

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 30TH DAY OF JUNE, 2021



Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Allison Chris Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

**IN THE MATTER OF DENNIS L.
TOWNSEND, MONMOUTH COUNTY,
DEPARTMENT OF PUBLIC WORKS AND
ENGINEERING, RECLAMATION DIVISION.**

OAL DKT. NO. CSV 11869-18
AGENCY DKT. NO. 2019-336

Barry D. Isanuk, Esq., for appellant (Isanuk Law Firm, attorneys)

**Steven W. Kleinman, Special County Counsel, for respondent (Michael D.
Fitzgerald, Monmouth County Counsel, attorney)**

Record Closed: September 30, 2020

Decided: April 29, 2021

BEFORE: CARL V. BUCK, III, ALJ:

STATEMENT OF THE CASE

Appellant, Dennis Townsend (Townsend) appeals his removal effective August 3, 2018, from his employment with the Monmouth County Department of Public Works and Engineering, Reclamation Division (Monmouth) as a Heavy Equipment Operator. Appellant was charged with:

1. N.J.A.C. 4A:2-2.3(a) 1. Incompetency, inefficiency, or failure to perform duties;
2. Insubordination; 6. Conduct Unbecoming; 7. Neglect of duty; 12. Other sufficient cause.

2. Violation of Monmouth County Policy 701 Employee Conduct and Work Rules of the County.
3. Violation of Monmouth County Policy 502 regarding Work Schedules.
4. Violation of Monmouth County Policy 307 regarding sick leave benefits.
5. Violation of Monmouth County Policy 104 regarding Business Ethics and Conduct.

PROCEDURAL HISTORY

On or about April 24, 2018, appellant was served with a Preliminary Notice of Disciplinary Action (PNDA). On or about May 10, 2018, a departmental hearing was held, and a Final Notice of Disciplinary Action was thereafter served upon appellant on August 3, 2018.

This matter was filed with the Office of Administrative Law on August 16, 2018, for determination as a contested case, pursuant to N.J.S.A. 40A:14-202d; N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A hearing was held on April 3, 2019, April 17, 2019, October 21, 2019, and February 21, 2020. Closing briefs were to be submitted on April 10, 2020, however due to the impact of COVID-19 closings, the parties requested additional time to make their submissions, which time extensions were granted. Briefs were submitted and the record closed on September 30, 2020.

FACTUAL DISCUSSION AND FINDINGS

1. Appellant was employed as a Heavy Equipment Operator at the Monmouth County Reclamation Division under the Monmouth County Department of Public Works and Engineering.
2. He had worked for Monmouth County for eighteen years.
3. On March 21, 2018 he called in late and did report for work.
4. On March 22, 2018 he called in sick and did not report to work.
5. Upon his return to work on March 23, 2018, he was advised he wouldn't receive pay for March 21, 2018 and was put on the litter patrol.
6. On April 24, 2018, a preliminary notice of disciplinary action was sent to Townsend.
 - a. A departmental hearing was held on May 10, 2018.
 - b. Townsend was given a final notice of disciplinary action on August 3, 2018.
 1. The charges were N.J.A.C. 4A:2-2.3(a) 1. Incompetency, inefficiency, or failure to perform duties; 2. Insubordination; 6. Conduct Unbecoming; 7. Neglect of duty; 12. Other sufficient cause.
 2. Violation of Monmouth County Policy 701 Employee Conduct and Work Rules of the County.
 3. Violation of Monmouth County Policy 502 regarding Work Schedules.
 4. Violation of Monmouth County Policy 307 regarding sick leave benefits.
 5. Violation of Monmouth County Policy 104 regarding Business Ethics and Conduct.

7. The basic specifications set forth was that on March 21, 2018 and March 22, 2018 he did not report for duty during a major snow event. It noted that on March 21, 2018 he sent a text message.
 - a. On March 22, 2018 he called in sick. It noted that as a result of his failure to report on March 21, 2018 his pay status was without pay; and he was temporarily placed on the grounds crew because of unauthorized absence, insubordination, undependability and complete disregard for a mandatory directive given by Mr. Dryer.
8. The specification further stated that a review of his attendance showed that during other snow events he called in sick and/or was out on vacation.
 - a. It also referred to statements taken by the Office of Professional Standards (OPS). The basis for the removal according to the final notice of disciplinary action was
 1. A blatant disregard for established policy and procedure.
 2. Insubordination by failing to follow a reasonable directive.
 3. Conduct contrary to last chance agreement.
 4. Failure to perform duties as a Heavy Equipment Operator.
 5. Exposing Monmouth County to potential liability.

As a result, Mr. Townsend was removed as of August 3, 2018.

LEGAL ANALYSIS AND CONCLUSION

The appellant's rights and duties are governed by laws including the Civil Service Act and the regulations promulgated thereunder. A civil service employee who commits a wrongful act related to his or her employment, or provides other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6, -20; N.J.A.C. 4A2-2.2, -2.3. 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, failure or inability to perform duties, chronic or excessive absenteeism or lateness; 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 be applied. West New York v. Bock, 38 N.J. 500 (1962).

The Appointing Authority has the burden of establishing the truth of the allegations by preponderance of the credible evidence. 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) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Charges Outlined in the FNDA

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. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant, and 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); In re Polk, 90 N.J. 550, 560 (1982). 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). 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, 49 (1975). Both guilt and penalty are redetermined on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571, 575-76 (1980).

