STATE OF NEW JERSEY

In the Matter of Syed Tariq-Shuaib, Hudson County, Department of Parks, Engineering and Planning CSC DKT. NO. 2020-1655 OAL DKT. NO. CSV 00129-20	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**

ISSUED: DECEMBER 21, 2022

The appeal of Syed Tariq-Shuaib, Principal Engineer, Hudson County, Department of Parks, Engineering and Planning, removal, effective November 20, 2019, on charges, was heard by Administrative Law Judge Thomas R. Betancourt (ALJ), who rendered his initial decision on November 3, 2022. 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, including a thorough review of the exceptions and reply, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of December 21, 2022, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision.

The Commission makes the following comments. As indicated above, the Commission thoroughly reviewed the exceptions filed by the appellant in this matter. The Commission notes that the ALJ's findings and conclusions in upholding the charges and the penalty imposed was based on his thorough assessment of the record and were not arbitrary, capricious or unreasonable. In this regard, the ALJ specifically provided many findings based directly on his assessment of the credibility of the witnesses. In this regard, he specifically found the testimony of the appellant's daughter "problematic," "self-serving" and "not credible," and the appellant's testimony "completely not believable." Upon its *de novo* review of the record, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not

transmitted by the record." *See also, In re Taylor,* 158 *N.J.* 644 (1999) (quoting *State v. Locurto,* 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra).* The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri u. Public Employees Retirement System,* 368 *N.J. Super.* 527 (App. Div. 2004). In this matter, the exceptions filed by the appellant are not persuasive in demonstrating that the ALJ's credibility determinations, or his findings and conclusions based on those determinations, were arbitrary, capricious or unreasonable. As such, the Commission has no reason to question those determinations or the findings and conclusions made therefrom.

Further, the Commission notes that given the sustained infractions in this matter as well as the appellant's recent history of major discipline, removal from employment is clearly warranted as that penalty neither shocks the conscious nor is disproportionate to the offenses in light of the appellant's prior history.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Syed Tariq-Shaiub.

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 21ST DAY OF DECEMBER, 2022

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
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 00129-20
AGENCY DKT. NO. 2020-1655

SYED TARIZ-SHUAIB,
HUDSON COUNTY DEPARTMENT OF
PARKS, ENGINEERING & PLANNING

Samuel Wenocur, Esq., for appellant, Syed Tariq-Shuaib (Oxfeld Cohen, attorneys)

Raymond J. Seigler, Esq., for respondent, Hudson County Department of Parks, Engineering & Planning (Chasan, Lamparello, Mallon & Cappuzzo, attorneys)

Record Close Date: September 19, 2022 Decided: November 3, 2022

BEFORE **THOMAS R. BETANCOURT**, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant appeals a Final Notice of Disciplinary Action, dated November 26, 2019, providing for a penalty of removal, effective November 11, 2019.

The matter was transferred to the Office of Administrative Law (OAL) as a contested case on January 3, 2020.

A prehearing conference was held on January 13, 2020, and a prehearing Order was entered on the same date.

Respondent filed a motion for summary decision on May 14, 2021. Appellant filed his reply thereto on June 11, 2021. Said motion was denied by Order dated August 13, 2021.

The hearing was held on December 6, 2021, and January 3, 2022.

The parties were permitted to submit written closing arguments after receipt of the transcript of the hearing. The parties requested an extension of time to submit closing arguments, which was granted.

Appellant submitted his closing argument on August 12, 2022. Respondent submitted their closing argument on September 12, 2022. Appellant was permitted a reply to Respondent's submission, which was filed on September 19, 2022, whereupon the record closed.

ISSUES

Whether there is sufficient credible evidence to sustain the charges set forth in the Final Notice of Disciplinary Action; and, if sustained, whether a penalty of removal is warranted.

SUMMARY OF RELEVANT TESTIMONY

Respondent's Case

Thomas Malavasi testified as follows:

He is the County Engineer for the County of Hudson, and has been so employed since January of 2016. Mr. Malavasi went on to describe his job duties.

When Mr. Malavasi started the Appellant, Mr. Shuaib, was employed by the County as a principal engineer. Mr. Malavasi then described the duties of a principal engineer. Failure of a principal engineer to perform their job could jeopardize funding received from the State. Road funding requires that contracts be awarded in three years. Bridge funding require that contracts be awarded in two years. Grants have time constraints. If projects are not done in a timely manner there is a risk of losing funding.

Appellant's job performance put the County at risk of losing funding. Appellant had been working on, before his illness, was Schuyler Avenue in Kearny. This was around October 2016. A project of this size would take an engineer four to six months. Mr. Malavasi received a reportedly final set of plans in December 2017. It took Appellant a little over a year. The plans were not complete. Appellant became ill soon after he submitted the plans. Mr. Malavasi did not review them right away. When he did he though they were around forty percent complete. Appellant was reassigned the project when he returned from his suspension in July of 2019.

