



DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 4<sup>TH</sup> DAY OF AUGUST, 2021

*Deirdre L. Webster Cobb*

Deirdre L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

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

Attachment



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. CSV 10581-20

AGENCY REF. NO. 2021-359

**IN THE MATTER OF JULIUS GAINES,  
CITY OF NEWARK, DEPARTMENT OF  
PUBLIC WORKS.**

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**Arnold Shep Cohen, Esq., for Appellant, Julius Gaines (Oxford Cohen, attorneys)**

**Jennifer Virella, Assistant Corporation Counsel, for Respondent, City of Newark  
(Kenyatta K. Stewart, Corporation Counsel, attorney)**

Record Closed: May 21, 2021

Decided: June 25, 2021

**BEFORE KELLY J. KIRK, ALJ:**

**STATEMENT OF THE CASE**

The City of Newark Department of Public Works suspended laborer Julius Gaines for sixty (60) working days for incompetency, inefficiency, or failure to perform duties, chronic or excessive absenteeism, conduct unbecoming a public employee, and other sufficient cause.

## **PROCEDURAL HISTORY**

Julius Gaines was served with a Preliminary Notice of Disciplinary Action (PNDA) on or about July 28, 2020. (R-1.) The City of Newark Department of Public Works (DPW) held a hearing on September 11, 2020, after which it issued a Final Notice of Disciplinary Action (FNDA), sustaining all charges and suspending Gaines for sixty working days. (R-2.)

Gaines appealed, and the Civil Service Commission transmitted the contested case to the Office of Administrative Law (OAL), pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, where it was filed on November 4, 2020. A hearing was held on April 12, 2021. The record remained open for post-hearing submissions and closed on May 21, 2021.

## **EVIDENCE AND FINDINGS OF FACT**

### **Background**

Gaines testified on behalf of appellant. Sharon Armour and Khalif Thomas testified on behalf of respondent. Based upon a review of the evidence presented, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I FIND the following FACTS:

Gaines is employed by the City as a laborer 1 in the DPW. His hire date of record is October 10, 1993. Gaines's job involves solid-waste collection and household-bulk collection. He works on the back of a garbage truck along with another laborer, picking up household trash and household bulk.

Sharon Armour has been employed by the City for approximately thirty-three years. She presently works in the DPW sanitation department, where she oversees the administrative staff, payroll, daily attendance, administrative actions, and personnel actions. Armour also oversees the time records to insure employees report to work and are paid accordingly.

Khalif Thomas has been employed by the City since 2007. Thomas has been the director of the Newark DPW for almost four years, and is responsible for, among other things, solid-waste collection and garbage collection, and the DPW budget.

If a DPW employee is not going to report to work as scheduled, the employee must call the Newark DPW recorded telephone line and provide his or her name and the reason for not reporting to work as scheduled. If the employee leaves a message that he or she is not going to report to work due to sickness, it is logged as "S" (sick) on the employee attendance record. If the employee leaves a message that he or she is not going to report to work, but does not provide a reason, it is logged as "A" (absent) on the employee attendance record. The recorded messages are retrieved by two DPW employees who input the information into the DPW Call Log and into the employee attendance record. These two DPW employees actively attempt to contact the employee to ascertain what type of leave is being taken if it was not specified on the recording, but if they are unable to get a response, the employee is marked "absent." Employees are not paid for "absent" days. Similarly, if the employee does not leave a message on the recorded telephone line and does not report to work (no call), the employee is not paid.

Between February 27, 2020, and July 28, 2020, Gaines was sick or absent twenty-nine times. (R-14.) Gaines's 2020 employee attendance record reflects the following:

- Sick: February 27; March 2; March 30; March 31; April 1; April 3; April 6; April 7; April 8; April 22; April 24; May 1; May 21; May 22; May 31; June 2; June 5; and June 16.
- Absent: March 9; March 11; March 16; March 23; March 27; June 18; July 2; July 15, July 16; July 19; and July 24.

May 31, 2020, and July 19, 2020, were Sundays. (R-3.) March 2, 2020, March 9, 2020, March 16, 2020, March 23, 2020, March 30, 2020, and April 6, 2020, were

Mondays. Gaines did not dispute his pay for any pay period from January 1, 2020, through July 28, 2020.

When an employee submits a note/excuse from a doctor, it is time-stamped and placed in the employee's personnel file. Gaines's personnel file contains no notes/excuses for the period from February 27, 2020, through July 28, 2020. Gaines receives fifteen sick days under his union contract and is allowed to carry over all sick days. Beginning in January 2020, Gaines had about seventeen and one-half (17.44) sick days available to him. He used eighteen sick days from February 27, 2020, through July 28, 2020. As of June 16, 2020, he had exceeded his available sick days for the year, and his employee time record reflects a negative amount of (-.56) sick days.

