



STATE OF NEW JERSEY

In the Matter of Humberto Vanegas
Township of North Bergen
Department of Parks and Public
Property

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC DKT. NO. 2021-1177
OAL DKT. NO. CSV 03392-21

ISSUED: OCTOBER 6, 2021 BW

The appeal of Humberto Vanegas, Laborer 1, Township of North Bergen, Department of Parks and Public Property, removal effective November 22, 2020, on charges, was heard by Administrative Law Judge Kimberly A. Moss, who rendered her initial decision on September 8, 2021. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of October 6, 2021, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Humberto Vanegas.

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 6TH DAY OF OCTOBER, 2021

Deirdre L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Allison Chris Myers
Director
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Civil Service Commission
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Trenton, New Jersey 08625-0312

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT.NO. CSV 03392-21
AGENCY DKT. NO. N/A

**IN THE MATTER OF HUMBERTO
VANEGAS, TOWNSHIP OF NORTH
BERGEN, DEPARTMENT OF PARKS AND
PUBLIC PROPERTY,**

Matthew Connaughton, Esq. for petitioner (Cohen, Leder, Montalbano
& Connaughton, LLC) attorneys

John A. Simeone, Esq., for respondent (Chasen, Mallon & Cappuzzo, P.C.
attorneys)

Karen Raminez, Spanish Language Interpreter

Record Closed: September 1, 2021

Decided: September 8, 2021

BEFORE KIMBERLY A. MOSS, ALJ:

STATEMENT OF THE CASE

Appellant, Humberto Vanegas, (Vanegas) appealed the Final Notice of Disciplinary Action (FNDA) charges of the Township of North Bergen (North Bergen) charging him with incompetency, inefficiency, or failure to perform job duties; insubordination, conduct unbecoming a public employee; neglect of duty, misuse of

public property, other sufficient cause, and breach of a last chance agreement. The basis of the charges are that Vanegas failed to do an assigned job, broke into the key cabinet, broke into an area of a garage, and painted the break room yellow.

PROCEDURAL HISTORY

Appellant was served with a Preliminary Notice of Disciplinary Action (PNDA) on January 7, 2021. He did not request a hearing. He was served with a FNDA on or about February 5, 2021. The discipline on the FDNA was removal effective November 22, 2020. On or about February 15, 2021, appellant filed an appeal of the major discipline. The matter was filed at the Office of Administrative Law as a contested matter on March 31, 2021. The hearing was held on July 14, 2021. Closing briefs were submitted on September 1, 2021, at which time I closed the record.

FACTUAL DISCUSSION

I FIND the following stipulated or uncontested **FACTS**.

Appellant began working for North Bergen in November 2016. He was a laborer. His days off were Tuesday and Sunday. Appellant reported to work on Saturday, November 21, 2020, and broke into the key cabinet to get the key to enter the youth center. Once in the youth center, he removed the plywood from the window, after which, he painted the break room yellow.

Testimony

Joseph Rotondi

Joseph Rotondi (Rotondi) is the Superintendent of North Bergen Parks Department. He supervises twenty employees in the parks department. He gives the work assignments to the work foremen Roberto Evora, Neil Gutierrez and Scott Tuccillo. The supervisor above the foreman is Daves Gomez. Tuccillo is the union foreman and shop steward. Guitierrez is the assistant shop steward and working foreman. Rotondi determines the assignments. The workers shift can be changed at any time as part of the union agreement.

Vanegas had been an hourly employee until he was hired full time in November 2016.

On November 21, 2020, a Saturday, Vanegas was at work. At 6:30 a.m. Rotondi gave out the assignments. He is not certain that Vanegas was present when the assignments were given out. He is not sure if he gave the assignments out in the break room or in the garage bay. Venegas and Evora were assigned to Parks Rounds and dog stations. Parks Rounds is opening the parks and picking up the trash from the parks. Each Park has a certain time when it is scheduled to open. Once the duties are assigned the trucks are loaded and the workers go to the destinations.

