STATE OF NEW JERSEY

In the Matter of William Able, City of Newark	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket No. 2018-3594	Request for Enforcement

ISSUED: JUNE 12, 2019 (WR)

William Able, a Senior Custodian with Newark School District, represented by Lesley Sotolongo, Esq., seeks enforcement of the attached Civil Service Commission (Commission) decision rendered on April 4, 2018, granting him mitigated back pay, benefits and seniority.

As background, the appellant was removed from employment effective September 16, 2015, on charges of conduct unbecoming a public employee, misuse of public property and other sufficient cause. Upon his appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing. Following a hearing and the Commission's *de novo* review, the appellant's removal was modified to a six-month suspension. Further, the Commission ordered that the appellant be reinstated and awarded mitigated back pay, benefits and seniority for the period following the six-month suspension to the date of actual reinstatement. The appellant indicates that he returned to work on June 18, 2018.[1] However, the parties have been unable to agree on the amount of the back pay due, and the appellant has requested Civil Service Commission (Commission) review.

Initially, it is noted that the appellant does not submit any proposed calculations concerning the gross amount of back pay owed to him. Rather, he contends in one affidavit that he did not receive any unemployment benefits or other compensation during the time he was separated from his position. The

[1] The appellant's County and Municipal Personnel System (CAMPS) records do not indicate that the appellant returned to work.

appellant also claims that although he made reasonable efforts to obtain employment, he was unable to find alternate employment. Specifically, in his affidavit, the appellant argues that he applied for "approximately six different head custodian positions" and to a position with Home Depot. The appellant indicates that he interviewed for a head custodian position with Millburn Public Schools in November 2015, but was not appointed.[2] In support of his request, the appellant submits unsigned tax returns for 2015 and 2016.[3] However, in the submitted tax returns for 2015 and 2016, the appellant indicated that he received a combined total of $16,796 in unemployment benefits for 2015 and 2016, and $7,230 in income in 2016.[4] He also submits a second, unsworn affidavit, in which he indicates that he received an unspecified amount of unemployment benefits and other compensation while he was separated from employment. The appellant observes that the appointing authority bears the burden of demonstrating that he failed to mitigate his damages in the instant matter and argues that it has not presented any evidence to counter his claim that he attempted to find comparable employment opportunities.

In response, the appointing authority, represented by Bernard Mercado, Senior Corporation Counsel indicates that the appellant is owed a total of $159,044.84 in gross, unmitigated back pay salary, minus all standard salary and tax deductions. Moreover, the appointing authority argues that there are discrepancies between the appellant's tax documents and his affidavit. For instance, he admitted to receiving $4,522 in unemployment benefits in 2015 and an additional $21,323.66 in extra income above his salary, but indicated in his affidavit that he did not receive any income or unemployment benefits. The appointing authority observes that the appellant's 2015 and 2016 tax returns are unsigned and there is no indication that they were actually filed. It also notes that the appellant did not indicate how much income he earned in 2017 because he did not file a 2017 income tax return. Finally, the appointing authority argues that the appellant did not make a reasonable effort to mitigate his losses. It argues that the appellant's claim that he applied to only six jobs in the nearly three years he was separated is insufficient to meet the standard, especially considering he does not provide any evidence other than his attempt at employment with Millburn Public Schools to demonstrate his effort to obtain employment.

CONCLUSION

Pursuant to *N.J.A.C.* 4A:2-2.10(d), an award of back pay shall include unpaid salary, including regular wages, overlap shift time, increments and across-the-Commission adjustments. *N.J.A.C.* 4A:2-2.10(d)3 provides that an award of back

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[2] The appellant provides a copy of an email from Millburn Public Schools, dated January 11, 2017, which informs him that he was not appointed to the position.

[3] The appellant indicated in his affidavit that he did not file a tax return for 2017.