When Appellant returned to work after his medical leave he was assigned a project on John F. Kennedy (JFK) Boulevard in North Bergen and Union City. It was a new assignment and Appellant was to prepare a set of plans, specifications and cost estimate. Appellant never finished this project. It was probably a six month project. Appellant worked on it from the date assigned, and the date he returned from his illness to the day he was suspended for sixty days.

Mr. Malavasi was involved in the process that resulted in Appellant being suspended for sixty days, from April 8 to July 2, 2019. He is Appellant's direct supervisor. He was also involved in the discipline that is the subject of the present hearing.

Appellant was suspended for sixty days for neglect of duty, insubordination, failure to perform duties, lack of compliance with office policy, lack of following direction.

Appellant did not prepare the required design documents or bid documents needed to improve county roads. This put funding at potential risk.

Appellant did not use the sign in book. Everyone signs in and out. Appellant would sign in and out, but it was not legible. Mr. Malavasi asked Appellant to email him with his in and out times. Appellant, at times, would not be accurate with his time. He misrepresented when he was coming and going. He personally observed Appellant sign in and leave to go find a parking spot.

Appellant also had a problem with submitting reports requested of him. Mr. Malavasi requested that Appellant provide weekly reports as to projects he was working on. This was requested because of his lack of progress. Appellant did not supply the requested reports. Mr. Malavasi would advise Appellant both verbally and via email.

The email requirement to advise as to times in and out was only for Appellant, as his handwriting was not legible, and he did not properly record his time in and out.

An email from January 22, 2019 from Mr. Malavasi to Appellant stated that Mr. Malavasi had low confidence that Appellant would complete the documents in March for the JFK Boulevard project he was working on. Appellant had a failure to meet deadlines past that went back to at least 2016, when Mr. Malavasi started.

Mr. Malavasi reviewed a series of emails between January 2019 and February 2019, from him to Appellant, with some responses from Appellant, wherein Mr. Malavasi set forth Appellant's non-compliance with emails requested regarding times in and out, not updating his physical therapy prescription which had expired, and his lack of progress on projects.

The disciplinary hearing that resulted in Appellant being suspended for sixty days took place in March 2019.

Mr. Malavasi noticed that on drawings submitted by Appellant were not all done by him. There was the handwriting of someone else on them. Appellant had been provided a laptop, and had access to computer aided drafting (CAD) in the office. Appellant's computer was fully updated with the latest version. He was given the

manual on how to use auto CAD. He was provided with links to the software website. Appellant never took advantage of the accommodations he asked for.

By email dated January 4, 2019, Mr. Malavasi advised Appellant he was aware that his daughter was in the office all week, and that he hoped she was not doing his work for him. This was based on Mr. Malavasi's observations that the plans were not completely in Appellant's handwriting. Thereafter, via email, Appellant was advised his daughter may not be in the office.

Mr. Malavasi confirmed with Appellant that his daughter was helping him with the drawing in March of 2019. Mr. Malavasi provided a certification to Appellant to sign that all the drawings were done by him. Appellant never signed it.

Appellant returned to work after his suspension in July 2019. Upon his return Appellant did not start emailing Mr. Malavasi regarding his in and out times. After about one month he did email regarding arrival, but was inconsistent with emailing about departure time. He was not consistent with working from 9:00 a.m. to 5:00 p.m. He came and went as he pleased.

Mr. Malavasi provided instruction to Appellant regarding the Schuyler Avenue project he was working on upon his return in July 2019. It should have taken about thirty days. It was not completed within ninety days.

Appellant did not follow through and use CAD. He never explained why.

Appellant was requested to provide email reports on Friday regarding his progress. They were not provided.

Mr. Malavasi reviewed emails from him to Appellant, and some in response by Appellant for the period between July 2019 and September 2019, noting that Appellant was not in compliance with his directives, and that Appellant was not close to completing the Schuyler Avenue work.

The Schuyler Avenue project was originally assigned to Appellant in 2016. In 2017 Appellant provided Mr. Malavasi a set of plans purported to be complete. In 2018 Appellant was out of work for a period of about one year. The Schuyler Avenue project was tabled by Mr. Malavasi during this time and reassigned to Appellant upon his return from his illness. Appellant was assigned two projects to close out that he previously worked on. He was also reassigned the Schuyler Avenue Project and assigned the JFK Boulevard project.

When Appellant returned to work after his illness, to the time he was suspended, he did work fewer hours as he went to physical therapy. Appellant holds a Professional Engineer (PE) license in the State of New Jersey. Not all engineers employed by Hudson County are PEs.

