



DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 6<sup>TH</sup> DAY OF APRIL, 2022

*Deirdre' L. Webster Cobb*

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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**

OAL DKT. NO. CSV 01570-21

CSC DKT. NO. 2021-904

**KIMY VELAZQUEZ,**

Appellant,

v.

**NEW JERSEY DEPARTMENT**

**OF TRANSPORTATION,**

Respondent.

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**George Horiates, Esq.,** for appellant

**Nonee Lee Wagner,** Deputy Attorney General, for respondent, (Matthew J Platkin,  
Acting Attorney General of New Jersey, attorney)

BEFORE **WILLIAM T. COOPER, III, ALJ:**

Record Closed: February 10, 2022

Decided: March 7, 2022

**STATEMENT OF THE CASE**

Appellant, Kimy Velazquez appeals the New Jersey Department of Transportation's (NJDOT) November 12, 2020, Final Notice of Disciplinary Action (FNDA) sustaining the charge of violation of N.J.A.C. 4A:2-6.2(b) (Resignation Not in Good Standing) by abandoning his job as a bridge operator.

## PROCEDURAL HISTORY

On August 3, 2020, appellant was arrested for Theft and Possession of Stolen Property in Ocean County, NJ. (C-1). On August 20, 2017, appellant was placed off duty without pay because of the alleged criminal charges. A Preliminary Notice of Disciplinary Action (PNDA # 1) was issued on August 21, 2017, for an Indefinite Suspension pending the outcome of the criminal charges.

On August 24, and November 9, 2017, counsel for appellant requested a departmental hearing to appeal the indefinite suspension. No hearing was provided.<sup>1</sup>

On October 23, 2020, NJDOT issued a Preliminary Notice of Disciplinary Action charging petitioner with a violation of N.J.A.C. 4A:2-6.2(b) (Resignation Not in Good Standing) (PNDA # 2). On November 12, 2020, NJDOT issued a Final Notice of Disciplinary Action (FNDA) sustaining the charge.

On November 23, 2020, appellant appealed the FNDA, and the matter was transmitted to the Office of Administrative Law (OAL) where it was filed as a contested case on May 20, 2021. N.J.S.A. 52:14 B-1 to-15; N.J.S.A. 52:14 F-1 to-13.

The hearing was conducted January 25, 2022. The record remained open for the parties to submit closing statements and closed on February 10, 2022.

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<sup>1</sup> N.J.A.C. 4A:2-2.7(a)(3) states that "where the appointing authority determines that an indefinite suspension should be imposed, a Final Notice of Disciplinary Action shall be issued stating that the employee has been indefinitely suspended pending disposition of the criminal complaint or indictment." This was not done in this case; however, petitioner made no application for relief to the Civil Service Commission regarding that suspension. Thus, the only issue here is the FNDA issued on November 12, 2020.

## **FACTUAL DISCUSSION**

### **For Appellant:**

**Kimy Velazquez** testified that he was employed as a Bridge Operator with the NJDOT for approximately fifteen (15) years and is a member of Local 195 of the International Federation of Professional and Technical Engineers (IFPTE). He was an employee in good standing and had passed the civil service examination to be appointed to the Chief position. He was also respected by both management and co-workers and seen as a potential shop steward for his local union affiliation. He was familiar with work rules and regulations.

The appellant was arrested, along with his wife, on August 3, 2017, and charged with theft and receiving stolen property. It was alleged that he and his wife were involved in a scheme referred to as "glitching," which is the use of internet codes to illegally obtain department store merchandise that is then sold online for cash. He denied any knowledge of his wife's activities or involvement in the scheme but admitted that stolen merchandise was found in the home he shared with his wife and daughter. Appellant was embarrassed by the arrest noting that it had made the local newspapers as well as local media.

The appellant did not notify anyone at the NJDOT about the arrest and continued to report to work. On August 18, 2017, he was told to report to Trenton on August 21, 2017. In Trenton he met with an IPTFE representative and two women from human resources (HR) who advised him he was indefinitely suspended. He had presented him with PNDA #1 and a COBRA letter. According to petitioner he was not entirely sure why he was being suspended and was unsure if it was with or without pay. He met with his attorney and authorized counsel to contest the suspension.<sup>2</sup>

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<sup>2</sup> N.J.A.C. 4A:2-2.7(a)(1) provides that a hearing shall be limited to the issue of whether the public interest would best be served by suspending the employee until disposition of the criminal complaint or indictment. The standard for determining that issue shall be whether the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order, or effective direction of public services.

On August 24, 2017, his attorney requested that the NJDOT conduct a hearing on the suspension; however, no hearing ever took place. A second letter was sent from his attorney on November 9, 2017, but again there was no response from NJDOT. Appellant took no further action regarding the indefinite suspension.

