STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

In the Matter of Victor Sanchez, Town of West New York, Department of Parks and Public Property

CSC Docket No. 2020-225

Request for Back Pay and Counsel Fees

ISSUED: DECEMBER 6, 2019 (HS)

Victor Sanchez, a Laborer 1 with the West New York Department of Parks and Public Property, represented by Joseph H. Neiman, Esq., requests back pay and counsel fees in accordance with the attached Civil Service Commission (Commission) decision rendered on May 22, 2019.

By way of background, the appointing authority issued a Final Notice of Disciplinary Action removing the petitioner on charges of insubordination, inability to perform duties, conduct unbecoming a public employee, neglect of duty 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 charges were dismissed and the Commission ordered that the petitioner be reinstated and awarded mitigated back pay, benefits and seniority from October 23, 2017 to the actual date of reinstatement and reasonable counsel fees. The record reflects that the petitioner was reinstated on June 19, 2019. However, the parties were unable to agree on the amount of back pay or counsel fees due to the petitioner, and the petitioner requested Commission review.

In his request, the petitioner indicates that his annual salary at the time of his removal was $25,000, for a monthly rate of $2,083.33. He indicates that he received $7,436 in unemployment insurance benefits from December 4, 2017 to May 16, 2018 and $342 in income from different jobs, consisting of $165 earned from Yalla Teaneck LLC for 15 hours from January 1, 2019 to January 15, 2019 and $177 earned from 74 Industries Inc. for 20 hours from February 17, 2019 to March 2,

2019. The petitioner asserts that he "tried to find other work" but could not. Specifically, it was "very difficult" because

> whenever a potential employer inquired about [his] past employment they would hear that [he] was having legal issues with [his] past employer and [he] still wanted to work there if [he] was successful in [his] case.

The petitioner adds that he tried to get the union to help him when he was removed, but the union "did nothing." Thus, the petitioner proposes that he is owed $33,888.60, which represents $41,666.60 (20 months from October 23, 2017 through June 18, 2019 multiplied by $2,083.33) less $7,436 in unemployment insurance benefits and $342 in income from different jobs. The petitioner states that he was also entitled to 12 vacation days and 12 sick days per year, or one vacation day and one sick day per month, which should mean an additional 20 vacation days and 20 sick days. In support, the petitioner submits pay stubs and a bank "Balance & Transactions" sheet showing 13 unemployment insurance payments of $572 each.

Additionally, the petitioner seeks counsel fees. Specifically, Mr. Neiman requests that he be awarded a minimum rate of $475 per hour, his normal hourly rate for litigation matters. He asserts that the rates set forth in *N.J.A.C.* 4A:2-2.12(c) do not reflect the standard fees for partners with over 30 years of experience that do litigation and practice in the Bergen, Hudson, Essex and Passaic areas. Mr. Neiman states that he has over 35 years of experience and has litigated dozens of complex employment litigation matters. He has won reversals in the Superior Court of New Jersey, Appellate Division and the United States Court of Appeals for the Third Circuit. *See, e.g., Bray v. Marriott Hotels*, 110 F.3d 986 (3d Cir. 1997). In support, Mr. Neiman submits the certifications of Joseph P. Rem, Jr., Esq. and Mark F. Heinze, Esq. Mr. Rem is a member of his firm and has been a litigator his entire career. Mr. Rem's experience is that attorneys in the Essex County, Hudson County and Bergen County-Hackensack areas who are partners or own their own firm with 30 or more years of experience generally charge $450-$650 per hour. Mr. Heinze is a partner of his firm and concentrates in commercial and real estate litigation principally in Bergen, Hudson, Essex and Passaic Counties. Mr. Heinze states that attorneys in these counties who are partners or who own their firm and who have 30 or more years of experience in civil litigation practice charge $450-$650 per hour for their services. Messrs. Rem and Heinze both state that it is appropriate to increase the hourly rate where the payment of counsel fees depends on achieving a successful outcome. Mr. Neiman argues that the Commission should be guided by two New Jersey Supreme Court cases: *Rendine v. Pantzer*, 141 *N.J.* 292 (1995), a Law Against Discrimination (LAD) case, and *Furst v. Einstein Moomjy, Inc.*, 182 *N.J.* 1 (2004), a Consumer Fraud Act case. In his view, consideration should also be given to the need to be able to attract competent attorneys. Thus, Mr. Neiman maintains that the counsel fee award should be no

less than $48,093.75 (101.25 hours spent from November 10, 2017 to August 19, 2019 at $475 per hour) and that the award for costs be $250 for translation services. In support, the petitioner submits Mr. Neiman's itemized bill for professional legal services rendered, dated August 19, 2019.[1]

In response, the appointing authority, represented by Andrés Acebo, Esq., argues that the petitioner offers no support for reasonable efforts made to seek suitable employment for the time periods May 16, 2018 through December 31, 2018 and January 15, 2019 through June 18, 2019. After his unemployment insurance benefits terminated in May 2018, it argues, the limited time the petitioner worked constitutes a *prima facie* case of underemployment as his income totaled only slightly more than $300. The appointing authority contends that the petitioner "sabotaged" any legitimate chance for work by advising prospective employers he would leave the job when and if he was reinstated by the appointing authority. In the appointing authority's view, the petitioner has not offered a description of efforts made to find work such as reviewing classified advertisements or online job listings, sending out resumes or listing any single employer where he sought work and was denied. It asserts that the petitioner's limited work cannot be considered "suitable employment" as defined in Civil Service regulations. The appointing authority contends that the petitioner's permanent title of Laborer 1 covers varied types of manual and unskilled laboring work for which job possibilities are countless. In this regard, a search for "laborer" in and around West New York on Monster.com in August 2019 produced 233 listings including warehouse associates, construction workers and packagers. The same search on Indeed.com produced hundreds of similar listings at rates of more than $20 per hour in various northern New Jersey municipalities.