Mr. Malavasi again stated how the sign in book worked. He agreed that a card swipe system would solve the issue of not being able to read Appellant's handwriting. It would also have helped to know when Appellant came and went.

Mr. Malavasi began documenting Appellant's behaviors around the time he returned from his illness. In the present disciplinary matter Mr. Malavasi relied upon everything he documented from 2018 and were taken into consideration as an ongoing problem.

Appellant did provide a second prescription for physical therapy in February 2019. His first prescription expired in January 2019.

Completion of the JFK project should have taken six months. Completion means completion of a set of drawings and bid specifications, so the project can go to bid. Mr. Malavasi described the work involved in getting a project ready for bid. Site visits are part of the process. Each project is assigned to one engineer.

Mr. Malavasi received a copy of Appellant's accommodation request.

Appellant denied having his children assist him with drawings in a March 27, 2019 email.

The County has used CAD for the six years Mr. Malavasi has been employed. In 2019 the County employed seven people with the word engineer in their title. Five of them utilized CAD, not including Appellant. This number includes draft and technical personnel, not necessarily degreed engineers.

Mr. Malavasi opined that a person could become proficient enough with CAD to draw to scale in a number of weeks. The County does not offer actual classes in CAD. There are tutorials available from the manufacturer.

The certification Mr. Malavasi sent to Appellant to sign was created for this particular situation.

Appellant was requested to provide his field notes. They could have been done by hand or on his laptop, which he did not use. They were not supplied.

When Appellant returned from his illness two projects needed to be closed out. He did not complete them. They were assigned to another for completion. Engineers work on two to three projects at a time.

Mr. Malavasi agreed that Appellant was working less hours after his return to work from illness.

In filing the disciplinary action that is the subject of the within matter Mr. Malavasi relied upon all that had transpired since he began documenting Appellant's activities in 2018. Some of the allegations used regarding the discipline that resulted in a sixty-day suspension were also used herein.

In preparing documents for a project an engineer is expected to walk the area of the project.

The laptop provided to Appellant did not have the CAD program. It was provided for field notes. The CAD program is on Appellant's office desktop computer. Appellant never explained why he was not using the CAD program. Mr. Malavasi directed Appellant to complete the Schuyler Avenue project in thirty days upon his return to work. He also directed Appellant that all future work shall be in CAD after completion of the Schuyler Avenue project.

Mr. Malavasi had noticed on some scanned sheets sent to him for review of Appellant's work that there was different handwriting. These were emailed to him on March 20, 2019.

Jennifer DeSalvo, testified as follows:

She is employed as a benefits specialist with the County of Hudson. She oversees the county benefit program. She is also the ADA coordinator for the county. She interacts with an employee who requests a medical accommodation.

Ms. DeSalvo was involved with the medical accommodation request of Appellant and had an accommodation meeting, which was held on April 10, 2019. Appellant had suffered a stroke and had some limb weakness. Appellant had requested a laptop and physical therapy. There was also a request to change work start and end times. Appellant provided her with the information for his medical accommodation request. Appellant specific request was for a laptop at survey site and two people for field work. Appellant also requested to change work hours from 9:00 a.m. to 5:00 p.m. to 7:00 a.m. to 3:00 p.m. Appellant was provided a medical inquiry form for his doctor to complete.

Upon receipt of the medical inquiry form she consults with his department director. The medical inquiry form indicated that Appellant should be provided a laptop, and that he continue physical therapy. The laptop was approved. The change in hours was not, as there would be no supervisor available. The earliest Appellant could start would be 8:00 a.m., as that is when the supervisor arrives. Appellant was not advised as to his medical accommodation request until June 26, 2019, as he was suspended.

The accommodations were approved to start on July 2, 2019. Appellant signed the letter stating what accommodations were made on June 29, 2019.

By email dated July 11, 2019 from Ms. DeSalvo to Appellant, she advised him that she had not received backup documentation regarding specific physical therapy appointment dates. Those dates were needed in order to accommodate schedule changes. Appellant responded via email requesting time to go to physical therapy between 7:00 a.m. and 3:00 p.m., or to work through lunch so he could leave early. Ms. DeSalvo again presented this request to his department. Ms. DeSalvo replied on July 12, 2019 that this request could not be accommodated as no supervisor was available at the time requested. His request to leave at 3:00 p.m. was granted.

By email dated July 29, 2019, Ms. DeSalvo again notified Appellant she still has not received documentation regarding physical therapy appointments. She followed up with a letter to Appellant of the same date advising him that without the information he would not be approved to go to physical therapy. He was also advised that he was to resume work hours from 9:00 a.m. to 5:00 p.m. Appellant responded via email and provided the prescription and therapy appointments. His request was then approved. She sent Appellant a letter, dated August 1, 2019, advising him what accommodations were approved.

