

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 17TH DAY OF NOVEMBER, 2021

Deirdre' L. Webster Cobb

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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 04310-2021

AGENCY DKT. NO. 2021-1507

**IN THE MATTER OF WILLIAM RUSK, JR.,
GLOUCESTER CITY, UTILITIES DEPARTMENT,
APPOINTING AUTHORITY**

Ken Gomeringer, United Steelworkers District 4 Staff Representative, for
appellant William Rusk, Jr., pursuant to N.J.A.C. 1:1-5.4(a)6

William F. Cook, Esq., for respondent Gloucester City, Utilities Department,
Appointing Authority (Brown & Connery, attorneys)

BEFORE SARAH H. SURGENT, ALJ:

Record Closed: September 1, 2021

Decided: October 12, 2021

STATEMENT OF THE CASE

Appellant William Rusk, Jr. (Rusk) appeals from respondent Gloucester City, Utilities Department's (the City's) disciplinary action terminating his employment as a City Water Department (Department) employee. Rusk seeks reinstatement and maintains that his termination was unjust and unduly punitive. The City maintains that Rusk was

derelict in his duties, dishonest about why, and therefore cannot be trusted to perform his job, which involves protecting the public health and safety of the City's residents.

PROCEDURAL HISTORY

On January 15, 2021, the City served Rusk with a Preliminary Notice of Disciplinary Action (PNDA), notifying Rusk of the charges against him. (J-1). After a departmental hearing on March 3, 2021, the City sustained all the charges: N.J.A.C. 4A:2-2.3(a)1, incompetency, inefficiency, or failure to perform duties; -2.3(a)6, conduct unbecoming a public employee (dishonesty); -2.3(a)6, conduct unbecoming a public employee (falsification); -2.3(a)7, neglect of duty; and -2.3(a)12, other sufficient cause. (J-7). By a Final Notice of Disciplinary Action (FNDA) dated March 29, 2021, the City notified Rusk accordingly, and imposed a penalty of removal effective January 14, 2021. Ibid.

On April 9, 2021, Rusk timely requested a hearing. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on May 12, 2021, to be heard as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. The hearing was conducted remotely via videoconference on September 1, 2021, due to the ongoing COVID-19 pandemic. The record closed on that date.

FACTUAL DISCUSSION AND FINDINGS

These salient points are not in dispute. I therefore **FIND** the following as **FACT**.

At the time of his removal, Rusk had been employed by Gloucester City for over twenty years. Until he transferred to the Department in March of 2020, he had worked for the City's Department of Public Works as a driver of all types of trucks and mowing equipment. (J-8).

After his transfer to the Department, Rusk was cross-trained in all facets of the City's water and sewage operations, including "on-call" duty. On Friday, November 27, 2020, Rusk was on call, which meant that he was required to carry a City-issued cellular telephone and answer all calls and respond to the scene within one hour of receipt of the calls. That morning, Rusk went to the water treatment plant to test the water quality, as was his duty, (J-4), and left the facility, as he was permitted to do. However, he was still on on-call duty, and was required to answer the phone.

At approximately 12:30 p.m., a sewage backup occurred at a commercial strip mall, and Rusk could not be reached after multiple calls to the on-call phone. Rusk's supervisor, Daniel Harkins (Harkins), therefore responded to the scene. Rusk later responded to the calls and arrived at the scene at approximately 2:00 p.m., some ninety minutes after the first call.

SUMMARY OF RELEVANT TESTIMONY

Daniel Harkins

Harkins, the Department's Supervisor for the past four years, testified on behalf the City. He has been an employee of the Department for a total of ten years. He oversees day-to-day operations, including, among other things, the water treatment plant, water distribution facilities, and sewer pump and distribution facilities. He supervises an eight-man United Steelworkers' crew and assigns tasks, including attending to emergencies. He is on call "24/7," and there is also one steelworker on call at any given time.

On November 27, 2020, Harkins received a call from the Camden County Communications Center (CCCC), the dispatch center for police, fire, and emergency medical services, indicating that no one had answered the Department's on-call phone. In such events, the CCCC would call Harkins, and if unavailable, call Thomas Kain (Kain), and if unavailable, call the Director of the Utilities Department, who was then Eric Fooder

(Fooder). That day, CCCC advised Harkins that there was a commercial sewer backup in the city, and the on-call person could not be reached.

Harkins then called the on-call phone "twice at least," and got no response. Harkins then called Kain and asked Kain to call the on-call phone in case Harkins' phone had somehow malfunctioned. Kain called the on-call phone, and also got no response. In all, Harkins called the on-call phone six or seven times with no response. He then attempted to contact Fooder and got no response. He then attempted to contact all the Department crew members, as required by union rules, before Harkins could handle the emergency himself. However, they were not required to and did not answer their personal phones.

