STATE OF NEW JERSEY

In the Matter of Manuel Suarez
Town of West New York
Department of Public Safety

CSC DKT. NO. 2013-2438
OAL DKT. NO. CSV 07366-13

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: September 3, 2014 PM

The appeal of Manuel Suarez, a Public Safety Tele-communicator with the Town of West New York, Department of Public Safety, resignation not in good standing effective April 19, 2011, on charges, was heard by Administrative Law Judge Sandra Ann Robinson, who rendered her initial decision on July 22, 2014. No exceptions were filed.

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 September 3, 2014, 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 disciplining and removing the appellant was justified. The Commission therefore modifies this action to a resignation in good standing.

Re: Manuel Suarez

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
SEPTEMBER 3, 2014

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 07366-13
AGENCY DKT. NO. 2013-2438

MANUEL SUAREZ,
Appellant,
v.
TOWN OF WEST NEW YORK
DEPARTMENT OF PUBLIC SAFETY,
Respondent.

Alan Kaufman, CWA District I Representative, for appellant

Sean D. Dias, Esq., representing respondent (Scarinci and Hollenbeck, attorneys)

Record Closed: June 20, 2014 Decided: July 22, 2014

BEFORE **SANDRA ANN ROBINSON**, ALJ:

STATEMENT OF THE CASE

Manuel Suarez, appellant, appeals the determination of the respondent, Town of West New York Department of Public Safety, that determined appellant is guilty of neglect of duty, abandonment of job, and resigning not in good standing, after appellant

did not return to work on April 19, 2011, which was the end date of the approved period for a leave of absence.

Respondent contends that appellant violated N.J.A.C. 4A:2-2.3(a) (7), neglect of duty; N.J.A.C. 4A:2.6.2 (b) abandonment of job, and N.J.A.C. 4A:2-6.2 (c), resignation not in good standing.

Respondent further contends that appellant's violations warrant a penalty of resignation not in good standing, effective April 19, 2011.

Appellant contends that the facts of the case will prove that the charges are unfounded and a resignation not in good standing is not warranted. Appellant seeks reinstatement to his prior position as a civilian public safety telecommunicator for the Town of West New York with appropriate back pay.

PROCEDURAL HISTORY

On April 16, 2013, respondent served appellant with a Preliminary Notice of Disciplinary Action (PNDA) that notes the possible disciplinary actions of removal from his permanent civilian title of public safety telecommunicator via a resignation not in good standing, effective April 19, 2011. Appellant requested an Internal Disciplinary Hearing that was completed on May 7, 2013. On May 13, 2013, a Final Notice of Disciplinary Action (FNDA) was mailed to appellant via certified mail. The FNDA sustained all charges set forth on the Preliminary Notice and implemented a disciplinary action of a resignation not in good standing, effective April 19, 2011.

On May 23, 2013, the New Jersey Civil Service Commission, Division of Appeals and Regulatory Affairs, transmitted the within matter to the Office of Administrative Law (OAL), for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to B-15 and N.J.S.A. 52:14F-1 to F-13. On June 11, 2013, this matter was assigned to the Honorable Tiffany Williams, ALJ. On August 8, 2013, the undersigned assumed responsibility for the case, approved a discovery schedule and deadlines, and

scheduled testimony to commence on November 25 and continue on November 27, 2013. The November 25 and 27 hearing dates were postponed due to scheduling conflicts by both parties' representatives. A hearing date was scheduled for January 3, 2014, and was postponed due to inclement weather and the closing of the courts. A new hearing date was set for March 4, 2014, and postponed because respondent's key witness, Lt. Edmond Monti, remained hospitalized. On April 10, 2014, testimony commenced and at the close of the day on April 10 the parties selected not to recall Lieutenant Monti or to produce appellant's wife for testimony. The parties request for post-hearing submissions was granted in light of the span of time since the 2011 resignation and the appeal filing. The attorneys requested an extension of time to submit post-hearing documents, which was granted. All submissions were received at OAL by June 20, 2014, and the record was closed.