Here, the appellant has been charged in an FNDA with chronic/excessive absenteeism, N.J.A.C. 4A: 2-2.3(a)4, conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)6, and other sufficient cause, N.J.A.C. 4A: 2-2.3(a)12 for violating DHSOA A.4, chronic or excessive absenteeism.

Under N.J.A.C. 4A:2-2.3(a)4, an employee may be subject to discipline for chronic or excessive absenteeism. While there is no precise number that constitutes "chronic," it is generally understood that chronic conduct is conduct that continues over a long time or recurs frequently. Good v. N. State Prison, 97 N.J.A.R.2d (CSV) 529, 531. Courts have consistently held that excessive absenteeism need not be accommodated, and that attendance is an essential function of most jobs. See, e.g., Muller v. Exxon Research and Eng'g Co., 345 N.J. Super. 595, 605-06 (App.Div. 2001); Svarnas v. AT&T Communications, 326 N.J. Super. 59, 78 (App.Div. 1999) ("[a]n employee who does not come to work cannot perform any of her job functions, essential or otherwise").

In general, employers cannot be expected to find a way to accommodate the unpredictable nature of an employee's sporadic and unscheduled absences. Svarnas, 326 N.J. Super. at 77. As noted by the New Jersey Supreme Court, "just cause for dismissal can be found in habitual tardiness or other similar conduct." West New York v. Bock, 38 N.J. 500, 522 (1962). While a single instance may not be sufficient, "numerous occurrences over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference amounting to neglect of duty." Id. As the Appellate Division summarized, "[w]e do not expect heroics, but 'being there,' i.e. appearing for work on a regular and timely basis is not asking too much" of an employee. State-Operated School District of Newark v. Gaines, 309 N.J. Super. 327, 333 (App.Div. 1998).

It is undisputed that appellant has either called out late for being tardy or called out late for being sick from work on at least five occasions since October 25, 2015^{1, 2}.

The appellant, in this matter, responds that he suffers lingering effects from an automobile accident and resulting coma in 2010. Further, he states he is suffering negative psychological effects from the sickness and death of his step-father which occurred on February 26, 2018 (some two weeks after the incident which gave rise to his removal). Even accepting the appellant's claim that his absences are related to various health issues does not raise a disputed issue of material fact since employees may be

¹ October 25, 2015, October 29, 2015, January 28, 2016, January 30, 2016 and February 11, 2016.

² There have been other instances of this violation prior to October 27, 2015.

subject to discipline for chronic/excessive absenteeism even if that excessive absenteeism is related to an illness or disability. See, e.g., Muller v. Exxon Research and Eng'g Co., 345 N.J. Super. 595, 605-06 (App. Div. 2001) (under the NJLAD, excess absenteeism need not be accommodated even if it is caused by a disability otherwise protected by the Act). An employee who does not show up for work does not satisfy the essential functions of their employment and cannot perform their workplace duties. Svarnas, 326 N.J. Super. at 78. As the Civil Service Commission has previously noted:

[E]xcessive absenteeism is not necessarily limited to instances of bad faith or lack of justification on the part of the employee who was frequently away from her job. After reasonable consideration is given to an employee by an appointing authority, the employer is left with a serious personnel problem, and a point is reached where the absenteeism must be weighed against the public right to efficient and economic service. An employer is entitled to be free of excessive disruption and inefficiency due to an inordinate amount of employee absence. Terrell v. Newark Housing Authority, 92 N.J.A.R.2d (CSV) 750, 752.]

See also Frank Bellamy v. Township of Aberdeen, Department of Public Works, 96 N.J.A.R.2d (CSV) 770 (excessive employee absences, even with good cause, impair the work of the political subdivision employer and may justify an employee's removal); Clifford Luckey v. Department of Public Works, Borough of Lindenwold, 96 N.J.A.R.2d (CSV) 266 (sustaining removal of civil service employee for excessive absences even though employee was "debilitated by an occasional illness, and by a continuing addiction to substance abuse" related to absences); Johnny LaBour v. Housing Authority of the City of Paterson, 95 N.J.A.R.2d (CSV) 682 (sustaining removal of civil service employee for excessive absences related to medical and substance abuse problems); Frank Weil v. Atlantic County Department of Public Safety, 97 N.J.A.R.2d (CSV) 413 (removal appropriate for excessive unauthorized absences even if those absences are related to medical condition). The respondent, like any governmental entity, "has the right to expect that its employees will report to work and perform the duties and functions assigned to them." Id. To permit employees to fail to report to work when they are required to do so "would create chaos in carrying out essential government functions and would greatly harm public officials in their attempts to carry out their duties and responsibilities." Id.

In judging whether an employee's absenteeism is chronic or excessive, relevant factors include, among others, the number of absences, the time span between the absences, and the negative impact on the workplace. See Harris v. Woodbine Developmental Ctr., CSV 4885-02, Initial Decision, (February 11, 2003), adopted, Comm'r (March 27, 2003) <http://njlaw.rutgers.edu/collections/oal/>; Hendrix v. City of Asbury, CSV 10042-99, Initial Decision, (April 10, 2001), adopted, Comm'r (June 8, 2001) <http://njlaw.rutgers.edu/collections/oal/>; Morgan v. Union Cnty. Runnells Specialized Hosp., 97 N.J.A.R.2d (CSV) 295. It is factually undisputed that, between October 25, 2015 and February 11, 2016, the appellant called off from work five times. The appellant's employer had a right to expect that he would be present at work as scheduled, willing, and able to perform the job for which he had been employed. The respondent is not obligated to continue to employ a person who either cannot or will not perform his job duties on a regular basis. Accordingly, I **CONCLUDE** that the respondent has demonstrated, by a preponderance of credible evidence, that the appellant's conduct constitutes a violation of N.J.A.C. 4A:2-2.3(a)(4) (Chronic and Excessive Absenteeism), and that such charge must be **SUSTAINED**.