Harkins then went to the scene of the backup and called the City Administrator because he had never encountered an issue with missing on-call personnel. The City Administrator called Rusk's personal phone and reached him. Rusk then called Harkins and asked if he had been trying to reach him. Harkins advised Rusk that multiple people had been trying to reach him for approximately one hour. Harkins asked Rusk what had happened, and Rusk replied that the on-call phone was "right next to" him, and that "it never rang." Harkins advised Rusk that Rusk needed to respond to the scene of the sewer backup. When Rusk arrived at the scene he said to Harkins, "I'm sorry, I never heard it. I never heard the phone." Rusk then said, "maybe I hit the mute button and turned the ringer off." Before they left the scene, Rusk said to Harkins, "well, you know, it is an old piece of shit phone." According to Harkins, the phone was a new smart phone—less than one year old—and no one else had ever complained of problems with it.

With respect to the sewer backup, Harkins and Rusk determined that it was the property owner's responsibility to hire a plumber to fix it, because it was caused by the property owner's plumbing, not the City's. The Department had responded to a similar call earlier in the week from the same property owner, and similarly advised them, but nevertheless responded to that day's call as well because every time there is a backup,

it could create a public health issue. Harkins described the scene as raw sewage overflowing from a plumbing trap and running through a parking lot and down a residential city street, creating a health and safety hazard for people and animals.

On the following Wednesday, December 2, 2020, Harkins was doing the Department's payroll, and there was a question about Rusk's paperwork. Rusk was called in, the issue was resolved, then Fooder asked Rusk about what had occurred on November 27, 2020. Rusk then stated that he was at his father's house because his father had fallen, that the police and an ambulance were there, and that he had left the on-call phone in his truck. That was the first time Harkins and Fooder had heard anything about a "family emergency." Harkins testified that if Rusk had told him at the time of the sewage backup that he was having a family emergency, there would have been no need for this hearing and decision. Harkins would not have disbelieved nor been affronted by the "family emergency"—he was, however, affronted by Rusk's lack of candor and "changing stories." Rusk never presented any proof of a police or ambulance response to his father's house, either before or during the hearing.

Harkins explained that the on-call person is required to answer the phone or return the call immediately, and to respond to the scene within no more than one hour of receipt of the call, without any discretion regarding whether to respond. If there were ever a question about whether a response was required, such as a repeat call for the same issue, the on-call person was to contact Harkins or Kain for instructions.

With respect to the City's exhibits, Harkins explained that J-2 is the log for Harkins' City-issued work phone with a number ending in 1556. (J-2). It demonstrates that on November 27, 2020, the CCCC, with a phone number ending in 4808, called Harkins at 12:31 p.m., after Rusk did not answer the on-call phone. (J-2; J-3). A screenshot taken by Fooder of the call log from the on-call phone which Rusk had possessed on that date demonstrates that the CCCC attempted to call Rusk twice at 12:30 p.m. (J-3). The on-call phone number ends in 9171. (J-2). Harkins' call log indicates that he called the on-call phone at 12:32, 12:33, 12:34, 12:37, and 12:52 p.m., and got no response. (J-2). At

12:40 p.m., Kain attempted to reach Rusk twice, and got no answer. (J-3). In all, Rusk failed to answer the on-call phone nine times. The record of all five of Harkins' calls to the on-call phone that day had been deleted from the phone by Rusk before he returned the phone to the Department for the next on-call person's use. (J-3).

At 1:21 and 1:22 p.m., Rusk finally returned Harkins' calls while Harkins was at the scene and on the phone with the City Administrator. (J-2). At 1:50 p.m., Rusk arrived at the Department facility to pick up a Department truck and go to the scene, where he arrived at approximately 2:00 p.m., ninety minutes after the first call from CCCC. (J-4). Harkins stated that he was unaware of any other on-call personnel who had failed to respond to a call while he was a supervisor.

Thomas Kain

Kain, the Department's treatment plant Supervising Operator, testified on behalf of the City. He oversees, among other things, the water tanks, treatment chemicals, and training new employees. He has been with the Department since 1980. He trained Rusk to run the water plant so that Rusk would be able to work on call. Rusk was also trained by Harkins about the sewer distribution system, and both Kain and Harkins had to be satisfied that he was properly trained before he was permitted to perform on-call duty.

The on-call person is required to answer the on-call phone immediately because the cause for the call could not otherwise be known and could be something as serious as a missing manhole cover or a sewer cave-in creating traffic and pedestrian hazards, a water main or fire hydrant break creating flooding issues, or a treatment plant shutdown, which could cause the water tanks to overflow or drop the water levels.

The on-call person must arrive at the scene as quickly as possible, but no later than one hour after they receive the call. The on-call person has no discretion not to respond, even if they responded to a similar call at the same property in the recent past, because it could be a new problem on a shared lateral sewer line between property

owners. If a store or restaurant is involved with a sewer problem, it is a "big problem" because sewage can seep in through floor drains and create a health hazard. At the strip mall in question, there are three to four businesses, including a restaurant, which all share a lateral sewer line.

On November 27, 2020, Harkins called Kain and reported that he could not reach Rusk on the on-call phone and could not reach any of the other workers who were off duty and not required to answer their personal phones. Kain tried to reach Rusk twice without success. (J-3). Harkins was unable to reach Fooder, then called the City Administrator, who answered and then reached Rusk on Rusk's personal phone. Rusk reported that the on-call phone was muted or turned off. However, during the December 2, 2020 meeting, Rusk stated that there was a medical problem with his father, that the police and fire departments were called, and that he had left the on-call phone in his truck.