The physical therapy appointments provided were between July 24 and August 1, 2019. She did not receive any other appointment dates. A letter dated November 4, 2019 was sent to Appellant to advise that accommodation expired and he was to return to normal a work schedule. Appellant did not request any additional accommodations.

She did not know why Appellant requested a second person in the field.

The doctor indicated Appellant would need physical therapy two to three times per week. She would check in regularly with employees about an ongoing need for physical therapy.

She did not know why there was no response to Appellant's request to have a second person in the field. She did not recall speaking to anyone about Appellant's request to work through lunch.

The doctor's note indicated that Appellant use a laptop and continue physical therapy. It did not mention a second person in the field.

Denise D'Allessandro testified as follows:

Ms. D'Allessandro is the Director of Road and Public Property. In that capacity she oversees five divisions of the county. The department of engineering is one of them. She is Mr. Malavasi's direct supervisor.

She discussed discipline of Appellant with Mr. Malavasi. She is the one that signs PNDAs and FNDAs. She reviewed the FNDA regarding Appellant's sixty-day suspension. She also reviewed the hearing officer's decision on the matter.

She signed the PNDA for the instant matter, as well as the FNDA.

Ms. D'Allessandro was aware there were issues with Appellant getting his work done, and issues with his sign in and sign out habits.

She was aware that the Count could have suspended Appellant for up to six months.

In approving the termination of Appellant Ms. D'Allessandro relied upon the information supplied by Mr. Malavasi.

Appellant's Case

Zehra Tariq-Shuaib testified as follows:

She is the daughter of Appellant. She is 23 years old and a student at the New Jersey Institute of Technology (NJIT). She resided with her parents. She would carpool with her father to work in Jersey City, where she would then take the PATH train to Newark to attend classes at NJIT. The return trip would be the PATH train to Jersey City where she would walk to her father's office. She denied ever visiting her father's office prior to January 2019. She admits to going to his office after January 2019 at the request of her father, who had asked for her assistance to trace blueprints of a road. The road was JFK Boulevard. This was during winter break from NJIT. She denied doing anything else in terms of her father's work.

She recalled another time she was in her father's office: March 2019. She was there with her brother and a friend. The visit lasted only twenty minutes. She did not work for her father at this time.

She was aware that her father had a problem completing work related tasks. This is why he asked for her help.

She recalled seeing the drawings of JFK Boulevard before when shown them. These are the blueprints she traced. She denied it was her handwriting on the drawings.

Syed Tariq-Shuaib, Appellant, testified as follows:

He was hired by Hudson County as an engineer in 2000. Mr. Malavasi was his supervisor.

Mr. Tariq-Shuaib stated that work hours were flexible. He further stated that work could begin before 8:00 a.m. He further described how he entered the building by using a swipe card. There are many cameras.

Mr. Tariq-Shuaib then described how he works on a project and what occurs during a site visit. He further explained what is entailed in drafting plans and providing specifications for the plans. Once the plans are done they go to the county engineer. If changes are needed the plans are amended. The project then goes out to bid. A project can take six months to a year.

He stated that Mr. Malavasi can check his work on his office computer.

He stated that the Schuyler Avenue project was completed before he fell ill and took medical leave. He took more than one medical leave. He stated it was from "too much load of work".

Upon his return to work he provided medical information as to his condition. He required physical therapy two or three times per week.

He did not recall if anyone from the County asked him to provide the dates he would be going to physical therapy.

Mr. Tariq-Shuaib stated that the JFK Boulevard project was a new project for him. He did not recall when it was assigned, maybe November or December 2018. He anticipated the project would take six months.

He stated that his daughter asked if she could help him. He stated that he asked for a helper but was refused. This was in January 2019. He estimated that his daughter helped him "maybe a week". He denied his daughter did anything other than tracing.

He stated that the sixty day suspension was illegal.

He denied asking his son to help him with his work.

Mr. Tariq-Shuaib acknowledged that the numbers on the JFK Boulevard plans are different. He believed it was his handwriting. He explained the difference in appearance that it might have been done with his left hand.

He recalled being suspended for sixty days. He returned to work on July 2, 2019. He believed he was assigned the Schuyler Avenue project upon his return. The project was changed, as there was another portion added on.

Mr. Tariq-Shuaib went on to explain the clock in and clock out procedures.

He then stated that he never used CAD before. He did learn the basics. He had a six hour course. He stated that none of the engineers have to use CAD. He further stated you can't do drawings in CAD. He added that you need a four year course to do the drawing.

Mr. Tariq-Shuaib then reviewed the accommodation request form. He did not recall who he spoke with regarding the form. He stated he signed it twice, once with each hand. He recalled discussing the need for a laptop. He was permitted to use the laptop for work, but was not permitted to take it home.

