

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 4TH DAY OF APRIL, 2018



Deirdre L. Webster Cobb
Acting 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 03717-17

AGENCY DKT. NO. 2017-1280

**IN THE MATTER OF ANDREA KINION,
CITY OF PATERSON, DIVISION OF
BUSINESS ADMINISTRATION.**

Seth Gollin, Organizer/Field Representative, AFSCME Local 3724, for appellant
Andrea Kinion pursuant to N.J.A.C. 1:1-5.4(a)(6)

Steven S. Glickman, Esq., for respondent City of Paterson

Record Closed: November 29, 2017

Decided: January 9, 2018

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE

Appellant Andrea Kinion (Kinion) appeals the determination of the respondent City of Paterson (City), Division of Business Administration, that found appellant was absent from duty for five or more consecutive days without the approval of a supervisor. Based on this action, respondent charged appellant with resignation not in good

standing, and other sufficient cause. Respondent contends that the appellant's violations warrant a penalty of resignation not in good standing, effective May 12, 2016.

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 her prior position as Affirmative Action Director for the City of Paterson.

PROCEDURAL HISTORY

On June 8, 2016, respondent served appellant with a Preliminary Notice of Disciplinary Action (PNDA) that notes resignation not in good standing effective May 12, 2016, from her position as Affirmative Action Director. Appellant requested an internal disciplinary hearing, which commenced on July 12, 2016. On September 9, 2016, a Final Notice of Disciplinary Action (FNDA), dated August 22, 2016, was served on appellant. The FNDA sustained all charges set forth on the PNDA. The disciplinary action against appellant based on the sustained charges is a resignation not in good standing effective on May 12, 2016.

On March 17, 2017, 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. This matter was assigned to the undersigned and a hearing date was held on September 14, 2017. After the hearing was held, the appellant submitted post-hearing submissions on November 8, 2017. Respondent filed its post-hearing submission on November 29, 2017, and then the record closed.

ISSUES

N.J.A.C. 4A:2-2.2 identifies major discipline types to include removal, disciplinary demotion, and suspension or fine for more-than five working days at any one time. The

issues in this proceeding are whether a preponderance of the credible evidence establishes that the charges set forth in the FNDA because of appellant's absence from work for medical reasons and her failure to provide a complete Leave of Absence Packet warrant a disciplinary action and the penalty of resignation not in good standing? If so, is resignation not in good standing the appropriate disciplinary action warranted under the circumstances? 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 April 10, 2013, are 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;

Violation of Civil Service Rule N.J.A.C. 4A:2-2.3(a)(12) – An employee may be subject to discipline for other sufficient cause.

Specification of the Charges

The specification for charges sustained in the Final Notice of Disciplinary Action (31-B), dated August 22, 2013, reads as follows:

You have been absent from duty for five or more consecutive days without the approval of your supervisor N.J.A.C. 4A:2-6(c)—February 12, 2013 to the present. You were given leave of absence **paperwork** that needed to be filled out and returned to your supervisor by March 6, 2013 to cover you for this time since you had no more sick days remaining and you failed to do so. You have used all your sick time in the 2013 calendar year as of February 11, 2013.

SUMMARY OF TESTIMONY

(Appellant's Witnesses)

Eugenia Byfield (Byfield) was a Personnel Department employee. She was responsible for accepting and date-stamping the documents submitted on behalf of employees concerning extended leaves of absence. Byfield usually stamped all pages submitted, retained the originals for the Personnel Department, and returned copies of the stamped documents to the person who submitted them. Byfield stated that she did not know as to whether other employees stamped all pages or just the top page but that she normally time-stamped every page of a document that was submitted. Byfield also testified that the note from the Hackensack University Medical Group was submitted to her but was not attached to the Application for an Extended Leave of Absence. (P-2; P-3.) It was Byfield's recollection that she received P-2 as a part of the documentation for the appellant's request for disability-related benefits.

During the timeframe at issue herein, all requests for extended leaves of absence that Byfield received on behalf of Kinion were submitted by Niecha McPherson (McPherson). Byfield did not directly inform Kinion that any of her requests for extended leaves of absence were approved or denied because she understood that Kinion was responsible for ensuring that her requests for extended leaves of absence were approved.

