



The ALJ set forth in her initial decision that the specifications of the charges sustained in the Final Notice of Disciplinary Action (FNDA) filed against the appellant concerned three separate incidents. The first allegation was that on May 1, 2017, the appellant did not follow proper protocol with respect to construction debris that he removed from a side walk without notifying the resident that he had two hours to remove the debris or make arrangements for the debris to be removed. When the appellant returned to the Department of Public Works' (DPW) garage with the debris in his truck, he was advised of the proper protocol for handling construction debris by Marileidys Baldeo, Secretary, and that per the directive from Silvio Acosta, Director, DPW, he was to return the debris. He was also told to notify the resident of his responsibility to remove the debris from the sidewalk. The FNDA alleged that the appellant failed to return all the debris in direct violation of DPW protocol.

The second incident listed on the FNDA occurred on May 15, 2017. In that matter, the appointing authority alleged that Acosta assigned the appellant to investigate a list of violations at various properties and the appellant refused the directive. The third incident occurred on May 19, 2017. Specifically, the appointing authority alleged that the appellant was ordered by supervisor Ramon Lago to take action regarding pallets being left on the street for more than 10 days. Although the appellant was directed to investigate for a possible violation, the appointing authority claimed that he did not take any action.

The ALJ found that Baldeo had received a complaint from resident that a number of bags containing construction material were left outside near his home. The appellant was directed by Baldeo to conduct an inspection, speak with the homeowner, and if necessary ask that the bags be removed. After speaking with the resident, the appellant removed the bags of construction debris and placed them in his truck. The ALJ found Baldeo testified credibly regarding advising the appellant that he was not permitted to pick up construction material and that per Acosta's directive he should return the bags back where he found them. Baldeo testified that she had reviewed surveillance video showing the appellant placing several garbage bags in the DPW's garage container after he had been directed to return the bags. Baldeo also testified that she examined the contents of the bags left in the DPW container and confirmed that they contained construction debris. Although the appellant testified that he complied with Baldeo's directive and returned all of the bags, the ALJ found Baldeo's testimony was more credible regarding the handling of the bags. The ALJ found that at least some of the bags collected by the appellant were not returned but were placed in the DPW container, contrary to Acosta's direction and department protocol concerning the handling of construction debris.

With regard to the May 15, 2017, incident, the ALJ found no evidence that the appellant was ever given a list of violations of various properties to investigate, as indicated in the FNDA. However, the ALJ indicates that the appellant conceded

that he did not issue a summons despite being directed to do so. In this regard, Acosta testified that he asked the appellant to issue the summonses after a supervisor had already investigated the property and found there to be a violation.

Further, the ALJ found that on May 19, 2017, the appellant was ordered by supervisor Lago to investigate a particular address where pallets were left outside the building. The ALJ determined that the appellant testified credibly that he presented to that building, spoke with the store owner concerning the pallets found on the sidewalk, and that the pallets were removed by the owner shortly thereafter. Thus, the ALJ found that the appellant did take action in response to Lago's direction by investigating the matter and directing the store owner to remove the pallets.

Based on the foregoing, the ALJ found that the appointing authority had proven by a preponderance of the credible evidence the charges of insubordination, neglect of duty, and conduct unbecoming a public employee, with regard to the appellant's conduct on May 1, 2017. Additionally, the ALJ concluded that the appointing authority had proven, by a preponderance of credible evidence, that appellant's conduct on May 15, 2017 was sufficient to sustain the charges. With regard to the alleged incident of May 19, 2017, the ALJ found that the appointing authority did not establish by a preponderance of the evidence that the appellant refused a supervisor's order to investigate for a possible violation or to "take any action" regarding pallets left outside a particular address. With respect to the penalty, the ALJ determined that given the charges that were sustained and dismissed, that a 20 day suspension was more appropriate and proportionate to the offenses.

In his exceptions, the appellant contends that Baldeo had no personal knowledge of the individual who called to complain about the construction debris on the sidewalk nor any knowledge of who took the video she relied upon to allege he had dumped construction garbage in a container in the DPW garage. Additionally, the appellant argues that this alleged video was not presented at the OAL hearing. Further, the appellant contends that Acosta attested to a rule regarding the removal of construction debris, but subsequently admitted that he never provided this supposed rule in writing to the appellant. Moreover, the appellant asserts that Acosta testified that he did not know and did not remember how many properties he requested that the appellant issue summonses to. Furthermore, the appellant argues that the specifications in the FNDA were devoid of the allegation that he never issued summons as directed by Acosta. The appellant also states that he removed the construction debris under his authority as a sanitation inspector and that he did so as a courtesy to a resident due to the resident's age, his broken ankle, and the size and number of bags of debris. Regardless, the appellant maintains that he returned the bags as instructed.