[4] The appellant failed to provide a W-2 or any other explanation of the source of this income.

pay shall be reduced by the amount of money that was actually earned during the period of separation, including any unemployment insurance benefits received, subject to any applicable limitations set forth in (d)4. Further, *N.J.A.C.* 4A:2-2.10(d)4 states that where a removal or a suspension for more than 30 working days has been reversed or modified and the employee has been unemployed or underemployed for all or a part of the period of separation, and the employee has failed to make reasonable efforts to find suitable employment during the period of separation, the employee shall not be eligible for back pay for any period during which the employee failed to make such reasonable efforts. "Reasonable efforts" may include, but not be limited to, reviewing classified advertisements in newspapers or trade publications; reviewing Internet or on-line job listings or services; applying for suitable positions; attending job fairs; visiting employment agencies; networking with other people; and distributing resumes. The determination as to whether the employee has made reasonable efforts to find suitable employment shall be based upon the totality of the circumstances, including, but not limited to, the nature of the disciplinary action taken against the employee; the nature of the employee's public employment; the employee's skills, education, and experience; the job market; the existence of advertised, suitable employment opportunities; the manner in which the type of employment involved is commonly sought; and any other circumstances deemed relevant based upon the particular facts of the matter. The burden of proof shall be on the employer to establish that the employee has not made reasonable efforts to find suitable employment. *See N.J.A.C.* 4A:2-2.10(d)4, *et seq.*

Initially, the record is unclear whether the appellant received unemployment benefits because he submitted conflicting affidavits and tax returns. In this regard, although in the appellant's sworn affidavit he states that he **did not** receive any unemployment benefits, the 2015 and 2016 tax returns he submits indicate he received unemployment compensation. Although there is a presumption that the receipt of unemployment insurance benefits evidences that an employee sufficiently mitigated during the period of separation, since searching for employment is a condition to receiving such benefits, this presumption may be rebutted where the appellant did not make a diligent effort to seek employment. *See In the Matter of Donald Hicks*, Docket No. A-3568-03T5 (App. Div. September 6, 2005). Accordingly, even assuming *arguendo* the appellant received such benefits, as described below, the appellant has not submitted sufficient evidence to demonstrate a reasonable effort to mitigate his damages.

After a review of the record, the Commission finds that the appellant failed to make reasonable efforts to find suitable employment. The appellant indicates that he applied to "approximately six different head custodian positions" and for a position with Home Depot during the nearly three years he was separated from employment. However, except for the position he applied for with Millburn Public Schools in which the appellant submits an email from Millburn Public Schools, the

appellant does not provide any further details about any of the other positions he applied for, such as the dates he submitted his applications or, except for Home Depot, the names of the employers he submitted applications to. The appellant had an obligation to seek substitute employment in good faith and could have sought employment in any of a number of fields to which he may be suited. Simply stated, applying for "approximately six different head custodian positions" and for a position with Home Depot in nearly three years does not constitute a reasonable effort to secure employment. *See In the Matter of Manuel Oliveira,* (CSC, decided January 14, 2009) (The Commission found that the petitioner's application for four positions in five years was not a reasonable effort of mitigation); *In the Matter of Donald Hicks* (MSB, decided December 20, 2006) (The Board found an appellant who only presented an affidavit of mitigation containing the names of five potential employers had not demonstrated that he made sufficient efforts to mitigate his damages). The Commission notes that an individual is not required to obtain employment while attempting to mitigate damages, but merely required to make a good faith effort to seek employment. *See, In the Matter of Robert Jordan* (MSB, decided June 11, 2008). The totality of the record in this matter clearly indicates that the appellant did not do so. Accordingly, the Commission finds that the appellant failed to make reasonable efforts to find suitable employment.

Finally, as noted above, the appellant's CAMPS records do not indicate that the appellant returned to work. Therefore, the appointing authority is ordered update the appellant's CAMPS record accordingly.

ORDER

Therefore, it is ordered that the appellant's request for backpay is denied. It is further ordered that the Newark School District immediately update William Able's CAMPS record as described in this decision. If the appointing authority does not adhere to the 30-day timeframe for proper recording, it may be subject to fines up to a maximum of $10,000. *See N.J.S.A.* 11A:10-3 and *N.J.A.C.* 4A:10-2.1.

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 12th DAY OF JUNE, 2019

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

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and
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Attachment

c: William Able
Lesley Sotolongo, Esq.
Bernard Mercado, Senior Corporation Counsel
Yolanda Mendez
Kelly Glenn
Beth Wood
Record Center

STATE OF NEW JERSEY

In the Matter of William Able
Newark School District

CSC DKT. NO. 2016-1907
OAL DKT. NO. CSV 01850-16

DECISION OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2018 BW

The appeal of William Able, Senior Custodian, Newark School District, removal effective September 16, 2015, on charges, was heard by Administrative Law Judge Leland S. McGee (ALJ), who rendered his initial decision on February 12, 2018. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on April 4, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision as well as his recommendation to modify the removal to a six-month suspension.

