

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 22ND DAY OF SEPTEMBER, 2021

Deirdre' L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 08373-20

AGENCY DKT. NO. 2021-178

**IN THE MATTER OF JESUS PEREZ,
CITY OF TRENTON, DEPARTMENT OF
WATER AND SEWER.**

Ramona S. Thomas, Union Representative, AFSCME Local 2286, for appellant,
appearing pursuant to N.J.A.C. 1:1-5.4(a)(6)

Stephen E. Trimboli, Esq., for respondent (Trimboli & Prusinowski, LLC,
attorneys)

Record Closed: July 23, 2021

Decided: August 13, 2021

BEFORE: **CARL V. BUCK III, ALJ:**

STATEMENT OF THE CASE

The City of Trenton, Department of Water and Sewer (Trenton or City) seeks to terminate Jesus Perez (Perez or appellant), who was employed as a laborer at the Trenton Water Works (TWW). Trenton contends that Perez engaged in "conduct unbecoming" and evidenced "inability to perform duties" in relation to an event that occurred on June 11, 2020. Appellant does not dispute that he was impaired on that date - but does dispute the policy under which he is to be disciplined. Specifically, he contends that the City's "Impaired Employee Policy" effective December 1, 1994, is not

superseded by the City's "Personnel Handbook Drug and Alcohol Policy", effective April 1, 2018 as the 2018 policy was never officially adopted by Trenton, thereby rendering the 2018 policy null for purposes of his discipline. Appellant contends that disciplining should be meted out under the "Impaired Employee Policy"; thereby affording him a "second chance" to save his position.

PROCEDURAL HISTORY

Trenton issued a Preliminary Notice of Disciplinary Action (PNDA) on June 19, 2020 (R-1), and a Final Notice of Disciplinary Action (FNDA) on July 13, 2020 (R-2). Perez appealed to the Civil Service Commission on August 14, 2020 which granted his request for an appeal on September 2, 2020. The matter was transmitted to the Office of Administrative Law (OAL) on September 3, 2020 for hearing as a contested case. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The hearing in this matter was held via the ZOOM platform on March 5, 2021. The record was held open for closing submissions by the parties. Submissions were made and the record closed on July 23, 2021.

On March 9, 2020, the Governor of the State of New Jersey issued Executive Order 103, declaring a public health emergency, due to the COVID-19 pandemic. The Governor's Executive Order 127 authorized the extension of time for the completion of administrative decisions, after the public health emergency. Subsequent Executive Orders have extended the public health emergency, which continues as of the date of this Initial Decision.

FACTUAL DISCUSSION

Based on the testimony of the witnesses and the documentation provided I **FIND** the following as **FACT**::

At all relevant times, Perez was a Laborer in the City's Water and Sewer Department. He was removed from his position effective July 6, 2020, when the

charges identified in the June 19, 2020 PNDA regarding an incident that took place on June 11, 2020 were sustained.

Charges

The FNDA removing Perez lists the following sustained charges:

1. Violation of N.J.A.C. 4A:2-2¹(A) Removal
(3) Inability to perform duties.
(6) Conduct unbecoming a public employee
(10) Other sufficient cause.

The Incident(s) giving rise to the charges read as follows:

On June 11, 2020 at about 8:30 a.m. you were in your personal vehicle and rear ended a co-worker's vehicle on the premises of TWW parking lot. There was a reasonable suspicion to believe you were impaired. Thus, per city policy, you were taken to Corporate Health for an alcohol and drug test. Your urine drug test results were positive.

Appellant does not challenge that he was impaired at work on June 11, 2020. He does challenge the methodology of the discipline imposed.

Testimony

Respondent

George Edward Johnson II (Johnson), Supervising Water Treatment Plant Repairer, was Perez's supervisor on June 11, 2020 when the incident occurred.

¹ The PNDA and FNDA state that appellant violated "N.J.A.C. 4A:2-2(A)." This issue was not addressed by either party at the hearing or in closing documents, but it is clearly a scrivener's error. The correct regulation is "N.J.A.C. 4A:2-3(A)". As neither party raised this issue, the tribunal will utilize the correct administrative code section in this Initial Decision.