In its reply to the exceptions, the appointing authority argues that the ALJ reasonably found its witnesses more credible than the appellant. Further, it contends that the ALJ's findings and determination of the charges were proper and that a 20 working day suspension was fair under the totality of the circumstances.

Upon its *de novo* review of the record, the Commission does not agree with the ALJ's determination regarding the charges and with the ALJ's recommendation to modify the 30 working day suspension to a 20 working day suspension. Rather, the Commission reverses the 30 working day suspension. In his exceptions, the appellant argues that the testimony of Baldeo and Acosta were largely inconsistent and incredulous and should not be relied upon. The Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. See *Matter of J.W.D.*, 149 N.J. 108 (1997). “[T]rial courts’ credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record.” See *In re Taylor*, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999) ). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto*, *supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence or was otherwise arbitrary. See N.J.S.A. 52:14B-10(c); *Cavaliere v. Public Employees Retirement System*, 368 N.J. Super. 527 (App. Div. 2004). Nevertheless, upon its review of the entire record, the Commission finds that there is sufficient evidence in the record to support the ALJ's credibility determinations. The ALJ explicitly indicated that she found Baldeo and Acosta's testimony more credible than that of the appellant. Therefore, appellant's claim that the ALJ should not have relied on the testimony from Baldeo and Acosta is unpersuasive.

In reviewing the charges, the Commission agrees with the ALJ's determination regarding the May 19, 2017 incident, that the appointing authority did not establish by a preponderance of the evidence that the appellant refused a supervisor's order to investigate for a possible violation or to “take any action” regarding pallets left outside a particular address. However, the Commission does not agree with the ALJ's determination regarding the May 15, 2017 incident. While the ALJ found no evidence that the appellant was ever given a list of violations of various properties to investigate, as indicated in the FNDA, she concluded that the appellant had conceded that he did not issue summonses despite Acosta directing him to do so. However, the appellant was never charged with not issuing summonses. The Commission notes that it is well established that the ALJ and the Commission only have jurisdiction to adjudicate disciplinary charges and specifications which were sustained at the departmental level hearing. See *Hammond v. Monmouth County Sheriff's Department*, 317 N.J. Super. 199 (App.

Div. 1999); *Lamont Walker v. Burlington County*, Docket No. A-3485-00T3 (App. Div. October 9, 2002); and *In the Matter of Charles Motley* (MSB, decided February 25, 2004). A review of the FNDA in this matter reveals that the specification for the May 15, 2017 incident only indicated that the appellant had failed to investigate a list of properties as directed by Acosta. There is no mention of the appellant failing to issue summonses. Therefore, the charges for this incident cannot be upheld because the appellant had conceded that he did not issue summonses, despite Acosta directing him to do so. Accordingly, as the specifications listed in the FNDA made no mention of the appellant's failure to issues summonses, and that the ALJ found no evidence that the appellant was ever given a list of violations of various properties to investigate, this charge cannot be sustained.

With regard to the incident regarding the bags of construction debris, the Commission does not agree with the ALJ's determination that the appellant's failure to follow a directive was worthy of a disciplinary action. In this regard, the Commission is troubled by the fact that the appointing authority ordered an employee to return construction debris to the sidewalk outside a resident's home. Once the appellant had removed the construction debris, ordering him to return the bags of debris is unfathomable. Such an act was in no way in the best interest of the public. Further, the witness testimony at OAL revealed no evidence that the appellant had been informed that he should not pick-up construction materials before his actions on May 1, 2017, nor was there any evidence that such a rule had been memorialized. In this regard, the Commission notes that no regulation, policy or rule concerning the proper handling of construction debris was presented at OAL or entered into the record as evidence. Accordingly, based on the foregoing, the Commission cannot sustain the charges regarding the May 1, 2017 incident.

Since the appointing authority has not met its burden of proof regarding the charges against the appellant, his 30 working day suspension must be reversed. Therefore, he is entitled to 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.

