resigns without complying with the required notice in N.J.A.C. 4A:2-6.1; (b) is absent from duty for five or more consecutive business days without approval of his or her superior; or (c) has not returned to duty for five or more consecutive business days following an approved leave of absence. N.J.A.C. 4A:2-6.2(a)-(c).

Here, Manning never returned to work after serving his suspension, and his absence was neither excused nor approved. He chose not to enroll in and complete a rehabilitation program pursuant to the Letter of Conditional Employment, and his failure to do so does not excuse Manning's obligation to report his absence from work, particularly because his absence was not due to his participation in a rehabilitation program or other excusable or authorized reason. Manning failed to inform the Department of his absence or whereabouts after March 25, 2018, and his absence from duty lasted more than five days. Based on Manning's own testimony, he clearly did not want to return to the Department to work in the Asphalt Division, and he had even started to work full time for another employer during this time.<sup>2</sup> Therefore, I **CONCLUDE** that respondent has demonstrated, by a preponderance of the credible evidence, that Manning absented himself from duty with the City for five or more consecutive business days and that this constitutes a resignation not in good standing, in violation of N.J.A.C. 4A:2-6.2, and therefore also a violation of N.J.A.C. 4A:2-2.3(a)(12), "other sufficient cause," and that such charge must be **SUSTAINED**.

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<sup>2</sup> There is nothing in the record to suggest that the Department was not authorized to reassign Manning to the Asphalt Division, and Manning never filed a grievance in connection with this reassignment.

## PENALTY

When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and “penalty” on appeal based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); W.N.Y. v. Bock, 38 N.J. 500 (1962). In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee’s offense, the concept of progressive discipline, and the employee’s prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to Bock, concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). Depending upon the incident complained of and the employee’s past record, major discipline may include suspension, removal, etc. Bock, 38 N.J. at 522–24.

Here, respondent maintains that removal is the appropriate penalty and consistent with the concept of progressive discipline given Manning’s extensive disciplinary history, which included several charges of absenteeism in 2012, 2015, and 2017, and significant major discipline, including a seventy-four-day suspension. The respondent also maintains that Manning’s continuous neglect and neglectful behavior, in addition to his chronic and excessive absenteeism, renders him unsuitable for continued employment with the City. Manning, on the other hand, maintains that discipline should be revoked because he denies the charges and because the City held the departmental hearing more than thirty days after the City issued the PNDA.

The principle of progressive or incremental discipline is not a “fixed and immutable rule” that must be applied in every disciplinary setting. In re Herrmann, 192 N.J. 19, 33 (2007); In re Carter, 191 N.J. 474, 484 (2007). Rather, “some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record.” Carter, 191 N.J. at 484. “Progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee’s position involves public safety and the misconduct causes risk of harm to persons or property.” Herrmann, 192 N.J. at 33.

In considering whether termination is the appropriate discipline here, I took into account Manning's testimony; his disciplinary history, which included prior charges of chronic/excessive absenteeism and a long-term suspension; and Manning's failure to comply with the clear and reasonable terms of the Letter of Conditional Employment to enroll in and complete a rehabilitation program. The Letter expressly put Manning on notice that his failure to comply with its terms may result in his termination. The City offered Manning an opportunity to keep his job, but he failed to hold up his end of the agreement by failing to attend and complete the program for no justifiable reason. I **CONCLUDE**, therefore, that the appellant's conduct warrants discipline and that his removal from employment is consistent with both the concept of progressive discipline and the terms of the settlement reached by the City and Manning. The City acted appropriately in removing appellant from his position as a laborer given the totality of the circumstances, and I, therefore, **CONCLUDE** that termination is the appropriate penalty.

### **ORDER**

It is **ORDERED** that the charges of chronic/excessive absenteeism, neglect of duty, other sufficient cause, and resignation not in good standing are **AFFIRMED**. It is further **ORDERED** that appellant be and hereby is removed from his employment with the City of Newark's Department of Public Works.

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.

11/12/19  
DATE

  
SUSANA E. GUERRERO, ALJ

Date Received at Agency:

11/12/19

Date Mailed to Parties:

11/18/19

jb

**APPENDIX**

**WITNESSES**

**For Appellant:**

Ernest Manning

**For Respondent:**

Valerie Goldston-Key

**EXHIBITS**

**For Appellant:**

A-1 New Directions Behavioral Health Center Certificate of Completion

**For Respondent:**

- R-1 Preliminary Notice of Disciplinary Action dated May 15, 2018
- R-2 Final Notices of Disciplinary Action dated June 1, 2018, and March 21, 2018; March 2018 Settlement Agreement and General Release, March 2018 Letter of Conditional Employment
- R-3 Timecard Printout
- R-4 Past Disciplinary Actions, including: Final Notice of Disciplinary Action dated March 21, 2018; Memorandum from D. Talib Aquil to appellant dated January 17, 2017; Final Notice of Disciplinary Action dated November 23, 2015; Notice of Minor Disciplinary Action dated June 2, 2015; Final Notice of Disciplinary Action dated June 1, 2015; June 2015 Notice of Suspension and Suspension Request; April 2013 Suspension Notice, April 2013 Stipulation of Settlement Agreement and General Release; City records concerning September 2012 Corrective Conference and April 2012 Written Warning; Notice of Minor Disciplinary Action dated April 24, 2012