ISSUES

Is there a preponderance of the credible evidence to establish the disciplinary charges set forth in the FNDA because of appellant's failure to return to work after an approved leave of absence that lasted more than five days? Is appellant guilty of one or more of the charges in the FNDA of: absence for more than five consecutive business days without approval, abandonment of job, and neglect of duty? If yes, is resignation not in good standing the appropriate disciplinary action warranted under the circumstances presented in the case? Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

(Disciplinary Charges)

The charges in the Final Notice of Disciplinary Action (31-B), dated May 13, 2013, appear as follows:

> Violation of Civil Service Rule N.J.A.C. 4A:2-6.2(b) – Any employee who is absent from duty for five or more consecutive business days without the approval of his or her superior shall be considered to have abandoned his or her

> position and shall be recorded as a resignation not in good standing.

(Specification of the Charges)

The specification for charges sustained in the Final Notice of Disciplinary Action (31-B), dated May 13, 2013, require the reader to refer back to the findings of the hearing officer during the May 7, 2013, internal hearing. The hearing officer's Determination Summary, in pertinent part, read as follows:

> It is undisputed by the parties that Mr. Suarez's last day of work for the Town as a telecommunications operator was April 19, 2011. It is also undisputed that Mr. Suarez has not returned to work for the Town in any capacity. Although Mr. Suarez testified that he had several conversations with members of the police department regarding his return to work, no documents or records exist to support this allegation. Lt. Monti's testimony was found to be credible. The attendance record submitted was unchallenged. The evidence also indicates that the request for a leave of absence was denied. The August 16, 2011 letter from Lt. Monti does not state that Mr. Suarez would be able to return to his position with the Town. The letter informs Mr. Suarez of the expiration date of his leave and merely requests that he contact Lt. Monti. I also find compelling that Mr. Suarez admitted that he applied for unemployment (UIB) in the fall of 2011 and waited until 2013 to file an appeal of this matter. Even if Mr. Suarez is correct that his three-month leave of absence was approved, that leave would have expired effective July 19, 2011. As Mr. Suarez did not return to work at that time, he is considered to have abandoned his job. Under the statute, a five-day absence is sufficient for a finding of resignation not in good standing. As the only documented evidence is the letter dated August 24, 2011, (over a month after the leave expired) it is hereby found that Mr. Suarez was absent without approval.

SUMMARY OF TESTIMONY

Lt. Edmond Monti

Lt. Edmond Monti has been employed with the West New York Police Department for twenty-five years and since 2011 he has held the title of lieutenant. His job duties include administrative assignments such as hiring, reviewing contract, monitoring vacation and leave time, training and monitoring civilian dispatchers. Lieutenant Monti knows appellant as a civilian police dispatcher and prepared the August 16, 2011, letter to appellant regarding his intentions to return to work. Lieutenant Monti testified as follows,

> I personally tried to reach appellant by phone before transmitting my August 16, 2011 letter. The telephone numbers were out-of-order or disconnected. Employees are required to submit a change-of-address report if their contact information changes. I never received a change notice from appellant. I did not receive a response from appellant in regard to my August 16, 2011 letter to him.

On cross-examination, Lieutenant Monti responded, as follows,

> I do not recall when I started phoning appellant or when I made the calls.

Nicholas Lordo

Nicholas Lordo has been a staff representative for CWA Local 1045 since June 2000. Local 1045 responsibilities include West New York municipal employees, except for police men and women. Local 1045 represent civilian dispatchers. Lordo, testified as follows,

> Appellant came to meet with me several times in 2011. He told me he was on a leave of absence and had not been called-back. He wanted the case adjudicated so he could return to work. I placed the case in Grievance Status. I

> contacted Joe DeMarco, the West New York Town Administrator, who initially did not know what I was talking about, probably since he had just started as administrator in May 2011. I contacted Gill Garcia, Esq., the town attorney to set up a hearing, but the Grievance was never heard and we never got an answer. I wrote a letter to the attorney about arranging Grievance Hearing dates and contract negotiations – but nothing ever happened.
>
> There was no PNDA and I was told to contact the Civil Service Commission (CSC). Appellant was told to contact Rita Harvey at CSC.

On cross-examination, Lordo responded,

> In August, September or October of 2011, I did not speak with Lt. Monti about appellant. The CWA has a Collective Bargaining Agreement. As far as I know, I was unaware of a PNDA that was in existence in 2011 or 2012.