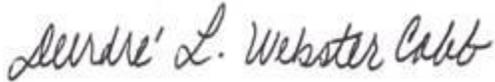
## **ORDER**

The Civil Service Commission finds that the appointing authority's actions in imposing a 30 working day suspension was not justified. Therefore, the Commission reverses the 30 working day suspension. The Commission further orders that Alex Navas be granted back pay, benefits and seniority. The amount of back pay awarded is to be reduced as provided for in *N.J.A.C.* 4A:2-2.10. Reasonable counsel fees are granted pursuant to *N.J.A.C.* 4A:2-2.12. Proof of income that was actually earned during the period of separation, including any unemployment insurance benefits received and 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/or counsel fees.

The parties must inform the Commission, in writing, if there is any dispute as to back pay and/or 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 should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 12TH DAY OF JUNE, 2019



Deirdré L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries	Christopher S. Myers
and	Director
Correspondence	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 17576-17

AGENCY DKT. NO. 2018-1279

**IN THE MATTER OF ALEX NAVAS,  
TOWN OF WEST NEW YORK,  
DEPARTMENT OF PUBLIC SAFETY.**

---

**Jason L. Jones, Esq., for appellant Alex Navas (Weissman & Mintz, attorneys)**

**Andrés Acebo, Esq., for respondent City of West New York (DeCotiis,  
FitzPatrick, Cole & Giblin, attorneys)**

Record Closed: March 11, 2018

Decided: April 25, 2019

**BEFORE SUSANA E. GUERRERO, ALJ:**

**STATEMENT OF THE CASE**

Appellant Alex Navas (Navas or appellant) appeals a thirty-day suspension imposed by respondent City of West New York, Department of Public Safety (DPW or respondent) when it determined that appellant failed to follow proper protocol and directives with respect to the handling of construction debris on May 1, 2017; and failed to comply with his supervisors' directives on two other occasions in May 2017.

## PROCEDURAL HISTORY

On or around June 8, 2017, respondent served Navas, a laborer, with a Preliminary Notice of Disciplinary Action (PNDA) informing him of the charges made against him for failing to follow proper protocol and directives with respect to the handling of construction debris on May 1, 2017, and for failing to follow his supervisors' orders on two other occasions later that month. (J-2.) Navas was served with a Final Notice of Disciplinary Action (FNDA), dated October 20, 2017, which sustained all charges set forth in the PNDA. (J-1.) The disciplinary action taken against Navas was a thirty-day working suspension beginning on June 9, 2017, and ending on July 20, 2017.<sup>1</sup>

On November 29, 2017, the Civil Service Commission transmitted the within matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to B-15 and N.J.S.A. 52:14F-1 to F-13. A hearing was held on September 24, 2018, and November 19, 2018, and the record closed on March 11, 2019, upon receipt of appellant's post-hearing brief.

## CHARGES

The charges in the FNDA include violations of: N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency or failure to perform duties; N.J.A.C. 4A:2-2.3(a)(2), insubordination; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; N.J.A.C. 4A:2-2.3(a)(8), misuse of public property, including motor vehicles; and N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause.

The specification of the charges sustained in the FNDA reads as follows:

On 05/01/17, you did not follow proper protocol with respect to construction debris that you removed from [REDACTED] Street. Specifically, you removed the construction debris which was left on the side walk located in front of [REDACTED] Street without notifying the resident that he has two hours to remove

---

<sup>1</sup> Navas is no longer employed by respondent.

the debris or make arrangements for the debris to be removed. When you returned to the DPW garage with the debris in your truck, you were advised by Ms. Baldeo of the proper protocol and told to return the debris to [REDACTED] Street. You were also told to notify the resident of his responsibility to remove the debris from the sidewalk. You did not return all of the debris to this address and placed some in the DPW garage and some at other properties. Your failure to return all of the debris to [REDACTED] Street was in direct violation of DPW protocol.

Additionally, on May 15, 2017, Silvio Acosta, Director of the Department of Public Works assigned you to investigate a list of violations at various properties in the Town of West New York. However, you refused Mr. Acosta's directive.

On or about May 19, 2017 you were ordered by Supervisor Ramon Lago to take action regarding pallets located on [REDACTED] and [REDACTED] which were there for more than 10 days. Specifically, you were directed to investigate for a possible violation. Yet, you did not take any action with respect to the violation in direct insubordination of your superiors and endangering the residents of the Town.

### **Summary of Testimony**

#### **Appellant's Witnesses**

##### **Alex Navas**

Navas began working for West New York in 2011, and was hired as a sanitation inspector with DPW in 2013. He denied receiving any training concerning his duties at DPW, and denied that Acosta held meetings with DPW investigators and supervisors as Acosta testified.