The appointing authority contends that the back pay period should run from November 11, 2017 through June 18, 2019 in that the petitioner had filed and been approved for temporary disability insurance benefits in late September 2017 and his return date was November 11, 2017 as indicated by his doctor's note. The appointing authority provides that the petitioner's biweekly salary was $961.53 (or $96.15 daily) in 2017, was $1,012.16 (or $101.22 daily) in 2018, and is $1,032.40 (or $103.24 daily) for 2019.[2] However, as noted earlier, it maintains that no back pay is owed for the periods May 16, 2018 through December 31, 2018 and January 15, 2019 through June 18, 2019 for lack of mitigation efforts. By the appointing authority's calculation, the petitioner is owed $15,608.60 in back pay after accounting for union dues and wages earned.

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[1] The August 19, 2019 bill reflects that Mr. Neiman received the Commission's decision on May 23, 2019. The bill includes nine entries, from May 24, 2019 through August 19, 2019, that postdate his receipt of the decision and total 17.5 hours. The number of these hours spent solely on the enforcement of counsel fees is not clearly broken out.

[2] The daily rates have been calculated by dividing the biweekly salary by 10 working days.

With respect to counsel fees, the appointing authority argues that the petitioner has presented no compelling reason for an hourly rate higher than that prescribed in *N.J.A.C.* 4A:2-2.12. This matter, according to the appointing authority, involved a straightforward, "quotidian" disciplinary proceeding with no novel or complex issues of law requiring unique legal experience. It asserts that the underlying matter concerned a disputed job abandonment; the parties did not require, nor did they engage in, protracted or complicated discovery; the petitioner did not propound any specific discovery demands beyond seeking copies of his personnel file, collective bargaining agreements, and other documents the appointing authority intended to rely upon; and the petitioner never requested a departmental hearing. The appointing authority maintains that *Rendine, supra*, and *Furst, supra*, do not overrule the Commission's statutory and regulatory framework, and neither case involved administrative proceedings. Those cases, in the appointing authority's view, are not dispositive of the instant request. The appointing authority proffers that Mr. Neiman has not substantiated that his years of general litigation experience warrant even the maximum $200 hourly rate allowed under *N.J.A.C.* 4A:2-2.12(c); has not highlighted the relevancy of his experience and whether his practice has focused on employment or labor law; has not certified to his experience handling Commission disciplinary matters; and has made no special distinctions about his private practice.

The appointing authority also takes issue with the following entries in Mr. Neiman's August 19, 2019 itemized bill as being "incomplete and/or excessive:"

- 0.5 hour on December 8, 2017 for receipt and review of an e-mail from the appointing authority's counsel comprised of a two-sentence letter attachment advising Mr. Neiman that it would be representing the appointing authority and that it instructed the appointing authority to honor the litigation hold
- 0.75 hour on January 24, 2018 for work described only as "Conference call" without any reference to context, the parties or subject matter involved
- 0.5 hour on April 23, 2018 for receipt and review of a Notice of Filing from the OAL, a document that merely lists a docket number, refers parties to the OAL website for rules governing a hearing, and advises parties that a hearing date will be provided in the future
- 0.5 hour on April 25, 2018 for receipt and review of an e-mail from the OAL that advised of the assigned judge and set a telephone conference date
- 1.75 hours on June 4, 2018 to prepare and forward correspondence for settlement purposes, correspondence that included a single paragraph consisting of three sentences with the first sentence merely advising that Mr. Neiman represented the petitioner

- 14.25 hours "speciously" block-billed on December 10-11, 2018 for preparation of Mr. Neiman's "truncated" post-trial brief and review of the appointing authority's post-trial submission
- 7.5 hours on December 20, 2018 for his 3.5-page reply brief, which cited no case law and referenced as authority only a model jury charge inapplicable to an OAL hearing
- 2.0 hours on December 21, 2018 for review of the appointing authority's post-trial reply brief, which was less than three pages

In reply, the petitioner states that he went for an interview at Powerstaffing, Inc. Two days later, he received a telephone call regarding a job loading trucks but he did not qualify for it due to his physical condition. He applied to Cosmopolitan Staffing Services and called and personally went to the office "on regular occasions" but was never offered anything. He applied to Brickforce Staffing and called and personally went to the office "on regular occasions" but was never offered anything. He also submitted a job application to a Burger King but never heard back. The petitioner believes that the combination of his age, physical limitations, language barrier and work history of having been removed for cause added up to make finding work difficult. In support, the petitioner submits copies of advertisements he used.

Regarding counsel fees, Mr. Neiman notes that in *In the Matter of Monica Malone,* 381 *N.J. Super.* 344 (App. Div. 2005), a Civil Service case, the court used the Internet to look at prevailing counsel fee rates. He argues that it would be hard to imagine his $475 hourly rate being outside the norm in this area for a litigator with his experience. Mr. Neiman proffers that if his hourly rate is limited to $175-$200, it would assure that no attorneys with significant experience would ever pursue such a matter knowing that at best with a total victory, they could expect a fee that is less than half their normal billing rate and if they end up losing, receive nothing. Mr. Neiman contends that the appointing authority has "nitpicked" at his billing entries and assures the Commission that, if anything, many hours went understated and those that are listed are clearly true. He maintains that if an entry states review of e-mail and indicates 0.5 hour spent, he would have not only read the e-mail but would also have checked the file, checked something else, made sure he had the right understanding of what he was doing, and likely made a note or two to the file concerning that e-mail. Mr. Neiman argues that the appointing authority's taking issue with the 7.5 hours spent on December 20, 2018 to generate his 3.5-page reply brief shows a total lack of understanding that, often, writing a shorter memorandum requires more rewrites than a longer one. It is simply not true, according to Mr. Neiman, that because no case law was cited, it could not have taken that long. He states that it took all day with writing and rewriting and that several cases were looked at but not cited. As to his entries for December 10-11, 2018, Mr. Neiman states that he spent two days writing, reviewing and rewriting.

