

was modified by the Commission, charges were sustained and discipline was imposed. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C. 4A:2-2.12(a)*, counsel fees must be denied.

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore modifies the 15 working day suspension to a 10 working day suspension. The Commission further orders that appellant be granted five days of back pay, benefits, and seniority. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

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

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 20th DAY OF MAY, 2020



Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
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attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 01298-20

AGENCY REF. NO. 2020-1631

**IN THE MATTER OF RICHARD SECULA,
MOTOR VEHICLE COMMISSION.**

Seth B. Kennedy, Esq., for appellant Richard Secula (Kroll Heineman Carton,
attorneys)

Nonee Lee Wagner, Deputy Attorney General, for respondent Motor Vehicle
Commission (Gurbir S. Grewal, Attorney General of the State of New
Jersey, attorneys)

Record Closed: March 10, 2020

Decided: April 2, 2020

BEFORE GAIL M. COOKSON, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Richard Secula (appellant) appeals from the decision of the New Jersey Motor Vehicle Commission (MVC) to suspend him from his position as a Safety Specialist 2 for fifteen (15) days on charges of insubordination in violation of N.J.A.C. 4A:2-2.3(a)(2); conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7); and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11). These charges arise as a result of appellant's alleged validation of inspections for school buses that were beyond their permitted life

expectancies, and for alleged errors made on the posting of a thirty-day "failed" bus sticker between February and May 2019. Appellant denies the charges, asserts that the inadvertent mistakes were quickly corrected; and that they were caused innocently because a recent change to his glaucoma prescription made reading numbers difficult.

On May 22, 2019, a Preliminary Notice of Disciplinary Action was filed seeking to suspend appellant from his position for fifteen days. The departmental hearing was conducted on November 15, 2019. Thereafter, a Final Notice of Disciplinary Action was issued on December 5, 2019, sustaining the disciplinary charges and suspending appellant for those fifteen days. Appellant appealed that disciplinary action on or about December 16, 2019. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on January 27, 2020, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The plenary hearing was held on March 10, 2020, with opening statements of counsel and testimony from four witnesses. In light of the purely factual nature of the issues, I determined that post-hearing briefs were not necessary, and the record closed on that date.

FACTUAL DISCUSSION

Based upon due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

The MVC called Neil Zollinger as its first witness. Zollinger has been employed by the agency since 1898, with the exception of a four-year layoff period in the middle of that tenure. He is a Regional Supervisor 2 for Region 1, which covers Bergen, Passaic, Sussex and parts of Morris Counties. The Region has four inspection team, three of which are for school vehicles and one is for commercial vehicles. Each team is staffed with six employees. In general, all school buses in the State as well as NJ Transit buses receive two inspections per year. Commercial buses are inspected only annually.

Zollinger provided an overview of the school bus safety inspection process undertaken by the MVC and of which appellant was a part. There are over one hundred items on the checklist; however, only the failed items are printed on the eventual report. The inspections take place at the terminals of each bus company, or in a fewer number of cases, at the Boards of Education that own their own school vehicles. Each inspection is done by a team of inspectors with different persons being given a different focus: under the hood, under the chassis or creep, exterior, interior, brake test, and computer. Zollinger also described the regulations for how long a school bus may remain in service before mandatory retirement from the fleet. Small school vans have to be retired after twelve years and regular yellow school buses have to be retired after fifteen years. If those years fall during an active school year, the vehicle is allowed to remain in service until August 31 of that concluding school year but may not be in service on September 1, the beginning of the next school year.

Zollinger reviewed the incidents at issue herein. On February 25, 2019, appellant was the Team leader because the Team Supervisor was away. Zollinger was onsite as well that particular day in his capacity for the Region. He reviewed the inspections and found that appellant had passed a dual-purpose bus (i.e., mixed school and commercial use) with a manufacture year of 2001, which was beyond its regulated life. Zollinger pointed it out to appellant who assented. He did not write appellant up at that time for this incident but made a note of it. Later in May 2019, Zollinger was asked to put the details of this incident into an email to Sherlin Martinez, who works in the MVC Department of Human Resources.