## **Testimony**

### *Khalif Thomas*

In February 2020 and March 2020 there were COVID-19 issues. Sanitation workers were and are essential frontline workers. The sanitation department worked throughout the whole pandemic. Any attendance problems are brought to Thomas's attention, and there are issues with absenteeism in the sanitation department. If a laborer does not show up, whether sick or absent, it hurts the City because of overtime pay and it hurts the sanitation department because laborers must sometimes work alone on the back of a truck or must be pulled from another area. Absenteeism affects other employees' workloads, starting with the person that the sick/absent employee normally works with. Sometimes there are multiple laborers out, which causes delays in garbage pickup or requires that contract vendors be utilized, which affects the budget. Absenteeism negatively affects the City. If frontline workers do not timely pick up trash it creates a health hazard outside homes.

It is possible that a contract vendor was utilized when Gaines was out, but Thomas did not know without checking specific dates against invoices. On days with many call-outs Thomas must call for extra help. Thomas has had people out sick and out because of COVID-19.

*Julius Gaines*

Gaines's employee attendance record reflects twenty-nine sick or absent days, but he does not believe it, and asserts that he did not miss twenty-nine days of work. He was out because he was nervous and scared about the COVID-19 pandemic and he has children. He was working around hundreds of people at his job and there was no COVID-19 testing or anything. He had sick time, so he used it.

During COVID-19, there was an announcement and memos that there would be no more garbage collection on Mondays and that it would be switched to Sunday nights. So, he went to work Sunday nights, but in the system he was getting marked absent by mistake. He has paystubs that show eighty hours.

**Factual Discussion**

A credibility determination requires an overall evaluation of the testimony considering 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. Spagnuolo v. Bonnet, 16 N.J. 546, 555 (1954). It must be such as the common experience and observation can approve as probable in the circumstances. Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961). "The interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

Gaines's testimony was implausible. He testified that the Monday trash pickups were canceled, but he provided no specifics as to the date that started and when or if it ended, and he offered no memos or testimony to corroborate his testimony. Further, if Monday pickups were canceled, the expectation would be that Gaines would have been absent every Monday. However, he was out only six total Mondays (March 2, 2020,

March 9, 2020, March 16, 2020, March 23, 2020, March 30, 2020, and April 6, 2020) and his employee attendance record reflects that he was sick—not “absent”—on half of those days (March 2, 2020, March 30, 2020, and April 6, 2020). It simply does not stand to reason that Gaines would utilize sick days for those days when he testified that he was not scheduled or expected to work. Additionally, although Gaines testified that he did work but was marked absent by mistake, Gaines never disputed his pay for any pay period despite that he was not paid for the marked “absent” days. Conversely, I credit the testimony of Armour and Thomas, which was consistent, matter-of-fact, and supported by the record.

### **LEGAL ANALYSIS AND CONCLUSIONS**

N.J.S.A. 11A:1-1 through 12-6, the “Civil Service Act,” established the Civil Service Commission in the Department of Labor and Workforce Development in the Executive Branch of the New Jersey State government. N.J.S.A. 11A:2-1. The Commission establishes the general causes that constitute grounds for disciplinary action, and the kinds of disciplinary action that may be taken by appointing authorities against permanent career service employees. N.J.S.A. 11A:2-20. N.J.S.A. 11A:2-6 vests the Commission with the power, after a hearing, to render the final administrative decision on appeals concerning removal, suspension or fine, disciplinary demotion, and termination at the end of the working test period, of permanent career service employees.

N.J.A.C. 4A:2-2.2(a) provides that major discipline shall include removal, disciplinary demotion, and suspension or fine for more than five working days at any one time. An employee may be subject to discipline for reasons enumerated in N.J.A.C. 4A:2-2.3(a), including “incompetency, inefficiency or failure to perform duties,” “chronic or excessive absenteeism or lateness,” “conduct unbecoming a public employee,” and “other sufficient cause.” N.J.A.C. 4A:2-2.3(a)(1), (4), (6), and (12). In appeals concerning such major disciplinary actions, the burden of proof is on the appointing authority to establish the truth of the charges by a preponderance of the believable evidence. N.J.A.C. 4A:2-1.4; N.J.S.A. 11A:2-21; Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).



Gaines was charged with incompetency, inefficiency, or failure to perform duties, chronic or excessive absenteeism, conduct unbecoming a public employee, and other sufficient cause, for the following incidents:

For the period of Jan. 01 2020 through present, of the possible 145 working days, Mr. Gaines has been absent twenty nine (29) days. This includes has exhausted fifteen (15) sick days. In addition, Mr. Gaines has called out 3 (three) consecutive Sundays, exhibiting a continued pattern of chronic absenteeism. Mr. Gaines unauthorized absences negatively, and severely impact refuse collection operations due to manpower and delays. His conduct is unbecoming of a City employee.

[R-2.]