Since the removal has been modified, the appellant is entitled to back pay, benefits and seniority following his suspension until the date of his reinstatement. *N.J.A.C.* 4A:2-2.12(a) provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in the disciplinary appeal is the merits of the charges. *See Johnny Walcott v. City of Plainfield*, 282 *N.J. Super.* 121,128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this matter, while the penalty was modified, charges were sustained and major discipline was imposed. Therefore, the appellant has prevailed on all or substantially all of the primary issues of the appeal. Consequently, as appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12, counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, unpublished, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. However, under no circumstances should the appellant's reinstatement be delayed based on any dispute regarding back pay.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. Accordingly, the Commission modifies the removal to a six-month suspension. The Commission further orders that the appellant receive back pay, benefits and seniority from the conclusion of the suspension until the actual date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. An affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties are encouraged to make a good faith effort to resolve any dispute as to back pay. However, under no circumstances should the appellant's reinstatement be delayed based on any dispute regarding back pay.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4th DAY OF APRIL, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Acting Chairperson
Civil Service Commission

Inquiries
and
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 01850-16
AGENCY DKT. NO. 2016-1907

IN THE MATTER OF WILLIAM ABLE,
NEWARK PUBLIC SCHOOL DISTRICT,

Lauren Bonaguro, Esq., for petitioner (Decotiis, FitzPatrick, Cole & Goblin, attorneys)

Bernard Mercado, Esq., for respondent (Charlotte Hitchcock, General Counsel, attorneys)

Record Closed: November 13, 2017 Decided: February 12, 2018

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This case arises out of an employment termination proceeding against William Able (Petitioner or Able) by the City of Newark Public School District (Respondent). Able worked for Respondent for approximately twenty years. His last position was as Head Custodian for Barringer High School. His employment was terminated effective September 16, 2015, for conduct unbecoming a public employee, misuse of public property, and other sufficient causes, occurring on or about September 7, 2015.

Specifically, Respondent alleged that Petitioner allowed, caused and/or supervised the disposal of "construction debris" into garbage bins at Barringer, and the use of a blower belonging to Barringer to be used to remove dust from the van that delivered the debris. Later that same day, the van returned and Petitioner is alleged to have allowed, caused and/or supervised the removal of twenty to twenty-five student lockers. Among the occupants of the van were Petitioner's children.

On September 18, 2015, Respondent issued a Preliminary Notice Disciplinary Action (PNDA) against Petitioner alleging three (3) charges. On November 19, 2015, Respondent issued a Final Notice of Disciplinary Action (FNDA) removing Able from public employment. The following charges were sustained:

- N.J.A.C. 4A:2-2.3(a)(6) – conduct unbecoming a public employee
- N.J.A.C. 4A:2-2.3(a)(8) – misuse of public property
- N.J.A.C. 4A:2-2.3(a)(11) – other sufficient cause

Petitioner then appealed the FNDA, and 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 -15 and N.J.S.A. 52:14F-1 to -13, where it was filed on January 29, 2016.

This matter was assigned to the Honorable Imre Karaszegi, ALJ. It was scheduled for hearing on September 27, 2016, which was adjourned and rescheduled for November 15, 2016. On October 14, 2016, this matter was reassigned to the undersigned. Hearings were rescheduled for, and held on February 16, and May 5, 2017. Post-hearing submissions were filed on November 13, 2017, and the record closed.

DISCUSSION OF THE FACTS

One substantive fact in this case is not in dispute and I **FIND** that Petitioner allowed his family to remove student lockers from Barringer High School. The issue in this case is whether Petitioner had the authority to remove the lockers.

Summary of Testimony

Respondent's witness, Keith Scott Barton (Barton), is the Executive Managing Director of Operations for Respondent. Barton was responsible for facilities operations. This includes custodial services, trade services, and fixed assets. He also serves as Respondent's Affirmative Action Officer.

Barton testified that employees must have authorization to dispose of the District property from the fixed assets division and his office to manage inventory. The procedure for disposing of fixed assets includes an inspection by Wilfred Young (Young), who maintains the inventory records. He visits sites to review inventory numbers, tag equipment, and to determine if items are operational. Respondent offered into evidence a Bulletin regarding "Removal of Obsolete Assets" (R-1), dated September 15, 2011. This document indicates that the procedure is that the school principal (or designee) makes recommendations on the "validity of the fixed assets" and causes a Fixed Assets Removal Form to be completed and signed as to the equipment to be removed. The form is submitted to the fixed assets department, specifically to Wilfred Young. If Young "determines that those desks, in this example, can no longer be used, then at that point, a dumpster is ordered, or we figure out the best way to dispose of the – that furniture. In most cases we order a dumpster." (T1-115:9-13.) Barton stated that if fixed assets are removed without following this procedure it is theft. Respondent entered into evidence a copy of a Newark Police Incident Report dated September 15, 2015, naming Tariq Mclamb as the "suspect." (R-2.)