In reply, the appointing authority contends that the petitioner's reply should be disqualified from consideration as it is prejudicial for the appointing authority to have to review it. On the merits, the appointing authority argues that the petitioner has provided only vague contentions of job interviews and company names without any dates, addresses, names of interviewers or follow-up by the petitioner.

Regarding counsel fees, the appointing authority points out that in *Malone, supra*, the $250 hourly rate awarded was nearly half that sought here. Additionally, it states that in *Malone*, the court approved of the enhanced fee because the attorney had specialized, advanced degrees in clinical psychology (Master's and Ph.D.); the underlying matter was a disciplinary hearing that involved the death of a patient; and the employee was seeking a medical license. That matter, in the appointing authority's view, was a complex one "far afield" from the instant routine disciplinary charge. Further, in *Malone* and unlike here, the attorney and client had a fee agreement and the client actually paid for the legal services rendered. As such, the appointing authority maintains that *Malone* is inapposite.

In reply, the petitioner requests additional counsel fees in the amount of $7,718.75 (16.25 hours spent from September 9, 2019 to September 20, 2019 at $475 per hour) for additional professional legal services rendered in connection with the instant request for back pay and counsel fees. In support, the petitioner submits Mr. Neiman's supplemental itemized bill for professional legal services rendered, dated September 20, 2019.[3] Thus, the petitioner maintains that the total counsel fee award should now be no less than $55,812.50 (117.5 hours in total at $475 per hour).

In reply, the appointing authority argues that the petitioner's request for additional counsel fees is excessive and should be rejected. It maintains that the petitioner should not have been permitted to submit multiple replies in a "protracted" process.

CONCLUSION

Initially, it is noted that the appointing authority suggests that the petitioner's replies be disregarded. However, in order for the Commission to make a reasoned decision in a matter, it must review a complete record. *See, e.g., In the Matter of James Burke* (MSB, decided June 22, 2005). Moreover, the appointing authority had opportunities to reply to the petitioner's submissions and did so. As such, there is no basis to disregard any of the parties' submissions.

[3] The number of hours, out of the additional 16.25, spent solely on the enforcement of counsel fees is not clearly broken out.

Back Pay

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-board adjustments. Benefits shall include vacation and sick leave credits and additional amounts expended by the employee to maintain his or her health insurance coverage during the period of improper suspension or removal. *N.J.A.C.* 4A:2-2.10(d)3 provides that an award of back 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.* *N.J.A.C.* 4A:2-2.10(d)9 states that a back pay award is subject to reduction for any period of time during which the employee was disabled from working.

It is undisputed in the record that the petitioner filed and was approved for temporary disability insurance benefits in late September 2017, and his doctor cleared him to return to work only on November 11, 2017. Consequently, since the petitioner was disabled from working, he is not entitled to any back pay from October 23, 2017 through November 10, 2017. *See N.J.A.C.* 4A:2-2.10(d)9.

Although the appointing authority contends that the petitioner should not receive back pay for the time periods May 16, 2018 through December 31, 2018 and January 15, 2019 through June 18, 2019 for lack of mitigation efforts, the Commission does not agree. The appointing authority takes issue with the petitioner's statement that:

> whenever a potential employer inquired about [his] past employment they would hear that [he] was having legal issues with [his] past employer and [he] still wanted to work there if [he] was successful in [his] case.

However, the petitioner "was not required to make deceptive or misleading statements to prospective employers in seeking substitute employment." *O'Lone v. Department of Human Services*, 357 *N.J. Super.* 170, 183 (App. Div. 2003). As such, the Commission is not persuaded that the petitioner "sabotaged" his employment search, an unduly harsh assessment. The petitioner in fact went for an interview at Powerstaffing, Inc. and applied to Cosmopolitan Staffing Services, Brickforce Staffing and a Burger King. He also called and personally went to the offices of Cosmopolitan Staffing Services and Brickforce Staffing "on regular occasions" and did obtain some employment. It should also not be ignored that the petitioner had been on temporary disability. Given that an individual serving in the title of Laborer 1 "performs varied types of manual and unskilled laboring work" per the Civil Service job specification, it is not implausible that physical limitations hampered the petitioner's employment search. The petitioner in fact provides one example of a job loading trucks that he did not qualify for due to his physical condition. In addition, the appointing authority's Internet searches for "laborer" positions were performed in August 2019, after the petitioner's reinstatement, and thus are not persuasive evidence of specific employment opportunities that were available during the separation period. Based on the foregoing, the appointing authority has not sustained its burden of proof showing that the petitioner failed to make reasonable efforts to find suitable employment for the May 16, 2018 through December 31, 2018 and January 15, 2019 through June 18, 2019 time periods.

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). This the petitioner did, based on the totality of the circumstances as discussed above. Therefore, the petitioner is entitled to back pay for his entire separation period, excepting only the time he was disabled from working. The calculation of the petitioner's mitigated back pay award is as follows:

DATES	AMOUNT OWED
October 23, 2017 – November 10, 2017	$0 (disabled from working)
November 11, 2017 – December 31, 2017	$3,365.25 (*i.e.*, $96.15 daily rate multiplied by 35 working days)
January 1, 2018 – December 31, 2018	$26,418.42 (*i.e.*, $101.22 daily rate multiplied by 261 working days)
January 1, 2019 – June 18, 2019	$12,492.04 (*i.e.*, $103.24 daily rate multiplied by 121 working days)
Total Gross Back Pay Amount	$42,275.71
Less Mitigation Amounts	$7,778 (*i.e.*, $7,436 in unemployment benefits and $342 in earnings from employment)
Total Mitigated Back Pay Award	**$34,497.71**

N.J.A.C. 4A:2-2.10(d)2 provides that the award of back pay shall be reduced by the amount of taxes, social security payments, dues, pension payments, and any other sums normally withheld. Thus, the appointing authority, by rule, should reduce the petitioner's total mitigated back pay award stated above consistent with this provision and provide the petitioner with a full accounting of its deductions when it makes its payment to the appellant. *See In the Matter of Ronald Dorn* (MSB, decided December 21, 2005).