Rotondi left the area after giving the assignments. He returned at approximately 8:00 a.m. to do paperwork in his office. He left his office at 9:15 a.m. and saw Vanegas sitting in the break room. Vanegas said that Evora had left him. Rotondi told Vanegas to clean the break room, sweep and mop the floor. Rotondi then called Rodney Reyes to act as an interpreter for Rotondi and Evora. Evora stated that after the truck was ready, he came back to the break room because Vanegas did not come out to the truck. He saw Vanegas eating pizza in the break room Evora said that he had waited fifteen minutes and when Vanegas did not come out Evora left to do the assignment. Evora usually understands the assignments when they are given out in English. If he does not understand he uses an interpreter to ask questions.

Evora and Vanegas work together every other Saturday. They have been assigned Parks Rounds and dog stations together previously. They are both bilingual. Evora understands most English words. He communicates job assignments to others.

Later that day, Rotondi received a call from Reyes stating that Vanegas broke into the key cabinet, removed the keys for the youth center and broke part of the lock off the key cabinet and then went into the youth center. The back of the youth center has a window that is boarded up with plywood. On the other side of the window is the garage called bay two which is the area for storage and paint. Vanegas broke into that window, took out yellow and black paint and proceeded to paint the break room yellow.

Vanegas was not ordered to paint the break room. The prior color of that wall was gray. Rotondi does not know where the yellow paint came from or if it was donated.

Vanegas did not tell Rotondi that he smelled smoke on November 21, 2020. No one else told Rotondi that they smelled smoke on November 21, 2020.

Vanegas had previously painting one of the walls in the break room with the letters N.B in white with a black background. Rotondi told Truccillo to tell Vanegas to stop painting the wall prior to the November 2020 incident. Vanegas was not disciplined for the initial painting of the break room wall.

On November 23, 2020, Rotondi approached Vanegas with termination papers. Vanegas admitted breaking into the key cabinet and breaking the plywood in the youth center window. The shop steward, Truccillo and assistant shop steward, Gutierrez, were present at this meeting. Vanegas refused to sign the termination letter. Truccillo and Gutierrez signed and dated the termination letter. Vanegas refused to leave the premises. He does not recall why Vanegas refused to sign the termination letter. Rotondi called the police because a terminated employee would not leave the premises. As the police approached, Vanegas left the premises.

On November 25, 2020, Vanegas again returned to the facility. He said that he was there to work. Rotondi told him that he had been terminated. Vanegas went to the break room and screamed at Truccillo. Rotondi again called the police and Vanegas left. The police did not come. Rotondi wanted to have a report from the police stating that Vanegas was on the premises on November 25, 2020. Venegas came back three weeks later to take pictures of the break room.

Occasionally employees stay in the break room for a few minutes after getting assignments but not for more than five minutes. Once the duty has been assigned it is not typical for an employee to sit in the break room for hours not doing the assignment. The PNDA and FNDA are determined by the township attorney, he tells the township attorney what occurred. Rotondi never ordered Vanegas to paint the break room. Re-painting a room in the premises requires an order from a supervisor.

Roberto Evora

Roberto Evora (Evora) is a supervisor at North Bergen. He testified using a Spanish language interpreter. He receives assignments from Rotondi. When he gets an assignment, he goes to the truck, then goes to the site.

On November 21, 2020, a Saturday, Evora reported at 6:30a.m. and received the assignment, Park Rounds and dog stations. Once he received the assignment, he prepared the truck. Vanegas and Evora were in the room outside of Rotondi's office at 6:31 a.m. when Rotondi was giving out the assignments. He was assigned to work with Vanegas on that date. He had previously worked with Vanegas for years. Vanegas was present when the assignment was given out.

Evora waited in the truck for Vanegas. When Vanegas did not come to the truck Evora went to the break room and saw Vanegas was eating pizza. He told Vanegas that they needed to go, but Vanegas did not respond. Evora had waited twenty-five minutes for Vanegas, then he the left to complete the assignment.

Evora is a supervisor on the weekend. When he left without Vanegas, he did not tell Rotondi.

Neil Guterrez

Neil Gutierrez (Gutierrez) is the Forman for North Bergen. He does not work weekends except when there is overtime. On November 20, 2020, Gutierrez worked overtime. He came in at approximately 10:00 am. He was working on a turkey drive. He saw Vanegas when he entered the premises. Vanegas was in the garage where they punch in. They spoke. Vanegas was going into the youth center. Guterrez heard a loud noise in the back of the youth center. He saw Vanegas' body halfway through the window. When he saw Vanegas come out of the garage that is on the other side of the youth center window, Venegas had paint and rollers. He saw Vanegas in the break room on November 21, 2020, at 2:00 p.m.