Johnson supervises eight laborers and five mechanics and described the safety-sensitive responsibilities of the laborers. The laborers assist with the handling, lifting and moving of very heavy equipment, including pumps weighing more than four tons and valves that weigh more than two tons. (Johnson T21:17 – 22:3). The laborers perform safety watch responsibilities when the mechanics are working in confined and/or hazardous spaces, to make sure the mechanics receive assistance and are protected from undue risk of injury. (Johnson T22:4-9). Laborers work with caustic and dangerous chemicals, such as high-concentrate Potassium, Sodium Hypochlorite, and Fluoride, all of which pose the risk of serious and permanent physical injury if not handled properly. (Johnson T22:10 – 23:23). For example, direct contact with highly concentrated Fluoride can cause “brittle bone syndrome” that destroys the calcium in human bone. (Johnson T23: 11-17).

Johnson testified to the events of the morning of June 11, 2020, basing his testimony on recollection and the recording made by the building’s parking lot camera. (R-12). On June 11, 2020, Perez started his shift at approximately 7:00 a.m.; his normal work shift was 7:00 a.m. to 3:30 p.m. (Johnson T32: 16-24). The video recording from the TWW building camera facing the parking area covers the period of time from 8:09 a.m. to 8:26 a.m. on June 11, 2020. (T32: 13-15)(R-12). That morning, the work crew had removed a heavy check valve weighing 300-400 pounds from a butterfly valve assembly, and the old check valve needed to be disposed of. Perez asked if he could take the valve part to scrap it.

Johnson state that in the video taken from the building, Perez is seen driving his pickup truck very slowly in the parking lot and it is the only vehicle moving in the scene at the time. (T35: 1-9). Perez is seen trying, slowly, to turn into a parking spot and he hits a curb. (T35:12-13). Perez then backs up his truck slowly and backs into a co-worker’s car. Perez had a black pickup truck, which was his personal vehicle. (T33: 13-18). Perez then gets out of his truck, looks at the damage, gets back in his truck, pulls forward, then backs up again and parks very close the vehicle he had just hit. (T35: 15-25). Johnson stated that Perez’s operating of the truck appeared to be “a little off”.

(T36:5). After parking his truck, Perez walked toward the loading dock area, and observed that the video shows Perez "doing a lot of swaying." (T37: 12-24). Perez then returns to his truck and drives the truck around the parking lot, appearing to try to pull into several parking spots to turn around and he then eventually drives the truck to the loading dock area and backs the truck to the loading dock area where the 300–400 pound check valve was ready to be loaded into the back of the truck. (T39: 3-23). The employees at the loading dock could not load the valve into Perez's truck because the truck's tailgate would not open. (T:42:8-14). The video also showed Perez appearing unsteady when he was walking on the stairs near the loading dock and was "wobbling a little bit." (T42: 19-24). While his coworkers were trying to get the heavy valve loaded into the truck, Perez was on his phone and swaying back and forth. (T43: 12-15). After this, Perez got back in his truck and drove "randomly" through the parking lot, back towards the vehicle he had hit earlier. (T45: 7-25). That is the point in time when the video recording preserved for the accident ended. (T47:16 – 48:4).

Johnson then described his interactions with Perez after the point in time when the video recording excerpt ended. Johnson walked over to speak with Perez by Perez's truck, where Perez was trying to decide whether to contact the insurance company or offer to pay cash to repair the other employee's vehicle. (T48: 12-19). In that interaction, Johnson observed that Perez was sweating, even though it was not hot that morning, swaying a lot, and slurring his speech. (T49:7-9). Johnson then suspected that Perez was impaired and went inside to report to Superintendent Taya Brown-Humphrey his recommendation that Perez be sent for drug testing. (T49: 10-14). Brown-Humphrey contacted the Water Department Administration Office who advised her to make a drug test appointment with Capital Health and she instructed Johnson to bring Perez to her office to monitor Perez before being sent for the drug test appointment. (T50: 6-21). Johnson and a security guard went to the parking lot and accompanied Perez back to the Superintendent's office. (T50:23 – 51:2).² Johnson called another employee, Operator Newt Wright, to come to the Superintendent's office