Barton also testified that the District pays for trash removal services. Under the contract the vendor, only trash generated by the District should be disposed of in Barringer's dumpsters.

Barton was doing a building walk-through in preparation for a news conference just before the beginning of the school year. He was also following up on an email from Carrieann Zielinski (Zielinski) who advised the facilities department that the lockers had been removed. Several student lockers were removed from hallways and stored in the boiler room. Barton had a conversation with Petitioner about replacing the lockers in spaces where tiles had fallen from the hallway walls. He stated that the lockers were not replaced and the spaces were covered with poster board. Barton testified that there was no policy about storing the lockers in the boiler room but it would be governed by safety and fire hazard regulations.

The parties entered a copy of pages 1 of 24, 2 of 24, and 18 of 24, of Respondent's Fixed Assets Manual updated by Wilford Young on July 18, 2011. (J-7.) Barton did not know whether Petitioner actually received a copy of the Manual. There is a procedure that requires each employee to sign for receipt of the Manual. He testified that the school administrator is primarily involved in the fixed assets process and custodians, per se were not be a part of the process outlined in the Manual. In the Barringer High School building, there are two separate schools. At the time, the principal in the lower level of the building was Mincy, with Zelinski responsible for operations. At the upper level, the principal was Breidlove, with Owens responsible for operations.

Barton testified that the custodians should know the procedures regarding removal of fixed assets through their administrators. There should have been training for all staff when they returned after the summer break and before the students arrived. He stated that there should have been a sign-in sheet for all staff in attendance at the training but he is not aware of whether Barringer had any such training program. He was also not aware if Petitioner specifically received instructions about the disposal of fixed assets. The District stopped issuing Bulletins in 2014.

Petitioner Stipulated that he stored some lockers in the boiler room and removed others. Although Barton testified that there were "a large number" of lockers missing from the hallways, he did not check the boiler room and did not know whether any lockers were stored there.

Esther Williams (Williams), Senior Head Custodian at night (3:00 p.m. to 11:00 p.m.) at Barringer High School, has been employed by Respondent for twenty seven years; twenty-one years as a custodian. In 2015, she was a custodial worker on the 7 a.m. to 3 p.m shift. She became Senior Head Custodian in July 2016.

Williams testified that she is not aware of any policies regarding the disposal of items in schools. She testified that she has never seen the September 15, 2011, bulletin regarding removal of obsolete assets. (R-1.) She has never seen the Newark Public Schools Fixed Asset Manual. (J-7.) As far as she knew, it was not necessary to have specific authorization to remove items that are to be thrown away. She stated, "[w]e always threw things out. We put them in the roll-off. We put them against the fence. We put them besides the roll-off. In Barringer we have a driveway." (T1 167:4-7.) Williams further stated,

> But no, we never call anybody. In none of the schools that I worked, did we call anybody. So, I never – and I was always – I was always close to the head man. Because I had, you know, intentions of becoming a head person. So anything that I could learn throughout the years, I would pick up to - - when I became this - - in the position. But never did I see that they ever called anybody.
>
> [T1:167, 15-23.]

The exceptions are computers and items that have a bar code or District ID number. In that case Young had to be called for direction. If the item was broken it could be discarded in the "roll-off"—dumpster. The dumpsters were not permanently placed at the school so they had to wait for one to be placed in the driveway. "Every school does the same thing." (T1 177:17-18.) None of the lockers had a bar code on them.

Williams testified that as the hearing was conducted, there were student lockers stored in the boiler room. Approximately twenty sets of lockers with six to eight lockers per set. No administrators have advised her that they could not remain in the boiler room.

Williams described problems with the lockers in the hallway. The computer teachers and staff at Babyland (daycare) complained that the locks were broken and stayed open. On the first floor between stairway nos 3 and 4, the students walked by and slammed the doors, which disturbed the teachers and babies. There was a meeting with Principal Zielinski to discuss moving the broken lockers. As a result of that meeting, Williams assisted in moving the lockers; the "good ones" went into the boiler room for possible use at other schools. Those that were corroded were placed outside by the fence over a two- or three-day period.