On cross-examination, Zollinger acknowledged that appellant had no disciplinary history prior to 2019. He considers appellant to be a good worker who is experienced and knows what he is doing as an inspector. Zollinger had no prior knowledge that appellant had any vision health issues. With respect to the particular school bus at issue on February 25, 2019, Zollinger admitted that this bus would have had to have been inspected and passed in violation of the regulations prior to appellant's inspection because it was already over its life expectancy by September 2017. He could not provide any additional details because he only has access to the last Vehicle Inspection

Report. No MVC employee was disciplined for those prior non-compliant inspections. In response to my questioning, Zollinger agreed that prior inspection reports were probably maintained by both the bus company and MVC, but he could not access them. Appellant was not insubordinate and Zollinger did not bring the matter to the attention of Human Resources or the union until requested to do so months later.

Keith Kelly was also called by respondent as a witness at the hearing. Kelly has worked for the MVC for thirteen years with four to five years as a Supervisor 1 assigned to Bus Team 7 Mobile Unit. Appellant was transferred into his unit in March 2019. This unit does inspections in Hunterdon, Morris and sometimes Bergen Counties. On April 2, 2019, Kelly's unit was in Chatham at the First Student facility. Kelly knew that this bus company had older "timed out" vehicles and brought that to the attention of his team members before the inspections began.

Kelly testified that appellant issued passed inspection stickers for two buses that week which should have been failed. While appellant should have issued stickers that expired in August 2019, they were issued for October 2019 on school buses that were manufactured in 2003 and needed to be timed out. In the first instance, the sticker had not been affixed to the bus when the error was detected; the second sticker was affixed and needed to be scraped off. Then on April 29, 2019, Kelly stated that appellant also failed to complete a "thirty-day sticker" out completely. Such a sticker is used to designate a minor failure that the bus company needs to cure within thirty days. He explained that those stickers used to have lines available to place the relevant identification numbers as well as the specific expiration date within the applicable month. While the form stickers being used at this time did not have those blank lines, appellant was still expected to complete that information with pen on the sticker.

Kelly requested Zollinger to write up a report on the "thirty day" sticker violation. Kelly reported the incidents earlier in April concerning the timed-out buses for which appellant issued stickers. On May 10, 2019, Kelly requested Sherlin Martinez to consider disciplinary action against appellant for these several violations. Kelly considered the fact that appellant was well-familiar with the regulations and failed to apply them.

On cross-examination, Kelly reiterated that he had reminded his team at the start of the First Student inspections about the age of its fleet of school vehicles. He acknowledged that someone other than appellant was on interior duty but that person was a trainee and was not disciplined or written up for his role. With respect to the thirty-day sticker, Kelly admitted that the sticker number he wrote into his report does not appear to match the sticker but could be a transposition. He also confirmed that this batch of thirty-day stickers did not have blank lines for the additional required information. He also agreed that the timed-out vehicle mistakes were caught and corrected before any bus left the depot.¹

Lastly, respondent called Sherlin Martinez as a witness. Martinez is a Personnel Trainee Assistant 4 with the MVC HR Department. She commenced her employment in October 2018. Kristina Adams is her manager who assigned her in May 2019 to the gathering of evidence for the potential discipline action against appellant. Martinez drafted the Preliminary Notice of Disciplinary Action (PNDA) using the MVC policy guidelines. The Office of Employee Relations makes the decision ultimately on discipline. Martinez's draft was reviewed by a consultant Alison Snyder and then signed by Adams. In drafting her recommended discipline, Martinez considered appellant's long tenure and lack of prior disciplinary history. Nevertheless, she considered the incidents to be "very egregious" because of the risk of harm to school children from timed-out buses, as well as the potential for MVC liability. Based on the policy guidelines, these incidents could have added up to a suspension of thirty days, although only the insubordination charge carried fifteen days for a first offense.

On cross-examination, Martinez acknowledged that she did not interview appellant during her investigation because that is never undertaken. However, in this case, petitioner initiated a conversation with her toward the goal of resolving the matters. Martinez included a charge of insubordination because appellant had been advised to pay attention to timed-out vehicles and then it happened again. She did not consider that to constitute "inadvertence."

¹ It was later acknowledged by the DAG that Kelly had been confused by her questioning as to the date of the last incident, which took place on May 3 during the week of April 29.

Appellant testified on his own behalf. As is undisputed, appellant has been a Safety Specialist with the MVC since 2002. In the middle of the events that led to this matter, he was transferred from Team 3 based in Warren County to Team 7 in Hunterdon County.