Gaines is an essential worker. However, he repeatedly failed to report to work as scheduled and failed to comply with the DPW call-out policy. He utilized eighteen sick days, exceeding his allotted sick time for the year by June, and he was absent an additional eleven days, without providing a reason. While the record does not reflect that he was out three consecutive Sundays, it does reflect that he was out six consecutive Mondays. Further, the record reflects that many of the days he was out either immediately preceded or immediately followed his compensatory time off.

Appellant's arguments relative to the Families First Coronavirus Response Act, the Emergency Paid Sick Leave Act, and the Emergency Family and Medical Leave Expansion Act are unavailing. There is no evidence that Gaines requested or was granted any COVID-19-related leave, and the dates he was sick or absent are not consecutive, which undermines his argument that his absences "were all attributable to COVID 19." Similarly, appellant's arguments relative to N.J.A.C. 4A:6-1.3A are unavailing. There is no evidence in the record, including any note/excuse from a doctor, that Gaines contracted COVID-19, and none was provided to the DPW.

Based upon the record, I **CONCLUDE** that Gaines failed to perform his duties and was chronically and excessively absent. I further **CONCLUDE** that his conduct was

unbecoming a public employee and burdened DPW operations and other employees, which in turn negatively impacts the public.

With respect to the 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 Commission 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, as well as formally adjudicated disciplinary actions and instances of misconduct informally adjudicated.

Gaines received a notice of minor disciplinary action on May 17, 2012, and he was suspended for one day for conduct unbecoming a public employee, failure to perform duties, excessive absenteeism, and other sufficient cause. (R-13.) Gaines received a notice of minor disciplinary action on August 9, 2012, and he was suspended for three days for conduct unbecoming a public employee, neglect of duty, chronic or excessive absenteeism or lateness, and other sufficient cause. (R-12.) Gaines received a notice of minor disciplinary action on April 4, 2013, and he was suspended for five days for conduct unbecoming a public employee, neglect of duty, chronic or excessive absenteeism or lateness, and other sufficient cause. (R-11.) Gaines received a notice of minor disciplinary action on June 15, 2017, and he was suspended for one day for chronic or excessive absenteeism. (R-9.) Gaines received a notice of minor disciplinary action on July 20, 2017, and he was suspended for three days for chronic or excessive absenteeism. (R-8.) Gaines received a ten-working-day suspension relative to incidents on June 13, 2013, June 27, 2013, July 11, 2013, and July 12, 2013, for chronic or excessive absenteeism or lateness, conduct unbecoming a public employee, and other sufficient cause. (R-10.) Gaines received a forty-five-working-day suspension relative to an August 22, 2018, incident for conduct unbecoming a public employee, misuse of public property including motor vehicle, and other sufficient cause. (R-4; R-6; R-7.) Gaines served the suspension from October 16, 2018, through December 17, 2018.

Appellant notes that his prior forty-five-day suspension did not relate to excessive absenteeism, and that the last suspension relative to excessive absenteeism was ten days, and argues that “[t]he leap from a ten day suspension to a sixty day suspension is inconsistent with the concept of progressive discipline.” I disagree. Gaines has been disciplined seven times before, with six of those times being for chronic or excessive absenteeism. He has previously been suspended a total of sixty-eight days, with twenty-three of those days being for chronic or excessive absenteeism. Given the extensive number of suspensions for the same charge, and that his most recent suspension was for forty-five days, I **CONCLUDE** that sixty days is not inconsistent with progressive discipline. There is no support cited for appellant’s premise that discipline must be for the same conduct in order to increase the penalty.

**ORDER**

I hereby **ORDER** that the charges against Gaines are **SUSTAINED** and that the penalty of a sixty-working-day suspension imposed by the Newark DPW 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.



June 25, 2021  
DATE

\_\_\_\_\_  
KELLY J. KIRK, ALJ

Date Received at Agency: June 25, 2021

Date Mailed to Parties: June 25, 2021

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**APPENDIX**

**List of Witnesses**

**For Appellant:**

Julius Gaines

**For Respondent:**

Sharon Armour

Khalif Thomas

**Exhibits In Evidence**

**For Appellant:**

None

**For Respondent:**

- R-1 PNDA, dated July 28, 2020
- R-2 FNDA, dated September 18, 2020
- R-3 2020 Calendar
- R-4 FNDA, dated October 4, 2018
- R-5 Addendum to FNDA, dated October 4, 2018
- R-6 Settlement Agreement, dated October 2018
- R-7 Letter of Conditional Employment, dated October 12, 2018
- R-8 Notice of Minor Disciplinary Action, dated July 20, 2017
- R-9 Notice of Minor Disciplinary Action, dated June 15, 2017
- R-10 FNDA, dated November 14, 2013
- R-11 Notice of Minor Disciplinary Action, dated April 4, 2013
- R-12 Notice of Minor Disciplinary Action, dated August 9, 2012
- R-13 Notice of Minor Disciplinary Action, dated May 17, 2012
- R-14 Employee Attendance Record