The appellant was also charged with conduct 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 of efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998). See also In re Emmons, 63 N.J. Super. 136, 140 (App.Div. 1960). 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 Department of Ridgewood, 258 N.J. Super. 32, 40 (App.Div. 1992) (quoting Asbury Park v. Dep't of Civil Service, 17 N.J. 419, 429 (1955)).

The appellant's attendance record demonstrates a pattern of chronic/excessive absenteeism. Such an attendance record evidences "an attitude of indifference

amounting to neglect of duty.” Bock, 38 N.J. at 522. I **CONCLUDE**, therefore, that the appellant’s conduct did rise to a level of conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6) and the respondent has met its burden of proof to sustain this charge. This charge must, therefore, be **SUSTAINED**.

The appellant has further been charged with violating N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause—specifically, a violation of DHS AO 4:08, “Tardiness/ Lateness”. HDC’s administrative procedures define tardiness “as the failure by an employee to report for duty at a re-determined time and after the scheduled start of the work assignment.” (J-3.) It is factually uncontested that appellant violated this policy on five occasions between October 25, 2015 and February 11, 2016. I **CONCLUDE**, therefore, that the respondent has met its burden of proof to sustain this charge and this charge must be **SUSTAINED**.

PENALTY

The Civil Service Commission may increase or decrease the penalty imposed by the appointing authority, though removal cannot be substituted for a lesser penalty. N.J.S.A. 11A:2-19. When determining the appropriate penalty, the Board must utilize the evaluation process set forth in West New York v. Bock, 38 N.J. 500 (1962), and consider the employee’s reasonably recent history of promotions, commendations, and the like (if any), as well as formally adjudicated disciplinary actions and instances of misconduct informally adjudicated. Since Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct: to support the imposition of a more severe penalty for a public employee who engages in habitual misconduct, and to mitigate the penalty for a current offense. In re Herrmann, 192 N.J. 19, 30–33 (2007).

“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). An employee’s poor disciplinary record

can “support an appointing authority's decision to rid itself of a problematic employee based on charges that, but for the past record, ordinarily would have resulted in a lesser sanction.” In re Anthony Stallworth, 208 N.J. 182, 196 (2011) (quoting In re Herrmann, 192 N.J. at 32). “[T]he concept of progressive discipline can be utilized to ‘ratchet up’ or support [the] imposition of a more severe penalty for a public employee who engages in habitual misconduct.” Stallworth, 208 N.J. at 196 (quoting In re Herrmann, 192 N.J. at 30-33)).

While the proposed sanction of removal in this matter is harsh, this sanction must be viewed in light of the appellant's prior history of discipline. It is undisputed that this incident is at least the fifth time the appellant has been subject to discipline for chronic/excessive absenteeism in the period October 25, 2015 to February 11, 2018. Each of these prior disciplinary actions employed escalating penalties for the appellant's conduct ranging from five working days suspension (J-5) to dismissal (J-6). His last disciplinary action resulted in Townsend signing a “Last Chance Agreement” which required him to accept a 48-day suspension “on the record” and required appellant to strictly comply with the County's rules, regulations, and policies. Appellant agreed that for the remainder of his County employment, if any future disciplinary action was sustained against him (unless the County exercised its discretion to seek only minor disciplinary action³), the only penalty to be imposed would be immediate removal from employment. Appellant was not precluded from seeking Commission review as to whether or not he committed the alleged disciplinary violation in the first place, but contractually agreed not to challenge the disciplinary penalty of removal in any forum whatsoever.

The validity of the Last Chance Agreement is not in question, and appellant signed it knowingly and with the assistance of a union representative.

The New Jersey Supreme Court has held in these instances that when an employee does not perform as contemplated by the parties in a last chance agreement, discharge is warranted. Watson v. City of East Orange, 175 N.J. 442 (2003). As the

³ Specifically, a suspension of five or less days, or an official reprimand, as provided by N.J.A.C. Title 4A.

Court explained, “[a] contrary conclusion likely would chill employers from entering into last chance agreements to the detriment of future employees.” *Id.* at 445-446; see also Golson–El v. Runyon, 812 F. Supp. 558, 561 (E.D.Pa.) (construing last chance agreements in favor of employers because to do otherwise would “discourage their use by making their terms meaningless”), aff’d, 8 F.3d 811 (3d Cir.1993).