Appellant first discussed a medical condition he has which he feels was the root cause of what happened in the several inspections at issue in the spring of 2019. Secula was diagnosed with glaucoma six to seven years ago. He is prescribed eye drops for the condition by his ophthalmologist and acknowledged that the condition does not usually impact his work. Appellant never formally advised any supervisor of his glaucoma, nor did he ever seek or feel he needed an accommodation. On one occasion in 2017, after a team meeting, appellant felt a need to explain to Zollinger and Starozytnyk about his eye condition when he was shown a photo of himself with his eyes closed.

Appellant testified that he had been prescribed Alphagan 0.1% eye drops for his glaucoma for quite a while. At the beginning of January 2019, without any prior notice, his health plan pharmacy OptumRx filled his latest prescription with the generic equivalent, Brimonidine 0.15% drops. Secula recalled that he started using that bottle in February. He began to experience more blurriness but was aware at first that it could have been caused by the new drops. He speculated that either he had a new health issue or needed stronger reading glasses. As a result, appellant procured slightly stronger reading glasses from an over-the-counter retailer, but they did not help.

Between February and May 2019, appellant was in communication with his doctor and OptumRx about the switch to the generic version of his prescription. On or about May 31, 2019, OptumRx put in writing that it would no longer cover the cost of Alphagan. Appellant proceeded to consult with his physician and get in for an appointment in June. Dr. Finegan was able to insist that OptumRx provide the Alphagan eye drops to appellant. On August 29, 2019, Dr. Finegan wrote a letter apparently for appellant to use with the MVC to the effect that his use of the generic drops probably led to the incidents of a blurriness with numbers at work.

With respect to the specific incidents at issue in these disciplinary charges, appellant was just at the inception of his vision becoming blurry. He had no other explanation for the February error. With respect to the April 2 inspection, appellant claimed that he knew the bus could only remain in service through August 2019. The sticker with an October 2019 date was automatically generated because of the MVC inspection cycle. Appellant claimed that he intended to correct it and that was why the sticker was never affixed to the vehicle. Appellant did acknowledge an error with the sticker that was issued on April 5 for a bus that would need to be pulled from service. He was assigned to the computer that day and his blurry vision caused him to misread the year "2003" as "2008." The sticker was affixed to the school bus but removed as soon as Kelly picked up on the mistake. The school bus never left the yard with an incorrect sticker.

The incident on May 3, 2019, involved a "thirty-day" sticker for a failed inspection that was a non-safety violation. Appellant explained that the stickers used to have room on their face for hand-insertion of the actual day of the month by which the vehicle must come into compliance. By the date in question, the MVC had obtained stickers for some unknown reason that no longer had a location for that information. Further, appellant knew the regulations for both pulling buses out of service for age and the thirty-day stickers. Had he been given the opportunity to double-check his work, at least two of these incidents would never have materialized.

In response to my own questioning, appellant admitted that he had no difficulty driving during this period, nor did he seem to have difficulty discriminating between letters as compared to numbers. He also acknowledged that he did not just seek the help of any other team member on these occasions of blurriness, including the one that led to an expired school vehicle being passed and stickered on April 5, 2019. On cross-examination, appellant could not seem to recall why Dr. Finegan's note was not written until the end of August. He confirmed that he never advised any supervisor of his short-term or long-term vision issues. Appellant took the position at the hearing that his supervisors should have guessed or presumed he was having a problem and taken the initiative to ask him about it rather than the other way around.

In this matter, the case turns on which version of the facts I find believable and more convincing. A credibility determination requires an overall assessment of the witness' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Here, I do not FIND appellant's excuses to have been credible. It does not make sense that he would not have asked a peer to help him read a number if it was blurry on these three occasions. It also challenges common sense that only numbers would be the problem he faced while using the generic glaucoma eye drops, and not also letters or road signs, etc. Appellant's testimony seemed strained to fit the facts that he needed to rebut.

Nevertheless, I also do not FIND that appellant was insubordinate to any of his supervisors or intentionally neglectful of the regulations that informed his duties. These errors by appellant were shown by the preponderance of the credible evidence to have been only inadvertent or simple negligence. The testimony of Martinez on how and why she so found is not entitled to much weight in view of her youth and level of inexperience at her position. There simply is no evidence in the record that any supervisor in the Office of Employee Relations gave the specific charges to be placed into the PNDA any genuine analysis as compared to a rubber-stamp of Martinez's work.

ANALYSIS AND CONCLUSIONS OF LAW

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

“There is no constitutional or statutory right to a government job.” State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against him and, if so, the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In this matter, the MVC bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

For evidence to be credible it must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the tribunal must “decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth.” Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). For reasonable probability to exist, the evidence must be such as to “generate belief that the tendered hypothesis is in all human likelihood the fact.” Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Credibility, or, more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954).