² On cross-examination, Johnson testified that the security guard was a retired police officer who told Johnson that Perez was definitely under the influence of something at that time. (T64: 8-15).

as a second person to monitor Perez and to accompany them to and from the testing site. (T51: 5-10). While Johnson, Wright and Perez were in the office area, Perez was observed "sweating, slouching a lot, mumbling, standing up and sitting down and pacing around looking at his phone." (T52: 12-17). He stated that this behavior was not typical for Perez, based on his prior interactions at work with Perez. (T52:25 – 53:3).

Johnson and Wright then drove Perez to the testing site at Capital Health in a government vehicle, with Perez in the back seat. During the twenty-minute drive, Johnson continued to observe Perez "slouching, impatient, a lot of mumbling, sweating", just as in the office. (T53: 24 – 54:14). In the waiting area at the testing facility, Perez kept telling Johnson that he was clean, everything's fine, and they are not going to find anything on him. (T55:2-6). After giving the sample, Johnson and Wright drove Perez back to TWW and sent him home to await the test results. (T55:9 – 56:4). Johnson testified that, based on his observation on June 11, 2020, he was "[one] hundred percent positive" that Perez was impaired while on duty that day. (T58:5-9). Johnson regarded Perez as a good employee generally and was not looking to get rid of him as an employee, on or before the day of the incident. (T58: 10-21). Trenton's Drugs and Alcohol Policy provides that "any employee who is observed by a supervisor or Department Head to be intoxicated or under the influence of alcohol or drugs during working hours or is under reasonable suspicion of the same shall be immediately tested and is subject to discipline up to and including termination." (Ex. R-8).

Taya Brown-Humphrey (Brown-Humphrey), Superintendent of the Water Treatment Plant, confirmed that the laborers, including appellant, perform safety-sensitive duties by working with chemical batches and handling of heavy equipment. (Humphrey T74:24 – 75:5). She sent Perez for drug testing on June 11, 2020. Brown-Humphrey independently observed Perez near her office and concluded that he demonstrated signs of impairment that day. She observed that Perez seemed to be impaired when Johnson brought him to her office before she contacted Administration about the testing. (Humphrey T76: 4-11). While Perez was in her office area, Brown-Humphrey observed that he kept getting up and sitting down, his speech was slurred,

and his eyes were fluttering, which indicated impairment to her. (T79: 15-23). She concluded that Perez appeared to be impaired. (T83: 4-10).

Rafael Valentin (Valentin) Senior Administrative Analyst, was the individual who administered the Human Resources function for TWW, and prepared the charges and confirmed the policies of the Trenton Department of Water and Sewer concerning drug testing.

The drug test results that were received by the City from the Corporate Health Center from the June 11, 2020 incident, were admitted into evidence showing a positive drug test for heroin, and were authenticated by Valentin (Ex. R-3; Valentin T100:16 – 101:14).

There were three bases for the removal of Perez from the events of June 11, 2020: damaging another employee's vehicle; being impaired on duty in a safety-sensitive position; and the positive drug test for heroin. (Valentin T105:22 – 106:22). Thus, the positive drug test result and the applicable policy concerning the consequences of the drug test, was only one of three bases for the removal of Perez.

Steven Ponella (Ponella), Personnel Officer for the City, confirmed the current policies of the City concerning drug testing, impairment on duty, and resulting disciplinary action.

LEGAL ANALYSIS AND CONCLUSIONS

Public employees' rights and duties are governed and protected by the provisions of the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, and the regulations promulgated pursuant thereto, N.J.A.C. 4A:1-1.1 to 10-3.2. However, public employees may be disciplined for a variety of offenses involving their employment, including the general causes for discipline as set forth in N.J.A.C. 4A:2-2.3(a). An appointing

authority may discipline an employee for sufficient cause, including failure to obey laws, rules, and regulations of the appointing authority. N.J.A.C. 4A:2-2.3(a)(12).