In In re Rice, A-2185-11T1, 2013 WL 1688356 (App. Div. 2013), the Appellate Division, in an unreported decision, went so far as to affirm a last chance agreement that precluded any administrative appeal to the Commission whatsoever, including whether a disciplinary violation had occurred in the first place. Instead, under the agreement, the employee was entitled to a departmental hearing only. The employee then was terminated for time and attendance violations and sought Commission review notwithstanding the terms of the last chance agreement. The Commission refused to accept the appeal, noting that the employee entered into the last chance agreement knowingly and voluntarily. The Appellate Division affirmed the Commission’s refusal, noting that “once the parties agreed on the essential terms ‘and manifest[ed] an intention to be bound by those terms, they have created an enforceable contract.’” *Id.*, slip op. at 3 (citing Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992)). The Appellate Division concluded:

The Commission, like a court, cannot rewrite contracts to favor a party, for the purpose of giving that party a better bargain. Relief is not available merely because enforcement of the contract causes oppression, improvidence, or because it produces hardship to one of the parties. Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 223 (2005). Neither an agency nor a court can “abrogate the terms of a contract’ unless there is a settled equitable principle, such as fraud, mistake, or accident, allowing for such intervention.” *Id.* at 223–24 (quoting Dunkin’ Donuts of America, Inc. v. Middletown Donut Corp., 100 N.J. 166, 183–84 (1985)). The record is bereft of any such evidence.

Id., slip op at 5.

Respondent cites the Shields case and here the appellant's conduct was more far reaching than that in Shields. Appellant's conduct cannot be excused as he stated that he told his supervisor he believed he could ignore their directives to report to work during a weather emergency.

Based upon a consideration of the totality of the evidence, with due consideration of appellant's prior disciplinary record, and taking into consideration the concerns expressed by the appellant, I am nonetheless constrained to **CONCLUDE** that sufficient cause was established by the respondent to warrant appellant's removal from his position with Monmouth County.

DECISION AND ORDER

Based upon the foregoing, in light of the facts and the law, the appellant's appeal is **DISMISSED**, and the penalty of removal is **AFFIRMED**.

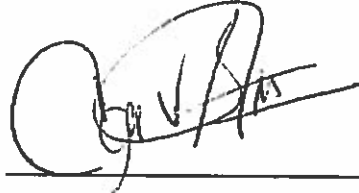
I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

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.

April 29, 2021

DATE



CARL V. BUCK III, ALJ

Date Received at Agency:

April 29, 2021

Date Mailed to Parties:

CVB/cb

APPENDIX

WITNESSES

For appellant:

Brian Butterfield

Kevin Tauro

For respondent:

Thomas Dreyer

Michael Pattman

Thomas Dreyer

Edward Curran

David Morris

EXHIBITS

For appellant:

- A-1 Snow Removal List
- A-2 MCRC Attendance Policy, Revised/Effective July 21, 2003
- A-3 716 Progressive Discipline
- A-4 510 Emergency Closings
- A-5 510 Emergency Closings
- A-6 Memorandum from Thomas Dreyer, The Board of Chosen Freeholders of the County of Monmouth, Department of Public Works and Engineering, to Reclamation Center Employees of Landfill Division/Grounds Maintenance Division, Call in Procedure for Sick and Emergency personal, dated May 17, 2018
- A-7 Bulletins – GovDelivery, dated October 25, 2018
- A-8 Letter to Appellant from William J. Walsh, D.C., Brick Pain Relief and Wellness Institute, LLC, Regarding Medical Records Request and

Authorization for Absence from Work Due to lower Back Injury While Shoveling Snow, dated October 24, 2018

- A-9 Public Works and Engineering, Policy/Procedure, Issuing Number: 6, Memorandum to All Public Works Division, Subject: Call in, Abuse of Sick Leave and Tardiness, Issued by James Cerreta-Senior Management Assistant, Approved by John W. Tobia, Director, Effective Date: January 1, 2010
- A-10 Attendance Records Division #2-3, Dated March 21, 2018 and Mach 22, 2018
- A-11 Medical Records

For respondent:

- R-1 Monmouth County Department of Human Resources, Office of Professional Standards, Final Notice of Disciplinary Action, dated August 3, 2018
- R-2 Monmouth County Department of Human Resources, Office of Professional Standards, Preliminary Notice of Disciplinary action, dated April 24, 2018
- R-3 Monmouth County Department of Human Resources, Office of Professional Standards, Minor Disciplinary Action Notice of Hearing, dated June 2, 2017
- R-4 Email from Joseph Santora to Glen Talavera, Subject: FW: Dennis Townsend – No Call No Show on March 21, 2018, dated March 27, 2018
- R-5 Text Message Regarding No Call No Show, dated March 22 and March 28, 2018
- R-6 Appellant's Time Clock Record, January 2018; and Storm Alters Email from Joseph Santora and Glen Talavera, March 27, 2018
- R-7 Appellant's Authorization for Absence, William J. Walsh, D.C., Brick Pain Relief and Wellness Institute, LLC, dated March 27, 2018
- R-8 Monmouth County Department of Human Resources, Office of Professional Standards, Witness/Confidentiality Acknowledgement of Dennis Townsend, OPS Conference Room, dated April 12, 2018
- R-9 An Employee Guide to Policies, Benefits and Services, The County of Monmouth, Issue Date October 2006
- R-10 New Jersey Civil Service Commission, Job Specification, Heavy Equipment Operator, July 26, 2016, dated April 2, 2019

- R-11 Major Disciplinary Action Notice of Hearing, County of Monmouth, dated May 25, 2007
- R-12 Notice of Minor Disciplinary Action, County of Monmouth, dated July 2004
- R-13 Notice of Minor Disciplinary Action, County of Monmouth, dated December 2003
- R-14 Notice of Major Disciplinary Action, County of Monmouth, dated October 2003
- R-15 Respondent's Request for Admissions to Appellant with Supporting Documents, dated October 10, 2018
- R-16 Notice of Counseling, County of Monmouth, dated May 2015
- R-17 Recipients of Emergency Message Sent on January 4, 2018 at 8:00 a.m.
- R-18 Monmouth County Department of Human Resources, Office of Professional Standards, Witness/Confidentiality Acknowledgement of Dennis Townsend, dated April 12, 2018
- R-19 Minor Disciplinary Action, Notice of Hearing, dated January 2009

