



**STATE OF NEW JERSEY**

In the Matter of Derrick Gully, City  
of Newark, Department of Water and  
Sewer

**FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION**

CSC DKT. NO. 2021-358  
OAL DKT. NO. CSV 10578-20

**ISSUED: JANUARY 19, 2022**

The appeal of Derrick Gully, Senior Maintenance Repairer, City of Newark, Department of Water and Sewer, resignation not in good standing, effective June 29, 2020, on charges, was heard by Administrative Law Judge Leslie Z. Celentano (ALJ), who rendered her initial decision on December 2, 2021. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting of January 19, 2022, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision.

**ORDER**

The Civil Service Commission finds that the action of the appointing authority in resigning the appellant not in good standing was justified. The Commission therefore affirms that action and dismisses the appeal of Derrick Gully.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 19<sup>TH</sup> DAY OF JANUARY, 2022

*Deirdre' L. Webster Cobb*

---

Deirdré L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

attachment

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



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

**INITIAL DECISION**

OAL DKT. NO. CSV 10578-20

AGENCY DKT. NO. 2021-358

**IN THE MATTER OF DERRICK GULLY,  
CITY OF NEWARK, DEPARTMENT OF  
WATER AND SEWER.**

---

**Arnold S. Cohen, Esq.**, for appellant (Oxford Cohen, attorneys)

**Hugh A. Thompson**, Assistant Corporation Counsel, for respondent (Kenyatta K. Stewart, Corporation Counsel)

Record Closed: October 20, 2021

Decided: December 2, 2021

BEFORE, **LESLIE Z. CELENTANO**, ALJ:

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

Appellant Derrick Gully (appellant or Gully), appeals the decision of respondent City of Newark (respondent or Newark), finding that he had failed to comply with leave policy; had been absent without authorization for five or more consecutive days and had thereby resigned his position not in good standing pursuant to N.J.A.C. 4A:2-6.2. Appellant was removed effective June 29, 2020 due to alleged chronic or excessive absenteeism or lateness, inability to perform duties, neglect of duty, and other sufficient

cause pursuant to N.J.A.C. 4A:2-2.3(a). By a Preliminary Notice of Disciplinary Action dated July 23, 2020, respondent advised appellant of the following charges:

- N.J.A.C. 4A:2-2.3(a)4 – Chronic or excessive absenteeism or lateness
- N.J.A.C. 4A:2-2.3(a)3 – Inability to perform duties
- N.J.A.C. 4A:2-2.3(a)7 – neglect of duty
- N.J.A.C. 4A:2-6.2(b) – Resignation not in good standing
- N.J.A.C. 4A:2-2.3(a)12 – Other sufficient cause (unfit for duty)

A departmental hearing was scheduled for September 11, 2020, and appellant failed to appear. By Final Notice of Disciplinary Action dated September 22, 2020, appellant was determined to have resigned not in good standing and removed effective June 29, 2020.

The matter was transmitted to the Office of Administrative Law (OAL) on November 4, 2020, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Based upon the availability of the parties, a telephone conference was scheduled for January 27, 2021, however petitioner did not appear. The telephone conference was rescheduled for March 3, 2021 and the hearing was scheduled for August 23, 2021 and took place on that date. The parties requested an opportunity to submit post-hearing briefs, and the submissions were received on October 20, 2021.

### ISSUES

1. Whether respondent has proven the charges by a preponderance of the credible evidence.
2. Whether the penalty of removal effective June 29, 2020, and resignation not in good standing effective June 29, 2020, was justified and reasonable if a charge or charges are sustained.

**FACTUAL DISCUSSION AND SUMMARY OF TESTIMONY**

What follows is not a verbatim accounting of the testimony, but rather a summary of the testimonial and documentary evidence I found to be relevant to resolving the issues in this matter. Based upon consideration of the testimonial and documentary evidence presented, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following as facts:

Appellant had been employed by the City of Newark, Department of Water and Sewer Utilities, since June, 2001. He took leaves of absences as follows:

Dates Absent	Number of Days Out	Returned to Work	Leave Approved
1/4, 7, 10, 11 1/23-31, 2019	11 Days		
2/1, 21-22	3 Days		
3/5, 6, 18, 26	No sick time left exhausted after March 5		
4/29 & 30	Absent no pay		
5/13, 14 & 30	Absent no pay		
9/10	Absent no pay		
9/30/19 – 10/31/21	24 Days	11/1/19	11/4/19
1/14/20 – 2/21/20	29 Days	2/24/20	2/26/20
4/17/20 - 6/12/20	40 Days	6/15/20	6/15/20 Not signed by appellant
6/29/20	Appellant never returned		