He explained that site visits were done by two people before Mr. Malavasi. It was for protection. His request for a second person on site visits in his accommodation request was denied.

His request to work from 7:00 a.m. to 3:00 p.m. was denied. He felt he would have been able to work a full day if this was granted.

Mr. Tariq-Shuaib went on to explain his disability and how it affects him.

He then went on to explain how NJDOT specifications are checked for a project.

He did not recall the County asking for specific dates for physical therapy.

He stated he did not listen to his daughter's testimony, stating his Zoom was off.

He stated the Schuyler Avenue project was completed ahead of time.

CREDIBILITY

When witnesses present conflicting testimonies, it is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story in light of its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see Polk, supra, 90 N.J. 550. Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973).

The finder of fact is not bound to believe the testimony of any witness, and credibility does not automatically rest astride the party with more witnesses. In re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved, but may not be disregarded at an administrative proceeding. Middletown Twp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962). Credible testimony must not only proceed from the mouth of credible witnesses but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546 (1954).

When facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings. Credibility is the value that a finder of fact gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, its internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (8th Cir. 1963).

Director Malavasi was credible. He was direct and professional in his answers. There was no hesitation. He was able to clearly articulate why he documented Appellant's work habits, and the deficiencies therein.

Also, Jennifer DeSalvo was credible. She ably and professionally laid out how the request for accommodations work and how the process proceeds. She was clear as to why some requested accommodations were provided, and some denied. She simply related the facts as to her involvement with the process.

Denise D'Allessandro too was credible. She was also direct and professional in her testimony. She related the facts as to her involvement in the disciplinary process and how she arrived at her decision.

Zara Tariq-Shuaib's testimony was problematic. While she admitted she assisted her father, at his request, with the tracing of some blueprints, she denied her handwriting appeared on said blueprints when asked. While the question was quite simple, her response was strained. At first, she hesitated in answering the question and became visibly nervous. The undersigned had to prompt her to answer the question by reminding her it was a rather simple one. At that point she said "no", it was not her handwriting. Further, almost every question posed to her on direct was leading (also without objection). Almost all her answers were "yes" or "no". This detracts from credibility. Further, her testimony was self-serving in that it assisted her father. I deem her not credible.

Syed Tariq-Shuaib, Appellant, was completely not believable. The most compelling example of his lack of honesty arose when asked if he listened to his daughter's testimony. He stated he did not listen to it as his Zoom was off. This notwithstanding the fact that the undersigned had to admonish him during his daughter's testimony as he tried to object to something she said. He stated "Yeah, I believe that he's misdirecting her". (Tr. 1/3/22, pg. 16, line 2-7). He was evasive and argumentative. His memory often failed him. His testimony was self-serving. I simply did not believe he was forthcoming at all.

FINDINGS OF FACT

I **FIND** the following **FACTS**:

1. Appellant was employed by the County of Hudson as a principal engineer, having commenced his employment in 2000.

2. Thomas Malavasi was the County Engineer and Appellant's supervisor.

3. Appellant's employment required that he oversee capital improvement Projects and prepare plans, engage in field visits, and provide various specifications, which are found on various government websites. Projects are completed when they are ready to be sent for bids.

4. It is possible for the County to lose funding should a project not be completed in a timely manner.

5. Appellant took a medical leave of absence in 2018. He returned to work and took a subsequent medical leave of absence. It is unclear as to the date he returned to work from his second medical leave. It may have been approximately August 2018.

6. On April 3, 2019, Appellant was suspended for sixty working days, with a return to work date of July 2, 2019. (R-1)

7. Upon his return to work Appellant was provided with a Return to Work Acknowledgement and was requested to sign the same. (R-13)

8. Appellant declined to sign said form. (R-14, R-15))

9. Appellant was directed by his supervisor to email his check in and check out times. He regularly failed to do this. (R-13, R-14)

10. Upon his return from the suspension Appellant was given the Schuyler Avenue project to complete. He had originally been assigned this project prior to his medical leave. He never completed it. (Tr. 12/6/21, 12:15 to 12:25, 13:1 to 13:4, 14:1 to 14:20, R-16, R-18, R-19, R-20, R-21)

11. Appellant was also assigned a new project upon his return: JFK Boulevard. He worked on it from that point to the date he was suspended. The project should have taken six months. He never finished it. (Tr. 12/6/21, 15:10 to 15:20, 16:2 to 16:13, R-7, R-9)

12. Appellant had his daughter assist him with his work. I specifically find that her assistance was more than merely tracing blueprints, as the handwriting on some drawings were clearly not Appellant's. (Tr. 1/3/22, 9, 10, 57, R-12)

13. Appellant had his son assist him with his work. (Tr. 12/6/21, 47:15 to 50:16; R-12)

14. Through his return from suspension on July 2, 2019, through his removal, Appellant repeatedly failed to follow instructions; repeatedly failed to perform his job satisfactorily.