Additionally, the Commission orders that the appointing authority award the petitioner any benefits (*i.e.*, vacation leave, sick leave, *etc.*) due, if it has not already done so. The record indicates that the petitioner was reinstated on June 19, 2019. The petitioner is not due any vacation leave for 2017 since vacation leave not taken in a given year can only be carried over to the following year. *See N.J.S.A.* 11A:6-3(e) and *N.J.A.C.* 4A:6-1.2(g). The petitioner is, however, due vacation leave for 2018 and 2019. In this regard, the petitioner would be entitled to have his 2018 vacation leave time credited or carried over and added to his 2019 vacation leave entitlement since he returned to work in June 2019. *See id.* As to the amount of sick leave due, the petitioner should receive any unused sick leave prior to October 23, 2017; sick leave for the November 11, 2017 through December 31, 2017 time period; and all of his sick leave for 2018 and 2019, since sick leave can accumulate from year to year without limit. *See N.J.S.A.* 11A:6-5 and *N.J.A.C.* 4A:6-1.3(f). However, it should be noted that sick leave does not accrue during a leave of absence without pay. *See N.J.A.C.* 4A:6-1.3(c). Since the October 23, 2017 through November 10, 2017 time period when the petitioner was disabled from working and for which he is owed no back pay is akin to a leave of absence without pay, no sick leave is due for that period.

<u>**Counsel Fees**</u>

N.J.S.A. 11A:2-22 provides that the Commission may award reasonable counsel fees to an employee as provided by rule. *N.J.A.C.* 4A:2-2.12(a) provides that the Commission shall award partial or full reasonable counsel fees incurred in proceedings before it and incurred in major disciplinary proceedings at the departmental level where an employee has prevailed on all or substantially all of the primary issues before the Commission. *N.J.A.C.* 4A:2-2.12(c) provides as follows: an associate in a law firm is to be awarded an hourly rate between $100 and $150; a partner or equivalent in a law firm with fewer than 15 years of experience in the practice of law is to be awarded an hourly rate between $150 and $175; and a partner or equivalent in a law firm with 15 or more years of experience in the practice of law, or, notwithstanding the number of years of experience, with a practice concentrated in employment or labor law is to be awarded an hourly rate between $175 and $200. *N.J.A.C.* 4A:2-2.12(e) provides that a fee amount may also be determined or the fee ranges in (c) above adjusted based on the circumstances of a particular matter, in which case the following factors (see the Rules of Professional Conduct of the New Jersey Court Rules, at RPC 1.5(a)) shall be considered: the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; the fee customarily charged in the locality for similar legal services, applicable at the time the fee is calculated; the nature and length of the professional relationship with the employee; and the experience, reputation and ability of the attorney performing the services.

The Commission finds that Mr. Neiman has not justified awarding his counsel fees at the requested hourly rate of at least $475. Extraordinary time and labor were not expended in the underlying disciplinary matter. The matter was not novel in any way and was no more complex than any of the thousands of disciplinary appeals involving major disciplinary action decided over the years by the Commission. It involved a one-day hearing with two witnesses. As such, the matter inherently lacked the legal complexity necessary to justify the hourly rate requested. In addition, no unique legal experience was required, unlike *Malone, supra*, where a rate above those provided by rule was warranted because the attorney there possessed Master's and Ph.D. degrees in Clinical Psychology and experience in psychology that made him uniquely qualified to address psychological diagnostic issues raised during the hearing. Contrary to Mr. Neiman's urging, whether the fee is contingent is not a factor to be considered under *N.J.A.C.* 4A:2-2.12(e). Mr. Neiman's reliance on *Rendine, supra*, an LAD case, and *Furst, supra*, a Consumer Fraud Act case, is unpersuasive since neither case concerns the determination of counsel fees in similar employment matters under Civil Service law and regulations. The certifications of Mr. Rem, who states only that he has been a litigator, and Mr. Heinze, who concentrates in commercial and real estate litigation, are not illuminating as they do not speak to the fee customarily charged

for similar legal services. Therefore, based on the information provided by Mr. Neiman regarding his years of experience in the practice of law, he should be reimbursed at the hourly rate of $200. *See N.J.A.C.* 4A:2-2.12(c) and (e). The Commission notes that, contrary to Mr. Neiman's concern, its determination here does not mean that an attorney should expect never to receive an hourly rate higher than those specified in *N.J.A.C.* 4A:2-2.12(c). It merely means that upon consideration of the factors in *N.J.A.C.* 4A:2-2.12(e), there is no basis for a higher rate in this particular case. In an appropriate case, consideration of those factors could very well justify a higher rate.

The appointing authority contends that billing entries for December 8, 2017, April 23, 2018, April 25, 2018, June 4, 2018, December 10-11, 2018, December 20, 2018 and December 21, 2018 are "incomplete and/or excessive." However, the Commission does not have a compelling reason, beyond the parties' differing opinions as to the amount of time the associated tasks should have taken, to eliminate the entries. As such, the Commission is satisfied that these entries, which include communication with opposing counsel, review of OAL documents and correspondence, legal research, and the preparation and review of briefs, were necessary for Mr. Neiman to provide his client with an adequate legal defense. The only entry that the Commission agrees is incomplete is the 0.75-hour "Conference call" on January 24, 2018. This entry does not, for example, indicate the other participants on the call. It is thus appropriate to deduct 0.75 hour from Mr. Neiman's 117.5 overall billable hours.