On October 29, 2018, the appellant agreed to enter the Pretrial Intervention Program (PTI) with the Ocean County Probation Department for a period of twenty-four (24) months. He indicated that he had suffered some serious life issues during this time, namely he divorced his wife and for a time was homeless, forced to live out of his car. Nevertheless, he was able to regain employment as a school bus driver. He successfully completed the PTI program and was discharged on November 21, 2019. (J-17). The PTI dismissal report indicates that the appellant's employer was R&D Transportation, and not the NJDOT. (J-18).

Appellant indicated that he was not immediately aware of the early dismissal from PTI and did not receive a letter from his Probation Officer until January 2020. He had not heard from his IPTFE representative until November 2020 when NJDOT was looking to terminate his employment. The appellant admitted that he was frustrated by NJDOT's lack of response to his previous request for a hearing and had attempted to reach them by phone but had never received a call back. NJDOT was not made aware of his change of address, and when questioned about this, the appellant indicated he had no one to tell because NJDOT had completely ignored him.

**For Respondent:**

**Michele Shapiro** testified that she is now retired from her former position as NJDOT's Director of Human Resources. She explained that appellant did not advise NJDOT of his arrest and that the NJDOT found out about it through the media coverage. Once NJDOT learned about the arrest it obtained information regarding the alleged violations and conducted an internal analysis of the charges. Based upon its review, the NJDOT determined that if appellant either plead guilty or was found guilty of the charges, he would be subject to forfeiture of his public office. As such she authorized and executed PNDA #1 which indefinitely suspended appellant from his employment without pay.

Shapiro acknowledged that appellant timely requested an appeal, but a departmental hearing did not occur. She noted that this is standard when criminal charges are involved, and the potential of employment forfeiture exists.

According to Shapiro, NJDOT routinely monitors the status of employees who are suspended for pending criminal charges. In September 2020 the agency learned that appellant had successfully completed PTI on November 20, 2019. Appellant had not contacted NJDOT to advise them the criminal charges were resolved or to seek a return to work.

Based upon appellant's failure to notify NJDOT of his status Shapiro issued PNDA #2 charging him with a violation of N.J.A.C. 4A:2-6.2(b) (Resignation Not in Good Standing) by abandoning his position. She had staff transmit the notice to appellant by regular and certified mail to his last known address. A timely appeal was not received and NJDOT issued an FNDA on November 12, 2020. Shapiro could not say whether the appellant had received PNDA #2.

Appellant's union received a copy of the FNDA on November 13, 2020, and an appeal was filed thereafter.

### **FINDINGS**

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also must be credible. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witnesses' story considering its rationality or internal consistency and the way it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9<sup>th</sup> Cir. 1963). Also, "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).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super 282, 287 (App. Div. 1958).

As to the credibility of respondent’s witness, I accept the testimony of Shapiro as credible. She easily recounted the actions taken by her staff once it was discovered that appellant had been arrested and charged with serious criminal offenses. She was candid in admitting that no hearing took place regarding the indefinite suspension even though a request for one had been received. Her testimony clearly established that once it was discovered that petitioner’s criminal charges were dismissed, and that he had not reported back to work, NJDOT initiated the proper procedure to terminate petitioner

Appellant blamed his wife for the criminal charges, only accepting some blame because stolen items were found in the marital residence when he was arrested. He testified that he met with his union representative and two NJDOT Human Resources (HR) staff members but claimed he was unaware of why he was being suspended and whether it was with or without pay. He blamed the State for ignoring his requests for a hearing but made no attempt to seek assistance through his union even though he claimed to be familiar with the work rules and regulations. Further, he claimed that he was not aware of the Order of PTI Dismissal being issued blaming his probation officer for not notifying him. Lastly, he denied receiving PNDA # 2 because it was not mailed to his current address, even though he admitted to not advising NJDOT of his address change. Appellant’s inability to accept any fault negatively impacted his credibility.

Based upon the testimony of the witnesses, and documentary evidence, I **FIND:**



1. Appellant was employed as a Bridge Operator by NJDOT for approximately fifteen years and was a member of Local 195 of the International Federation of Professional and Technical Engineers.
2. Appellant was arrested on August 3, 2017, on an alleged violation of Theft and Possession of Stolen Property.
3. On August 21, 2017, appellant was personally served with an indefinite suspension without pay pending the resolution of the pending criminal charges pursuant to N.J.A.C. 4A:2-2.7 (PNDA #1). Appellant was also served at the same time with a COBRA letter.
4. On August 24, 2017, counsel for appellant requested a departmental hearing to appeal the indefinite suspension.
5. On November 9, 2017, counsel for appellant submitted a second request for a departmental hearing to appeal the indefinite suspension.
6. No departmental hearing was held, and appellant took no further action concerning PNDA # 1.
7. On October 29, 2018, appellant was placed into the Pretrial Intervention Program with the Ocean County Probation Department for a period of twenty-four months, with an anticipated completion date of October 28, 2020.
8. The appellant successfully completed the program early and on November 12, 2019, the criminal charges were dismissed. (J-17 &18).
9. Appellant did not notify NJDOT that he had successfully completed PTI or that the criminal charges pending against him had been dismissed.
10. Appellant did not notify NJDOT of his address change.
11. On September 14, 2020, NJDOT learned that appellant had concluded PTI approximately eleven months earlier and had failed to notify them of his status or whether he wanted to return to work as a bridge operator.
12. On October 23, 2020, PNDA #2 was issued charging appellant with a violation of N.J.A.C. 4A:2-6.2(b) (Resignation Not in Good Standing).
13. PNDA #2 was sent to appellant via certified and regular mail on October 26, 2020, at his last known address.
14. The appellant did not request a hearing for PNDA #2, and on November 13, 2020, a FNDA was issued sustaining the charges against appellant.