Angiulo, Nicholas (CSC)

From: Kleinman, Steve <Steve.Kleinman@co.monmouth.nj.us>
Sent: Wednesday, May 26, 2021 12:07 PM
To: Angiulo, Nicholas (CSC); bisanuk@optonline.net
Cc: Myers, Allison Chris (CSC); Messina, JoAnn (CSC); Berdecia, Christina (OAL)
Subject: [EXTERNAL] RE: Townsend v. Monmouth County Public Works; OAL Docket No. CSV-11869-2018S
Attachments: Townsend v. Monmouth CSV 11869-18 Executed Settlement.pdf

To the Civil Service Commission and or Office of Administrative Law (ALJ Buck):

I represent Monmouth County in the above-noted disciplinary removal matter pending before the Civil Service Commission. On or about April 29, 2021, Judge Buck issued his Initial Decision in this matter affirming the removal of the Appellant, Dennis Townsend. As per the below e-mail, the Commission granted my adversary, Barry Isanuk (copied on this e-mail) an extension to submit his exceptions until this Friday, May 28, 2021.

Of particular note, the County agency where Mr. Townsend worked recently privatized its operations. Accordingly, the parties determined that there is no need for continued litigation and entered into the attached settlement agreement that would provide Mr. Townsend's employment record would reflect a general resignation in lieu of a disciplinary removal.

Typically, prior to the issuance of an Initial Decision, a settlement agreement of this nature would be presented to the ALJ for his/her approval before being submitted to the Commission for final agency action. It is not clear to me whether ALJ approval is still required at this stage of the matter. As such, Mr. Isanuk and I are submitting this to both the Commission and Judge Buck for whatever action would be appropriate to effectuate the settlement.

Can you please confirm receipt of this e-mail and how the matter should be addressed? Further, I would need to know where the original agreement should be sent, if the PDF version is not sufficient. And it goes without saying that if there is any issue with the settlement, it is not the County's intention to prejudice Mr. Isanuk's ability to submit exceptions, in the unlikely event that should be necessary.

I appreciate your guidance in this matter.

Steven Kleinman
Special Counsel to the County of Monmouth
Hall of Records
1 East Main Street, Room 236
Freehold, NJ 07728
Phone: (732) 683-8990
Fax: (732) 409-4820

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From: Angiulo, Nicholas (CSC) <Nicholas.Angiulo@csc.nj.gov>
Sent: Monday, May 10, 2021 6:19 PM
To: bisanuk@optonline.net
Cc: Myers, Christopher (CSC); Messina, JoAnn (CSC); Kleinman, Steve
Subject: RE: [EXTERNAL] Townsend v. Monmouth County Public Works; OAL Docket No. CSV-11869-2018S

Mr. Isanuk:

Your request is granted.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
Civil Service Commission

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From: ISANUK [<mailto:bisanuk@optonline.net>]
Sent: Monday, May 10, 2021 1:59 PM
To: Myers, Christopher (CSC) <Christopher.Myers@csc.nj.gov>
Cc: Kleinman, Steve <Steve.Kleinman@co.monmouth.nj.us>; Kevin Tauro <ktauro@cwa1075.org>
Subject: [EXTERNAL] Townsend v. Monmouth County Public Works; OAL Docket No. CSV-11869-2018S

Mr. Myers,
Please see my attached letter.
Thank you,
Barry D. Isanuk, Esq.

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SETTLEMENT AGREEMENT AND COMPLETE RELEASE

This Settlement Agreement and Complete Release (“Agreement”) is entered into this **26th day of May, 2021**, and is by and between the County of Monmouth (“County”), Dennis Townsend (“Townsend” or “Employee”), and CWA Local 1075 (“Union”).

RECITALS

WHEREAS, Townsend was employed by the County as a Heavy Equipment Operator in the Monmouth County Department of Public Works and Engineering, Reclamation Division, and is represented by the Union in this matter; and,

WHEREAS, on April 24, 2018, the County issued Townsend a Preliminary Notice of Disciplinary Action (DPF-31A) (the “Disciplinary Action”) relating to his actions during an adverse weather event on March 21 and March 22, 2018; and,

WHEREAS, the Disciplinary Action alleged Townsend violated N.J.A.C. 4A:2-2.3(a)(1), (2), (6), (7) and (12) and County Policies 104, 307, 502, and 701; and,

WHEREAS, because Townsend was subject to a “Last Chance Agreement” at the time of the Disciplinary Action, the County sought his removal from employment; and,

WHEREAS, following a departmental hearing conducted on May 10, 2018, the charges alleged in the Disciplinary Action were sustained and Townsend was removed from employment on August 3, 2018; and;

WHEREAS, Townsend timely filed an appeal of his removal to the New Jersey Civil Service Commission (“Civil Service Commission”), which was transmitted to the Office of Administrative Law (“OAL”) for hearing as a contested case under docket number CSV 11869-18; and,

WHEREAS, an Initial Decision in the appeal was issued by A.L.J. Carl V. Buck on April 29, 2021 affirming Townsend's removal; and,

WHEREAS, given the Monmouth County Reclamation Center is no longer operated by the County and Townsend has secured other employment, the parties agree that there is no further purpose in continuing the litigation and have determined that the most expeditious way to promptly and amicably resolve this matter is for the County to accept Townsend's general resignation and to mutually request the Civil Service Commission approve a settlement in this matter; and

WHEREAS, based on the foregoing, the County, Union and Townsend desire to resolve all outstanding issues with respect to the aforementioned Disciplinary Action.