Manuel Suarez

Manuel Suarez, appellant, became a new hire West New York civilian dispatcher on May 27, 2008. In 2011, he requested a leave-of-absence, when his new-born son was diagnosed with a brain abnormality. Appellant testified as follows,

> I spoke with lieutenants and sergeants about a leave and they told me time could be taken from my vacation, sick and administrative leave time. Sgt.'s helped me to write up the leave-of-absence that began on April 19, 2011 and continued for three months.
>
> The first two dates for my leave I went to work because the dispatchers were short staffed.
>
> I would come back and forth to have lunch with the squad because they were a part of my life, they are friends. I have a car so I drove over.
>
> When my son's condition did not worsen, I started having discussions with Lt. Flores, Director Gibbens and Lt. Monti about my interest in returning to work earlier than planned. At the end of May or beginning of June 2011, I spoke with

Lt. Monti and he told me to speak with Acting Director Gibbens. I was told that the police department would look into it.

The first communication I received about returning to work was from Lt. Monti in a letter dated August 16, 2011. I responded to Lt. Monti's letter via CM/RRR on August 24, 2011. I went to see my CWA Shop Steward to explain what was not happening about my job. The Shop Steward told me she would handle it. Eventually, I was given Rita Harvey's number in Trenton, New Jersey at the CSC. Ms. Harvey told me that I was still listed as an active employee for the Town of West New York.

I was then directed to Pamela Medina at the Division of Appeals, who provided me with the procedures for filing an appeal and filing fees. Several days passed and Ms. Medina phoned me and said the appeal was received, but there was no PNDA attached, so no action could be taken at that time. Respondent sent a PNDA to Trenton and Ms. Medina informed me when it arrived and said she could move forward with the appeal.

On cross-examination, appellant responded, as follows,

In the fall of 2011, I filed for unemployment benefits (UIB). I needed money to take care of my family. UIB was slow in starting because the records showed me as an active employee of the Town of West New York. The West New York employment department straightened the matter out with UIB. I received UIB for one year.

I live six blocks from the police department and I could walk to work. Civilian dispatchers are on the first floor near the customer service area. The building is three to four stories high. The police director and captain's offices are also on the first floor.

I had no personal contact with Lt. Monti between August 16 and 31, 2011. I spoke to Lt. Monti at the end of May or beginning of June 2011. In September 2011, I never went to see Lt. Monti about his letter to me, dated August 16, 2011. I did not directly approach Lt. Monti because I have a union. I spoke with Directors Gibbens and Indri, in June and July 2011.

FINDINGS OF FACT

Based on the documentary and testimonial evidence presented, and having had the opportunity to observe the demeanor of the witnesses and to assess credibility, I make the following **FINDINGS of FACT**:

1. On May 27, 2008, appellant was employed by respondent as a civilian public safety telecommunicator or dispatcher;

2. Appellant's job description was primarily that of a 911 dispatcher for situations requiring emergent police, fire, and ambulance services in West New York;

3. Appellant requested a leave-of-absence in 2011, when his new-born son was diagnosed with a brain abnormality;

4. Respondent granted a leave of absence until April 19, 2011, and time was taken from his sick, vacation, and administrative leave time. The first two days of his approved leave were rescinded because the squad was short staffed;

5. On March 25, 2011, appellant wrote to respondent requesting an extended leave for a three-month period, commencing on April 19, 2011. There is no dispute that respondent received appellant's March 25 letter;

6. On March 30, 2011, Albert L. Bringa, Director of Police, wrote to Commissioner Lawrence Riccardi and attached a copy of appellant's March 25 extended-leave request, for the Commissioner's approval;

7. On April 1, 2011, Commissioner Riccardi responded to the request by writing his initials on Director Bringa's March 30 memorandum and writing the word "denied";

8. Commissioner Riccardi's response was never relayed to appellant;

9. Appellant lives six blocks from the police department. The dispatch office that appellant worked out of is on the first floor, as is also the police director's, the captains, and Lieutenant Monti's offices;

10. Between April and July 2011, appellant frequently came to the building to have lunch with the squad members because they were a part of his life and all had become friends;

11. Appellant's son's medical condition did not worsen and appellant made inquiries of Lt. Flores, Acting Police Director Gibbens, and Lieutenant Monti about returning to work earlier than requested. The Acting Police Director told appellant the matter would be looked into;

12. Appellant remained out of work after July 19, 2011;

13. Appellant stopped frequenting the police department to visit and have lunch with the dispatch squad workers after July 2011;