Venegas had previously been told that he could paint a wall in the break room a neutral color. Venegas was told to stop painting the wall prior to November 21, 2020. On November 21, 2020, Gutierrez saw Venegas paint the break room yellow. The supervisors talked about the break room needing painting, but it was not agreed that Venegas would do it.

On November 23, 2020, he met in the youth center with Venegas, Genez, Truccillo and Rotondi. Rotondi asked Venegas questions about November 21, 2020. Venegas gave sarcastic answers. Rotondi attempted to give Venegas a termination letter, but Venegas would not accept it. Guterrez initialed the termination letter. Guterrez believes Rotondi told Venegas to speak to the union representative.

Guterrez was not aware of any yellow or blue paint being donated to North Bergen. He saw the window damage that Venegas did in the youth center and the lock mechanism broken off the key cabinet. Venegas did not have authority to break either.

Scott Tuccillo

Scott Tuccillo (Tuccillo) is a working foreman at North Bergen. On November 21, 2020, he came to work in the late morning or early afternoon. He went into the garage next to the youth center. He saw the broken wood and the metal cage down. He was told Venegas went into the garage to get paint. He saw the key cabinet was broken, then spoke to Venegas and asked him what happened and explained that he could have gotten the key from a supervisor. Venegas said that he was frustrated that he did not have a key to the key cabinet and that was why he busted the key cabinet. This conversation occurred in the in the parking lot. Tuccillo told Rotondi that he saw Venegas in the youth center getting rollers. He did not order Venegas to paint the break room. He did not smell smoke on that day. He did not hear anyone say that they smelled smoke on that day.

On November 23, 2020, Tuccillo was present when Venegas was brought into the youth center to discuss what occurred on November 21, 2020. Venegas admitted to getting the keys to the youth center by breaking the key cabinet and going into the youth

center to get paint. Rotondi was present and gave Vanegas a termination letter, which Vanegas refused to accept. Vanegas would not leave and Rotondi called the police. Tuccillo spoke to Vanegas telling him that he would not want to get the police involved.

On November 25, 2020, Vanegas returned to North Bergen. Vanegas attempted to punch in and then sat in the break room. Vanegas was told that he was fired and had to leave the premises.

Tuccillo has had a coworker refuse an order. When that occurs, he would wait then go back and talk to the worker. He was not part of the conversation about the break room being painted. He is not sure where Vanegas got the paint or where the paint is stored.

Rodney Reyes

Rodney Reyes (Reyes) is a laborer for North Bergen. He receives his assignments from the foreman. He recalled working on November 21, 2020. He was present at the meeting where assignments were given. Evora and Vanegas were also present at the meeting. After the meeting he went to the truck and did the Park Rounds alone. He left North Bergen to begin the park rounds at 6:30 a.m.

Reyes received a call from Rotondi at 10:00 a.m. He was told to call Evora, to find out why Vanegas was not with him. Evora told Reyes that he waited ten to fifteen minutes in the truck for Vanegas, then he went in and told Vanegas lets go, but Vanegas said nothing. Reyes relayed this to Rotondi.

Later that day Reyes returned to North Bergen, he was helping Gutierrez and Truccillo in the youth center when he heard a noise and saw Vanegas inside of the window in the youth center. Reyes saw Vanegas painting the break room yellow. He asked Vanegas what he was doing, Vanegas said painting. He saw the key cabinet broken. None of the laborers have keys to the key cabinet. Vanegas admitted to Reyes that he broke the key cabinet.

On November 25, 2020, Reyes saw Vanegas in Rotondi's office at 7:35 a.m. Vanegas was told that he was fired. He had seen Vanegas trying to punch into work.