Navas testified that when a resident left construction debris outside, he would talk to the resident or owner of the property first and provide them with an opportunity to remove the debris before issuing a summons. At times, he would remove the debris himself as a courtesy to the resident or when its placement on the sidewalk created a

hazard. Navas believed that he was authorized to provide this courtesy, and he was never prohibited from doing so.

On May 1, 2017, Navas drove to the residence located at [REDACTED] Street because he received a call over the radio from Marileidys Baldeo (Baldeo),<sup>2</sup> asking him to investigate bags left outside of the property. He drove to that address in his DPW pick-up truck and spoke with the resident who indicated that he was informed that DPW was going to remove the bags for him. The resident appeared to have a broken ankle, and Navas told him that he would take the bags for him as a courtesy. There were eight to ten bags that Navas removed from the property and placed in his truck. DPW was located only a couple of blocks away from this residence, and when Navas arrived at DPW, Baldeo instructed him that "per Acosta,"<sup>3</sup> he was to return the bags to the resident. Navas testified that he then returned all of the bags collected back to 67th Street and the resident ultimately had someone else remove the debris. Navas testified that he was never told why he had to return the bags, and Acosta never spoke with him about this incident.

Concerning the alleged May 15, 2017, incident Navas testified that he was never given a list of violations to investigate, as indicated in the FNDA. He testified that Silvio Acosta (Acosta) had directed him to issue a summons on a matter that Navas had not investigated. According to Navas, Acosta never informed him that an investigation had already been conducted at the site(s) for which he was instructed to issue a summons. Navas told Acosta that he did not feel comfortable doing it because he did not conduct the investigation himself, and he thought that it would be unethical and could present a problem if challenged in court if he were to issue a summons without conducting the investigation himself. Navas had never issued a summons without first conducting an investigation. After being given this directive that he felt uncomfortable with, Navas called the union and two union representatives met with him and Acosta. He never issued the summons.

---

<sup>2</sup> At all relevant times, Baldeo was employed as a secretary with DPW and reported directly to the Director, Silvio Acosta. Her duties include, in part, relaying instructions from the Director to other employees.

<sup>3</sup> Referring to Silvio Acosta, DPW Director.

Concerning the May 19, 2017 alleged incident, Navas testified that he spoke with his supervisor Ramon Lago (Lago) about pallets that had been left outside a particular storefront. Navas was not aware that the pallets had been left out for ten days, as indicated in the FNDA. Navas testified that after speaking with Lago, he travelled to the address, spoke with the owner of the pallets and the owner's son, and instructed them to remove the pallets. An hour later, Navas drove past the property again and when he saw that the pallets had been removed, he did not issue a summons.

Navas denied having any conversations with Acosta, Lago, or any of his supervisors concerning these incidences, and was only informed of the allegations after Human Resources informed him of his suspension.

### Alain Gomez

Alain Gomez (Gomez) has been employed by West New York in various capacities since 1998. He became a steward representative for the local CWA this year.

On May 15, 2017, Gomez was called by Nelson Rodriguez (Rodriguez), the chief steward, regarding an incident involving Navas. On that day, he met with Navas, Rodriguez, and Acosta. At the meeting, he asked Acosta for a list of the violations for which Navas was instructed to give out summonses. Gomez's understanding was that Navas was being directed to issue summonses without first being given the opportunity to investigate for any violations, which Gomez believed was required. He was involved in handling this grievance on behalf of Navas, and was involved in "back and forth" concerning this incident with Acosta. Following this incident, the local union instructed its members to include the supervisor or director's name on the summons if the member was directed to issue a summons but felt uncomfortable doing so because he did not have any personal knowledge of the violation. (A-1.) Acosta never provided a list of the violations for which Navas had allegedly been instructed to issue summonses.

Andrés Arias

Andrés Arias (Arias) has worked for West New York for approximately seventeen years. In 2017 he was a truck driver for DPW's lift trucks and picked up construction debris pursuant to the inspector supervisors' directives after a summons was issued. He worked with Navas when Navas was a DPW inspector. He testified that before issuing any summons for leaving construction debris out on the street, inspectors and supervisors would typically give the resident/owner of the property two hours to remove the construction debris. He also disputed Acosta's testimony that he held weekly meetings with DWP supervisors and investigators.