In disciplinary cases, the appointing authority has the burden of both persuasion and production and must demonstrate by a preponderance of the competent, relevant, and credible evidence that it had just cause to discipline the employee and lodge the charges. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (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 the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958).

The first issue in this proceeding would ordinarily be whether a preponderance of the credible evidence establishes that the appellant's actions on June 11, 2020 constitute a violation of the charges set forth in the FNDA.

- Violation of N.J.A.C. 4A:2-3(a)
- (3) Inability to perform duties
- (6) Conduct unbecoming a public employee
- (10) Other sufficient cause.

Inability to Perform Duties

An appointing authority may discipline an employee for, among other causes, an inability to perform duties. N.J.A.C. 4A:2-2.3(a)(3). The City bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). In this matter, the City terminated appellant's employment predicated on his inability to perform duties, stemming from his appearing at work in an impaired condition – to which appellant admits. Therefore, being unable to perform his assigned tasks and duties. I **CONCLUDE** that this conduct supports the charge of inability to perform duties, N.J.A.C. 4A:2-2.3(a)(3).

Conduct Unbecoming a Public Employee

“Conduct unbecoming” a public employee is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances “be such as to offend publicly accepted standards of decency.” Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (Pa. 1959)). Such misconduct need not necessarily “be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.” Hartmann v. Police Dep’t of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep’t of Civil Serv., 17 N.J. 419, 429 (1955)).

Respondent has charged appellant with the willful violation of Policies and Procedures by appearing for work under the influence of a narcotic substance. The testimony established that he was aware of the policies and procedures, yet he acknowledged that he failed to comply with them, admitting that he appeared for work in an impaired state. I **CONCLUDE** that this conduct supports the charge of conduct unbecoming, N.J.A.C. 4A:2-2.3(a)(6).

Other Sufficient Cause

Having determined that appellant violated the Policies and Procedures as herein described, I **CONCLUDE** that appellant has given other sufficient cause for disciplinary action, and that the appointing authority has demonstrated by a preponderance of the credible evidence that the charge of a violation of N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, must be sustained.

Finding that the preponderance of the credible evidence establishes that appellant's actions on June 11, 2020 constitute a violation of the charges set forth in the FNDA, the second issue - whether the violation warrants removal from employment or a lesser penalty, if any, must be addressed.

PENALTY

When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); W.N.Y. v. Bock, 38 N.J. 500 (1962). In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to Bock, concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). Depending upon the incident complained of and the employee's past record, major discipline may include suspension, removal, etc. Bock, 38 N.J. at 522-24.

Progressive discipline may only be bypassed when the misconduct is severe, when it renders the employee unsuitable for continuation in the position, or when the application of progressive discipline would be contrary to the public interest. In re Herrmann, 192 N.J. 19, 33 (2007). Termination of employment is the penalty of last resort reserved for the most severe infractions or habitual negative conduct unresponsive to intervention. Rotundi v. Dep't of Health and Human Services, OAL Dkt. No. CSV 385-88 (Sept. 29, 1988)

Here, respondent maintains that removal is the appropriate penalty and consistent with the nature of the violation. Respondent referred to appellant's time of employment as a "probationary" employee and an incarceration during his employment.

However, no foundation or explanatory documentation were presented on these issues and the tribunal will not, therefore, consider these factors. Further, no foundation was laid for an alleged prior positive drug screen in November 2019 and the tribunal will not, therefore, consider this factor. A final issue is determination of which policy, the 1994 or the 2018 policy, was in place at the time of the incident. Appellant contends that the 1994 policy was the policy provided to appellant at his hiring and that:

The City of Trenton Impaired Employee Policy, effective December 1, 1994, refers an employee to E.A.S., once he or she tests positive for substance abuse for further evaluation. The Department head and Union rep meet to determine conditions of continued employment and if the employee elects to continue their employment are required to go "On Notice". If employees refuse to sign the "On Notice Agreement that is an automatic termination. (Exhibit F, pg. 6).