\*March 5 was the last day of sick leave in 2019

Testifying for respondent was Tiffany Stewart. Ms. Stewart began working for respondent as the attorney for the Department of Water and Sewer Utilities. She was in that position for three years and then assumed the position in customer service and billing. Two years later she became the Assistant Director of the Department of Water and Sewer Utilities and has been in that position for two years. Her responsibilities include anything related to the city watershed, all discipline in the department, billing and customer service, project management for the utility, and assuring federal and state regulatory compliance, and legal issues.

She became involved in this matter when she was made aware there was no documentation regarding appellant's absences. She asked staff to send him a letter (R-1) which was signed by the director of the department. Gully did not do a FMLA form for his leave commencing September 30, 2019.

Director Kareem Adeem approved the FMLA leave on November 4, 2019, after appellant had been out for 24 days. Appellant had gone out on leave on September 30, 2019, so his leave was approved after the fact. The paperwork is supposed to be submitted before someone takes leave, not at the end of the leave. (R-2, pg. 5.)

Appellant was cleared to return on November 1, 2019 (R-2, pg. 8) but did not return on that date. His attendance sheet for 2019 (P-9) showed he used all 15 days in the first three months of the year; 11 in January, 3 in February and 1 in March.

After he used all of his days he was absent again in March for three more days; in April for two more days without pay; in May three more days without pay; and in September one more day. Employees get fifteen days for the full year and appellants absenteeism was chronic and excessive. There are also fourteen or fifteen municipal holidays and vacation time and they need sufficient coverage to provide clean and safe drinking water to residents. Inconsistent and unreliable attendance makes it difficult to manage the field work and operations. She noted that sick days are credited at the start of the year but have to be earned, and if an individual does not accrue sufficient work time, the leave is prorated. Slightly over one day is earned each month, and if an employee leaves employment with the city they owe the money back.

A memo to appellant from the then Acting Chief of Administrative Services (R-3, page 10), warned appellant to let them know if he needed extended leave; and that he is already impeding daily operations of the Department. Also, on page 12 was another warning that medical documentation was required and had to be provided to explain the absences. Appellant was reminded several times via written warnings and telephone calls seeking documentation on a number of occasions.

On page 15 was the FMLA return to work form signed by the Director on February 26, 2020, meaning the leave was approved after appellant returned on February 24, 2020. He should have submitted the request for leave and all documents before taking the time off.

Appellant's attendance sheet for 2020 (R-3, pg. 18) shows that he had 15 days at the start of January but used all of his sick time that month and was also absent after that and has a pattern of chronic absenteeism.

On page 19 is another letter from the Department to the appellant dated May 5, 2020, constituting another warning because he was out again without documents and absent without any communication.

By this time appellant was familiar with the process; they had sent him so many warnings. They try to be lenient and work with employees and could have imposed more discipline than they did. They try to help them be compliant but in appellant's case, he never followed any of the proper procedures. His sporadic, inconsistent, unreliable attendance as a Senior Maintenance Repairer affected their operations. He was responsible to maintain the city water infrastructure for example if a water main broke; to find it, isolate and repair it so people are not without water for a significant period of time.

On page 21 appears another letter warning dated May 7, 2020, letting him know he had once again not done the paperwork and had not worked since April 16, 2020. The letter instructs him to return the form by May 18, 2020, or be terminated and they never received that form back.

On June 3, 2020, appellant was advised (R-5, pg. 28) that his paperwork was not sufficient. At page 29 is the FMLA form covering April 17, 2020 to June 12, 2020. It was signed by the director on June 15, 2020, two months after appellant's last work day. Appellant never even signed the form and continued to fail to follow protocols. Paperwork was always submitted long after it was due.

On page 30 a June 11, 2020, doctor's note says that appellant can return to work June 15, 2020, and he did return that day, but then did not show up on June 29, 2020 which was his last day. He has not worked since.

At page 32 a doctors note dated July 6, 2020, says he can return to work July 20, 2020, however on page 31 is a July 20, 2020, doctor's note saying he has to be out again till August 17, and then reevaluated before he can return, so there is no return to work date. Thus, after June 29, 2020, it would have been seven more days until July 20, 2020, and then another month out until August 17.