NOW, THEREFORE, in consideration of the promises and conditions set forth herein, the adequacy of which is hereby acknowledged, the County, Union and Townsend hereby agree as follows:

1. RESOLUTION OF THE DISCIPLINARY ACTION AND GENERAL RESIGNATION OF DENNIS TOWNSEND.

The County, Union and Townsend hereby agree as follows:

a. Townsend agrees that his execution of this Agreement shall represent his irrevocable resignation from employment with the County, effective and retroactive to August 3, 2018.

b. Townsend's separation from employment shall be recorded as a "general resignation" as that term is defined in the Civil Service Commission's regulations as codified in N.J.A.C. Title 4A.

c. Given Townsend's decision to submit his general resignation, the parties agree to amicably conclude the ongoing proceedings at the OAL and Civil Service Commission

prior to any decision on the merits of the case, and will mutually take whatever action is necessary and appropriate to conclude this matter in accordance with the terms of the Agreement.

d. The parties specifically recognize that by submitting his resignation, Townsend is not admitting in any way that the allegations contained in the Disciplinary Action are accurate. The parties further agree that the facts and legal conclusions reached by ALJ Buck, as set forth in his Initial Decision, should not be deemed a definitive account of the events underlying the Disciplinary Action. The parties specifically note for the record that the Civil Service Commission never reached a final agency decision as to the matter and absent this Agreement Townsend intended to file exceptions to the facts and legal conclusions set forth in ALJ Buck's Initial Decision.

e. Townsend agrees that after his separation from County employment on August 3, 2019, he will not apply for, nor will he accept any employment with the County, or any of the County's agencies or instrumentalities (as that term is defined by New Jersey law). However, this provision is not intended to limit in any way Townsend's ability to seek either public or private employment other than with the County or its agencies or instrumentalities.

f. Each party shall bear its own costs and expenses with respect to the events, information or disputes giving rise to this matter, as well as the negotiation and execution of this Agreement, including attorney's fees, if any.

g. The County shall ensure its personnel and other records conform to the terms of the Agreement, including specifically that Townsend has resigned from County

employment, rather than was removed as a result of disciplinary action. All internal County records will remain intact.

2. COMPLETE RELEASE AND RELINQUISHMENT OF CLAIMS.

In consideration of the settlement hereinabove, and to the fullest extent permissible by law, Townsend, along with his successors, assigns, heirs, representatives and estates (collectively, “**Releasor**”), agrees to irrevocably and unconditionally relinquish any and all causes of Action, demands or claims, including claims for attorney’s fees and costs, Releasor had, has or may have from the beginning of time up to the date this Agreement is executed against the County of Monmouth and all of its elected and appointed officials, officers, agents, employees, agencies and instrumentalities (collectively, “**Releasees**”), regardless of whether such claims are presently known or unknown to Releasor. This full and unconditional relinquishment and release of claims includes, but is not limited to, any causes of action, demands or claims relating in any way to Townsend’s employment with the County, including the events, information or disputes giving rise to this matter, the Disciplinary Action or the Agreement.

This full release also specifically includes, but is not limited to, matters arising at common law, such as breach of contract, expressed or implied, promissory estoppel, wrongful discharge, tortious interference with contractual rights, infliction of emotional distress, defamation and any other common-law tort.

This full release also specifically includes, but is not limited to, matters arising under federal, state or local laws, statutes, regulations, ordinances, orders or policies, including, but not limited to, the United States Constitution, the federal Fair Labor

Standards Act, the federal Employee Retirement Income Security Act of 1974 (ERISA), the federal Family and Medical Leave Act (FMLA), the federal Equal Pay Act, the federal Civil Rights Act of 1866, Title VII of the federal Civil Rights Act of 1964, the federal Civil Rights Act of 1991, the federal Age Discrimination and Employment Act (ADEA), the federal Older Workers Benefit Protection Act (OWBPA), the federal Rehabilitation Act of 1973, the federal Americans With Disabilities Act (ADA), the New Jersey Constitution, the New Jersey Conscientious Employee Protection Act (CEPA), the New Jersey Law Against Discrimination (NJLAD), the New Jersey Family Leave Act, and the New Jersey Civil Rights Act.

This full release also specifically includes, but is not limited to, claims for reemployment by contract or recall rights, compensatory damages, punitive damages, reinstatement, back pay, overtime compensation, back benefits, back emoluments, seniority credit, attorneys' fees, equitable relief, or any other relief.

This full and unconditional release does not prevent, and is not intended to prevent, Townsend from making an allegation of discrimination to the U.S. Equal Employment Opportunity Commission ("EEOC"), the New Jersey Division on Civil Rights ("NJDCR") or any other state or local civil rights agency. However, Releasor irrevocably waives any right to receive any monetary relief or any other compensation whatsoever in connection with the prosecution of a charge or suit brought on Townsend's behalf by the EEOC, NJDCR, or any other third party such as another federal, state or local governmental agency or entity.