Hunberto Vanegas

Vanegas was hired full time by North Bergen in November 2016. He regularly works on Saturdays. On November 21, 2020, he arrived at North Bergen at approximately 6:30 a.m. He did not attend the meeting where assignments were given out. He went to the break room and was eating pizza. A coworker named Tommy was there as well. Evora entered the break room and looked for an outlet for the toaster oven to warm up Vanegas pizza. Evora said "don't worry, each takes care of the other." Vanegas does not recall Evora telling him lets go. He does not recall Evora returning to the break room. He waited ten to fifteen minutes for the pizza to warm up. Vanegas usually drives with Evora. Evora left without him. Vanegas did not inform Rotondi of this when it occurred. Vanegas was assigned Park Rounds every Saturday. He did not know that Evora waited twenty-five minutes for him.

At 9:00 a.m. Rotondi asked Vanegas why he wasn't doing Parks Rounds. Vanegas was in the break room for two hours before he saw Rotondi. Vanegas said that Evora left him, so he guessed that he had the day off. Vanegas did not call Evora. He heard Evora drive the truck out to do the Parks Rounds. Rotondi told him to clean the break room, sweep and mop the floor and take out the garbage.

Vanegas had spoken to all the laborers and the shop steward about the break room needing to be painted. Prior to November 2020, Vanegas painted the letters N and B on the wall in the break room. No one told him not to paint the wall. Vanegas was never ordered to paint the break room.

On November 21, 2020, Vanegas went to get rollers out of Bay two. He testified that could not open Bay one or Bay two with the code. He smelled smoke from Bay two, he got the keys and opened the window to the youth center. There was nothing burning. He did not report the smell of smoke to anyone. He broke the key cabinet to get the keys because he smelled smoke in the youth center.

Venegas painted the break room again on November 21, 2020. He had received the paint from a paint shop. It was stowed in open garage called Bay four. Venegas painted the break room yellow.

On November 23, 2020, Rotondi, Tuccillo and Guitierrez were waiting for him in the parking lot. They had a meeting about the broken key cabinet, the broken plywood and Vanegas painting the break room yellow. He sarcastically told Rotondi did you see what a good job I did. Rotondi gave him a termination letter. Vanegas refused to accept the termination letter. Vanegas was asked to leave the premises. He stated there was no reason for him to leave. He decided to leave when he saw the police arrive.

On November 25, 2020, Vanegas tried to punch in for work. He was told he was terminated. Rotondi yelled that Vanegas is dead. Vanegas went into the break room and asked Truccillo why he initialed the termination letter. Truccillo told him to contact the union.

In February 2021 Venegas came to North Bergen and took pictures of the break room. He could not upload those pictures from his computer.

FACTUAL DISCUSSION

In light of the contradictory testimony presented by respondent's witnesses and appellant the resolution of the charges against Vanegas requires that I make credibility determinations with regard to the critical facts. The choice of accepting or rejecting the witness's testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 60 N.J. 546 (1974); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). A fact finder "is free to weigh the

evidence and to reject the testimony of a witness even though not contradicted when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth.” In re Perrone, 5 N.J. 514, 521-522 (1950); see D’Amato by McPherson v. D’Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to observe the demeanor of the witnesses, I **FIND** Rotondi, Evora, Gutierrez, Truccillo and Reyes to be credible. Their testimony was clear and consistent. I did not **FIND** Vanegas to be credible. He went to work on November 21, 2020 and believed that Evora would do the job without him without any testimony that this had occurred before. Vanegas did not provide a reason why Evora would offer to do the assignment alone like for example, if Vanegas did not feel well. Vanegas testified that he broke the key cabinet lock and the plywood over the window in the youth center because he smelled smoke. None of the other people present smelled smoke. Vanegas did not tell anyone that he smelled smoke and he did not call the fire department to report the smell of smoke.

Having reviewed the testimony and evidence and credibility of the witnesses, I make the following **FINDINGS of FACT**.

Vanegas had been an hourly employee until he was hired full time in November 2016. A few days after Vanegas came to Rotondi and stated that he wanted to negotiate his shift. Rotondi told him if he did not accept his shift he would be terminated. Rotondi verbally terminated Venegas that day, which was a Saturday. On the following Monday, Vanegas apologized. There was no paperwork regarding that termination and Vanegas continued working.