Migdalia Salcedo (Salcedo) was also an employee in the Personnel Department and was also responsible for accepting and date-stamping the documents. Salcedo was unsure as to whether on April 13, 2016, she stamped both pages submitted or just the top page. Salcedo stated that she retained the originals for the Personnel Department and returned copies of the documents to the person who submitted them. During the period at issue, any requests for extended leaves of absence that Salcedo received on behalf of Kinion were submitted by Niecha McPherson. Salcedo received an Extended Leave of Absence form, dated April 12, 2016, along with a Hackensack

University Medical Group letter, dated April 12, 2016, about Kinion, when McPherson submitted them together on behalf of Kinion. (P-2.)

Salcedo's testimony was inconsistent, as for example, she stated that she would time-stamp every document and then testified that when McPherson submitted an application for Kinion, the application was on the front and doctor's notes were attached. Salcedo also testified that not only was P-2 submitted with P-3, it was attached in front of P-3. As such I find that Salcedo lacked credibility and as such should be given little weight.

Niecha McPherson (McPherson) was a City of Paterson employee and was a friend of Kinion. McPherson submitted to the Personnel Department several Extended Leave of Absence forms and other related documents on behalf of Kinion.

This witness testified on March 14, 2016, that she submitted to Byfield an Extended Leave of Absence form and a doctor's note at the Personnel Department on behalf of Kinion. Byfield then returned copies to McPherson. McPherson did not recall exactly which pages were stamped and which pages were not stamped. McPherson stated that she was unable to return to Kinion the copies of the Extended Leave of Absence form and the doctor's note she had received back from Byfield on March 14, 2016.

On April 13, 2016, McPherson submitted to Salcedo at the Personnel Department a doctor's note and another form on behalf of Kinion. Salcedo returned copies (P-2 and P-3) to McPherson. McPherson gave the copies (P-2 and P-3) that she received from the Personnel Department to Kinion within a few days of April 13, 2016.

On May 25, 2016, McPherson submitted to the Personnel Department an Extended Leave of Absence form and a doctor's note on behalf of Kinion. McPherson gave the copies that she had received from the Personnel Department to Kinion within

a few days of May 25, 2016. McPherson's testimony was also inconsistent and contrary to the more credible testimony of Abby Levenson and Byfield.

Andrea Kinion (Kinion) is the appellant in this case and has filed this appeal. Kinion returned from workers' compensation on October 5, 2015, and was directed to work three days per week and have therapy two days per week during each work week. On October 25, 2015, Kinion went back out of work on workers' compensation.

On December 15, 2015, Personnel Director Levenson directed Kinion to complete Family Medical Leave Act (FMLA) paperwork. Kinion questioned why because she was already out on workers' compensation, but completed the form anyway in January 2016. Kinion applied for disability because Levenson told her that workers' compensation was ending at the end of February 2016 and that she was running out of time. Kinion believed that FMLA leave commenced when workers' compensation ended around the end of February 2016.

In March 2016, McPherson submitted an Extended Leave of Absence form and a doctor's note to the Personnel Department on behalf of Kinion. Kinion was unable to testify that McPherson gave the application to respondent as she did not submit same herself. Kinion did not receive back from McPherson copies of what was submitted to the Personnel Department because McPherson was unable to get it to Kinion. Kinion received the stamped and signed versions of the Extended Leave of Absence form, dated March 11, 2016, and the Hackensack University Medical Group letter concerning Kinion dated March 11, 2016, (P-1) from Byfield because McPherson was unable to give Kinion the copies she received back from the Personnel Department when she submitted them.

On April 13, 2016, McPherson submitted an Extended Leave of Absence form and a doctor's note to the Personnel Department on behalf of appellant. Within a few days, McPherson returned to Kinion the documents the Personnel Department returned to McPherson on April 13, 2016, (P-3); the Extended Leave of Absence form, dated

April 12, 2016, and the Hackensack University Medical Group letter in regarding Kinion, dated April 12, 2016. (P-2.)

Kinion did not ask for signed copies of the documents submitted on April 13, 2016, because she received the copies back from McPherson with the date-stamp on P-2. Kinion believed that she had been granted an extended leave of absence through May 23, 2016, as was indicated on P-3. The Personnel Department did not inform Kinion that she was not granted an extended leave of absence through May 23, 2016.

On May 25, 2016, McPherson submitted an Extended Leave of Absence form and a doctor's note to the Personnel Department on behalf of Kinion. Within a few days, McPherson returned to Kinion the documents the Personnel Department returned to McPherson on May 25, 2016. (P-4.)