15. The FNDA was received by appellant's [possessive] union representative on November 13, 2020.
16. On November 23, 2020, appellant filed a Major Disciplinary Appeal Form with NJDOT.

### LEGAL ANALYSIS

The issue presented here is whether appellant's failure for approximately eleven months to notify NJDOT of the final disposition of the criminal charges pending against him and that he was ready to report back to work, constitute an abandonment of his position and should be recorded as a resignation not in good standing.

Appellant's rights and duties are governed by the Civil Service Act and accompanying regulations. 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 through 2-20; N.J.A.C. 4A:2-2.2, through 2.6. Major discipline includes removal, fine, or suspension for more than five working days.

The appointing authority has the burden of establishing the truth of the allegations by a 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 the 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), overruled on other grounds, Dwyer v Ford Motor Co, 36 N.J. 487 (1962).

N.J.A.C. 4A:2-6.2(b) provides that;

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.

Here, appellant was suspended indefinitely on August 21, 2017, pending the outcome of the criminal charges. On October 29, 2018, appellant was placed into PTI with the Ocean County Probation Department for a period of twenty-four months, with an anticipated completion date of October 28, 2020. The appellant successfully completed this program early and on November 12, 2019, the criminal charges were dismissed. The appellant was eligible to have his suspension lifted as of November 12, 2019. However, from that date until September 14, 2020, (when NJDOT learned that the criminal charges were dismissed) the appellant made no attempt to contact NJDOT. The appellant failed to advise NJDOT that the criminal charges had been dismissed, or that he was ready to return to work.

Further, appellant failed to provide a reasonable explanation regarding his failure to notify NJDOT. His claim that there was no one to contact at NJDOT is simply without merit. If the appellant were having difficulty reaching his employer, then he could have contacted his union representative for assistance. Instead, for eleven months appellant simply chose to take no action, and essentially abandoned his position as a bridge operator.

Applying the law to the facts, I **CONCLUDE** that NJDOT has sustained, by a preponderance of the credible evidence, the violation charge of N.J.A.C. 4A:2-6.2(b) (Resignation Not in Good Standing) specifically by the appellant failing to return to duty after the final disposition of the criminal charges, thereby abandoning his position.

### **ORDER**

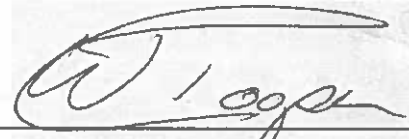
I **ORDER** that the charge of Resignation Not in Good Standing, in violation of N.J.A.C. 4A:2-2.6(B), is sustained, and that the action of the NJDOT in removing the appellant, Kimy Velazquez, from his position as a bridge operator is hereby **AFFIRMED**. The appeal is **DISMISSED**.

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.

March 7, 2022  
DATE



WILLIAM T. COOPER, III, ALJ

Date Received at Agency:

March 7, 2022

Date E-Mailed to Parties:  
lr

March 7, 2022

**APPENDIX**

**Witnesses**

**For Appellant:**

Kimy Velazquez

**For Respondent:**

Michele Shapiro

**Exhibits**

- C-1 Joint Stipulation of Facts
- C-2 Revised Joint Exhibit List
- C-3 Written Summation of Appellant 2/2/22
- C-4 Written Summation of NJDOT 2/8/22
- J-1 August 21, 2017, COBRA letter from Shapiro
- J-2 August 24, 2017, UPS tracking info for Request for Departmental Hearing
- J-3 August 24, 2017, Request for Departmental Hearing Action
- J-4 August 21, 2017, Preliminary Notice of Disciplinary Action (PNDA #1)
- J-5 November 9, 2017, Second Request for Departmental Hearing
- J-6 October 23, 2020, Preliminary Notice of Disciplinary Action (PNDA #2)
- J-7 October 23, 2020, Letter from Shapiro to Velazquez.
- J-8 to J-9 November 23, 2020, Request for Appeal of Major Disciplinary Action
- J-10 Appeal of Major Disciplinary Action
- J-11 to J-12 November 10, 2020, Final Notice of Disciplinary Action and Specifications
- J-13 to J-14 Analysis Sheet
- J-15 to J-16 February 23, 2021, Notice of Filing
- J-17 November 19, 2019, Pretrial Intervention Order of Dismissal
- J-18 Ocean County Pretrial Intervention Dismissal Report
- J-19 NJ Courts Memorandum dated November 19, 2019
- J-20 Excerpt from NJ DOT Disciplinary Policy