Kain explained that there is absolutely no policy which allows employees to delete the on-call phone records, which must be maintained if there is a dispute between the Department and a property owner about when a call came in and when it was responded to. The Department is regulated by the Department of Environmental Protection (DEP), and must maintain all records, including phone records, for inspection at any time. The Department is also subject to the Open Public Records Act (OPRA) and must respond to information requests sent to it by the City clerk's office. Kain never told anyone that deleting records from the on-call phone would be acceptable, but he also did not advise employees that it was unacceptable, because he thought that that was obvious, and therefore not necessary. Indeed, Kain pointed out that according to the City's own employee manual, "[a]n employee may be subject to discipline for . . . [f]alsification of public records, including attendance and other personnel records." (J-5).

William H. Rusk, Sr.

William H. Rusk, Sr. (William), Rusk's father, testified on behalf of Rusk. He is seventy-one years old. He submitted a notarized letter dated June 20, 2021, which states:

To whom it may concern,

My names William Rusk Sr., on the day after Thanksgiving I had a more then few too many drinks, made a poor decision, got drunk, and I ended up falling and injuring my whole front of my head and nose. I had a bloody nose, 2 black eyes, and busted lip. My kids came and helped and treated my wounds. I refused going to the Hospital for multiple reasons COVID being 1 of them. Bill [Rusk] stayed a couple hours but had to leave to go get his work phone that was left in his truck. My son has been with the city for 20 years, for you to dismiss him, especially during COVID, was wrong.

[(A-1) (sic passim).]

William was not feeling well on the day of the hearing and had skipped some of his medications so that he could stay alert. He testified that his lack of medications did not affect his ability to testify in any way, and he did not believe that it affected his ability to remember things. However, he did not remember signing his notarized letter and he denied stating in the letter that he was drunk. He denied drinking or being drunk on the date of the incident and stated that he had a few beers the night before while watching a football game.

William stated that on November 27, 2020, he was making coffee, was "up late," tripped over a throw rug, hit his head on a hardwood floor, and got a "big knot" on his head. He did not want to call anyone for help because it was a holiday weekend. His daughter came to his home and saw the lump on his head. He believes that his daughter called Rusk because Rusk came to his house. He was certain that no police or ambulance were ever called to the scene because he was still paying off the bill from his last ambulance service. Rusk and his sister attended to William's injuries.

After repeatedly refreshing his recollection with his notarized letter, he was not 100% sure that the signature was his. He "believed" that he may have seen the document before, but it was "hard to recall." Then he remembered reading the letter sometime before the date of the hearing. He did not type the letter himself. He could not recall who was with him when he signed the letter and he could not recall whether anyone had asked

him to sign it. He did not remember telling anyone what he wanted to say in the letter because he “had no reason to.” Then he stated that the letter contained his own words, but that so much had happened in the past year that he found it “hard to function.” As “far as [he] could recall, they were [his] words and [he] signed it.” He believed that his wife¹ and Rusk may have approached him about giving the notarized statement. He stated that he wrote the words down, and then his wife and Rusk rewrote them because he is “not a good speller.” He did not save his original draft of the letter.

He thought that he may have given his words to Rusk, but he could not recall when. He then adopted his letter as his testimony at the hearing, including having been drunk at the time of the incident. He insisted that he only had one black eye, rather than two, and that his letter was inaccurate in that regard. He recalled that Rusk had to leave to get his work phone. He was unsure about when Rusk came to his house, and guessed that it might have been 12:00 or 1:00 p.m. He believed that Rusk stayed with him for one-and-one half to two hours after he arrived. He stated that Rusk left because “I didn’t want him there, I didn’t want nobody bothering me.” Upon prompting, he then stated that Rusk said, “Aw, shit, I got to get my phones.”

Ellamary Rusk Legenski

Ellamary Rusk Legenski (Legenski), Rusk’s sister, testified on his behalf. She submitted a notarized letter dated June 20, 2021, which states:

To whom it may concern,

My name is Ellamary Rusk Legenski, I am writing this in regards to my brother Billy’s [Rusk’s] incident involving the city and my father. We take turns checking him, due to all the medications, alcohol, and covid. He has a history of falling and injuring himself or just bad health so we always stop by and make sure he is okay. The day after Thanksgiving he fell and cracked his head open, he refused to go to the hospital, I

¹ William testified that at the time of the incident, he was divorced and lived alone. I therefore presume that he was referring to his ex-wife.

sent my brother Tim to get Billy and they showed up almost immediately and our father refused to go to the emergency room so we bandaged him up and Tim took Billy [Rusk] back to his truck to go get his cell phone and work phone when he noticed he didn't have neither on him. My brother worked for the city for 20 years, loved his job, would never jeopardize it for anything. Hope that this ends well.

[(A-2) (sic passim).]