Kinion had not received the PNDA, dated May 12, 2016, when she had McPherson submit an Extended Leave of Absence form and a doctor's note to the Personnel Department on her behalf on May 25, 2016. Kinion did not learn of the City's disciplinary action against her concerning her absence until she received the PNDA, dated June 8, 2016. (P-5.)

Absent from Kinion's testimony is the fact that her application for leave was approved by the respondent. It was Kinion's position that she had no duty to verify that her application for leave was approved.

(Respondent's Witness)

Abby Levenson (Levenson) has been employed with the City of Paterson as a unit chief for the Personnel Director since July 2015. As the Personnel Director, Levenson's duties included overseeing payments, providing health benefits, handling disciplinary matters, handling State benefits including unemployment, and applications for leaves of absence.

Levenson testified that Kinion was an employee hired by Paterson since 1995. Kinion went out on medical leave in 2009, which led to a separation from employment. Thereafter, Kinion was rehired on a part-time basis in August 2012. Kinion then resumed full-time employment in April 2013. In August 2013, Kinion went out on workers' compensation. Kinion then returned from workers' compensation in October 2015 working only three of the five work days per week, working on a part-time basis. From the time of October 5, 2015, and November 2, 2015, Kinion was at work for five and one-half days.

Kinion was then out pursuant to the FMLA beginning on November 2, 2015. Kinion was not eligible for this leave because she had not worked the necessary number of hours in the previous twelve months. Kinion then submitted a doctor's note (P-1) when she submitted the Extended Leave of Absence form, dated March 11, 2016. (R-5.) Kinion's FMLA was then extended to March 14, 2016, and approved by the respondent on March 28, 2016. The documents contained in P-1 (Leave of Absence and the doctor's note) were date-stamped by the City's Personnel Department. Levenson wrote to Kinion on March 7, 2016, advising her that Kinion's leave was about to expire and thus Kinion could be brought up on charges of job abandonment. (R-4.)

During time frame at issue herein, Eugenia Byfield and Migdalia Salcedo were employees in the Personnel Department and were responsible for accepting and date-stamping the documents submitted on behalf of employees concerning extended leaves of absence. The Personnel Department did not notify employees that requests for extended leave of absence were granted because it was the employee's responsibility, in accordance with the City's Personnel Policy Manual, to check to ensure that the employee's request had been granted. Kinion's leave was approved until April 15, 2016. (R-5 and/or P-1.)

The letter from the Hackensack University Medical Group concerning Kinion, dated April 12, 2016, was received by the Personnel Department, but was unrelated to a request for extended sick leave. The Extended Leave of Absence form, dated April 12, 2016, was not received by the Personnel Department. (P-3.)

The April 15, 2016, date passed without Kinion communicating with the respondent. The Personnel Department received the Extended Leave of Absence form dated May 20, 2016, on May 25, 2016, but took no action on this form because the Personnel Department was already in the process of serving Kinion with a PNDA (R-2) taking the action of a resignation not in good standing.

No denials of Kinion's requests for extended leave of absence were sent because it was the employee's responsibility, pursuant to the City's Personnel Policy Manual, to check to ensure that the employee's request had been granted. The timeframe had passed without such approval. The Unemployment Benefit Form B187Q for the quarter ending September 30, 2016, reflects the weeks to which Kinion's benefit payments were applicable, but does not necessarily reflect the date(s) on which Kinion actually received the benefit payments. (R-10.)

Levenson never saw Kinion's application for an extended leave of absence, which sought an extension of her leave of absence from April 15, 2016, through May 23, 2016. (P-3.) I **FIND** Levenson's testimony in general—and specifically on this topic—to be credible.

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. Appellant was employed by respondent as an Affirmative Action/EEO Director in 1996.
2. Kinion went out on medical leave in 2009, which resulted in a separation from employment.

3. Kinion was then rehired on a part-time basis in August 2012.
4. Kinion then resumed full-time employment in April 2013 but then went out on workers' compensation in August 2013.
5. Kinion returned from workers' compensation in October 2015 and was working only three of five days per work week.
6. Kinion began a medical leave on November 2, 2015, which was due to expire on March 15, 2016.
7. On March 11, 2016, Kinion submitted a request for an extension of her leave of absence, which the respondent approved through April 15, 2016.
8. During the above process Byfield and Salcedo were working for the City in the Personnel Department and were responsible for accepting and processing documents submitted on behalf of employees concerning requests for extended leaves of absence.
9. Respondent's Personnel Department does not notify employees of action taken on applications for leaves of absence and the employees check to ensure the action taken on their application.
10. Kinion was advised by Levenson on March 7, 2016, that Kinion's failure to return to work after the expiration of her leave of absence could result in job abandonment charges.
11. Kinion's approved extension of her leave of absence was granted by the respondent until April 15, 2016.
12. Kinion did not obtain an extension of her leave of absence after April 15, 2016, from the Personnel Department.