According to the union contract, employees have deemed to abandon their job after five days.

On page 33 is a memo scheduling the hearing for September 11, 2020, and appellant did not show up for the hearing. He was resigned not in good standing effective June 29, 2020, and per the union contract five days or more of absence is considered a resignation not in good standing.

Millions of people rely on clean and safe drinking water and they have to be certain that facilities are maintained 24/7. The infrastructure needs to be stable, and they finally had to terminate appellant for safe maintenance of the system. He was an unreliable employee and they needed someone who could do those duties. He was not showing up for work, and was not submitting the required documentation so they could prepare for his absences. Asked on cross examination why didn't they terminate him when he was out from April 17 to June 12, 2020, Stewart noted that just because they kept constantly giving him latitude does not mean they have to do that endlessly, and they finally got to a



point where they could not operate where a senior employee was not performing his duties. This had gone on for one and a half years and he was out for a huge chunk of time with no backup documentation, no advance warning that there was going to be a vacancy, and they "cannot operate the department on a fly-by-the-seat-of-the-pants manner."

Since September 2019 appellant has not followed protocol. He had fifteen days of sick leave at the start of 2019 when employees are loaned those days at the beginning of the year and each month they accrue days. If an individual quits or does not work, they owe the city the return of any days that they used that they had not yet accrued. In appellant's case by March 1, 2019, he had used all of his days for 2019. In 2020 he also used all of his days in the first four months. He chronically abused his time and always had to be asked for doctors notes. They were never given in advance as required. He was warned many times and always filled out the paperwork after returning from leave. It was a significant detriment to the department when he abandoned his job for excessive periods of time.

On May 5, 2020, appellant received a written warning for abuse of sick-time benefits which outlined the requirements for medical certification when absent due to illness. He was informed that if he failed to adhere to the policy and the behavior were to continue, disciplinary action would be instituted, and could include termination of employment.

On May 7, 2020, appellant received an amended written warning for the absence which had commenced on April 16, 2020. FMLA forms were attached and appellant was instructed to return them no later than May 18, 2020. On June 3, 2020 appellant received another written warning for failure to provide the necessary documentation, and was reminded of the policies and procedures, including the requirement for submission of medical certification. The warning also reminded appellant that continued abuse of the policies could result in termination.

I found Ms. Stewart to be a credible and reliable witness.

**LEGAL DISCUSSION AND CONCLUSION**

The Civil Service Act and regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:2-1.1 to 4A:2-6.2. A civil service employee who commits a wrongful act related to his or her duties or who gives other just cause may be subject to major discipline. N.J.S.A. 11A:2-6, -20; N.J.A.C. 4A:2-2.2, -2.3.

In an appeal such as this from a disciplinary action that resulted in the termination of employment, the appointing authority has 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); In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of the 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 (1975). Credibility, or, more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954). Both guilt and penalty are redetermined on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

A public employee who is protected by the provisions of the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are enumerated at N.J.A.C. 4A:2-2.3, which provides, in salient part:

- (a) An employee may be subject to discipline for:

.....

3. Inability to perform duties;
4. Chronic or excessive absenteeism or lateness;
- ....
7. neglect of duty
- ....
12. Other sufficient cause.

Appellant is also charged with resignation not in good standing. N.J.A.C. 4A:2-6.2(b) provides:

Any employee who is absent from duty for five or more consecutive business days without the approval of his or her superior shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing. Approval of the absence shall not be unreasonably denied.

In Delgesso v. Atlantic County Adult Detention Center, 97 N.J.A.R.2d (CSV) 321, an employee's absence for fifty-nine days in one year was determined sufficient to support a finding of excessive absenteeism.

In Viereck v. City of Gloucester, 97 N.J.A.R.2d (CSV) 573, an employee was to return to work on September 26, 1994, from family leave, and did not return as scheduled. On September 28, 1994, the employee was terminated. On October 3, 1994, the employee provided a doctor's note dated September 23, 1994; however, two days' absence was determined to be sufficient under the circumstances of that case to support removal. The employee was ultimately reinstated by the Merit System Board, which indicated in its final decision that the two-day absence cited by the ALJ was not sufficient to support removal, largely due to the employee's sterling attendance record up to that point. This case is therefore easily distinguished from the within matter.<sup>1</sup>

In Littlejohn v. Division of Medical Assistance and Health Services, 96 N.J.A.R.2d (CSV) 471, the employee was terminated and deemed to have abandoned her position

---

<sup>1</sup> Viereck subsequently sued the City for violations of the FMLA (Viereck v. City of Gloucester City, 961 F. Supp. 703 (D. N.J. 1997)).

and resigned not in good standing after failing to return to work following a leave of absence. She did not provide a timely medical verification of her illness, and only after receiving the Preliminary Notice of Disciplinary Action did she provide a physician's note to her employer. The ALJ determined that the employee's attempt to supply a physician's note after receiving the notice of discipline failed to rehabilitate the circumstances and was unavailing.

