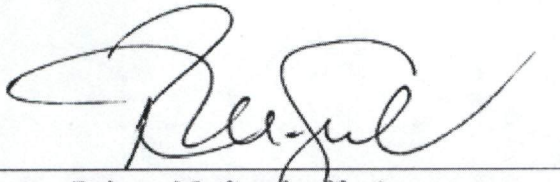


This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JUNE 21, 2017



Robert M. Czedo, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 00755-16

AGENCY DKT. NO. 2016-1883

**IN THE MATTER OF ISAAC WILLIAMS,
CITY OF WILDWOOD, DEPARTMENT OF
PUBLIC WORKS AND PUBLIC PROPERTY.**

Issac Williams, appellant, pro se

William G. Blaney, Esq., appearing for respondent, (Blaney & Karavan,
P.C., attorneys)

Record Closed: April 1, 2017

Decided: May 16, 2017

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE

Appellant, Isaac Williams (Williams or appellant), an employee of respondent, City of Wildwood Department of Public Works and Public Property (City), appeals from the determination of respondent that he be removed for an incident that occurred on February 17, 2015. Respondent argues that he violated: N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty; N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause; City of Wildwood Workplace Violence Policy; City of Wildwood Employee Policies and Procedures Manual and the Progressive Discipline Policy

"Unauthorized Use of Computers, Internet and Email". The appellant denies the allegations.

PROCEDURAL HISTORY

On September 2, 2015, the City issued a Preliminary Notice of Disciplinary Action suspending appellant without pay indefinitely, beginning February 23, 2015. On November 17, 2015, the City issued a Final Notice of Disciplinary Action sustaining the charges and removing the appellant from his position, effective November 17, 2015. Appellant filed a timely notice of appeal.

The Division of Appeals and Regulatory Affairs of the Civil Service Commission transmitted the case to the Office of Administrative Law, where it was filed on January 8, 2016. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The hearing was held on February 2, 2017. Appellant was afforded the opportunity to present an oral summation. The record remained open until March 1, 2017, for the respondent to submit a written summation argument. Also, appellant was afforded the opportunity to present a written summation, if he so chose, by April 1, 2017. On that date, the record closed.

FACTUAL DISCUSSION

Testimony for respondents

Detective John Elwell (Elwell) testified for the respondents that he has been employed by the City of Wildwood for the past ten years as a Police Officer; the last four of which have been as a Detective.

He recalled that on February 17, 2015, he received an assault complaint about an incident that occurred between Williams and Wilmont Jones. Both individuals are Laborers with the City of Wildwood and the specifics were that Williams threatened Jones with a knife while on the job.

On February 20, 2015, Elwell instituted an active investigation and interviewed everyone involved, including Williams and Jones. The investigation was reduced to a report. (R-6 Detective Report). The investigation revealed that another employee told Williams that he was not pulling his fair share of work while shoveling snow. Williams pulled a "pocket knife" out of his pocket and gestured to Jones as if he was going to throw the knife at him several times. Williams acknowledged the incident and agreed that it happened in that manner, but it was done in a playful manner. Williams was charged with aggravated assault, but the charges were summarily dismissed by the County Prosecutor's Office. Elwell did not know why it was dismissed. He also testified that Jones has a significant disability and "you can tell" but do not know what it is. He said he has trouble communicating, verbalizing and also wears a hearing aide.

Herman Seney Jr. (Seney) has been employed by the City of Wildwood Public Works for twenty-two years in Street Maintenance as a Truck Driver.

On February 17, 2015, he went to work because there was a significant snowfall. He was assigned to drive a salt truck with Williams and Jones. At some point, Williams, Jones and another employee were shoveling salt out of the truck. Williams then returned and sat in the truck refusing to do any work. Williams then got out of the truck and said, "You better not say it," to Jones. At that same time, Williams was motioning with a knife in his hand as if he was going to throw the knife at Jones.

Seney also testified that Jones is "slow" and wears hearing aids. Nevertheless, it was obvious that he was "scared." Also, since the incident, Williams has intimidated him as a witness and said, "I'm gonna [sic] get you." On one occasion, Williams kicked the grill of Seney's truck and he "says stuff" to him all the time.