Legenski stated that on November 27, 2020, she went to visit her father between 11:00 and 11:30 a.m. and saw that he had "something on his eye and something on his hand." She did not believe that her father was drunk, but he was "kind of out of it," and said that he had tripped and fallen. He had a gash on the side of his head. Contrary to her notarized letter, she denied ever having said that "he cracked his head open." He refused to go to the hospital or to have an ambulance called. She tried to call Rusk on his personal cell phone and got no answer, so she called her other brother, and asked him to find Rusk, because their father needed to go to the hospital and might listen better to Rusk than to her.

Rusk realized that he did not have his phones because Legenski yelled at him for not answering his phone. He told Legenski that he did not answer her call because he did not have his phone. She later recanted that statement and stated that Rusk left before Legenski did so that he could get his phones. However, she later stated that Rusk did not tell her why he was leaving, and that it "was not [her] business," then reverted to Rusk left because he did not have his phones with him. She estimated that Rusk was at their father's house for thirty to forty-five minutes.

She stated that no one asked her to make or sign her notarized statement—she "did it on [her] own"—but then stated Rusk told her that it would help in his defense. She could not remember where she was when she signed it, but stated that she was with "Kathy," the notary. She does not know Kathy socially and did not sign the statement at Kathy's office. She was with her father when he signed his statement, but she did not know who typed her father's statement. Both Rusk and his brother were also at the

signings, and Rusk chose the notary. Legenski did not type her statement herself, her son did, after she hand-wrote it. She “doubted” whether she saved her original hand-written statement.

Robert Tapp

Robert Tapp (Tapp), the President of the Local 4-380 United Steelworker’s Union, testified on Rusk’s behalf. I note that Tapp had not been sequestered from the other witnesses’ testimony, as he was not expected to testify. He stated that he spoke to the unit’s chairperson, “Mike N.,” about Rusk’s case, and Mike advised that if Rusk had any witnesses, their sworn affidavits would be needed for Rusk’s defense. Tapp conveyed that information to Rusk, who then obtained and provided his father’s and sister’s statements.

Michael Niedzwiadek

Michael Niedzwiadek (Niedzwiadek), the local union Unit Chairperson, testified on behalf of Rusk. He has been with the Department for over seventeen years, is a pump station operator, and is familiar with the on-call process. He stated that very recently, well after the incident with Rusk, two employees overslept. They were questioned by their supervisor, told the truth, and were each given verbal warnings. One employee who overslept simply arrived late to work. He was not on call. The other employee was on on-call duty and did not answer the phone or respond to the scene in the middle of the night because he was sleeping and did not hear the call. Harkins responded to the scene because a sewage system was going “offline,” which constituted an emergency. The employee who was on on-call duty was a new employee, with no prior disciplinary record.

Niedzwiadek was unaware of any Departmental policy prohibiting the deletion of messages or call logs on the on-call phone at the time of the incident. He stated that he has deleted information from the on-call phone in the past, after he recorded the information on a work order, so that he knew that he had taken care of that call and would

not check it again. He had no knowledge as to whether Rusk similarly documented calls before deleting the phone records. Rusk never told Niedzwiadek that he had deleted phone records, and he did not tell Niedzwiadek about the incident with his father until sometime after Rusk was served with the PNDA. After Rusk was terminated, a policy was put in place prohibiting the deletion of any on-call phone records.

Pursuant to the Department's unwritten "one-hour rule," on-call personnel must answer calls immediately and respond to the scene within one hour of receiving the call. Niedzwiadek had previously responded to the scene of the subject sewer backup and advised the property owners that they were responsible for clearing their common lateral sewer line.

With respect to training, Niedzwiadek stated that Rusk was still in training, because the job is "a hands-on learning experience." However, he conceded that at the time of the incident, Rusk had already been fully trained, including for on-call duty, and had previously been on on-call duty.

Rusk

Rusk testified that on November 27, 2020, after he left the water treatment facility, he was at home "bringing up Christmas stuff" to his front yard when his brother pulled up and said, "Dad fell. Let's go." He went to his father's home, and unintentionally left his personal and on-call phones in his truck, because he was "in a panic." He stated that he was only about ten feet away from the phones when he was in his front yard, but agreed that the on-call phone could have rung while he was in the house, bringing out Christmas decorations. He denied his alleged prior statements about calling the police or calling for an ambulance for his father and stated that no one called 911. When he realized that he did not have the phones with him, he asked his brother to take him back to his house so that he could retrieve them.

Upon reaching his phones, he saw that CCCC, Kain, and Harkins had called the on-call phone numerous times, and that the City Administrator had called Rusk's personal phone. He called the Administrator "right back." The Administrator advised Rusk that Harkins had been trying to reach him, so Rusk then called Harkins. Rusk told Harkins that he would be "right there." Rusk could not estimate how much time had elapsed between the first on-call call and his arrival at the scene because he is "not too good with time." He did not believe that it exceeded the one-hour response rule.

When Fooder questioned Rusk about the incident on December 2, 2020, Rusk stated that his father had fallen, and that it was a medical emergency. Rusk claimed that Fooder merely gave him a verbal warning—"try not to let it happen again." He had no other communications with the Department about the incident prior to the issuance of the PNDA, his Departmental hearing, and the FNDA terminating him effective January 14, 2021.