Williams stated that there was no training in regard to the removal of items; she stated, "I only know what they told me." Much what they learned was "on-the-job," as you go along. She did not know what occurred on the date of the within incident. She was not aware of Petitioner's children being present when she helped him remove the lockers. During the time that the lockers were removed from the premises, she was "upstairs . . . sealing . . . taking care of the floors at that moment." (T1, 187:18-20.)

Williams has worked at Barringer between four and six years. She has a close relationship with Petitioner in that he's "like a son" to her. They also are colleagues in the same union. They had acknowledged that stealing from school grounds is not acceptable. Williams also testified that she has a Black Seal license and is aware that it is not proper to store the lockers in the boiler room. The original intention was for them to be moved to other locations but when this case started, she was advised by Mr. Barton to leave everything just as Petitioner left things.

Petitioner testified that he started working for Respondent nineteen or twenty years ago as a temporary custodial worker. One year later he became a full-time employee. Ten years later he became Senior Head Custodian.

Able acknowledged that he removed the lockers. He stated that the school had a rodent problem that required shutting the entire building down for a weekend. The infestation was concentrated on the first floor where students left food in open lockers. He moved lockers to clean behind them and many of them were broken. He had a meeting with Ms. Zelinski in the middle of August 2015 and explained that there was trash

behind the lockers and that the students regularly slammed the doors as they walked passed them. He suggested that they be removed and Zelinski consented.

Petitioner testified that when Barton inspected the building prior to the press conference, he asked Petitioner about damage to the walls where the lockers had been removed. Petitioner stated that if the walls were not repaired, he would put the lockers back in place. The next day a teacher put up a bulletin board with students' work, which covered the damaged walls. The lockers shown in the video of September 7 had not been used in the fifteen years that he has worked there.

Petitioner testified that his first supervisor was Clement Collins and that is who "trained" him. Collins told him to use his discretion in disposing of old items. If there is a bar code on it, contact Wilford Young. Everything else was discretionary; determine if items could be repaired.

Petitioner has twelve children, eight boys and four girls, and they often went to school with him. The administrators know his children and they have always been welcome in the school and at school events. He stated that the assistant superintendent has invited his children to the staff cookouts. Petitioner acknowledges that he should not have had his children helping him on the day that the lockers were removed. However, he denies stealing or otherwise improperly removing the lockers from the school. It was his understanding that "garbage" could be discarded and he had the discretion to determine what was garbage. He denies receiving or seeing the Fixed Assets Manual (J-7) or the September 15, 2011, Bulletin (R-1).

Petitioner testified that he put the lockers in the school driveway by the fence and that it was his uncle who removed them from the premises. Petitioner does not know what his uncle did with the lockers after they were removed.

Petitioner testified that nobody asked him where the lockers were and he never mentioned to Burton that there were lockers stored in the boiler room. He has a Black Seal license and the training directive was to ensure that there were no combustibles in the boiler room. He described two tiers in the boiler room; the top tier is where he placed

the lockers in the area where the incinerators used to be. It was summer time and the boilers were not in operation—they run from October through April. In May, they clean and shut down the boilers.

Carricann Zielinski is the school operation manager at Barringer High School. She is responsible for the daily operations of the school which includes everything that is not instructional: the cafeteria, the custodians, procurement, helping the principal develop the budget, and scheduling. She is the direct report of the Head Custodian, who is responsible for supervising the individual custodians.

Zielinski testified that the Head Custodian is responsible for preparing work orders for repairs such as door knobs and other equipment that is repairable. She is not aware of any policy for equipment that is damaged beyond repair, "they would probably have to reach out to Facilities." (T2 7:24-25.) Zielinski stated that there is no formal process for how policies are communicated to her.

Zielinski stated that in the past, Petitioner has submitted work orders for items that are in disrepair. In this specific instance, she did not authorize him to take the lockers himself; however, she never talked with him about what he was going to do with the lockers.