Wilmont Jones (Jones) testified that he has worked at Public Works for a number of years with his brother. He recalled that Williams had a knife in his hand and motioned that he was going to throw a knife at him four to five times. He stated with particularity that he was also "scared" and "I moved back."

During his testimony I observed that Mr. Jones was wearing at least one hearing aid and had some difficulty hearing some of the questions. Also, based on some of his responses, it is my impression that he had difficulty comprehending some of the questions and verbalizing his responses.

Mark D'Amico (D'Amico) had been employed by the City of Wildwood for thirty-one years. He is currently retired from Wildwood City as Superintendent of Public Works. Prior to Public Works, he was employed by Wildwood City as a Police Officer.

He testified that Jones has a disability and has limited communication skills because of that mental disability. Also, he has hearing aids. Both Williams and Jones worked for him as Laborers. He became aware of the incident because Jones and other employees came in his office and told him about it. When they were in his office, it was clear that "Jones was [visibly] upset" by the incident.

He alone drafted the Write-up Notice to Terminate Employee. (R-1). It includes not only the incident involving Wilmont Jones but also use of a cell phone and social media while on city time. He explained that the City of Wildwood Policy Manual states in relevant part that there is to be "no work place violence and no cell phone usage during work." (R-8). As part of the investigation of Williams, there was a search of his open Facebook account. It revealed that on multiple occasions, Williams was accessing Facebook and posting photos while he was at work. (R-12 through R-15). This information was confirmed with Williams' work schedule. (R-35). This was not surprising since Williams has had a significant history of discipline with the City of Wildwood. (R-2).

Testimony for appellant

Isaac Williams had been a Wildwood City Public Works employee for a number of years prior to February 17, 2015. He recalled that on that date, he was called into work due to a snow storm. His work crew was tasked with clearing snow from the public areas around the City of Wildwood. While Williams was seated in the truck, Jones told Williams to get his "black ass out the truck." He admitted that while in the

truck, he pulled a knife out and was gesturing to Jones with the knife with a throwing motion. The knife was initially being used to cut the inserts of his gloves but he never intended any harm toward Jones. He believes that he used good judgment on that day and did nothing wrong. He explained that he never meant to upset Jones and would never hurt him. However, he also believes that other employees put Jones up to this story and are coercing him into getting Williams fired.

FINDINGS OF FACT

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

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

The testimony of the respondent's witnesses was especially credible and persuasive. Their testimony was clear and concise. It was obvious that they had concerns regarding Williams' actions that included promotion of safety for the individuals working in the Wildwood City Public Works facility and for Jones.

Conversely, Williams' testimony was not credible. Williams' own testimony assisted the respondent in proving the facts of the case by a preponderance of the evidence. He admitted to gesturing toward Jones with a knife as if he was going to throw it at him. However, more disturbing was that Williams failed to grasp the gravity of his actions. He believes that he used good judgment and did nothing wrong because he was just joking around. Also, Williams' attempt to shift the blame for this incident on other employees was unavailing. The dismissive comment that Jones was being put up to this story was unfounded in fact.

After hearing the testimony and reviewing the evidence, I **FIND**, by a preponderance of credible evidence, that on February 17, 2015, while on the job with the City of Wildwood, Williams pulled out a knife and gestured as if he was going to throw it at another employee, Jones. I **FURTHER FIND**, that Williams used the internet via a cellular telephone while on the job at the City of Wildwood.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil-service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A. 1 1A:1-2(a). 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, including removal. N.J.S.A. 1 1A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. The general causes for such discipline are set forth in N.J.A.C. 4A:2-2.3(a).

This matter involves a major disciplinary action brought by the

respondent appointing authority against the appellant. An appeal to the Merit System Board requires the OAL to conduct a hearing de novo to determine the appellant's guilt or innocence as well as the appropriate penalty, if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). Respondent has the burden of proof and must establish by a fair preponderance of the credible evidence that appellant was guilty of the charges. Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is found to preponderate if it establishes the reasonable probability of the fact alleged and generates a reliable belief that the tendered hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. 487 (1962).

The respondent sustained charges of violations of N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty; N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause; City of Wildwood Workplace Violence Policy; City of Wildwood Employee Policies and Procedures Manual and the Progressive Discipline Policy "Unauthorized Use of Computers, Internet and Email".