15. Appellant was directed to email Mr. Malavasi with his check in and check out times. Appellant repeatedly failed to do so, even after multiple requests for the same. (R-5, R-6, R-10)

16. Appellant often would come in late and leave early. (R-10)

17. Appellant requested accommodations due to his disability on April 10, 2019. (R-22)

18. Accommodations were granted, as follows: use of laptop; and, use of sick time for physical therapy. (R-23)

19. Appellant was also permitted a modified work schedule of 8:00 a.m. to 3:00 p.m. three times per week. (R-26)

20. Appellant declined the use of the laptop. (R-13)

LEGAL ANALYSIS AND CONCLUSION

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a civil service employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1, N.J. Civil Serv.

Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). In order to carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

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 set forth in N.J.A.C. 4A:2 2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relies 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 (1962); In re Polk, 90 N.J. 550 (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 (1958). Therefore, the judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). This burden of proof falls on the agency in enforcement proceedings to prove violations of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987).

In the instant matter, after a disciplinary hearing, the following charges set forth in the FNDA were sustained:

N.J.A.C. 4A:2-2.3(a)2 – Insubordination;
N.J.A.C. 4A:2-2.3(a)3 – Failure to perform duties[1];
N.J.A.C. 4A:2-2.3(a)6 - Conduct unbecoming a public employee;
N.J.A.C. 4A:2-2.3(a)7 - Neglect of duty; and,
N.J.A.C. 4A:2-2.3(a)(12) - Other sufficient cause.

[1] N.J.A.C. 4A:2-2.3(a)3 reads "inability to perform duties".

Appellant is charged with insubordination. The Civil Service Commission utilizes a more expansive definition of insubordination than a simple refusal to obey an order. In re Chaparro, Initial Decision (November 12, 2010), modified, CSC (March 18, 2011) (citing In re Stanziale, A-3492-00T5 (App. Div. April 11, 2002), <http://njlaw.rutgers.edu/collections/courts/> (appellant's conduct in which he refused to provide complete and accurate information when requested by a superior constituted insubordination)); In re Lyons, A-2488-07T2 (App. Div. April 26, 2010), <http://njlaw.rutgers.edu/collections/courts/>; In re Moreno, CSV 14037-09, Initial Decision (June 10, 2010), modified, CSC (July 21, 2010), <http://njlaw.rutgers.edu/collections/oal/>; In re Bell, CSV 4695-09, Initial Decision (May 12, 2010), modified, CSC (June 23, 2010), <http://njlaw.rutgers.edu/collections/oal/>; In re Pettiford, CSV 8804-07, Initial Decision (March 13, 2008), modified, Merit System Board (May 21, 2008), <http://njlaw.rutgers.edu/collections/oal/>. (Moreno, Bell, and Pettiford all concerning disrespect of a supervisor.)

The Civil Service Commission also has determined that an appellant is required to comply with an order of his or her superior, even if he or she believed the orders to be improper or contrary to established rules and regulations. See Palamara v. Twp. of Irvington, A-5408-05T3 (App. Div. February 28, 2005), <http://njlaw.rutgers.edu/collections/courts/>; Compare, In re Allen, CSV 11160-04, Initial Decision (May 23, 2005), remanded, Merit System Board (July 14, 2005), CSV 09132-05 Initial Decision, (November 22, 2005), adopted, Merit System Board (January 26, 2006) <http://njlaw.rutgers.edu/collections/oal/> (in which the Board determined that the appellant's disobedience was justified by concerns for the safety of the clients on a bus and reversed his removal).

Herein Appellant was clearly insubordinate. He refused to conform to repeated direction from his supervisor to email check in and check out times. He frequently failed to respond to emails. He did not conform to work times, frequently arriving late or leaving early. All this after repeated admonitions from his supervisor.

"Inability to perform duties" - The charge of inability to perform duties, under N.J.A.C. 4A:2-2.3(a)(3), has been upheld where the employee is incompetent to execute his job responsibility. Klusaritz v. Cape May CntySha, 387 N.J. Super. 305, 317 (App. Div. 2006) (removal of accountant who was incapable of preparing a bank reconciliation and was of no value to the county); Richard Stockton College v. Parks, CSV 4279-03, Initial Decision (January 31, 2005), adopted, Merit Sys. Bd. (April 3, 2005), <http://njlaw.rutgers.edu/collections/oal/final/csv4279-03.pdf> (where respondent failed to prioritize and complete tasks in a timely manner). The County has carried its burden. Appellant demonstrated on numerous occasions that he could not, or would not, do his job.

"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 (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)).