The "On Notice" agreement places employees on probation for one year, requires employees to remain drug and alcohol free and meet with EAS as scheduled, complete the EAS program and pass a drug and alcohol screening before being considered fit for duty. Any failed drug test during the probation period is an automatic termination. (Exhibit E, pg. 7).

Use of the 1994 policy might allow an employee to continue their employment and go "on notice" **after the department head and union representative meet to determine conditions of continued employment** (emphasis added).

Use of the 2018 policy states, "An employee who is observed by a supervisor or Department Head to be intoxicated or under the influence of alcohol or drugs during working hours or is under reasonable suspicion of the same shall be immediately tested and is subject to discipline up to and including termination." (p. 5 City of Trenton, Personnel Handbook, Effective April 1, 2018).

Here, progressive discipline must be bypassed. For purposes of academic discussion, and presuming that the 1994 policy were in effect, the nature of the violation and the potential threat to the health, safety and welfare of:

1. The appellant;
2. Appellant's coworkers;
3. The ratepayers and customers of the TWW

Are of such a nature and concern and the opportunity for disaster so portentous, so as to preclude any possible option to allow appellant continued employment at TWW.

Looking at the infractions under the lens of either the 1994 or the 2018 policy, appellant's conduct, and the danger it presented, was so severe and egregious that the penalty of removal of his employment is justified and warranted.

Accordingly, I **CONCLUDE** that removal is the appropriate discipline for the violations of inability to perform duties in violation of N.J.A.C. 4A:2-2.3(a)(3); conduct unbecoming a public employee in violation of other N.J.A.C. 4A:2-2.3(a)(6); and sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(10), be **AFFIRMED**.

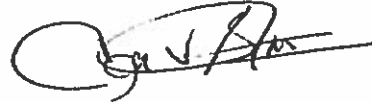
ORDER

Accordingly, it is **ORDERED** that the charges entered in the Final Notice of Disciplinary Action, dated July 13, 2020, of the City of Trenton against appellant, Jesus Perez, are hereby **SUSTAINED**. I **ORDER** that the action of the appointing authority removing appellant from his position effective June 18, 2020, is hereby **AFFIRMED**.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



August 11, 2021 _____

DATE

CARL V. BUCK III, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

CVB/lam

APPENDIX

WITNESSES

For appellant:

None

For respondent:

George Johnson
Taya Brown-Humphrey
Rafael Valentin
Steven Ponella

EXHIBITS

For appellant:

- A-1 Personnel Handbook Grievance, dated 09/10/2018
- A-2 Attachment dated 0/27/2018 and Union Personnel issues email, dated 10/16/2018
- A-3 Personnel Manual email, dated 12/04/2018dated 06-11-20
- A-4 New Draft Personnel Manual email, dated 01/29/2019 (Local 2286)
- A-5 New Draft Personnel Manual email, dated 01/29/2019 (Local 2281)
- A-6 Signed acknowledgement of COT Impaired Employee Policy dated 02/04/2019
- A-7 Personnel Handbook email, dated 03/03/2020
- A-8 Personnel Handbook email, dated 07/07/2020 (Local 2281 & 2286)
- A-9 Resolution adopting personnel handbook email, dated 07/16/2020 (Local 2281 & 2286)

For respondent:

- R-1 PNDA, dated 6-19-20
- R-2 FNDA, dated 07-13-20
- R-3 Drug Test Results, dated 06-11-20
- R-4 Hiring Letter, dated 01-18-19
- R-5 Leave of Absence Request Letter, dated 12-11-19
- R-6 Leave of Absence Request Letter, dated 01-07-20
- R-7 Personnel Manual 2018
- R-8 Handbook – Drugs and Alcohol Policy
- R-9 Impaired Employee Policy (1994)
- R-10 Perez Responses to First Interrogatories, dated 11-19-20
- R-11 Perez Responses to Second Interrogatories. dated 12-23-20
- R-12 Video Recording Parking Lot for 06-11-20