Arnold Hernandez

Arnold Hernandez (Hernandez) retired from employment with the respondent in May 2017, after approximately thirty-seven years of service. He worked as a sanitation truck driver for about fifteen years, became sanitation inspector, and was then a DPW supervisor for over fifteen years. He met Navas approximately four years ago. He testified that during his tenure at DPW, no employee was ever disciplined for picking up construction debris left outside by a resident. He also denied that Acosta held weekly meetings with supervisors and inspectors.

**Respondent's Witness**

Marileidys Baldeo

Marileidys Baldeo (Baldeo) has been employed as a secretary with the DPW for over eight years. She was Navas's co-worker, and is the Vice President of the CWA Local 1045, which served as Navas's exclusive collective bargaining representative.

At approximately 1:00 pm on May 1, 2017, Baldeo received a call from a resident, referred to as "Mr. Alvarez," informing that fifteen to twenty garbage bags had been improperly left on the sidewalk outside [REDACTED] Street. Baldeo then called Navas and

instructed him to go to this address to assess whether this consisted of illegal dumping. Rather than investigate the matter and instruct the owner to remove the bags, Navas removed the bags himself.

Baldeo testified that Mr. Alvarez called her a second time and informed her that Navas had taken all of the garbage bags himself, and that the bags contained construction material. Baldeo told Navas that if the bags contained construction material, he should return them to the residence since he was not to pick up construction material for residents.

Mr. Alvarez called Baldeo a third time and told her that Navas had returned and placed some of the bags in front of a different neighbor's property and that some bags were not returned at all. He also indicated that he had pictures and video of this and intended to report this to the mayor's office. Mr. Alvarez had been issued a summons for leaving construction material outside his own property, and he felt that this neighbor was being given special treatment. Baldeo testified that Mr. Alvarez forwarded to her cell phone four pictures taken by Mr. Alvarez of [REDACTED] Street (across the street from Mr. Alvarez) that day, a picture of a DPW truck operated by Navas, and a video taken by Mr. Alvarez of Navas unloading some of the bags from his truck when he was returning them.

Baldeo testified that Navas returned to the address to drop off bags of debris, but only took back some, not all, of the fifteen bags. She testified that, according to Mr. Alvarez, Navas picked up about fifteen bags but only returned seven or eight. She conceded on cross-examination that the video footage sent to her cellphone does not completely capture Navas returning the bags—i.e., therefore, making it impossible to observe how many bags were returned by Navas.

On the morning of May 2, Baldeo was informed by a part-time DPW employee that there was a lot of construction debris on top of the DPW container located in the garage. She reviewed surveillance footage taken inside the garage the previous evening and it showed Navas dropping off about nine bags into the container at about

5:00 p.m., after Baldeo had left for the day. She examined the content of the bags herself that morning and confirmed that they contained construction debris. Baldeo later reported this to Acosta.

### Silvio Acosta

Silvio Acosta (Acosta) has been the Director of DPW for the past six years. He supervises inspectors and laborers, including Navas at the time.

Concerning the alleged May 1, 2017 incident, Acosta testified that DPW received a complaint that Navas picked up bags of construction material from a residence and that when directed to return the bags to the owner, he only returned some bags, left others at another site, and dumped others in DPW's container. He testified that Baldeo told Navas that he had to return the construction material to the owner, and Baldeo later informed Acosta that they found this construction material in the DPW container. Acosta asserts that this constituted a violation of DPW's rules, and that he met with supervisors and inspectors every week and explained that picking up a resident's construction material is illegal. These meetings did not occur on a particular day of the week, and no agendas of these alleged meetings were ever issued. Acosta did not investigate this matter himself.

With respect to the handling of construction debris, Acosta testified that if a supervisor finds construction debris outside a property, he should first inform the owner that the town does not pick up construction debris and that if the owner does not remove the debris, a summons will be issued. They typically give the owner a couple of hours to remove the debris. This rule was not memorialized. Acosta conceded that his knowledge concerning the May 1 incident was limited to the information contained in an e-mail from the Town Administrator that copied Acosta, which Acosta could not even recall having received. (R-2.) He never spoke with Navas about this incident because the Town Administrator said that he would take care of the incident himself.

With respect to the alleged March 15 incident, Acosta testified that he directed Navas to go to a particular property, take a photograph of the infraction, and issue a summons to a resident who left garbage/furniture outside. Navas refused to do so because he did not observe the violation himself. Acosta indicated that one of the supervisors conducted the investigation at the residence and noted that there was furniture left outside of the building, creating a public hazard. Navas was instructed to issue the summons. When Navas refused to issue the summons, he did so in the presence of Acosta, Rodriguez, and Gomez. Acosta did not recall giving Navas a list of violations of various properties that he was to investigate (as indicated in the FNDA).