Rusk claimed that on the day of the incident, Harkins did not ask Rusk what had happened or why he did not answer the on-call phone. As to the scene, Rusk said there was just "a little puddle" of sewage, and that both he and Harkins tried to plunge the sewer trap unsuccessfully. He said that there was no sewage running down the street. At Harkins' direction, Rusk advised the property owner that it was their problem to fix. At the scene, Rusk did not tell Harkins why he missed the calls and was late, he just said, "sorry, I had something to do." He stated that he did not tell Harkins why because he does not talk to Harkins "that way," because he had just transferred to the Department and did not want to get into "any more trouble." Before Rusk left the scene, he asked Harkins "are we okay?" and Harkins said, "nope, we're good." He did not recall saying to Harkins "this is an old piece of shit phone," that he may have muted the ringer on the phone, and that he did not hear the phone ring. He did not tell Harkins that he did not have the phone in his possession at the time of the calls. He explained that the phone was a "piece of shit" because it was "older" than his personal phone.

With respect to Harkins' missing phone call records, Rusk stated that he erases on-call phone calls right after the call, and "didn't get that far," because Kain's and the CCCC's phone calls both before and after Harkins' calls still existed. (J-2; J-3). He stated that he tried to delete those calls as well, but was apparently unsuccessful, as he is "really not that good with cell phones." He stated that Niedzwiadek told him to delete old phone call records so as not to confuse them with new calls. However, he later testified that he was "never told by anybody" to delete phone records, but then backtracked and said that Niedzwiadek told him to do it. He also stated that his practice was to call the on-call phone to ensure that it was working, as demonstrated by an unanswered call from his personal phone to the on-call phone at 2:04 p.m. (J-3). He stated that he was never instructed by either Kain or Harkins that he could not delete phone records on the on-call phone.

After his transfer to the Department, Rusk was trained in the on-call procedures, understood them, and had previously served on-call duty prior to the date of the incident. He stated that he did not have the phone with him when CCCC called him at 12:30 p.m. He stated that he was at his father's house in Belmar, and the phone was in his truck parked in front of Rusk's house in Gloucester City. He could not estimate when he arrived at his father's house, again stating, "I'm not that good with time." He then speculated that he may have arrived at 12:00 or 12:30 p.m. When asked what time he responded to the call, he again stated, "I'm not sure. I'm not good with time." Rusk decided not to call an ambulance because he knew that his father would refuse transport and treatment. He estimated that he was at his father's house for "probably a good hour." He did not know when he left his father's house.

Harkins

Harkins was recalled as a rebuttal witness for the City. With respect to the recent incident where the on-call person was sleeping and did not answer the phone in the middle of the night, Harkins explained that when the employee returned the call, he was "in a panic" and said that he would come in immediately. He explained that neither he

nor his wife had heard the phone ring. Harkins, who was still at the scene, told him that the problem was resolved. The employee subsequently stayed up for the rest of the night, and promptly responded to another call two hours later. The next day Harkins only gave the employee a verbal counseling session because he was “upfront, honest, [and] apologizing profusely.” He did not obfuscate or change his story, and he made no excuses.

With respect to the December 2, 2020 meeting with Fooder, Kain, Harkins, and Rusk, Harkins stated that Fooder never told Rusk that he was only going to give him a verbal warning.

CREDIBILITY DETERMINATIONS AND FURTHER FINDINGS OF FACT

I.

I must weigh the credibility of the witnesses to determine the ultimate issues. Credibility is the value that a factfinder gives to a witness's testimony. An ALJ's findings of fact as to issues of credibility of a witness' testimony may not be rejected or modified unless the record demonstrates that the findings are arbitrary, capricious or unreasonable, or are not supported by sufficient, competent, credible evidence in the record. N.J.S.A. 52:14B-10(c).

“Credibility involves more than demeanor. It [contemplates] the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence.” Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). “Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances.” State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955) (quoting In re Perrone's Estate, 5 N.J. 514, 522 (1950)).

A fact finder is expected to base credibility decisions on their common sense and life experiences. State v. Daniels, 182 N.J. 80, 99 (2004). Credibility is not dependent on the number of witnesses who appeared, State v. Thompson, 59 N.J. 396, 411 (1971), and a fact finder “is not bound to believe the testimony of any witness, in whole or in part,” State v. Muhammad, 182 N.J. 551, 577 (2005) (internal quotation marks omitted). Rather, they “may reject what in their conscientious judgment ought to be rejected and accept that which they believe to be credible.” Ibid. Testimony may be disbelieved but may not be disregarded at an administrative proceeding. Middletown Twp. v. Murdoch, 73 N.J. Super. 511, 523 (App. Div. 1962). “The interest, motive, bias, or prejudice of a witness may affect [their] credibility and justify the [trier of fact] . . . in disbelieving [their] testimony.” State v. Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952) (internal quotation marks omitted).