13. Byfield and Levenson understood that it was Kinion's responsibility to ensure that her requests for an extension of her leaves of absence were approved by the City.
14. The submission of paperwork from Hackensack University Medical Group was filed with the City on April 12, 2016, but no application for an extension was filed with it.
15. Kinion failed to return to work after April 15, 2016, without obtaining a further extension of her leave.
16. Respondent's Personnel Department received an Extended Leave of Absence form dated May 20, 2016, on May 25, 2016, but the respondent did not take any action on this application because it was already in the process of serving Kinion with a PNDA for being absence from duty without the approval of her supervisor for more than five days, thus a 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)).

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). It provides:

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.

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 (no evidence was presented on this issue), 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, CSV 11813-09, 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 be in good standing has been settled law in this New Jersey for some time. 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).

Kinion argues and the respondent does not dispute, and I agree, that it is the duty of the respondent to approve or not approve an employee's application for a leave of absence. I find it credible, as set forth in Levenson's testimony, that Kinion's first application for FMLA application was approved and had Levenson's signature on it. Thereafter, Kinion's request for an Extended Leave of Absence application for the first time was also approved and had the signatures of Levenson and the Business Administrator, Nellie Pou. There is no doubt that the alleged next request for an extended leave of absence has neither the signature of Levenson nor Pou and thus was never approved.

Respondent's Personnel Policy Manual (R-3), which Kinion testified she drafted, states:

I understand that if my family or medical leave (total of paid and unpaid time) does not exceed 12 weeks I will be returned to my same or equivalent position. I understand that if my family or medical leave exceeds 12 weeks, the City may terminate my employment in accordance with applicable law. If my request for a leave is approved, it is my understanding that unless the City has authorized an extension of my leave in writing, I must report to duty on the first workday following the date my leave is scheduled to end. I understand that failure to do so will constitute unequivocal notice of my intent not to return to work and the City may terminate my employment.

[Emphasis added.]

The application for an Extended Leave of Absence states: "We are requesting signatures for approval of the above request." There is no doubt that the respondent has the duty to approve or not approve such an application. In the case when the employee does not receive a written approval, as required above, it is incumbent upon the employee to determine if the application was approved, and if this is not obtained, the employee must report for duty, or risk being terminated by being found to have

resigned not in good standing. In this case, it is clear that the employee received no written or verbal approval of an extension of her request for leave.

Kinion is charged with resigning from her position, not in good standing, pursuant to N.J.A.C. 4A:2-6.2(b). Based upon the above findings, I **CONCLUDE** that Kinion has resigned from her position not in good standing as of May 12, 2016.

Under N.J.A.C. 4A:2-6.2(b), five or more consecutive days absence without approval of an employee's supervisor is regarded as abandonment of the position and deemed a resignation not in good standing. In the current instance, Kinion did not return to work after submitting an application for an Extended Leave of Absence and was not on an authorized leave of absence. Kinion was on a leave of absence that began on November 2, 2015, and was due to expire on March 15, 2016. Kinion extended the leave until April 15, 2016. Thereafter, there was no approved extension and Kinion did not return to work. Kinion made an application for another extension of her leave on a form dated May 20, 2016, and received May 25, 2016. (See R-6.)

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Perth Amboy v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at this de novo hearing are whether Kinion is guilty of the charge brought against her and, if so, the appropriate penalty, if any, that should be imposed. See Henry, supra, 81 N.J. 571; Bock, supra, 38 N.J. 500. In this matter, the City bears the burden of proving the charges against Kinion by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Suero, CSV 5039-04, Final Decision (June 22, 2005), <<http://njlaw.rutgers.edu/collections/oal/>>.

There is no debate that Kinion failed to report to work following the expiration of her leave of absence on April 15, 2016, or that she failed to contact her supervisors to

determine if her request for extension was granted. McPherson was acting on behalf of Kinion, and did so by requesting an extension of the leave of absence. However, McPherson, as well as Kinion herself, failed to contact the City to determine if the extension had been granted. There is no dispute that no approval of an extension of the leave was granted by the respondent based on the fact that the respondent was taking disciplinary action against Kinion for resignation not in good standing.