The petitioner is also not entitled to any counsel fees after May 23, 2019, the date he received the Commission's May 22, 2019 decision. Generally, a petitioner is entitled to counsel fees regarding his enforcement request *for his counsel fee award* since New Jersey courts have recognized that attorneys should be reimbursed for the work performed in support of any fee application. *See H.I.P. (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc.*, 291 *N.J. Super*. 144, 163 (Law Div. 1996) [quoting *Robb v. Ridgewood Board of Education*, 269 *N.J. Super*. 394, 411 (Ch. Div. 1993)]. However, the petitioner is not entitled to an award of counsel fees for time spent on reinstatement or back pay issues where the appointing authority did not unreasonably delay carrying out the Commission's order and did not act with an improper motivation. In the instant matter, the record does not evidence that the appointing authority unreasonably delayed implementing the Commission's order or that the appointing authority's actions were based on any improper motivation. Thus, the record does not reflect a sufficient basis for an award of counsel fees for time spent on reinstatement or back pay issues. *See N.J.A.C.* 4A:2-1.5(b); *In the Matter of Lawrence Davis* (MSB, decided December 17, 2003); *In the Matter of William Carroll* (MSB, decided November 8, 2001). Mr. Neiman's itemized bills reflect 33.75 billable hours incurred after receipt of the Commission's May 22, 2019 decision. Since the number of those hours spent solely on the enforcement of counsel fees has not been clearly

broken out, the Commission cannot determine how much time Mr. Neiman spent solely on that issue and has no choice but to deduct all 33.75 hours from the overall total.

Therefore, Mr. Neiman is entitled to be reimbursed for 83 hours at the hourly rate of $200 for a total of **$16,600** in counsel fees.

__Costs__

N.J.A.C. 4A:2-2.12(g) provides that reasonable out-of-pocket costs shall be awarded, including, but not limited to, costs associated with expert and subpoena fees and out-of-State travel expenses. Costs associated with normal office overhead shall not be awarded. Thus, Mr. Neiman's $250 expense for translation services is reimbursable. *See N.J.A.C.* 1:1-14.3(a) (providing, in pertinent part, that any party at his own cost may obtain an interpreter if the judge determines that interpretation is necessary). Accordingly, Mr. Neiman is entitled to costs in the amount of **$250**.

ORDER

Therefore, it is ordered that the appointing authority pay Victor Sanchez the gross amount of $34,497.71 for back pay within 30 days of receipt of this decision.

It is further ordered that the appointing authority pay counsel fees in the amount of $16,600 and costs in the amount of $250 within 30 days of receipt of this decision.

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 DECEMBER, 2019

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

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Attachment

c. Victor Sanchez
Joseph H. Neiman, Esq.
Victor Barrera
Andrés Acebo, Esq.
Kelly Glenn
Records Center

STATE OF NEW JERSEY

In the Matter of Victor Sanchez
Town of West New York, Department
of Parks and Public Property

DECISION OF THE CIVIL SERVICE COMMISSION

CSC DKT. NO. 2018-2795
OAL DKT. NO. CSV 05728-18

ISSUED: MAY 22, 2019 BW

The appeal of Victor Sanchez, Laborer 1, Town of West New York, Department of Parks and Public Property, removal effective October 23, 2017, on charges, was heard by Administrative Law Judge Kelly J. Kirk, who rendered her initial decision on April 18, 2019 reversing the removal. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, the Civil Service Commission (Commission), at its meeting on May 22, 2019, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the charges have been dismissed, the appellant is entitled to mitigated back pay, benefits, and seniority and reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2-2.12.

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*, 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 or counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra,* if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Victor Sanchez. The Commission further orders that appellant be granted back pay, benefits, and seniority from October 23, 2017 to 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. Proof of income earned and 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.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of services in support of reasonable counsel fees 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 and *N.J.A.C.* 4A:2-2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay and counsel fees 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 22ND DAY OF MAY, 2019

Deirdré L. Webster Cobb
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 05728-18

AGENCY DKT. NO. 2018-2795

IN THE MATTER OF VICTOR SANCHEZ, TOWN OF WEST NEW YORK, DEPARTMENT OF PARKS AND PUBLIC PROPERTY.

Joseph H. Neiman, Esq., for appellant Victor Sanchez

Michael DiFazio II, Esq., for respondent Town of West New York (DeCotiis, FitzPatrick, Cole & Giblin, attorneys)

Record Closed: January 30, 2019 Decided: April 18, 2019

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE

The Town of West New York (the Town or West New York) Department of Parks and Public Property (DPPP) terminated laborer Victor Sanchez for insubordination, inability to perform duties, conduct unbecoming a public employee, neglect of duty, and other sufficient cause.

New Jersey is an Equal Opportunity Employer

PROCEDURAL HISTORY

On or about October 23, 2017, the West New York DPPP served Sanchez with a Preliminary Notice of Disciplinary Action (PNDA), charging him with insubordination, inability to perform duties, conduct unbecoming a public employee, neglect of duty, and other sufficient cause. (R-1.) A departmental hearing was not held, and all charges were sustained. (R-2.) On or about March 5, 2018, West New York served Sanchez with a Final Notice of Disciplinary Action (FNDA), terminating him effective October 23, 2017. (R-2.)

Sanchez appealed, and the Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 to the Office of Administrative Law (OAL), where it was filed on April 23, 2018. The hearing was scheduled for August 24, 2018. The parties requested adjournment of the hearing date to continue to engage in settlement negotiations. The parties confirmed awareness of potential back-pay issues and the hearing date was adjourned. The parties were unable to settle, and the hearing was held on November 9, 2018. The record remained open for post-hearing submissions and closed on January 30, 2019.

FACTUAL DISCUSSION

James Cryan testified on behalf of West New York. Victor Sanchez, via translator, testified on his own behalf.

Background

I **FIND** the following preliminary **FACTS** in this case:

Sanchez began working as a laborer for the West New York DPPP in July 2015. Initially he was classified as part-time and was an evening security guard. He became a full-time employee in July 2016, working as a laborer in the DPPP.

There were approximately fifty employees in the DPPP, approximately seven or eight of whom were laborers. The laborers' duties and responsibilities included building maintenance for Town-owned public buildings, and maintenance of sixteen fields and parks. Sanchez's immediate supervisor was Luis Kano, and his commissioner was Margarita Guzman.