Initially, respondent sustained charges against appellant for Conduct Unbecoming a Public Employee, N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "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." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Suspension or removal may be justified where the misconduct occurred while the employee was off duty. Emmons, supra, 63 N.J. Super. at 140.

It is difficult to contemplate a more basic example of conduct which could destroy public respect in the delivery of governmental services than the image of a Public Works employee gesturing that he was going to throw a knife at another employee. Also, the same individual was on his cellular telephone during work hours. I **CONCLUDE** that appellant's actions constitute unbecoming conduct, and the charge of N.J.A.C. 4A:2-2.3(a)(6) is hereby **SUSTAINED**.

The respondent also sustained charges for a violation of N.J.A.C. 4A:2-2.3(a)(7) (Neglect of Duty). Neglect of Duty can arise from an omission or failure to perform a duty as well as negligence. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div 1977). "Duty" signifies conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957). Neglect of duty can arise from omission to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Although the term "neglect of duty" is not defined in the New Jersey Administrative Code, the charge has been interpreted to mean that an employee has neglected to perform and act as required by his or her job title or was negligent in its discharge. Avanti v. Dep't of Military and Veterans Affairs, 97 N.J.A.R.2d (CSV) 564; Ruggiero v. Jackson Twp. Dep't of Law and Safety, 92 N.J.A.R.2d (CSV) 214.

Again, it is difficult to contemplate a more basic example of neglect of duty than the image of a Public Works employee gesturing that he was going to throw a knife at another employee. Also, the same individual was on his cellular telephone during work hours. I **CONCLUDE** that appellant's actions constitute neglect of duty, and the charge of N.J.A.C. 4A:2-2.3(a)(7) is hereby **SUSTAINED**.

Appellant has also been charged with a violation of N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause). Specifically, appellant is charged with violations of the Other Sufficient Cause; City of Wildwood Workplace Violence Policy; City of Wildwood Employee Policies

and Procedures Manual and the Progressive Discipline Policy "Unauthorized Use of Computers, Internet and Email".

It is noted that the preliminary and final notices of disciplinary action (R-3 and R-4) indicate the sustained charges. Accordingly, I **CONCLUDE** that the consideration of the charges constituting a violation of N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause) will be limited to the regulations, rules and general orders specifically enumerated in the Final Notice of Disciplinary Action. (R-4).

As such, appellant is charged with violating City of Wildwood Workplace Violence Policy. (R-6). The rule provides that:

The City of Wildwood will not tolerate workplace violence. Violent acts or threats made by an employee against another person or property are cause for immediate dismissal and will be fully prosecuted. This includes any violence or threats made on municipal property, at municipal events or under other circumstances that may negatively affect the Municipality's ability to conduct business.

Prohibited conduct includes, but may not be limited to:

3. Aggressive, hostile or bullying behavior that creates a reasonable fear of injury to another person or subjects another individual to emotional distress.
5. Possession of a weapon while on Municipal property or while on Municipal business, except for those uniformed officers permitted to do so by law. (R-8 pg. 8).

The record reflects in all of the testimony that while on the job for the City of Wildwood, Williams pulled a knife out of his pocket and gestured that he was going to throw it at another employee, Jones. Accordingly, I **CONCLUDE** that the appointing authority has met its burden in demonstrating a violation of the City of Wildwood's Policy on Workplace Violence and the charge is hereby **SUSTAINED**.

Finally, the City of Wildwood Employee Policies and Procedures Manual and the Progressive Discipline Policy address the "Care In Use of Email, Voicemail, Internet and Computer Network Systems". It has a provision that prohibits the recording of "job related incidents or occurrences with any... cellular telephone." (R-8 pg. 26).

R-11 through R-33 are photographs that were placed on Williams' personal Facebook account. The images reflect that Williams photographed incidents and occurrences during his work hours at the City of Wildwood. Also, he posted them to his personal Facebook account during those same times. Appellant did not comply with the City of Wildwood Employee Policies and Procedures Manual involving "Care In Use of Email, Voicemail, Internet and Computer Network Systems". Therefore, I **CONCLUDE** that the appointing authority has met its burden in demonstrating a violation of this section and the charge is hereby **SUSTAINED**.