Having heard the witnesses’ testimony and observed their demeanors, I **FIND** Harkins’ testimony to be highly credible. He was concise, spontaneous, straightforward, and consistent. Similarly, I **FIND** Kain’s testimony to be highly credible for the same reasons.

I **FIND** William’s testimony to be unreliable. He contradicted his own notarized statement and was snide and combative at the hearing. He did not recognize his own signature and his memory was not intact. I also **FIND** Legenski’s testimony to be unreliable. She was sarcastic, combative, confrontational, and contradicted herself.

I **FIND** Tapp’s testimony to be credible and straightforward. I **FIND** Niedzwiadek’s testimony to be credible, except with respect to his testimony that Rusk was still in training. As Niedzwiadek had to concede, Rusk was fully trained at the time of the incident.

I **FIND** Rusk’s testimony to be not credible. He was evasive, his testimony was irrational, and he denied prior contradictory statements and statements against interest made to Harkins, Kain, and Fooder.

II.

Based upon the foregoing credibility determinations and the competent, credible evidence of record, I further **FIND** the following **FACTS**.

I adopt Harkins' and Kain's testimony in their entireties and therefore **FIND** all of the following as **FACT**. Rusk was on on-call duty on November 27, 2020. He had been fully trained and had been on on-call duty previously. He was obliged to keep the on-call phone with him at all times and to immediately answer all calls and respond to the scene within one hour of receiving the calls. He did not do so. He failed to answer the phone nine times between 12:30 and 12:52 p.m., and he did not return Harkins' calls until 1:21 p.m. Contrary to the one-hour-rule, he did not respond to the scene until 2:00 p.m.—ninety minutes after CCCC's first call. Contrary to Rusk's testimony that there was just "a little puddle" of sewage at the scene, there was actually raw sewage running down a residential street creating a public health and safety hazard.

Whether Rusk was untruthful about the phone being "right next to" him and not ringing, or being on mute, or being "a piece of shit phone," or about his "family emergency," and whether or not the police and an ambulance were called is immaterial. One way or the other, Rusk lied to his superiors about an incident that implicated public health and safety, and I so **FIND**. I also **FIND** that Rusk deliberately deleted the call log record of Harkins' phone calls to the on-call phone.

LEGAL ANALYSIS AND CONCLUSIONS

I.

A civil service employee's rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1 to 4A:10-3.2. The Act is an inducement to attract qualified individuals to public service positions and is to be liberally construed toward attainment of merit appointments

and broad tenure protections. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576, 581 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583, 586 (App. Div. 1972). However, "[t]here 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).

Indeed, a civil service employee who commits a wrongful act related to their employment may be subject to discipline, which may be a reprimand, suspension, or removal from employment, depending upon the incident. N.J.S.A. 11A:1-2c; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2(a). Public entities should not be burdened with an employee who fails to perform their duties satisfactorily or engages in misconduct related to their duties. N.J.S.A. 11A:1-2c. Thus, a public entity may impose major discipline upon a civil service employee, including termination/removal from their position. N.J.S.A. 11A:1-2c; N.J.A.C. 4A:2-2.2(a).

In appeals concerning major disciplinary action such as termination, the appointing authority bears the burden to prove the FNDA charges by a preponderance of the competent credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v Parsekian, 37 N.J. 143, 149 (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) (internal quotation marks 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). OAL hearings on civil service removal appeals are de novo, both as to guilt and the penalty to be imposed. Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980); W. New York v. Bock, 38 N.J. 500, 522, n.1, n.3 (1962).

The Charges

Although the Administrative Code does not specifically define the general causes for major discipline delineated in N.J.A.C. 4A:2-2.3(a), those general causes have been defined by well-established case law.

1. N.J.A.C. 4A:2-2.3(a)1: Incompetency, inefficiency or failure to perform duties

As to the charge of incompetency, inefficiency, or failure to perform duties, in violation of N.J.A.C. 4A:2-2.3(a)1, incompetency has been defined as a “lack of the ability or qualifications necessary to perform the duties required of an individual. . . . [and a] consistent failure by an individual to perform his/her prescribed duties in a manner that is minimally acceptable for his/her position.” Sotomaver v. Plainfield Police Dep’t, CSV 9921-98, initial decision (December 6, 1999), https://njlaw.rutgers.edu/collections/oal/html/initial/csv9921-98_1.html, (internal citation omitted), adopted, Merit Sys. Bd. (January 24, 2000), <https://njlaw.rutgers.edu/collections/oal/final/csv09921-98.pdf>. Inefficiency has been defined as the “quality of being incapable or indisposed to do the things required” of an employee in a timely and satisfactory manner. Glenn v. Twp. of Irvington, 2005 N.J. AGEN LEXIS 35, *2, initial decision (February 25, 2005), adopted, Merit Sys. Bd. (May 23, 2005), <https://njlaw.rutgers.edu/collections/oal/final/csv5051-03.pdf>. Failure to perform duties has been defined as “failure to take an action reasonably anticipated from the duties of the position as set forth in the civil service regulations and job description.” In re Fernandez, Camden County Bd. of Soc. Servs., 2014 N.J. AGEN LEXIS 229, *34, adopted, Comm’r (June 18, 2014), https://njlaw.rutgers.edu/collections/oal/final/csv00652-12_1.html.