On April 19, 2017, Vanegas tested positive for marijuana during a random drug test. On August 8, 2017, a FNDA was issued against Vanegas sustaining the charges of incompetency, inefficiency, or failure to perform job duties, conduct unbecoming a public employee, other sufficient cause, and violation of the Township drug and alcohol policy for commercial drivers and safety sensitive employees. On August 8, 2017,

Vanegas was suspended for thirty days. On April 19, 2017, Vanegas signed a last chance settlement agreement arising out of the April 19, 2017, positive drug test.

On August 29, 2018, Vanegas was scheduled for a random drug test. He refused to take the drug test even after consulting the union. On June 12, 2020, Vanegas was given a work assignment to paint a trailer with two of his co-workers. Vanegas refused to paint the trailer. Venegas was told that it was grounds for insubordination. He was also told he could be terminated. Vanegas said that he would drop off the other workers, but he would not paint the trailer.

On July 30, 2020, Venegas entered into another last chance agreement with North Bergen for refusing to take the drug test and refusing to paint the trailer. Venegas was suspended sixty days. One of the other conditions of the second last chance agreement was that he was subject to immediate dismissal if he received a major discipline.

On November 21, 2020, a Saturday, Rotondi gave out the assignments at 6:30 a.m. Vanegas, Evora and Reyes were present when the assignments were given out. Evora and Vanegas were assigned Parks Rounds and dog stations. Evora went to put the necessary supplies on the truck. Vanegas went to the break room. After Evora waited at the truck for Vanegas for approximately twenty-five minutes, he went into the break room and told Vanegas they needed to go, but Vanegas did not respond. The Parks Rounds assignment is time sensitive. The parks must be opened a specific time. Evora left to do the park rounds alone. Vanegas stayed in the break room. Rotondi came out of his office at approximately 9:15 a.m. He saw Vanegas sitting in the break room. He asked Vanegas, why he was there. Vanegas said that Evora left him. Rotondi told Venegas to sweep and mop the break room and clean up the garbage.

Vanegas swept and mopped the break room floor. He then broke into the key cabinet to get the key to the youth center. Only supervisors have a key to the key cabinet. Vanegas then entered the youth center. The youth center has a window that has a garage on the other side. That window is covered with plywood. Vanegas broke the plywood off the window. He entered the garage and retrieved yellow paint and

rollers. Vanegas proceeded to paint the break room yellow. No supervisor directed him to paint the break room.

On a previous occasion Vanegas painted the break room wall with the letters N and B. He was told by Truccillo to stop painting the break room at that time.

On November 23, 2010, Rotondi met with Vanegas with Guitierrez and Truccillo present to discuss the events of November 21, 2020. Rotondi attempted to give Vanegas a termination letter. Vanegas refused to accept the termination letter. Guitierrez and Truccillo signed the termination letter. Vanegas was told to leave the premises. He refused to leave. Rotondi called the police to inform them that a terminated employee would not leave the premises. Venegas was outside speaking to Truccillo when the police arrived. Venegas left when the police arrived.

On November 25, 2020, Vanegas came to North Bergen and attempted to punch in for work. He was told that he was terminated and to leave the premises.

LEGAL ANALYSIS AND CONCLUSION

The charge of with incompetency, inefficiency, or failure to perform job duties; insubordination, conduct unbecoming a public employee; neglect of duty, Misuse of public property, other sufficient cause, and breach of a last chance agreement. is **SUSTAINED.**

The purpose of the Civil Service Act is to remove public employment from political control, partisanship, and personal favoritism, as well as to maintain stability and continuity. Connors v. Bayonne, 36 N.J. Super. 390 (App. Div.), certif. denied, 19 N.J. 362 (1955). The appointing authority has the burden of proof in major disciplinary actions. N.J.A.C. 4A:2-1.4. The standard is by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962). Major discipline includes removal or fine or suspension for more than five working days. N.J.A.C. 4A:2-2.2. Employees may be disciplined for insubordination, neglect of duty, conduct unbecoming a public employee, and other sufficient cause, among other things. N.J.A.C. 4A:2-2.3. An employee may be removed for egregious conduct without regard to progressive

discipline. In re Carter, 191 N.J. 474 (2007). Otherwise, progressive discipline would apply. W. New York v. Bock, 38 N.J. 500 (1962).