Nothing in this release shall apply to any vested benefits or any claim to determine or enforce rights with respect to said benefits, nor with respect to any claim filed under the New Jersey Workers Compensation Act.

3. **OLDER WORKERS BENEFIT PROTECTION ACT REVOCATION PERIOD.**

This Agreement is intended to comply with the federal Older Workers Benefit Protection Act (OWBPA), and Townsend acknowledges he specifically is waiving rights and claims under the OWBPA. Therefore, this Agreement and Release shall not be effective nor shall any payments hereunder be made, until the expiration of the seven (7) day revocation period set forth in the OWBPA.

4. **ACKNOWLEDGEMENT.**

Townsend acknowledges that this Agreement shall resolve all issues related to this matter and that he has had the right and opportunity to discuss all aspects of this Agreement with his chosen representation prior to entering into it and that he has availed himself of this right, that he has carefully read and fully understands all of the provisions of this Agreement, and that he is entering into this Agreement knowingly and voluntarily in exchange for good and valuable consideration.

5. **UNION REPRESENTATION.**

Townsend acknowledges that he has been advised by his Union representation of his options in this matter, by and through its attorney Barry Isanuk, Esq., including Townsend's right to have Judge Buck's Initial Decision reviewed by the Civil Service Commission and thereafter the Superior Court of New Jersey. Understanding the foregoing, Townsend certifies that (1) he is satisfied with the representation the Union has provided his in this matter, (2) the Union has not made any representations

concerning the terms or effects of this Agreement other than those contained herein; and (3) he has been advised by the Union that by entering into the Agreement, he is irrevocably giving up his right to have Judge Buck's Initial Decision reviewed by the Civil Service Commission and thereafter the Superior Court of New Jersey. Townsend has informed the Union that with full knowledge of these understandings, he wishes to resign pursuant to the terms of the Agreement.

6. GOVERNING LAW AND FORUM.

The parties agree that the laws of the State of New Jersey shall govern this Agreement and Release and the parties will submit to the jurisdiction of the state and/or federal courts located within the State of New Jersey for the resolution of any dispute that may arise hereunder.

7. HEADINGS.

The headings contained in the Agreement are for reference purposes only and shall not in any way affect the meaning or interpretation of this Agreement.

8. SEVERABILITY CLAUSE.

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not part of this Agreement.

9. AMBIGUITIES.

Each party and their representation have participated fully in the review and revision of this Agreement. Any rule of construction to the effect that ambiguities are to

be resolved against the drafting party shall not apply in interpreting this Agreement. The language in this Agreement shall be interpreted as to its fair meaning and not strictly for or against any party.

10. MODIFICATIONS TO BE IN WRITING.

The parties agree that this Agreement and Release may not be altered, amended, modified, superseded, canceled or terminated except in writing and duly executed by all the parties, or their attorneys on their behalf, which makes specific reference to this provision.

11. ENTIRE UNDERSTANDING.

This Agreement and Release sets forth the entire understanding between Townsend, the Union and the County, and fully supersedes any and all prior agreements or understandings between them pertaining to the subject matter thereof, if any.

12. NON-ADMISSION.

Except for the assessment of Townsend's employment record in any subsequent disciplinary or employment matter involving the County (or any of its elected and appointed officials, officers, agents, employees, agencies and instrumentalities) as a party, nothing in this Agreement shall be construed as an admission by any party that any action taken was unlawful or wrongful, or that any action constituted a breach of contract or violated any federal, state, or local law, policy, rule or regulation.

13. AGREEMENT NON-PRECEDENTIAL.

The parties agree that this Agreement shall be non-precedential, is limited to specific, unique facts and circumstances, and is not intended to create a past practice nor shall it be binding with respect to any other employee of the County. The Union

specifically agrees not to utilize this Agreement as evidence of “past practice” in any forum.

14. **NON-DISPARAGEMENT.**

- a. Townsend agrees that, unless required by legal process or applicable law, he (i) will not say anything to any person or entity that disparages or defames the County, or any of its elected or appointed officials, officers, employees, agents, agencies or instrumentalities; (ii) will not advise or encourage any person or entity to bring a claim against the County, or any of its elected or appointed officials, officers, employees, agents, agencies or instrumentalities; and (iii) will not assist any person or entity in connection with any such claim unless required to do so by law. Neither this provision nor anything else in the Agreement shall be construed to prohibit Townsend from reporting conduct to, providing truthful information to or participating in any investigation or proceeding conducted by any federal or state government agency, including, but not limited to, the EEOC or NJDCR.
- b. The County agrees that, unless required by legal process or applicable law, or unless the parties mutually agree otherwise, if it is contacted by any person or entity regarding Townsend’s employment with the County, including, but not limited to, a request for a job or other reference, it will only confirm the information required to be made public by the New Jersey Open Public Records Act (“OPRA”), more specifically, his title, position, salary, payroll record, length of service, date of separation, the amount and type of any pension received, and that Townsend received a general resignation from his County employment.