14. Lieutenant Monti's testimony that he personally tried to reach appellant several times by phone before transmitting the August 16, 2011, letter, but could not reach him because the numbers were out-of-order or disconnected, is incredible, but was not disputed;

15. Lieutenant Monti's testimony that he never received a change notice from appellant and does not recall when he started making phone calls to appellant, is credible;

16. On August 16, 2011, Lieutenant Monti wrote to appellant via CM/RRR to inquire about appellant's intent to return to work;

17. The August 16 letter also informed appellant that he had ten days in which to respond and if he did not respond an assumption would be made that he is no longer interested in the position and termination proceedings would commence;

18. Termination proceedings did not commence in 2011;

19. On August 24, 2011, appellant mailed a CM/RRR letter to Lieutenant Monti, which included a statement "with all that being said I look forward to returning to work." Appellant provided his current telephone contact information in his letter;

20. Appellant's testimony about his reason for not walking to the police department, six blocks away from his home, to discuss resolving the situation was because he was adhering to the terms and procedures of a Collective Bargaining Agreement, is doubtful;

21. During the fall of 2011, appellant applied for UIB because he had no income to take care of his family. The UIB was delayed for three months because West New York still listed appellant as an active employee on the employment record. Appellant received UIB for one year;

22. During 2011, appellant met with Nicholas Lordo, staff representative for CWA Local 1045, to learn what could be done about returning to his employ with the Town of West New York. During Lordo's testimony he acknowledge his meetings in 2011 with appellant;

23. Lordo and appellant agreed that the problem should be placed in Grievance Status;

24. Lordo's testimony that during August, September and October of 2011, he did not speak with Lieutenant Monti about appellant due to the Collective Bargaining Agreement, is incredible;

25. Lordo contacted Joe DeMarco, the West New York Town Administrator, who had recently started in his position in May 2011. DeMarco was unfamiliar with the situation;

26. Lordo contacted Gill Garcia, Esq., the town attorney to schedule a Grievance hearing, but that hearing never happened;

27. On December 18, 2012, Lordo wrote to the Town of West New York Legal Department Attorney Gilberto Garcia, to request dates for disciplinary hearings for appellant and others, but a hearing never happened for appellant;

28. Appellant contacted his Shop Steward, who told him (appellant) that she would take care of the situation. The Shop Steward instructed appellant to contact Rita Harvey in Trenton, NJ at CSC to file a complaint. Ms. Harvey informed appellant that a formal complaint could not be filed without a PNDA and FNDA;

29. On March 25, 2013, Pamela Medina at the Division of Appeals, wrote to appellant to inform him that his appeal was timely, since no FNDA had been issued. Ms. Medina wrote that the appeal would be held in abeyance until the FNDA was received;

30. CSC and West New York Town employment personnel worked out the concern and a PNDA was received at CSC on or about April 16, 2013;

31. On May 13, 2013, a FNDA was issued to appellant via CM/RRR that indicates effective April 19, 2011, respondent removed appellant from his position via resignation not in good standing.

LEGAL ANALYSIS

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 County 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 Bock, supra, 38 N.J. at 519. 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)).

(Abandonment of Job)

Respondent charges appellant with abandonment of his position pursuant to N.J.A.C. 4A:2-6.2(c), which directs:

> (c) An employee who has not returned to duty for five or more consecutive business days following an approved leave of absence shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing. A request for extension of leave shall not be unreasonably denied.

In general, the regulation was intended to cover unwarranted and unjustified absences or those undertaken without notice of the reason for such absence and of the time when the employee expects to return. Cumberland County Welfare v. Jordan, 81 N.J. Super. 406, 412 (App. Div. 1963).

In the instant matter, there is no debate that appellant failed to report to work after April 19, 2011, or July 19, 2011. The credible evidence further establishes that

appellant did not personally contact his superior by phone, in person, or in writing, to confirm if he was approved for an additional leave of absence after April 19, 2011, when he did not receive a verbal or written authorization for an extended leave after April 19, 2011. Appellant acknowledges receiving written correspondence from respondent that request appellant to be in contact with his superior. Appellant acknowledges speaking in person to Lieutenant Monti prior to July 19, 2011, and confirms that Lieutenant Monti told him (appellant) to go see his (appellant's) superior about any issue relative to returning to work. Appellant did not go to see his superior or attempt to arrange a meeting to resolve the return to work matter prior to July 19, 2011. In the fall of 2011, instead of interceding with his superior about returning to work, appellant applied for unemployment benefits, so he would have money to care for his family. Appellant had no idea that his request for an extended leave to July 19, 2011 had been denied because no one related the Commissioner's denial to appellant. Based on respondent's letter dated August 26, 2011, respondent concedes that appellant's last day on leave was July 19, 2011. Appellant did not report to work on or after July 19, 2011, and never reported back to work.