In this case, I **CONCLUDE** that the City has met its burden to prove by a preponderance of the competent credible evidence that Rusk was incompetent, inefficient, and failed to perform his duties. Rusk was on on-call duty on the day of the incident—that is, emergent duty—for the benefit of the City’s residents’ public health and safety. He was to be available twenty-four hours per day and to be reachable via the on-call phone at all times. He was to answer calls as they came in. He was to respond to the scene of the sewer back up within one hour of the first call from the CCCC. He did none of those things and missed a total of nine calls to the on-call phone. Regardless of

which of the varying versions of events Rusk relies upon, his conduct was the epitome of incompetency, inefficiency, and failure to perform his duties.

2. N.J.A.C. 4A:2-2.3(a)6: Conduct unbecoming a public employee (dishonesty)

As to the charge of “conduct unbecoming a public employee,” in this charge, dishonesty, in violation of N.J.A.C. 4A:2-2.3(a)6, “conduct unbecoming” is an elastic phrase which encompasses “any conduct which adversely affects the morale or efficiency of [a governmental unit] . . . [or] which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services.” Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998) (quoting In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960)). “[I]t is sufficient that the conduct complained of and its attending circumstances “be such as to offend publicly accepted standards of decency.” Id. at 555 (quoting In re Zeber, 150 A.2d 821, 825 (1959)). Such misconduct need not “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)). “It is well settled that public employees are expected to exhibit appropriate behavior, both on and off the job, in order to project a positive image to the public that they serve and the taxpayers who fund their positions. Any conduct that serves to diminish the public’s trust in the integrity of its employees is intolerable.” In re Green, Dep’t of Human Servs., 2006 N.J. AGEN LEXIS 632, *5 (June 7, 2006).

It is axiomatic that dishonesty constitutes conduct unbecoming a public employee upon whom the public relies for its health and safety. In this case, Rusk was dishonest about why he failed to answer the on-call phone, no matter which, if any, of Rusk’s inconsistent versions of events may be true. Rusk was tasked with protecting the public health and safety of the City’s citizens, which included, among other things, testing the City’s drinking water quality and responding to a sewage backup that flowed down a

residential street. Rusk's supervisors and the City must be able to have complete faith that he will be truthful in performing and reporting such events, to ensure the public health and safety, rather than to further his own personal goals, which appear to include deception concerning evading his public duties. I therefore **CONCLUDE** that the City has met its burden to prove by a preponderance of the competent credible evidence that Rusk engaged in conduct unbecoming a public employee when he was dishonest with his supervisors about why he missed nine calls to the on-call phone.

3. N.J.A.C. 4A:2-2.3(a)6: Conduct unbecoming a public employee (falsification)

For the same reasons, I **CONCLUDE** that the City has met its burden to prove by a preponderance of the competent credible evidence that Rusk engaged in conduct unbecoming a public employee when he falsified the on-call phone log by deleting all of Harkins' calls to him on the day of the incident, presumably to support his initial excuse that the phone "never rang." Again, the overarching concern is public health and safety, not Rusk's personal interest in "covering his tracks" or avoiding his professional duties. If he cannot be trusted to maintain accurate Department records, I have no confidence that he could be trusted to test and accurately report the state of the City's drinking water, which is of grave importance to its citizenry.

4. N.J.A.C. 4A:2-2.3(a)7: Neglect of duty

Neglect of duty has been interpreted to mean "any conduct where an employee neglects to perform an act required by his or her job title or was negligent in its discharge." In re Middleton, 2008 N.J. AGEN LEXIS 62, *6 (Jan 17, 2008). "Neglect of duty can arise from an omission or failure to perform a duty and includes official misconduct or misdoing, as well as negligence. Generally, the term 'neglect' connotes a deviation from normal standards of conduct." In re Holder, 2021 N.J. AGEN LEXIS 217, *69 (July 2, 2021) (citing Kerlin, 151 N.J. Super. at 186). Neglect of duty implies nonperformance of some official duty imposed upon a public employee, not merely the

commission of an imprudent act. Rushin v. Bd. Of Child Welfare, 65 N.J. Super. 504, 515 (App. Div. 1961).

Under these circumstances, I **CONCLUDE** that the City has met its burden to prove by a preponderance of the competent credible evidence that Rusk neglected his on-call duty by failing to answer the on-call phone nine successive times and by failing to respond to the sewer backup scene within one hour of CCCC's first telephone call to him.