On September 1, 2015, Zielinski forwarded an email to Burton and William Polk, her second in command. (J-13.) Attached to the email were pictures of the walls and the floor from which the lockers were removed. In the email she acknowledged that Petitioner moved the lockers to clean garbage underneath it. It further stated,

> Upon further examination, it was discovered there were major holes in the wall, rat nests, and piles of garbage. The pictures attached show the damage done to the wall and the piles of garbage. I spoke with BAAH and we would prefer if the lockers were removed permanently. I saw the masons working on the wall yesterday. If we could just fix the wall and remove the lockers that would be ideal. With the lockers gone on the first floor it opens the hallways for the flow of traffic between the two schools. Since no one uses those lockers

> they become filled with trash and whatever else the students hide in there.
>
> [J-13.]

Zielinski testified that after requesting that the lockers be removed, she was not concerned about where they went from there. She assumed that there was a protocol for what would be done with the lockers once they were removed. Her purpose in sending the e-mail was to have the wall repaired and not have the lockers put back. As far as she knew, the lockers that were removed were still in the boiler room.

David Rawles (Rawles) is a project manager in Office of Project Control, which is in the Office of Facilities. He testified that he is familiar with the duties and responsibilities of custodial workers. He confirmed that student lockers, among other items, are considered "school property" and there is a process for addressing broken lockers. In his previous position as the special assistant for the High School Network, they provided support to the schools in the district. That support included preparing schools for the upcoming year. At the end of a school year Rawles (and/or staff in his office) emptied out student lockers and through a District contracted; a vendor would come in and repair lockers. For example, if a door is broken, "typically" lockers are cleaned out and either custodial staff or a designee in the school identifies the lockers that are in disrepair and the vender is contacted. "At some time throughout the summer the locker door is repaired or the lock."

Rawles testified that the process for disposing of items in disrepair varies depending upon how the item was acquired. Federally funded (grants) property cannot be disposed of in the "normal" way. Once the grant funding has ended "typically" there's an inventory of what was purchased through a grant, and they cannot be disposed of in the "normal" way. As such, there are different procedures for different items and circumstances. In this case, he is not aware of whether the lockers were purchased through a grant. He stated that there was a "general understanding" that school proper could not be taken for personal use.

Rawles stated that when preparing the building for the first press conference with Commissioner Serf, he personally inspected it. There were tiles in disrepair from where the lockers had been removed. Barton wanted the lockers placed back on the walls after the tiles were repaired. Petitioner was with them for the inspection. Rawles does not know why they were not put back on the walls and would be surprised if they were still in the building. They were not being used and some were in disrepair. Petitioner did not tell Rawles that the lockers were disposed of and Petitioner did not have permission to dispose of them.

Clement Collins (Collins) has been a supervisor of custodians for Respondent for approximately twelve years and was a custodian for fifteen years. His "training" as a supervisor "came from being a custodian." (T2 71:6.) He never received any specific training on the policies, but occasionally there were email circulars to the custodians and they would meet to discuss or sometimes develop the circulars. He never received any training regarding what items should be "tagged" or why, nor any training regarding which items were purchased by way of a grant, or otherwise.

He manages the custodial staff and grounds crews for eighteen high schools and three stadiums. He testified that it is not proper for custodians to take school property. The "normal" practice for addressing "broken" property is to try to repair it or to throw it out. When asked whether a custodian has to get permission prior to throwing property out, Collins stated that "it depends." In clarifying he stated,

> Well, it depends on if the custodian – because, you know, the custodian has the ability to determine, you know, what's trash depending on who assesses it.
>
> If there is – if there's items that were thrown out in the past then obviously they wouldn't have to get authorization for it, they would just probably – the normal procedure is just to throw it out.
>
> [T2 63:11-17.]

When asked whether Petitioner told him that there were several lockers that were broken at Barringer that had to be disposed of, Collins stated,

> I know they were going through a project, he never -- I don't recall him calling me directly but I know there was lockers that -- there was a project there that they were removing lockers, but I never got a call from him directly, no.
>
> . . .
>
> Well, as custodian in the building, you know, he would be directly involved with the removal or, you know, the transport and the discarding, you know.
>
> [T2 64:19 -- 65:9.]

Collins stated that the custodians made the determination about what should be fixed or thrown out. Once the custodian makes that determination an item can just be discarded. When asked whether a custodian can take discarded property without authorization, Collins stated, "[w]ell, it's not in the policy to say that you can't but, I mean, I've never experienced that" (T2 67:18-19) and "it's possible" to take discarded property. Although he never gave Petitioner authority to take property, the proper person to give such authority was the administrator in the building.