In December 2016, Sanchez injured his shoulder at work. He went to physical therapy and continued to work, not on restricted duty, but ultimately had surgery in April 2017. After the surgery he was out of work until September 5, 2017. On September 15, 2017, he reinjured his shoulder at work.

Sanchez visited Angeline Macalalag, FNP, of North Hudson Community Action Corporation Health Center, on September 16, 2017, on which date his diagnoses included right-shoulder pain. On that date, Sanchez was provided with an excuse slip to excuse him from work from September 16, 2017, to September 25, 2017, for his right shoulder. (P-2.)

Sanchez visited Angeline Macalalag/Mapa, APN, on September 27, 2017, on which date he was provided with a prescription blank stating, "Pls excuse pt from work due to con't (R) shoulder pain until October 6, 2017." (P-3.)

Sanchez visited Angeline Macalalag/Mapa, APN, on October 11, 2017, on which date he was provided with a prescription blank stating, "Pls excuse from work from Oct 7–Nov 7, 2017 due to cont. (R) shoulder pain. Pt needs to see PT & ortho for further eval of this pain." (P-4.)

On October 12, 2017, at 1:26 p.m., Yesenia "Jennie" Delrio (aide to DPPP commissioner Margarita Guzman) sent an email about Sanchez to Kelly Schweitzer (human resources clerk), with a copy to Guzman and James Cryan (West New York business administrator), stating, in pertinent part, as follows:

> As per my conversation with Commissioner Guzman, according to Victor Sanchez last doctor's note he was

> supposed to return to work on October 6. I reached out to him via text on Saturday, October 7 to see if he was going to commence work. He replied that he had gone to his doctor and she told him to return on October 11 that she was very busy and that she will then give him a note to cover him from the 6th to the 11th. As of today, I have not yet heard from him. Please advise[.] Thank you.
>
> [R-12.]

On or about October 17, 2017, Sanchez completed an application for temporary disability, reflecting that the first day he became unable to work due to disability for right-shoulder pain was September 15, 2017. (P-5.) The Medical Certificate accompanying the application reflects that his diagnosis was: "(R) shoulder tear anterior fibers of supraspinatus; (R) shoulder pain." (P-5.)

Article IV, "Sick Leave," of the Employee Handbook (P-6) reflects the following:

> B. Reporting of Absence on Sick Leave
>
> 1. If an employee is absent for reasons that entitle him or her to sick leave, his or her supervisor shall be notified by the employee's starting time.
>
> 2. Failure to so notify his/her supervisor or his/her designee for any day during that calendar year may be cause of denial of the use of sick leave for that absence and constitute cause for disciplinary action.
>
> C. Verification of Sick Leave
>
> . . . .
>
> 2. An employee who shall be absent on sick leave for three (3) or more consecutive work days during any calendar year shall submit acceptable medical evidence substantiating the illness. The Town may require proof of an illness of an employee on sick leave. Abuse of sick leave shall be cause for disciplinary action.

Additionally, Article XVIII, "Special Provisions—Public Works and Parks Department," reflects, in pertinent part, the following: "C. In the event of absence for sickness, or any other reason, the employee shall make one (1) phone call to the Public Works Department, which shall be recorded on a telephone answering service." (P-6.)

Sanchez has no prior disciplinary history.

Testimony

James Cryan

Cryan testified that October is a very busy month for the Town because the football and soccer fields require maintenance and because the Town hosts the statewide Hispanic Day Parade, participates in Paint the Town Pink for breast-cancer awareness, and holds a fall feast. The Town needs all laborers working in October. Due to budget constraints, that department is already short-staffed, so if a laborer is out sick, calling other laborers on their day off or asking laborers to work longer hours creates overtime issues. Services are disrupted when an employee does not communicate or show up for work.

Delrio texted Sanchez to determine whether he was returning to work. This was not the normal process, and was done because in the past there had been issues with Sanchez contacting the Town, and they tried to be proactive to avoid such a situation.

Policy requires that if an employee is going to be out sick, the employee must notify the supervisor that day. Cryan was not aware that the Town ever authorized sick leave for Sanchez. Other than from Delrio's email, Cryan was not aware if anyone had spoken to Sanchez during the time in question, and he testified as follows:

> Q. Did you speak to everybody that he would have spoken to, to find out if he contacted anyone?
>
> A. Is there anybody in particular that you're talking about?

Q. I just want to know if you spoke with anybody.

A. It's a tough question for me to answer exactly. Did I speak with anybody?

Q. Did you speak with anybody in the administration that Victor would have called to say that I'm not coming in.

A. I probably did.

Q. You probably did?

A. Yeah, I mean I can't say exactly because you're not saying anything specific.

Q. Okay. What part of did you speak with anyone isn't specific enough for you to understand?

A. Anyone is a very broad term.

Q. I understand, but I'm talking about in the administration. Any people that Victor would have contacted. You say it's very broad. How many people would Victor have contacted in the administration here to tell them that he wasn't coming in?

A. I don't know.

Cryan later testified that there were approximately five different people, including payroll, the human resources clerk, or the commissioner, that Sanchez could have contacted to advise he was not returning to work. Cryan further testified that he had spoken to each of the five people, but did not know the exact date.

Cryan testified that Sanchez was not deemed to have "excessive absences," because that would be for absences without medical excuses.

Per Sanchez's collective-bargaining-agreement employment contract, Sanchez would notify Kano or payroll if he were going to be out. Kano was not copied on the email from Delrio, but Kano is generally out on the road working, and Delrio would be in the office and the one contacted. Cryan was unable to specify what individual Sanchez would

have to call if he were out, indicating that could be payroll or human resources or his supervisor. Cryan testified that he verified that Sanchez had not called any of the three.

Cryan acknowledged that the Town had received written medical excuses for all of Sanchez's absences, but believed most of the medical notes were presented well after the dates of absence.