Respondent resigned Gully not in good standing for being absent from duty for more than five consecutive business days without approval, thereby deeming him to have abandoned his position, N.J.A.C. 4A:2-6.2(b), and for habitual abuse of the family-and-medical-leave policy and leave-of-absence policy.

Appellant's employer had a right to expect that he would be present at work, willing and able to perform his duties. Certainly respondent is not obligated to continue to employ a person who either cannot, or will not, perform his job duties on a regular basis. Frequent absences cause disruption in the public work place and create a hardship for the remaining employees, who must absorb the job duties of a person who cannot or will not perform them.

Appellant had multiple warnings making abundantly clear what the policy was, and he failed and refused to comply each and every time, providing insufficient or no notice, insufficient medical documentation, and ignoring the warnings. The fact that the leaves were approved after the fact does not justify his conduct.

Based upon the credible evidence in the record and the specific findings above, I **CONCLUDE** that respondent has met its burden of proving, by a preponderance of the credible evidence, the charges against appellant. Respondent was more than accommodating to appellant; indeed, there were a number of absences where appellant did not follow designated procedures for supplying medical verification, but appellant was not cited or held accountable for those absences. Appellant had ample opportunity to correct his chronic and excessive absenteeism.

It was recognized in Bock, supra, 38 N.J. at 522, that "[j]ust cause for dismissal can be found in habitual tardiness or similar chronic conduct." The same principle can be applied to the instant matter, where the charges and proofs include a consistent, long-term and unimproved course of habitual and chronic absenteeism. Moreover, the respondent benevolently exhibited great patience towards the appellant. He was warned more than once, yet none of the warnings bore any positive results. Considering the totality of the circumstances, and particularly considering the degree of patience exhibited by respondent, I **CONCLUDE** that respondent was justified in taking disciplinary action against appellant and justified in imposing the penalty of removal.

Respondent has afforded appellant ample opportunity to report to work on a regular basis and to comply with required procedures. Appellant is either unable or unwilling to do so. Accordingly, I **CONCLUDE** that the penalty imposed is appropriate. Therefore, as respondent has met its burden of proof with respect to the charges, appellant's removal and resignation not in good standing from his position are **AFFIRMED**.

### **ORDER**

It is hereby **ORDERED** that the removal and resignation not in good standing of Derrick Gully are **AFFIRMED** and his appeal is **DISMISSED**.

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION**

**OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION,  
44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312, marked  
"Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the  
other parties.**

December 2, 2021

DATE



LESLIE Z. CELENTANO, ALJ

Date Received at Agency:

December 2, 2021

Date Mailed to Parties:

December 2, 2021

dr

**APPENDIX**

**Witnesses**

For Appellant:

None

For Respondent:

Tiffany Stewart

**Exhibits**

For Appellant:

None

For Respondent:

- R-1 Amended Final Notice of Disciplinary Action (2pages)  
Final Notice of Disciplinary Action (1 page)  
Preliminary Notice of Disciplinary Action (2 pages)
- R-2 Doctor's Note and FMLA Forms for (9/30/19 – 11/1/19)  
2019 Attendance sheet
- R-3 April 16, 2019 and January 21, 2020, Written Warnings  
FMLA Form from 1/14/22 – 2/24/20  
Doctor's Notes from 1/14/20 -2/24/20  
2020 Attendance Sheet
- R-4 May 5, 2020 and May 7, 2020 Written Waning  
FMLA Form and Correspondence form Department  
FMLA Form 4/17/20 – 6/12/20
- R-5 FMLA Letter from The Department  
FMLA Form from 4/17/20 to 6/12/20  
Doctor's Note Stating Gully Can Return 6/15/20
- R-6 Doctor's Notes for August  
Memo Scheduling a Department Hearing