"Neglect of Duty" - There is no definition in the New Jersey Administrative Code for neglect of duty, but the charge has been interpreted to mean that an employee has failed to perform and act as required by the description of their job title. Neglect of duty can arise from an omission or failure to perform a duty and includes official misconduct or misdoing, as well as negligence. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977), neglect of duty implies nonperformance of some official duty imposed upon a public employee, not merely commission of an imprudent act. Rushin v. Bd. of Child

Welfare, 65 N.J. Super. 504, 515 (App. Div. 1961). Neglect of duty is predicated on an employee's omission to perform, or failure to perform or discharge, a duty required by the employee's position and includes official misconduct or misdoing as well as negligence. Clyburn v. Twp. of Irvington, CSV 7597-97, Initial Decision (September 10, 2001), adopted, Merit System Board (December 27, 2001), <http://njlaw.rutgers.edu/collections/oal/>; see Steinel v. Jersey City, 193 N.J. Super. 629 (App. Div.), certif. granted, 97 N.J. 588 (1984), aff'd on other grounds, 99 N.J. 1 (1985).

The evidence strongly preponderates that Appellant, on multiple occasions, failed to do his job. The County has carried its burden as to this charge.

There is no definition in the New Jersey Administrative Code for other sufficient cause. Other sufficient cause is generally defined in the charges against Appellant. The charge of other sufficient cause has been dismissed when "respondent has not given any substance to the allegation." Simmons v. City of Newark, CSV 9122-99, Initial Decision (February 22, 2006), adopted, Comm'r (April 26, 2006), http://njlaw.rutgers.edu/collections/oal/final/. Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.

Clearly Appellant's actions violate the implicit standard of good behavior. Not doing your job, when given multiple opportunities to do so, fail to meet the implicit standard of good behavior. The County has carried its burden as to this charge as well.

This forum has the duty to decide in favor of the party on whose side weight of the evidence preponderates, in accordance with a reasonable probability of truth. Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" 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 (1975). 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). The burden of proof falls on the appointing

authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The respondent must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson, supra, 37N.J. 143. The evidence needed to satisfy the standard must be decided on a case-by-case basis.

Here it is clear that the evidence preponderates in favor of Respondent that Appellant is guilty of the five sustained charges in the FNDA, as set forth above.

What now must be determined is whether a termination from employment is the appropriate penalty.

An appeal to the Merit System Board[2] requires the Office of Administrative Law to conduct a de novo hearing and to determine appellant's guilt or innocence as well as the appropriate penalty. In the Matter of Morrison, 216 N.J. Super. 143 (App. Div. 1987). In determining the reasonableness of a sanction, the employee's past record and any mitigating circumstances should be reviewed for guidance. West New York v. Bock, 38 N.J. 500 (1962). Although the concept of progressive discipline is often cited by appellants as a mandate for lesser penalties for first time offences,

> that is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> [In re Hernmann, 192 N.J. 19, 33-4 (2007) (citing Henry, supra, 81 N.J. 571).]

Although the focus is generally on the seriousness of the current charge as well as the prior disciplinary history of the appellant, consideration must also be given to the purpose of the civil service laws. Civil service laws "are designed to promote efficient public service, not to benefit errant employees . . . The welfare of the people as a whole,

and not exclusively the welfare of the civil servant, is the basic policy underlining the statutory scheme." State Operated School District v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). "The overriding concern in assessing the propriety of the penalty is the public good. Of the various considerations which bear upon that issue, several factors may be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record." George v. North Princeton Developmental Center, 96 N.J.A.R. 2d. (CSV) 463, 465.

In West New York v. Bock, 38 N.J. 500, 522 (1962), which was decided more than fifty years ago, our Supreme Court first recognized the concept of progressive discipline, under which "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct." In re Herrmann, 192 N.J. 19, 29 (2007) (citing Bock, supra, 38 N.J. at 522). The Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary proceeding, and held that an employee's "past record" includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee." Bock, supra, 38 N.J. 523–24.

The concept of progressive discipline has been used to reduce the penalty of removal in other cases involving a law-enforcement officer who used racist language in public but who otherwise had a largely unblemished employment record. In In re Roberts, CSR 4388-13, Initial Decision (December 10, 2013) adopted, Comm'n (February 12, 2014), <http://njlaw.rutgers.edu/collections/oal/>, for example, an on-duty police officer who, while arresting an uncooperative black suspect, shouted to his K-9 police dog, "Zero, bite that nigger," had his penalty modified from removal to a six-month suspension. The ALJ had found that his misconduct was "plainly aberrational," as his past record only included an oral reprimand for a motor-vehicle accident over the course of seven years of service and several of his minority co-workers credibly testified that he had otherwise treated citizens in an impartial and respectful manner. While the

[2] Now the Civil Service Commission, N.J.S.A. 11A:11-1

ALJ found that, due to mitigating circumstances, "termination is too severe a penalty," he nonetheless concluded that, despite a past record that included only an oral reprimand, the "fitting" penalty "is the longest suspension which the law allows: six months."