Cryan was aware that Sanchez reinjured his shoulder while working. Cryan agreed that once out sick, a doctor's note was required to return, so Sanchez could not have come back to work if he could not obtain a doctor's note. If Sanchez did not have a doctor's note reflecting that he would be out for two weeks, he would have to call daily to advise that he would be out each day.

Victor Sanchez

On September 15, 2017, Sanchez reinjured his shoulder at work, picking up garbage bags that were too heavy. That night, Sanchez tried to call Kano several times, to no avail. On September 16, 2017, at 6:00 a.m., Sanchez texted Kano that he had been injured and was in pain all evening and that he would not be able to work that day because he had to see his doctor. Sanchez went to the doctor on September 16, 2017, and afterward he hand-delivered the summary and excuse slip to Olga in payroll. She made Sanchez a copy and he provided a copy to Delrio, the secretary at the DPPP. Kano called Sanchez on September 16, 2017, at 11:36 p.m., but Sanchez had taken pain medication and was sleeping.

Sanchez advised Kano, payroll, and the DPPP that he reinjured himself. Sanchez was out from September 16, 2017, to September 25, 2017. He returned to the doctor on September 27, 2017. He was still very much in pain and not able to work. The doctor gave him a note excusing him from work until October 6, 2017. On his way home from the doctor, he stopped and provided the note to payroll and to the DPPP. Sanchez testified that the note excused him from work through October 6, 2017, so he was to return on October 7, 2017.

On October 6, 2017, he spoke to Delrio, and he could hear Guzman in the background. They were calling to tell him he was supposed to return to work that day. He told Delrio that the excuse note included October 6, 2017. Later that day, Sanchez went to the doctor's office, but the doctor was very busy and did not have time to see him. Normally, there is no specific doctor at that clinic, just whoever is on duty, but since that specific doctor was covering his case, she was the person he was to see. He was asked to return on October 11, 2017. Thereafter, he went to Town Hall and spoke to Delrio and to payroll and advised them that the doctor had been unable to see him, and he could not get an appointment until October 11, 2017. Payroll advised him that he could not return to work without a note allowing him to return to full duty, because they did not have light duty.

Sanchez went to the doctor on October 11, 2017, and obtained another medical-excuse note, which he hand-delivered to Olga in payroll and to the DPPP. He also had the doctor complete a disability form while he was there, which form he also provided to the Town.

Sanchez's work schedule was Wednesday through Sunday. He was off on Mondays and Tuesdays. Monday, October 9, 2017, was Columbus Day, a holiday. If a holiday falls on a Monday, his scheduled day off, he would get Monday, Tuesday, and Wednesday off.

Sanchez was out of work from October 6, 2017, to October 23, 2017, on temporary disability.

Sanchez denied receipt of a text from Delrio on or about October 12, 2017. He did speak to Delrio on October 6, 2017. She told him that she was sorry, but he did not have any more personal or sick days and was not getting any compensation. Sanchez testified that he has always maintained communication with Kano and Guzman if he was taking a day off for sickness or injury. Sanchez spoke with Kano on October 8, 2017. Kano and Delrio knew he would not be able to see the doctor until October 11, 2017.

Additional Findings of Fact

A credibility determination requires an overall evaluation of the testimony in light of its rationality or internal consistency and the manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Testimony to be believed must not only proceed from the mouth of a credible witness, but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 555 (1954). It must be such as the common experience and observation of mankind can approve as probable in the circumstances. Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961). "The 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).

From Delrio's email, the DPPP was on notice that Guzman would be out until either October 5 or October 6. There is a difference of opinion as to the first date of work, the Town being of the view that the note reflects that Sanchez was to return on October 6, and Sanchez being of the view that he was to be out through October 6. From the testimony, however, it was evident that he would not be allowed to return to work after leave without a doctor's note clearing him to return to work. He did not have such a note on October 6 or October 7. Additionally, from Delrio's email, the DPPP was also on notice as of October 7 that Sanchez was not yet returning to work, and that his doctor was going to provide a note to cover his absence through his appointment on October 11.

Sanchez testified that he provided the medical excuse obtained on October 11 to the Town on the same day. Although Delrio's email reflects that as of October 12, 2017, at 1:26 p.m., she had not heard from Sanchez, Sanchez testified that he provided the note to Olga in payroll and to the DPPP on October 11, 2017. Cryan had no firsthand knowledge relative to the notes, and his testimony was not reliable in terms of the individuals he did or did not speak to. Further, even if it had been reliable, it nevertheless would have been hearsay. Hearsay evidence is admissible in the trial of contested cases and is accorded whatever weight the judge deems appropriate taking into account the nature, character, and scope of the evidence, the circumstances of its creation and

production, and, generally, its reliability. N.J.A.C. 1:1-15.5(a). However, notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. N.J.A.C. 1:1-15.5(b). Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony, when there is a residuum of legal and competent evidence in the record. Weston v. State, 60 N.J. 36, 51 (1972). Sanchez disputed Cryan's testimony, and the Town did not present any testimony from Delrio, Kano, Guzman, or Olga. Accordingly, there is no credible evidence to refute Sanchez's testimony that he timely provided the documentation to the Town.

In view of the testimony, I **FIND** the following additional **FACTS**:

Sanchez reinjured his shoulder. The Town has been provided with medical excuses for every day that Sanchez was absent. Sanchez would not have been allowed to return to work without a doctor's note clearing him to do so. Sanchez's weekly work schedule was Wednesday through Sunday.

LEGAL ANALYSIS AND CONCLUSIONS

N.J.S.A. 11A:1-1 through 12-6, the "Civil Service Act," established the Civil Service Commission in the Department of Labor and Workforce Development in the executive branch of the New Jersey State government. N.J.S.A. 11A:2-1. The Commission establishes the general causes that constitute grounds for disciplinary action, and the kinds of disciplinary action that may be taken by appointing authorities against permanent career-service employees. N.J.S.A. 11A:2-20. N.J.S.A. 11A:2-6 vests the Commission with the power, after a hearing, to render the final administrative decision on appeals concerning removal, suspension or fine, disciplinary demotion, and termination at the end of the working test period, of permanent career-service employees.