(Neglect of Duty)

Regarding Civil Service Rule N.J.A.C. 4A:2-23(a)(7), there is no definition in the New Jersey Administrative Code for neglect of duty, 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 and includes official misconduct or misdoing, as well as negligence. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977), neglect of duty implies nonperformance of some official duty imposed upon a public employee, not merely commission of an imprudent act. Rushin v. Bd. of Child Welfare, 65 N.J. Super. 504, 515 (App. Div. 1961).

In the instant matter, appellant did not return to his job after an approved leave of absence, nor after five or more days after the leave of absence ended. Appellant's job

was unattended when he did not return and therefore he neglected to perform his duties. The charge of neglect of duty has been upheld where an employee has failed to perform and act as required by his or her job title. Ferguson v. County of Passaic, CSV 05514-04 (unreported). If an absence is either excused or excusable, it can negate a finding of neglect of duty. Golaine v. Cardinale, 142 N.J. Super. 385, 397 (Law Div. 1976).

(Resignation Not In Good Standing)

The rule governing resignation not in good standing is found at N.J.A.C. 4A:2-6.2(b) and (c), provides:

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

The Civil Service Code also provides the appointing authority or the Board may modify the resignation not in good standing to an appropriate penalty or to a resignation in good standing, Cumberland County Welfare Board v. Jordan, 81 N.J. Super. 406 (1963). Although the record may clearly establish that an appellant was absent without authorization in excess of five consecutive business days, if the appellant was unable to work due to medical reasons, a resignation not in good standing should be modified to a resignation in good standing. Sykes v. New Jersey Judiciary, Middlesex Vicinage, CSV 4461-04, Initial Decision (July 12, 2005), adopted, Comm'r (September 23, 2005), <http://njlaw.rutgers.edu/collections/oal/final/csv4461-04.pdf>; Taylor v. New Lisbon Medical Center, CSV 2842-05, Initial Decision (December 9, 2005), adopted, Comm'r

(January 18, 2006), <http://njlaw.rutgers.edu/collections/oal/final/csv2842-05.pdf>; Salley v. Hudson County Dep't of Roads and Public Property, Initial Decision (January 4, 2011), adopted, Comm'r (February 18, 2011), <http://njlaw.rutgers.edu/collections/oal/final/csv11813-09.pdf>. The validity of modifying a resignation to be in good standing has been settled law in New Jersey for some time. The appointing authority may modify a resignation not in good standing decision to (a) an appropriate penalty, or (b) to resignation in good standing. N.J.A.C. 4A:2-6.2(f); In Cumberland Id. 414, the court stated that while the granting of leave is discretionary, the Civil Service Commission may review the appointing authority's decision to determine whether or not there was an abuse of discretion. See Weil v. Atl. County Dep't of Public Safety, 97 N.J.A.R.2d (CSV) 413, 418; McLaughlin v. N.J. Civil Serv. Comm'n, 137 N.J. Law 338 (Sup. Ct. 1948), aff'd, 1 N.J. 284 (1949); Griffin v. City of Jersey City, 4 N.J. Super. 81 (App. Div. 1949).

CREDIBILITY

This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, in accordance with a reasonable probability of truth. Evidence is said to preponderate if it establishes the reasonable probability of the fact. Preponderance may also be described as the greater weight of 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). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). The burden of proof falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The respondent must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson, supra, 37 N.J. 143. The evidence needed to satisfy the standard must be decided on a case-by-case basis.

When witnesses present conflicting testimonies, it is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. In other words, credibility is

the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story in light of its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see Polk, supra, 90 N.J. 550. Credibility findings are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record. State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973).

The finder of fact is not bound to believe the testimony of any witness, and credibility does not automatically rest astride the party with more witnesses. In re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved, but may not be disregarded at an administrative proceeding. Middletown Twp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962). Credible testimony must not only proceed from the mouth of credible witnesses but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546 (1954). The evidence presented and the credibility of the witnesses will assist in resolving whether the charges and discipline imposed should be sustained; or whether there are mitigating circumstances, which should impact the charges and the penalty. Mitigating circumstances must be taken into consideration when determining whether there is just cause for the penalty imposed.