Having met its burden in demonstrating violations of City of Wildwood Workplace Violence Policy and the City of Wildwood Employee Policies and Procedures Manual, "Care In Use of Email, Voicemail, Internet and Computer Network Systems," I **CONCLUDE** that the charge of a violation of N.J.A.C. 4A:2-2.3(a)(12), Other Sufficient Cause, is hereby **SUSTAINED**.

PENALTY

Where appropriate, concepts of progressive discipline involving penalties of increasing severity are used in imposing a penalty and in determining the reasonableness of a penalty. West New York v. Bock, supra, 38 N.J. 523-24. Factors determining the degree of discipline include the employee's prior disciplinary record and the gravity of the instant misconduct.

However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. See Henry v. Rahway State Prison, 81 N.J. 571 (1980). It is settled that the theory of progressive discipline is not a fixed and immutable rule to be followed without question. Rather, it is recognized that some

disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. See Carter v. Bordentown, 191 N.J. 474 (2007).

The record reflects that while employed by the City of Wildwood, appellant has been reprimanded and/or received a written warning on eighteen prior occasions and has been suspended on two occasions. Two of the prior incidents were for altercations with other employees. Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See In re Herrmann, 192 N.J. 19, 32 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). (NOTE: Gaines had a substantial prior disciplinary history, but the case is frequently quoted as a threshold statement of civil service law.)

"In addition, there is no right or reason for a government to continue employing an incompetent and inefficient individual after a showing of inability to change." Klusaritz v. Cape May County, 387 N.J. Super. 305, 317 (App. Div. 2006) (termination was the proper remedy for a county treasurer who couldn't balance the books, after the auditors tried three times to show him how).

In reversing the MSB's insistence on progressive discipline, contrary to the wishes of the appointing authority, the Klusaritz panel stated that "[t]he [MSB's] application of progressive discipline in this context is misplaced and contrary to the public interest." The court determined that Klusaritz's prior record is "of no moment" because his lack of competence to perform the job rendered him unsuitable for the job and subject to termination by the county.

[In re Herrmann, 192 N.J. 19, 35-36 (2007) (citations omitted).]

Considering the foregoing, the respondent seeks termination of the appellant. Considering the record in the present matter including the appellant's attitude, disciplinary record, the nature of the job duties and the nature of the charges, I **CONCLUDE** that the respondent's action terminating appellant be **AFFIRMED**.

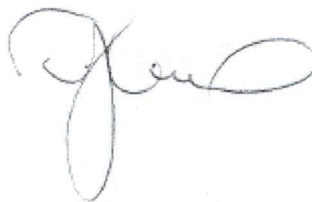
DECISION AND ORDER

I **ORDER** that the charges of N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty; N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause be **SUSTAINED**. I further **ORDER** that the charges of violating the City of Wildwood Workplace Violence Policy and City of Wildwood Employee Policies and Procedures Manual "Care In Use of Email, Voicemail, Internet and Computer Network Systems" be **SUSTAINED**. I **FURTHER ORDER** respondent to terminate appellant from employment with the City of Wildwood.

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.



May 16, 2017

DATE

DEAN J. BUONO, ALJ

Date Received at Agency:

5/16/17

Date Mailed to Parties:

5/17/17

/vj

LIST OF WITNESSES:

For appellant:

Isaac Williams

For respondent:

Detective John Elwell

Herman Seney, Jr.

Wilmont Jones

Mark D'Amico

LIST OF EXHIBITS:

For appellant:

None

For respondent:

R-1 Write-up Notice to Terminate Employee

R-2 Disciplinary Action Log of Williams

R-3 Preliminary Notice of Disciplinary Action

R-4 Final Notice of Disciplinary Action

R-5 Criminal Complaint

R-6 Investigative Report

R-7 Order Dismissing Indictment

R-8 Wildwood City Policy Manual

R-9 Attendance Record

R-10 Directive Receipt

R-11- R-33 Photos and Facebook Postings

R-34 Employee Attendance Record

R-35 Employee Attendance Record

R-36 Employee Attendance Record

R-37 Last Chance Agreement