As set forth above, I found that the respondents’ witnesses were more credible and their testimony was entitled to more weight than the denials or excuses of appellant. I **CONCLUDE** that Zollinger and Kelly were more objective and credible in their testimony than that of appellant. Thus, I **CONCLUDE** that these incidents occurred and that they violated the inspection regulations with respect to school buses.

Having concluded that an incident occurred, I must determine the proper penalty or discipline to be assessed. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty. See Bock, supra, 38 N.J. at 523-24. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of the concept of progressive discipline is the nature, number and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential. In addition to considering an employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, a suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

In this case, appellant had never received any discipline in his seventeen-year history with the MVC and it was universally noted that he has been a good inspector and a valuable team member. Moreover, as I stated above, there was no credible evidence of insubordination on his part toward his supervisors. There was clear evidence, however, of some inattention to detail which was not adequately excused by testimony of blurry vision on just those select dates.

Accordingly, I **CONCLUDE** that the imposition of fifteen (15) days for errors in the safety inspection process by appellant that were nevertheless corrected in a timely manner is excessive. I **CONCLUDE** that an unpaid suspension for ten (10) days is appropriate and the proper balance between management's need to maintain proper decorum in the workplace and appellant's right to be forewarned of management's expectations.

ORDER

Accordingly, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action of the Motor Vehicle Commission against appellant Richard Secula is hereby **AFFIRMED**. It is further **ORDERED** that the penalty imposed for this disciplinary action shall be reduced from fifteen (15) days to ten (10) days. It is further **ORDERED** that back pay and any other accompanying employment benefits shall be reinstated to appellant Richard Secula for the five days he already served suspended net of any earnings in mitigation. It is further **ORDERED** that counsel fees should not be awarded to the appellant.

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, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, 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 2, 2020



DATE

GAIL M. COOKSON, ALJ

Date Received at Agency:

Date Mailed to Parties:

id _____

APPENDIX

LIST OF WITNESSES

For Appellant:

Richard Secula

For Respondent:

Neil Zollinger

Keith Kelly

Sherlin Martinez

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

- A-1 OptumRx for Richard Secula, dated October 30, 2018
- A-2 OptumRx for Richard Secula, dated January 10, 2019
- A-3 OptumRx Determination re generic Alphagan, dated May 31, 2019
- A-4 Letter from James T. Finegan, Jr., M.D., Re Richard Secula, dated August 29, 2019

For Respondent:

- R-1 Preliminary Notice of Disciplinary Action, dated May 22, 2019
- R-2 [not in evidence]
- R-3 NJMVC Policy/Procedure, Discipline, dated February 23, 2009
- R-4 Safety Team Assignment Sheet for Week of February 25, 2019
- R-5 E-Mail Thread Between Zollinger and Martinez, Re: Richard Secula, dated May 21, 2019
- R-6 Vehicle Inspection Report (Duplicate) for Byram Bus Inc., dated February 25, 2019
- R-7 [not in evidence]
- R-8 School Vehicle Retirement Chart
- R-9 Notes on First Student Inc. 2003 Bus Inspection

- R-10 Vehicle Inspection Report (Duplicate) for First Student Inc., dated April 2, 2019
- R-11 Vehicle Inspection Report (Duplicate) for First Student Inc., dated April 2, 2019
- R-12 Image of School Vehicle Inspection Sticker BL1934056
- R-13 Image of School Vehicle Registration xxx53659
- R-14 Vehicle Inspection Report (Duplicate) for First Student Inc., dated April 5, 2019
(Initial)
- R-15 Vehicle Inspection Report (Duplicate) for First Student Inc., dated April 5, 2019
(Retest)
- R-16 Image of School Vehicle Inspection Sticker BL1934086
- R-17 Safety Team Assignment Sheet for Week of April 29, 2019
- R-18 Statement of Zachary Heinemann, dated May 3, 2019
- R-19 Image of School Vehicle Registration and Manufacturer Sticker xxx8563
- ~~R-20 Notes on School Vehicle Inspection Pass Sticker 1934305~~
- R-21 Image of School Vehicle Registration and License Plate xxx8563
- R-22 Image of School Vehicle Thirty-Day Sticker
- R-23 E-Mail Thread Between Kelly and Martinez, Re: Richard Secula, dated May 10, 2019