In the instant case there is no evidence that appellant has been disciplined for similar conduct or actions in the past. In regard to testimony on ancillary facts offered to support or negate a charge, the weight of the evidence indicates the appellant did not adhere to respondent's telephone and written requests for him (appellant) to contact his superior. The weight of the evidence indicates that appellant waited from July 19, 2011, to March 2013, approximately twenty (20) months, before appealing his resignation not in good standing. It is noted that in the fall of 2011 appellant applied for and received UIB.

DISCIPLINARY HISTORY

An employee's past disciplinary record may be reviewed to determine the appropriate penalty for the current specific offense. Bock, supra, 38 N.J. 500. 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.

Appellant was hired on May 27, 2008. His disciplinary history is void of any similar actions during his three years and two months of employment with the respondent. On February 3, 2010, appellant received a Letter of Commendation from Captain Michael E. Indri.

MITIGATION

The following mitigating circumstances have been taken into consideration in determining whether there is just cause, in this case, for a penalty; and, if yes, whether the penalty of resignation not in good standing, warranted.

1. Appellant has worked for the Town of West New York Department of Public Safety for three years and two months;

2. During appellant's employment there were no concerns about his ability to perform his job duties fully and satisfactorily;

3. On February 3, 2010, appellant received a Letter of Commendation from his captain, for aiding in the arrest of a prolific career criminal;

4. Appellant's testimony and evidence of having mailed respondent CM/RRR letter dated August 24, 2011, in response to respondent's CM/RRR letter to appellant, dated August 19, 2011, was disputed, but not refuted;

5. Appellant has never had disciplinary charges brought against him.

PENALTY

Unless the penalty is unreasonable, arbitrary or offensively excessive under all of the circumstances, it should be permitted to stand. Ducher v. Dep't of Civil Serv., 7 N.J. Super. 156 (App. Div. 1950). The appellant's record of performance must be considered when attempting to determine if the judgment of the appointing authority was unreasonable, arbitrary or capricious. See Bock, supra, 38 N.J. 500. In the instant matter, the evidence offered leaves me to believe that the appellant was aware of what he needed to do and could have walked to police department and sat down with the captain prior to July 19, 2011, to discuss in-person his return to work. The evidence also shows a change in appellant's habit or pattern after July 19, 2011, (the end of the three-month extended leave), when appellant stopped visiting co-workers or dropping by for lunch.

Appellant has no past disciplinary history, which makes a discussion of progressive discipline awkward in light of the circumstances in this case. However, the preponderance of evidence indicates that appellant was granted a leave of absence in 2011 when his son was born with a brain abnormality. Appellant then requested that the leave be extended for three months. Allegedly the Commissioner denied the request for the extended leave by writing the word "denied" and initialing a memorandum provided by the Director Binga regarding the extended leave. Appellant was never told about or received a letter about the extended leave denial. Lieutenant Monti's letter to appellant, dated August 16, 2011, confirms that the police department recorded appellant's leave time to expire on July 19, 2011. When the approved leave time ended appellant did not return or present himself for work, even though he lived six

streets from the police department. The penalty of removal not in good standing, even though the circumstances are such that a reasonable person could assume appellant should have handled the matter differently, is too harsh and unwarranted.

CONCLUSION

In an appeal, from a major disciplinary action, the burden of proof is on the appointing authority to show that the action taken was justified. N.J.A.C. 4A:2-1.4(a). This burden requires the appointing authority to establish by a preponderance of the competent, relevant, and credible evidence that the employee is guilty of the stated offenses. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). Here, the respondent charges the appellant with:

1. Neglect of Duty;
2. Abandonment of Job; and
3. Resignation Not in Good Standing.

Based on testimonial and documentary evidence presented, in regard to charges creating violations of N.J.A.C. 4A:2-2.3(a)(7) and N.J.A.C. 4A:2-6.2,

I CONCLUDE that the evidence indicates that appellant did mail a certified letter dated August 24, 2011 to respondent, in response to respondent's certified letter to appellant, dated August 19, 2011.