5. N.J.A.C. 4A:2-2.3(a)12: Other sufficient cause

Other sufficient cause has been described as other conduct not specifically delineated in N.J.A.C. 4A:2-2.3(a) which would violate "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." In re Boyd, Cumberland County Dep't of Corrs., 2019 N.J. CSC LEXIS 621, *115 (July 3, 2019), adopted Comm'r, id. at 1-2 (Aug. 14, 2019). N.J.A.C. 4A:2-2.3(a)12 is essentially a catchall provision for why an employee may be subject to major discipline. "An appointing authority may discipline an employee for sufficient cause, including failure to obey laws, rules and regulations of the appointing authority." In re Mumford, 2014 N.J. CSC LEXIS 478, *33, final decision, (June 5, 2014). Although the "other sufficient cause" was not specifically delineated in the FNDA, Kain credibly testified that the City's employee manual prohibits "[f]alsification of public records, including attendance and other personnel records." (J-5). As stated in my factual findings and discussed immediately above, Rusk violated the City's mandate against such conduct by deleting the record of Harkins' calls to the on-call phone, which demonstrates "other sufficient cause."

I therefore **CONCLUDE** that the City has met its burden to prove by a preponderance of the competent credible evidence that Rusk's misconduct constituted other sufficient cause for discipline.

II.

Once a determination has been made that an employee violated a statute, rule, or regulation concerning their employment, the concept of progressive discipline requires consideration. In re Stallworth, 208 N.J. 182, 195-96 (2011); Bock, 38 N.J. at 523. When deciding what disciplinary action is an appropriate penalty, the fact finder shall consider the nature of the sustained charges and the appellant's past record. Bock, 38 N.J. at 523-24. The employee's past record is said to encompass their reasonably recent history of promotions or commendations on the one hand, and on the other hand, any "formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated . . . by having been previously called to the attention of and admitted by the employee." Ibid. Consideration as to the timing of the most recently adjudicated disciplinary history should also be given. Id. at 524.

However, the theory of progressive discipline is not a fixed rule to be followed without question. In re Carter, 191 N.J. 474, 484 (2007). "[S]ome disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." Ibid. The question for the fact finder is whether the disciplinary action is so disproportionate to the offense, considering all the circumstances, to shock one's sense of fairness. Ibid. Removal has been upheld where the acts charged, with or without a prior disciplinary history, have warranted imposition of that sanction. Ibid. Hence an employee may be removed, without regard to progressive discipline, if their conduct was egregious. Ibid.; In re Herrmann, 192 N.J. 19, 33-34 (2007). Indeed, progressive discipline "is not a necessary consideration when . . . it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest." Herrmann, 192 N.J. at 33.

In light of my legal conclusions on the sustained charges, I **CONCLUDE** that Rusk's misconduct was so egregious as to warrant automatic removal, without regard to progressive discipline, because his misconduct implicated and jeopardized the City's

public health and safety. However, even if the concept of progressive discipline were applied, I **CONCLUDE** that Rusk's misconduct in this case warrants removal.

Rusk's prior disciplinary history includes a January 23, 2020 sixty-day suspension from the City's Highway Department which was triggered by Rusk bringing a City mowing tractor to his home and mowing his lawn "on company time." A concerned citizen took a picture of Rusk mowing his lawn with City equipment and posted it on Facebook. During his testimony in the present matter, Rusk claimed that he took the tractor home to "check on" his daughter, and that his supervisor knew that he was taking the tractor to his residence. Rusk then facetiously denied that he mowed his lawn with the tractor, notwithstanding the picture on Facebook and the FNDA which was issued after a litigated departmental hearing sustaining all the charges, including that "the tractor was in use mowing the grass." (J-9). Rusk did not contest and appeal from that disciplinary finding and penalty at the OAL.

After he served his sixty-day suspension, Rusk either voluntarily transferred or was transferred to the Department in March of 2020. Notably, only eight months later, Rusk committed the charged misconduct in this matter. Under the totality of the facts and circumstances in this case, and Rusk's recent and significant prior disciplinary history, I **CONCLUDE** that termination is the only appropriate penalty, both under the egregious misconduct and progressive discipline standards.

ORDER

It is therefore **ORDERED** that the charges in the March 29, 2021 FNDA are hereby **SUSTAINED**; and it is further

ORDERED that Rusk be and is hereby removed from his position in the Department, effective January 14, 2021; and it is further

ORDERED that Rusk's petition of appeal is hereby **DISMISSED**.

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.



October 12, 2021
DATE

SARAH H. SURGENT, ALJ

Date Received at Agency:

October 12, 2021 (emailed)

Date Mailed to Parties:

SHS/mel

APPENDIX

Witnesses

For Appellant:

William H. Rusk, Sr.
Ellamary Rusk Legenski
Robert Tapp
Michael Niedzwiadek
William Rusk, Jr.

For Respondent:

Daniel Harkins
Thomas Kain

Exhibits

Joint Exhibits:

- J-1 PNDA dated January 15, 2021
- J-2 Call log for Harkins' City-issued work phone ending in digits 1556
- J-3 Photograph of on-call cellular telephone log
- J-4 Rusk's time card for November 27, 2020
- J-5 City employee discipline policy
- J-6 Not in evidence
- J-7 FNDA dated March 29, 2021
- J-8 PNDA dated November 6, 2019
- J-9 FNDA dated January 23, 2020

For Appellant:

A-1 Notarized letter of William Rusk, Sr., dated June 20, 2021

A-2 Notarized letter of Ellamary Rusk Legenski, dated June 20, 2021