With respect to the alleged March 19 incident, Acosta testified that supervisor Lago informed him that they received complaints that a pallet was left outside a building located at [REDACTED] street and [REDACTED], creating a dangerous condition. Acosta did not personally observe the alleged violation, and it was Lago, who retired approximately one year ago, who directed Navas to issue a summons to the store owner for leaving the pallets outside. According to the FNDA, Navas refused to issue the summons.

### FINDINGS OF FACT

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

At all relevant times, Navas was employed by the DPW as a sanitation inspector.

On May 1, 2017, Baldeo received a complaint from a private resident, identified as Mr. Alvarez, that a number of bags containing construction material were left outside 67th Street. Navas was directed by Baldeo to conduct an inspection at that address and speak with the homeowner/resident, if necessary, to ask that the bags be removed. After speaking with the resident, Navas removed the bags of construction debris that had been left outside, and placed them in his truck. Mr. Alvarez then called Baldeo

again to complain that Navas had improperly removed construction debris from the property, and he alleged that the resident/owner at [REDACTED] Street was being given favorable treatment.

Baldeo testified credibly regarding her exchanges with Mr. Alvarez and Navas. Therefore, I **FIND** that Baldeo informed Navas that he was not permitted to pick up construction material and that, per Acosta's directive, he should return the bags containing construction material to [REDACTED] Street, as the owner is responsible for the removal of construction debris. Pursuant to DPW's general practice or protocol, the owner is given an opportunity to remove his debris or garbage before issuing a summons, and the owner, not DPW, is responsible for removing his own construction debris. While Navas testified that he complied with this directive and returned all of the bags back to the address, Baldeo's testimony was more credible with respect to Navas's handling of the bags after he was directed to return them. Specifically, Baldeo testified that she received a subsequent call from Mr. Alvarez informed her that Navas had not returned all of the bags back to the address, and that the following day she reviewed surveillance video depicting Navas placing several garbage bags in the DPW container after she directed Navas to return the bags. Baldeo testified credibly that on the morning of May 2, 2017, she examined the contents of the bags left in the container and confirmed that they contained construction debris. Although the evidence is inconclusive as to how many bags of construction debris were initially picked up by Navas and how many were returned, I **FIND** that at least some of the bags collected by Navas were not returned to [REDACTED] Street but placed in, or on top of, the DPW container, contrary to Acosta's direction and DPW protocol concerning the handling of construction debris.

On May 15, 2017, Acosta instructed Navas to issue a summons to a particular property. There is no evidence that Navas was ever given a list of violations of various properties to investigate, as indicated in the FNDA, but he concedes that he did not issue a summons despite the Director directing him to do so. Acosta testified credibly that he asked Navas to issue the summons after a DPW supervisor had already investigated the property and found there to be a violation warranting a summons.

Navas expressed his concern about issuing this summons because he did not conduct the investigation of the property himself. Navas never issued the summons as Acosta had directed him to do so and no evidence was presented to indicate that Acosta's order was contrary to law, DPW rules, or improper.

On or about May 19, 2017, Navas was ordered by supervisor Lago to investigate for a possible violation at a particular address where pallets were left outside the building. The evidence is inconclusive as to whether the pallets had been left outside the building for at least ten days or whether Navas was aware of this. Navas testified credibly that he presented to that building, per Lago's direction, spoke with the store owner concerning the pallets found on the sidewalk, and that the pallets were removed by the owner shortly thereafter. I **FIND** therefore that Navas did take action in response to Lago's direction by investigating the matter and directing the store owner to remove the pallets. I also **FIND** that that the evidence is inconclusive as to whether Navas acted improperly in not issuing the resident a summons.

### **LEGAL ANALYSIS AND CONCLUSIONS**

Public employees' rights and duties are governed and protected by the provisions of the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, and the regulations promulgated pursuant thereto, N.J.A.C. 4A:1-1.1 to 4A:2-6.2. However, public employees may be disciplined for a variety of offenses involving their employment, including the general causes for discipline as set forth in N.J.A.C. 4A:2-2.3(a). An appointing authority may discipline an employee for sufficient cause, including failure to obey laws, rules and regulations of the appointing authority. N.J.A.C. 4A:2-2.3(a)(11).

In disciplinary cases, the appointing authority has both the burden of persuasion and production and must demonstrate by a preponderance of the competent, relevant and credible evidence that it had just cause to discipline the employee and lodge the charges. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct.