I CONCLUDE that even though, on the surface, it appears that the entire matter could have been resolved by appellant walking to the police department and meeting with his superior prior to July 19, 2011 that also, the matter could have been resolved by respondent issuing a timely PNDA, to trigger the internal hearing process, close to the date appellant did not return to work.

I **CONCLUDE** that appellant and respondent deviated from procedures defined and mandated by regulations pertaining to establishing charges, internal departmental hearing rights and implementing penalties.

Regarding N.J.A.C. 4A:2-2.3(a)(7), Neglect of Duty - I **CONCLUDE** that the appellant did engage in neglect of duty when he failed to return to work at the end of the approved leave period, which was taken because his son was born with a brain abnormality. Appellant's initial three month approved leave was a reasonable necessity, but when his child improved he did not return to employment, but collected UIB and waited twenty months to appeal a resignation not in good standing. The evidence shows that both appellant and respondent procrastinated in resolving the concern about appellant extended leave and return to employment. On March 25, 2011, appellant requested respondent to approve a three month extended leave from April 19th to June 19th 2011. On April 1, 2011, the police commissioner denied appellant's extended leave request. Appellant claims he never received a denial letter or a phone call about being denied. However, a reasonable person would have sat at the police department until a superior assisted with granting permission to return to work, denied permission or granted a leave extension. Appellant stretched his self-approved extended leave without good cause for having done so.

Regarding abandonment of job N.J.A.C. 4A:2-6.2 (b) Any employee who is absent from duty for five or more consecutive business days without the approval of his or her superior shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing. Approval of the absence shall not be unreasonably denied. However, again in the instant case, as discussed under neglect of duty, the evidence shows that both appellant and respondent procrastinated in resolving the concern about appellant's extended leave and return to employment. In arguendo, even if the request for an extension of the first leave was approved appellant did not return to work after July 19, 2011, therefore abandonment of his job applies if appellant is found guilty, pursuant to N.J.A.C. 4A:2-6.2 (c).

Regarding N.J.A.C. 4A:2-6.2 (c), Resignation Not In Good Standing - appellant did create a situation for a charge of resignation not in good standing to be implemented,

> (c). An employee who has not returned to duty for five or more consecutive business days following an approved leave of absence shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing. A request for extension of leave shall not be unreasonably denied.

Again, as discussed under neglect of duty and abandonment of job the evidence shows that both appellant and respondent procrastinated in resolving the concern about appellant's extended leave and return to employment until CWA got involved.

I therefore **CONCLUDE** that the penalty of a resignation not in good standing on the charges as set forth hereon, when giving consideration to appellant's clean disciplinary history and to the situation that both parties deviated from regulatory disciplinary action procedures that the penalty is unreasonable and unwarranted and should be modified to resignation in good standing.

ORDER

Based on the foregoing, I **ORDER** that the charges of neglect of duty and abandonment of job be **SUSTAINED**. In regard to resignation not in good standing I **ORDER** that the determination of respondent, Town of West New York Department of Public Safety be **MODIFIED** to reflect a resignation in good standing. I also **ORDER** that respondent pay appellant for any back-pay owed to him and for any vacation, sick or administrative time he may have accrued up to July 19, 2011.

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.

July 22, 2014
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

Date Received at Agency: July 22, 2014

Date Mailed to Parties: JUL 23 2014

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

APPENDIX

WITNESSES

Appellant:

Manuel Suarez

For Respondent:

Lt. Edmond Monti, West New York Police Department

Nicholas Lordo, CWA

EXHIBITS

Joint:

J-1 Preliminary Notice of Disciplinary Action (31-A), dated April 16, 2013

J-2 Final Notice of Disciplinary Action (31-B), dated May 13, 2013

For Appellant:

A-1 Letter from appellant to Lieutenant Monti, dated August 24, 2011

A-2 Certified Mail Receipt for letter from appellant to Lieutenant Monti, dated August 24, 2011

A-3 Certified Mail Receipt for letter from appellant to Pam Medina, dated March 15, 2013

A-4 Letter from Nicholas F. Lordo, CWA Staff Representative to Town of West New York Legal Department, dated December 18, 2012

For Respondent:

R-1 Letter from Lt. E. Monti to appellant re: Leave of Absence, dated August 16, 2011

R-2 Memorandum from Director Albert L. Bringa to Commissioner Lawrence Riccardi, dated March 30, 2011 **ID ONLY**