Collins stated that he has not seen a policy for how to determine what items should be discarded and what shouldn't. He stated that some property/items are "tagged" with a "BO" number. That process started when the district started getting computers, laptops, new lawnmowers, and equipment that "they wanted to make sure that we had a count on or an inventory . . ." It was associated with computerization of the inventory. For those items that are not tagged, "[t]here's to my knowledge no process."

CREDIBILITY

When the testimony of witnesses is in disagreement, the trier of fact must weigh the witnesses' credibility in order to make factual findings. Credibility is the value that the fact finder gives to testimony of a witness and contemplates an overall assessment of the witness's story in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Credible testimony must proceed from the mouth of a credible witness and must be such

as common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955); Gilson v. Gilson, 116 N.J. Eq. 556, 560 (E. & A. 1934). A fact finder is expected to base credibility decisions on his or her common sense and life experiences. State v. Daniels, 182 N.J. 80, 99 (2004). Credibility is not dependent on the number of witnesses who appeared, State v. Thompson, 59 N.J. 396, 411 (1971), and the finder of fact is not bound to believe the testimony of any witness. In re Perrone, 5 N.J. 514, 521-22 (1950).

I **FIND** that the testimony of Petitioner, Collins, Zielinski, Rawles, and Williams to be credible and consistent with respect to whether or not there was a clear policy for disposal of school property and whether or not that policy was clearly articulated to Petitioner or any other custodian within the Respondent school district.

LEGAL ANALYSIS AND CONCLUSIONS

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576, 580-81 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act states that State policy is to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). To carry out this policy, the Act authorizes the discipline and termination of public employees.

N.J.A.C. 4A:2-2.3(a) provides that a public employee may be subject to major discipline for various offenses. The New Jersey Department of Human Services has a Disciplinary Action Program that sets forth the standards that all employees must meet. (R-12.) "Unbecoming conduct" is broadly defined as conduct that adversely affects the morale or efficiency of the government unit or has the tendency to destroy public respect and confidence in the delivery of government services. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

N.J.A.C. 4A:2-2.3(a)(6) (conduct unbecoming a public employee)

Regarding Civil Service Rule N.J.A.C. 4A:2-2.3(a)(6), I **FIND** that petitioner did not engage in conduct unbecoming a public employee with respect to discarding the lockers. There is no precise definition for conduct unbecoming a public employee, and the question of whether conduct is unbecoming is made on a case-by-case basis. King v. County of Mercer, CSV 2768-02, Initial Decision (February 24, 2003), adopted, Merit Sys. Bd. (April 9, 2003), http://njlaw.rutgers.edu/collections/oal/.

In Jones v. Essex County, CSV 3552-98, Initial Decision (May 16, 2001), adopted, Merit Sys. Bd. (June 26, 2001), http://njlaw.rutgers.edu/collections/oal/, it was observed that conduct unbecoming a public employee is conduct that adversely affects morale or efficiency or has a tendency to destroy public respect for governmental employees and confidence in the operation of public services. Unbecoming conduct is not precisely defined in N.J.S.A. 11A or N.J.A.C. 4A; see, e.g., In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). In Karins v. City of Atlantic City, 152 N.J. 532 (1998), an off-duty firefighter directed a racial epithet at an on-duty police officer during a traffic stop. The Court noted that the phrase "unbecoming conduct" is an "elastic one that includes any conduct that adversely affects morale or efficiency by destroying public respect for municipal employees and confidence in the operation of municipal services." Id. at 554.

In Hartmann v. Police Department of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992), that court stated that a finding of misconduct need not "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior, which devolves upon one who stands in the public eye as an upholder of that, which is morally and legally correct."

In the present case, I **CONCLUDE** that there were no clearly established protocols for how to dispose of school property that was in disrepair. Further, there was no formal training for the custodians with respect to disposal of school property, and custodians had a great deal of latitude in determining what items should be disposed of and how. Custodians were left to rely on "past practices" for guidance as to the disposal of property

in disrepair. Finally, Petitioner's removal of the lockers was not clandestine and was consistent with what he believed to be the proper process. Therefore, I **CONCLUDE** that this charge should not be upheld with respect to the removal of the lockers.

I further **FIND** that Petitioner did engage in conduct unbecoming a public employee with respect to allowing his children to enter the school building to assist in the removal of the lockers. Therefore, I **CONCLUDE** that this charge should be upheld with respect to allowing the children on school property.