1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958).

The first issue in this proceeding is whether a preponderance of the credible evidence substantiates the charges set forth in the FNDA and warrants disciplinary action. If so, the second issue to be addressed is whether a thirty-day suspension is the appropriate discipline.

Navas is charged with violating N.J.A.C. 4A:2-2.3(a)(1) for incompetency, inefficiency, or failure to perform their duties. In this type of breach, an employee performs his or her duties, but in a manner that exhibits insufficient quality of performance, inefficiency in the results produced, or untimeliness of performance, such that his or her performance is substandard. See Clark v. N.J. Dep't of Agric., 1 N.J.A.R. 315 (1980), <http://njlegallib.rutgers.edu/njar/>. Incompetence means that an individual lacks the ability or the qualifications to perform the duties required of him or her. Rivera v. Hudson Cty. Dep't of Corr., CSR 6456-16, Initial Decision (October 24, 2016), <http://njlaw.rutgers.edu/collections/oal/>.

Regarding the charge of insubordination, pursuant to N.J.A.C. 4A:2-2.3(a)(2), the Civil Service Act does not provide a definition for this charge. The term, however, is generally interpreted to mean the refusal to obey an order of a supervisor. In re Shavers-Johnson, CSV 10838-13, Initial Decision (July 30, 2014), <https://njlaw.rutgers.edu/collections/oal/>. According to Webster's II New College Dictionary (1995) "insubordination" refers to acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. In In re Rudolph, CSV 5083-99 (consolidated), Initial Decision (October 23, 2000), adopted, Merit Sys. Bd. (December 18, 2000), <http://njlaw.rutgers.edu/collections/oal/>, the Merit System Board upheld the removal of a public works repairer for refusing to respond to the reasonable orders of his supervisor to complete an assignment.

Navas is also charged with conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming" is an elastic phrase that 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 Atl. 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, 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)).

Appellant is also charged with neglect of duty, N.J.A.C. 4A:2-2.3(a)(7). "Neglect of duty" has been interpreted to mean that an employee "neglected to perform an act required by his or her job title or was negligent in its discharge." In re Glenn, CSV 5072-07, Initial Decision (February 5, 2009), adopted, Civil Service Commission (March 27, 2009), <http://njlaw.rutgers.edu/collections/oal/>. The term "neglect" means a deviation from the normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" means conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted). Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing. State v. Dunphy, 19 N.J. 531, 534 (1955). Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job.

Navas is also charged with the misuse of public property, including motor vehicles, pursuant to N.J.A.C. 4A:2-2.3(a)(8). The term "misuse" is defined generally as "incorrect or improper use." See Merriam-Webster dictionary (<https://www.merriam-webster.com/dictionary/misuse>).

Finally, Navas is charged with violating N.J.A.C. 4A:2-2.3(a)(12), "other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standards of good behavior which devolve upon one who stands in the public eye as an upholder of that which is morally and legally correct. In re MacDonald, CSR 9803-13, Initial Decision (May 19, 2014), adopted, Civil Service Commission (September 3, 2014), <http://njlaw.rutgers.edu/collections/oal/>.

With respect to the alleged incident that occurred on May 1, 2017, respondent established by a preponderance of the evidence that Navas failed to follow Acosta's direction, as expressly communicated by Baldeo, and DPW protocol when he failed to return all of the bags of construction debris back to [REDACTED] Street address, and placed some of the bags in a container located inside the DPW garage. Navas was given a clear and direct order which he failed to comply with without any reasonable justification. Based on my findings, I **CONCLUDE** that respondent has demonstrated, by a preponderance of credible evidence, that appellant's conduct on May 1, 2017, when he failed to follow orders to return all bags of construction debris to the owner/resident, constitutes a violation of N.J.A.C. 4A:2-2.3(a)(2) (insubordination), N.J.A.C. 4A:2-2.3(a)(7) (neglect of duty), and N.J.A.C. 4A:2-2.3(a)(6) (conduct unbecoming), and that these three charges must be **SUSTAINED**.

Regarding the alleged incident of May 15, 2017, Navas was directed by Acosta, the Director of DPW, to issue a summons for a violation investigated by a supervisor. While Navas may have believed that he was obligated to conduct the investigation himself before issuing a summons, Acosta's directive was not contrary to law or any DPW rule. Navas's refusal to issue the summons or at a minimum investigate the alleged violation was unreasonable and defiant. Based on my findings, I **CONCLUDE** that respondent has demonstrated, by a preponderance of credible evidence, that appellant's conduct on May 15, 2017, when he failed to follow Acosta's directive to issue a summons, constitutes a violation of N.J.A.C. 4A:2-2.3(a)(2) (insubordination) and N.J.A.C. 4A:2-2.3(a)(7) (neglect of duty), and N.J.A.C. 4A:2-2.3(a)(6) (conduct unbecoming), and that these charges must be **SUSTAINED**.