Kinion attempts to cloud the issue by arguing that the City had the burden to notify the appellant of the action taken on her application, i.e., approval or denial. The argument is not persuasive. In the first instance, the City has demonstrated adequately that there was no action taken on the appellant's application for an extension and that Kinion filed an application for an extension beyond five days after the expiration of her leave.

Kinion contends that the withholding of approval for the leave extension was unreasonable. The record establishes that Kinion had the duty to appear for work in the event that she did not receive an approval from the respondent. I **CONCLUDE** that the City has been reasonable in authorizing leaves of absence in the past and in this case. Based upon the foregoing, I **CONCLUDE** that the City has met its burden of proving by a preponderance of the credible evidence, that Kinion was absent from duty for five or more consecutive business days without approval of her supervisor. It is within the discretion of an appointing authority as to whether a request for a leave of absence should or should not be granted. See Smith v. College of New Jersey, CSV 977-98, Final Decision (October 14, 1998), <<http://njlaw.rutgers.edu/collections/oal/>>. I, therefore, **CONCLUDE** that the City did not unreasonably fail to grant Kinion a further leave of absence. Accordingly, I **CONCLUDE** that Kinion's unapproved absence effectuated a resignation not in good standing.

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. 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 sufficient 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 City did not provide Kinion with an extension of her leave of absence and that Kinion's application, dated May 20, 2016, was well beyond the expiration of her leave of absence which ended on April 15, 2016.

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. 11A:2-21, 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, supra, 37 N.J. 143; Polk, supra, 90 N.J. 550. Here, the respondent charges the appellant with 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), I **CONCLUDE** that the Civil Service Rule N.J.A.C. 4A:2-6.2(b), resignation not in good standing, if an employee is absent from duty for five or more consecutive business days, or has not returned to work for five or more business days following an approved leave of absence, without the approval of her superior, she shall be considered to have abandoned her position and shall be recorded as a resignation not in good standing. N.J.A.C. 4A:2-6.2(b)(c). In the instant matter, appellant was absent for more than five consecutive days without a supervisor's approval. Respondent has proven that Kinion abandoned her employment by failing to obtain an extension of her leave signed by her supervisor prior to failing to return to duty less than five days later. I, therefore, **CONCLUDE** that the penalty of a resignation

not in good standing on the charges as set forth herein, is reasonable and warranted and the charge should be upheld.

ORDER

It is **ORDERED** that Andrea Kinion is hereby deemed to have **RESIGNED** from her position not in good standing, effective May 12, 2016.

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.

January 9, 2018
DATE

Date Received at Agency:

Date Mailed to Parties:
jb

JAN 11 2018

MICHAEL ANTONIEWICZ, ALJ

January 9, 2018
Andrea Sanders

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESSES

Appellant:

Eugenia Byfield
Migdalia Salcedo
Niecha McPherson
Andrea Kinion

Respondent:

Abby Levenson

EXHIBITS

For Appellant:

- P-1 Extended Leave of Absence dated March 28, 2016 (approved)
- P-2 Letter from Hackensack University Medical Group, dated April 12, 2016
- P-3 Extended Leave of Absence (May 23, 2016, return date; not approved)
- P-4 Extended Leave of Absence (July 1, 2016, return date; not approved)
- P-5 Preliminary Notice of Disciplinary Action dated June 8, 2016

For Respondent:

- R-1 Final Notice of Disciplinary Action (31-A) dated August 22, 2016
- R-2 Preliminary Notice of Disciplinary Action dated May 12, 2016
- R-3 Leave of Absence, Family and/or Medical Leave Application dated December 16, 2015
- R-4 Letter from Abby Levenson to Andrea Kinion dated March 7, 2016
- R-5 Extended Leave of Absence form dated March 11, 2016
- R-6 Extended Leave of absence form dated May 20, 2016
- R-7 Extended Leave of Absence form dated June 30, 2016

- R-8 Civil Service Commission decision (Hearing Denied) dated October 28, 2016
- R-9 Civil Service Commission decision (Request for Reconsideration) dated March 13, 2017
- R-10 Unemployment Benefits Form B187Q for the quarter ending September 30, 2016
- R-11 Personnel Action Form (3.75) dated June 20, 2011