15. CONFIDENTIALITY.

The parties agree that this document constitutes a confidential personnel record under the Open Public Records Act and/or the common law governing public records, and will not be publicly disclosed, except as consistent with law. Townsend and the Union agree they will not, in another action or proceeding before any state, federal or local court or any governmental or administrative agency or during any arbitration or mediation, obtain discovery or offer evidence, unless required by law or court order (in which case they agree to notify the County before doing so to provide for an opportunity to oppose such a request), relating to the terms or execution of this Agreement. The parties further recognize that an Initial Decision has been issued in this matter by ALJ Buck following a hearing at the OAL that was open to the public, and as such, any matter relating to the Disciplinary Action that was publicly addressed at the hearing is not subject to a confidentiality provision.

16. REPRESENTATIONS.

Each person signing this Agreement represents and warrants that he or she is duly authorized and has legal capacity to execute and deliver this Agreement. Each party represents and warrants to the other that the execution and delivery of the Agreement and the performance of such party's obligations hereunder have been duly authorized and that the Agreement is a valid and legal agreement binding on such party and enforceable in accordance with its terms.

17. COUNTERPARTS AND FACSIMILE OR SCANNED SIGNATURES.

This Agreement may be signed in counterparts with the same effect as if the signatures to each counterpart were upon a single instrument, and all such counterparts

together shall be deemed an original of this Agreement. For purposes of this Agreement, a facsimile or electronically scanned copy of a party's signature shall be sufficient to bind such party.

18. APPROVALS.

The parties acknowledge that this Agreement is subject to approval by the Civil Service Commission and shall be provided to the Civil Service Commission and/or the assigned Administrative Law Judge for approval. Any disapproval by the Civil Service Commission shall not interfere with the rights of either party to pursue the matter further.

19. Dennis Townsend agrees to and acknowledges the following:

- (a) I agree and acknowledge that I was represented by and consulted with representation of my choosing throughout the negotiation and execution of this Agreement and Release. I further acknowledge and agree that I was given a reasonable and sufficient amount of time within which to consider the Agreement and Release before signing it.
- (b) I agree and acknowledge that I have the right to reflect upon this Agreement and Release for a period of twenty-one (21) days before executing it, and I will have an additional period of seven (7) days after executing the Agreement and Release to revoke it under the terms of the Older Workers Benefit Protection Act by notifying in writing: *Steven W. Kleinman, Special Monmouth County Counsel, or any successors at the Hall of Records, 1 East Main Street, Freehold, NJ 07728.*
- (c) I understand and acknowledge that if I sign this Agreement and Release, along with the waiver attached hereto, prior to the expiration of the twenty-one (21) day

review period, I am voluntarily and knowingly waiving the twenty-one (21) day review period.

20. ACKNOWLEDGEMENT.

By signing this Agreement and Release, Dennis Townsend acknowledges:

- i. I HAVE READ THIS AGREEMENT AND RELEASE COMPLETELY.
- ii. I HAVE HAD AN OPPORTUNITY TO CONSIDER THE TERMS OF THIS AGREEMENT AND RELEASE.
- iii. I ACKNOWLEDGE I HAVE BEEN ADVISED BY THE COUNTY TO CONSULT WITH AN ATTORNEY OF MY CHOOSING PRIOR TO EXECUTING THIS AGREEMENT AND RELEASE TO EXPLAIN THE LEGAL CONSEQUENCES OF SIGNING THIS DOCUMENT AND AFFIRM THAT I HAVE IN FACT CONSULTED WITH AN ATTORNEY.
- iv. I KNOW THAT I AM GIVING UP IMPORTANT LEGAL RIGHTS BY SIGNING THIS AGREEMENT AND RELEASE.
- v. I UNDERSTAND AND MEAN EVERYTHING THAT I HAVE SAID IN THIS AGREEMENT AND RELEASE, AND I UNDERSTAND AND AGREE TO ALL ITS TERMS.
- vi. I HAVE NOT RELIED UPON ANY REPRESENTATION, WRITTEN OR ORAL, NOT SET FORTH IN THIS AGREEMENT AND RELEASE.
- vii. I HAVE SIGNED THIS AGREEMENT AND RELEASE VOLUNTARILY AND ENTIRELY OF MY OWN FREE WILL.
- viii. I REPRESENT AND AGREE THAT I AM NOT UNDER THE INFLUENCE OF ANY ILLNESS, INCLUDING MENTAL OR EMOTIONAL ILLNESS, MEDICAL CONDITION, DISABILITY OR IMPAIRMENT, OR OF PRESCRIPTION OR OTHER MEDICATION THAT WOULD AFFECT MY ABILITY TO REVIEW THIS AGREEMENT IN ITS ENTIRETY, UNDERSTAND IT AND KNOWINGLY AND VOLUNTARILY AGREE TO IT.
- ix. I AGREE AND ACKNOWLEDGE THAT THIS AGREEMENT IS NOT THE RESULT OF ANY FRAUD, DURESS OR UNDUE INFLUENCE EXERCISED UPON ME BY THE COUNTY OR BY ANY THIRD PARTY.

IN WITNESS WHEREOF, and intending to be legally bound hereby I, Dennis

Townsend, executed the foregoing Agreement this ____ day of May, 2021.

Sworn and subscribed to before me
this 27th day of May, 2021

[Signature]

Notary Public of the
State of New Jersey

[Signature]
Date: 5/26/21

Date: 5/24/21

[Signature]
DENNIS TOWNSEND

County of Monmouth

By: [Signature] Steven Kleinman, Special County Counsel

CWA Local 1075

By: [Signature]

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the 21-day period referred to in Paragraph 19(c) of this Agreement.


DENNIS TOWNSEND

Date: 5/24/21