N.J.A.C. 4A:2-2.2(a) provides that major discipline includes removal, disciplinary demotion, and suspension or fine for more than five working days at any one time. An employee may be subject to discipline for reasons enumerated in N.J.A.C. 4A:2-2.3(a),

including insubordination, inability to perform duties, conduct unbecoming a public employee, neglect of duty, and other sufficient cause. N.J.A.C. 4A:2-2.3(a)(2), (3), (6), (7), and (12).

In appeals concerning such major disciplinary actions, the burden of proof is on the appointing authority to establish the truth of the charges by a preponderance of the believable evidence. N.J.A.C. 4A:2-1.4; N.J.S.A. 11A:2-21; Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Sanchez was charged with insubordination, inability to perform duties, conduct unbecoming a public employee, neglect of duty, and other sufficient cause. The burden of proof is on West New York to prove the charges by a preponderance of the credible evidence.

N.J.A.C. 4A:2-2.3(a)(2) does not define insubordination. Black's Law Dictionary 919 (10th ed. 2014) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Likewise, N.J.A.C. 4A:2-2.3(a)(6) does not define conduct unbecoming. However, the Appellate Division has held that conduct unbecoming a public employee is "any conduct . . . which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." Karins v. Atl. City, 152 N.J. 532, 554 (1998). What constitutes conduct unbecoming a public employee is primarily a question of law. Id. at 553.

The FNDA (R-2) states:

> Your hours of work are 7:30 a.m. to 3:30 p.m., Wednesday through Sunday. You have failed to report for duty on the following dates in 2017: October 6th, 7th, 8th, 9th, 10th, 11th and 12th[.] These absences were not approved by your supervisor. You informed your supervisor you would be returning to work on October 6th. You were absent for seven (7) consecutive working days without the approval of your supervisor. This is considered abandonment of your position.

With respect to the issue of "abandonment," N.J.A.C. 4A:2-6.2(b) provides that "[a]ny 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." Similarly, N.J.A.C. 4A:2-6.2(c) provides that "[a]n employee who has not returned to duty for five or more consecutive business days following an approved leave of absence shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing. In either situation, the request for extension of leave shall not be unreasonably denied. N.J.A.C. 4A:2-6.2(b), (c). Where an employee is resigned not in good standing, the employee shall be provided with notice and an opportunity for a departmental hearing under N.J.A.C. 4A:2-2.5, and Final Notice and a right to appeal to the Civil Service Commission under N.J.A.C. 4A:2-2.8. N.J.A.C. 4A:2-6.2(d). If the resignation is reversed, the employee shall be entitled to remedies under N.J.A.C. 4A:2-2.10.

I **CONCLUDE** that the appointing authority has failed in its burden to prove insubordination, inability to perform duties, conduct unbecoming a public employee, neglect of duty, and other sufficient cause, and further **CONCLUDE** that no penalty should apply. There was no documentation presented reflecting any request to Sanchez for documentation. The FNDA states, "You have failed to report for duty on the following dates in 2017: October 6th, 7th, 8th, 9th, 10th, 11th and 12th," and "You were absent for seven (7) consecutive working days without the approval of your supervisor." However, Sanchez testified that since October 6, 2017 was a holiday on his regularly scheduled day off, he would have been off Monday and Tuesday as scheduled and would have been off Wednesday for the holiday. Therefore, Sanchez would not have been required to report for duty on October 6, October 7, or October 8, and would not have been absent for seven consecutive "working days" as alleged. He was not allowed to return without a doctor's note, and the Town was aware that he was not able to see the doctor until October 11, 2017. Further, it was undisputed that the Town had medical excuses for each absence, and that it was aware that Sanchez had reinjured his shoulder. Sanchez also testified that he was on temporary disability until October 23, 2017.

ORDER

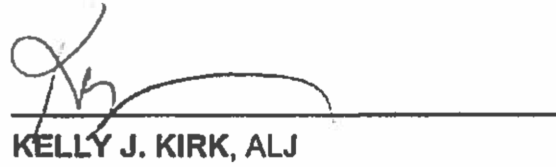
I ORDER that the charges of insubordination, inability to perform duties, conduct unbecoming a public employee, neglect of duty, and other sufficient cause are **NOT SUSTAINED**, and I further **ORDER** that the penalty of removal by the appointing authority is **REVERSED** in its entirety. It is further **ORDERED** that Sanchez be awarded back pay, benefits, and seniority in accordance with the guidelines set forth in N.J.A.C. 4A:2-2.10, taking into account, however, his disability and/or workers' compensation status.

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.



April 18, 2019
DATE

KELLY J. KIRK, ALJ

Date Received at Agency: April 18, 2019

Date Mailed to Parties:

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APPENDIX

WITNESSES

For Appellant:

Victor Sanchez

For Respondent:

James Cryan

EXHIBITS IN EVIDENCE

For Appellant:

P-1 Visit Summary, dated September 16, 2017
P-2 Excuse slip, dated September 16, 2017
P-3 Prescription blank, dated September 27, 2017
P-4 Prescription blank, dated October 11, 2017
P-5 Temporary Disability Insurance Application, dated October 17, 2017, and Pensionable Salary Spreadsheet
P-6 Sick-leave policy

For Respondent:

R-1 PNDA
R-2 FNDA
R-3 (Not in Evidence)
R-4 (Not in Evidence)
R-5 (Not in Evidence)
R-6 (Not in Evidence)
R-7 (Not in Evidence)
R-8 (Not in Evidence)
R-9 (Not in Evidence)

R-10 (Not in Evidence)

R-11 (Not in Evidence)

R-12 Email from Delrio, dated October 12, 2017