N.J.A.C. 4A:2-2.3(a)(8) (misuse of public property, including motor vehicles)

Regarding Civil Service Rule N.J.A.C. 4A:2-2.3(a)(8) and the charge of misuse of public property, while Petitioner reasonably believed that he had the authority to discard school property that was in disrepair, I **CONCLUDE** that it was not proper for him to allow anyone to remove the lockers from school grounds. There is no definition in the New Jersey Administrative Code for misuse of public property, but the charge is understood to mean that an employee has used public property, in a manner that is inconsistent with agency policy or reasonable safety standards. In In re Pressley, Nos. A-0699-13T4, A-0700-13T4 (consolidated) (App. Div. June 21, 2016), http://njlaw.rutgers.edu/collections/courts/, recurring incidents of unpermitted and erratic driving were sufficient to sustain a charge under N.J.A.C. 4A:2-2.3(a)(8).

I **CONCLUDE** that did misuse public property when he allowed the lockers to be removed from the premises as opposed to being disposed in the dumpster. Therefore, I **CONCLUDE** that this charge should be sustained.

N.J.A.C. 4A:2-2.3(a)(12) (other sufficient cause)

Regarding Civil Service Rule N.J.A.C. 4A:2-2.3(a)(12), **FIND** that Respondent did not provide a factual basis for "other sufficient cause." There is no definition in the New Jersey Administrative Code for other sufficient cause. Other sufficient cause is generally defined in the charges against petitioner. The charge of other sufficient cause has been dismissed when "respondent has not given any substance to the allegation." Simmons

v. City of Newark, CSV 9122-99, Initial Decision (February 22, 2006), adopted, Comm'r (April 26, 2006), http://njlaw.rutgers.edu/collections/oal/final/.

The FNDA does not specify what conduct should be considered to be "other sufficient cause." Therefore, I **CONCLUDE** that this charge should not be sustained.

ORDER

Based upon the foregoing, Respondent has not met its burden of proving all of the charges by a preponderance of the competent and credible evidence. There is no allegation and no evidence that Petitioner profited from the removal of the property. Further, although a criminal complaint was filed, no charges were brought against Petitioner for removing the lockers. It is therefore, **ORDERED** that the action of Respondent State-Operated School District of the City of Newark, in removing Petitioner was not justified and the penalty imposed is hereby **MODIFIED**.

It is **ORDERED** that for allowing school property to be removed from school grounds, a penalty of six months suspensions is hereby imposed.

It is further **ORDERED** that Respondent is paid back pay and benefits from six months following the date of termination. Consistent with Petitioner's duty to mitigate his damages, I **ORDER** Petitioner to submit to Respondent a certified statement detailing any employment and income for the period following his termination, with copies of relevant tax and other records and names of addresses of employers. N.J.A.C. 4A:2-2.10.

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.

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.

February 12, 2018
DATE

LELAND S. MCGEE, ALJ

Date Received at Agency:

February 12, 2018
LISA JAMES-BEAVERS
ACTING DIRECTOR AND CHIEF
ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: February 13, 2018

lr

APPENDIX

LIST OF WITNESSES

For Petitioner:

William Able

Esther Williams

For Respondent:

Keith Scott Barton

Benjamin Mauriello

Carrieann Zelinski

Maurice Rawles

Clement Collins

LIST OF EXHIBITS IN EVIDENCE

Joint

J-1 Final Notice of Disciplinary Action dated December 18, 2001

J-2 Final Notice of Disciplinary Action dated May 8, 2002

J-3 Final Notice of Disciplinary Action dated January 5, 2004

J-4 Final Notice of Disciplinary Action dated February 12, 2005

J-5 Final Notice of Disciplinary Action dated November 17, 2008

J-6 Final Notice of Disciplinary Action dated November 19, 2015

J-7 Newark Public Schools Fixed Asset Manual cover dated July 18, 2011

J-8 New Jersey Civil Service Commission Job Specification for Senior Custodian

J-9 Security Surveillance Video dated September 6, 2015, 6:37 p.m.

J-10 Security Surveillance Video dated September 7, 2015, 10:24 a.m.

J-11 Security Surveillance Video dated September 7, 2015, 4:06 p.m.

J-12 Security Surveillance Video dated September 7, 2015, 3:43 p.m.

J-13 Email from Zelinski dated September 1, 2015

For Petitioner:

None

For Respondent:

R-1 Newark Public Schools Bulletin dated September 15, 2011

R-2 Newark Police Incident Report dated September 15, 2015

R-3 Email correspondent from Barton dated September 16, 2015

R-4 Email correspondence from Barton dated September 1, 2015