While concept of progressive discipline in determining the level and propriety of penalties imposed requires a review of an individuals prior disciplinary history a "clean" record may be out-weighed if the infraction had issued a serious in nature.Henry v. Rahway State Prison, 81 N.J. 571 (1980); Carter v. Bordentown, 191 N.J. 474 (2007). Further some disciplinary infractions are so serious that removal is appropriate. Destruction of public property is such an infraction. Kindervatter v. Dep't of Envt'l Protection, CSV 3380-98, Initial Decision (June 7, 1999), http://lawlibrary.rutgers.edu/collections/oal/search.html.

Herein, Appellant had one prior discipline that resulted in a sixty working day suspension. Upon his return to work after serving that suspension (a suspension he termed "illegal") he resumed the same bad work ethic, culminating in the present matter. It is clear to the undersigned that another, longer suspension is not appropriate. Removal is the appropriate penalty.

In determining the penalty to be imposed, the court noted that none of the factors justifying mitigation of removal were present. Namely mistake, negligence, or remorse. The Court was compelled to hold that whatever the employee's motive, and regardless of the worth of the computer, she had to be subject to major discipline. While the goal of discipline is to either remove an employee unsuitable for public service or to impose some lesser sanction when the employee may be rehabilitated, the Court held that the extraordinary serious offense in this case could not be mitigated by a prior good-service record as that mitigation is reserved only for lesser offenses.

In the instant matter removal is the appropriate penalty. Appellant did not make a mistake, was not negligent and is wholly unremorseful. His actions were that of an employee avoiding doing his job, failing to follow repeated instructions of his supervisor, failing to respond to repeated requests from his supervisor. Appellant sought during the

course of the hearing to sluff off much of his bad actions on his disability. This is belied by the fact that he was provided accommodations. It is worth noting that the laptop he requested he declined to use. He is simply not a good employee. He is one who shirks his job responsibilities.

Thomas Malavasi, Appellant's supervisor, meticulously documented Appellant's numerous shortcomings in his series of emails with Appellant, as to his check in and out times, his failure to timely complete projects, his misuse of work time and the use of **this** children in his work.

Based upon the above, I **CONCLUDE** that Respondent has demonstrated by a preponderance of the credible evidence that Appellant is guilty of the sustained charges in the FNDA, and that removal is the appropriate penalty.

ORDER

It is hereby **ORDERED** that Appellant's appeal is **DENIED**; and,

It is further **ORDERED** that the Final Notice of Disciplinary Action, dated November 26, 2019, providing for a penalty of removal, effective November 20, 2019, is **SUSTAINED**.

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.

November 3, 2022
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: November 3, 2022

Date Mailed to Parties: November 3, 2022
db

APPENDIX

List of Witnesses

For Appellant:

Zara Tariq-Shuaib
Syed Tariq-Shuaib, Appellant

For Respondent:

Thomas Malavasi
Jennifer Desalvo
Denise D'Alessandro

List of Exhibits

For Appellant:

None

For Respondent:

R-1 FNDA 4/3/19
R-2 PNDA with Rider 10/21/19
R-3 PNDA with Rider 11/26/19
R-4 emails 1/24/19 to 1/29/19
R-5 emails 1/15/19 to 2/4/19
R-6 emails 1/19/19 to 20/20/19
R-7 emails 1/15/19 to 2/22/19
R-8 email 2/21/19, including Wayne Neurological Associates Medical Exam
R-9 emails 2/18/19 to 3/14/19
R-10 emails 3/16/19 to 3/27/19
R-11 emails 3/37/19 to 3/29/19
R-12 emails 1/4/19 to 3/29/19
R-13 emails 7/2/19 to 7/3/19 with return to work acknowledgement
R-14 emails 7/1/15 to 7/15/19

R-15 emails 7/1/15 to 7/17/19

R-16 emails 7/24/19

R-17 emails 8/2/19

R-18 emails 8/2/19 to 8/23/19

R-19 emails 9/6/19

R-20 emails 9/6/19 to 9/11/19

R-21 emails 9/6/19 to 9/12/19 and reasonable accommodation notes

R-22 4/10/19 correspondence and medical inquiry form

R-23 6/26/19 correspondence and emails: 7/11/19

R-24 emails 7/11/19 to 7/29/19

R-25 emails 7/11/19 to 7/30/19 and OT prescription

R-26 emails 8/1/19 correspondence and emails: 7/29/19 to 8/1/19

R-27 11/4/19 correspondence

R-28 JFK Blvd. drawings