Hearings at the OAL are de novo. Ensslin v. Twp. of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994), certif. denied, 142 N.J. 446 (1995).

Under N.J.A.C. 4A:2-2.3(a)(1), an employee may be subjected to major discipline for “incompetency, inefficiency, or failure to perform duties.”

Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency’s judgment. See In re Herrmann, 192 N.J. 19, 32 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old’s face was terminated, despite lack of any prior discipline).

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

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

In reversing the MSB’s insistence on progressive discipline, contrary to the wishes of the appointing authority, the Klusaritz panel stated that “[t]he [MSB’s] application of progressive discipline in this context is misplaced and contrary to the public interest.” The court determined that Klusaritz’ s prior record is “of no moment” because his lack of competence to perform the job rendered him unsuitable for the job and subject to termination by the county. [In re Herrmann, 192 N.J. 19, 35–36 (2007) (citations omitted).]

Black's Law Dictionary 802 (7th Ed. 1999) 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." Such dictionary definitions have been utilized by courts to define the term where it is not specifically defined in contract or regulation.

"Insubordination" is not defined in the agreement. Consequently, assuming for purposes of argument that its presence is implicit, we are obliged to accept its ordinary definition since it is not a technical term or word of art and there are no circumstances indicating that a different meaning was intended. [Ricci v. Corporate Express of the East, Inc., 344 N.J. Super. 39, 45 (App. Div. 2001) (citation omitted).]

Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person. Insubordination is always a serious matter, especially in a paramilitary context. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

One of the grounds for discipline of public employees is "[c]onduct unbecoming a public employee." N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of 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)). Suspension or removal may be justified where the misconduct occurred while the employee was off duty. Emmons, 63 N.J. Super. at 140.

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

The charges can merge in this matter. Vanegas was given a work assignment and went into the break room to eat. He never went out to the truck to begin the assignment. When Evora told Vanegas that they needed to go, he did not respond. Evora waited twenty-five minutes for Vanegas before he did the assignment alone. When Vanegas realized the Evora left, he did not attempt to contact Evora or Rotondi. He did not attempt to contact anyone. He sat in the break room from 6:30a.m. until Rotondi saw him at 9:15 a.m.

Vanegas broke open a lock on the key cabinet to get the key. He broke the plywood of the window in bay two and painted the break room yellow without being assigned to paint.

The next issue is the discipline to be imposed.

Typically, the Board considers numerous factors, including the nature of the offense, the concept of progressive discipline and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463.

"Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Bock, 38 N.J. 500, 523 (1962), that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990).

Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

In this matter, Vanegas has had three prior disciplines. He received a thirty day and a sixty-day suspension. He has had two last chance agreements. The second last chance agreement states that Vanegas was subject to immediate dismissal if he received a major discipline. I **CONCLUDE** that the discipline of removal is appropriate in this matter. Vanegas violated the conditions of the second last chance agreement by receiving a major discipline.

I **CONCLUDE** the discipline in this matter should be removal.

ORDER

Based on the foregoing findings of fact and applicable law, it is **ORDERED** that the determination of respondent to removal Vanegas be and is hereby **AFFIRMED**.

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.

September 8, 2021



DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

September 8, 2021

Date Mailed to Parties:

September 8, 2021

ljb

WITNESSES

For Appellant

None

For Respondent

Joseph Rotondi

Roberto Evora

Neil Guterrez

Scott Tuccillo

Rodney Reyes

EXHIBITS

For Appellant

None

For Respondent

R-1 Cover Letter for FNDA Dated February 5, 2021

R-2 FNDA Dated February 5, 2021

R-3 PNDA Dated December 7, 2020, with Attached Rider

R-4 Cover Letter of Last Chance Agreement Dated August 14, 2020

R-5 Last Chance Agreement Dated July 30, 2020

R-6 Letter advising Vanegas of His Termination by North Bergen, dated November 23, 2020

R-7 Photos depicting the condition of North Bergen's Break Room, Youth Center and Key Cabinet.

R-8 Incident Report Regarding Vanegas

R-9 Police Report Dated November 30, 2020

R-10 FNDA Dated August 11, 2020

R-11 PNDA Dated June 18, 2020, with Attached Rider