With respect to the alleged incident of May 19, 2017, respondent did not establish by a preponderance of the evidence that Navas refused a supervisor's order to investigate for a possible violation or to "take any action" regarding pallets left outside a particular address. Navas did take action by asking the store owner to remove the pallets, and since the pallets were removed by the store owner, there is no reason to believe that a summons was warranted. I, therefore, **CONCLUDE** that respondent has failed to establish by a preponderance of the credible evidence that appellant's conduct on May 19, 2017, constituted a violation of the charges set forth in the FNDA.

While the evidence supports that three of the six charges be sustained with respect to the incidents of May 1 and May 15, 2017, I **CONCLUDE** that respondent has failed to establish by a preponderance of the credible evidence that appellant's conduct constituted a violation of N.J.A.C. 4A:2-2.3(a)(1) (incompetency), N.J.A.C. 4A:2-2.3(a)(8) (misuse of public property), or N.J.A.C. 4A:2-2.3(a)(11) (other sufficient cause), and that these charges must be **REVERSED**.

When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); W.N.Y. v. Bock, 38 N.J. 500 (1962). In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 1996 N.J. AGEN LEXIS 467 (April 16, 1996). Pursuant to Bock, concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). Depending upon the incident complained of and the employee's past record, major discipline may include suspension, removal, etc. Bock, 38 N.J. at 522-24.

Navas's prior disciplinary history consists of a fifteen-day suspension in 2012 for excessive absenteeism and submitting time sheets for hours not worked. In 2016 he was written up for a "no call, no show," but no discipline was ever imposed.

Respondent maintains that, given the charges and Navas's disciplinary history, it is well within its rights to terminate Navas for these alleged infractions but has opted to exercise substantial leniency by issuing only a thirty-day suspension.

The sustained charges against Navas, and particularly the charges of insubordination, are sufficiently serious in nature to warrant major disciplinary action. While progressive discipline should apply here, not all of the charges against Navas are sustained and given the nature of the infractions, I **CONCLUDE** that a thirty-day suspension is excessive. In light of Navas's acts of insubordination on May 1 and May 15, 2017, and taking into account Navas's prior disciplinary history, I **CONCLUDE** that a twenty-day suspension is more appropriate and proportionate to the offenses.

### **ORDER**

It is **ORDERED** that the penalty imposed by the appointing authority be **MODIFIED** to a twenty-day working suspension.

It is further **ORDERED** that back pay and other benefits be issued to appellant as may be dictated by N.J.A.C. 4A:2-2.10.

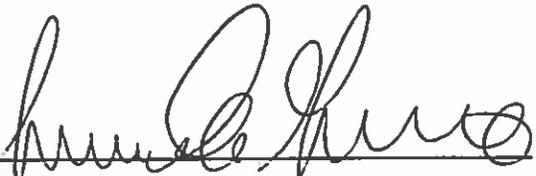
I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

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.

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.**

April 25, 2019  
DATE

  
SUSANA E. GUERRERO, ALJ

Date Received at Agency: April 26, 2019

Date Mailed to Parties: April 26, 2019

jb

**APPENDIX**

**WITNESSES**

**For Appellant:**

Alex Navas  
Arnold Hernandez  
Alain Gomez  
Andrés Arias

**For Respondent:**

Marileidys Baldeo  
Silvio Acosta

**EXHIBITS**

**Joint:**

J-1 Final Notice of Disciplinary Action dated October 20, 2017  
J-2 Preliminary Notice of Disciplinary Action dated May 25, 2017  
J-3 Agreement between West New York and CWA AFL-CIO Local 1045

**For Appellant:**

A-1 Letter from Union

**For Respondent:**

R-1 Not in evidence  
R-2 E-mail  
R-3 Not in evidence  
R-4 Preliminary Notice of Disciplinary Action dated December 9, 2016  
R-5 Final Notice of Disciplinary Action dated September 17, 2012 and  
Preliminary Notice of Disciplinary Action dated June 28, 2012  
R-6 Not in evidence  
R-7 Video  
R-8A-D Photographs