

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 21ST DAY OF SEPTEMBER, 2022

Dolores Gorczyca

Dolores Gorczyca
Presiding Member
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

OAL DKT. NO. CSV 06457-20
AGENCY DKT. NO. 2020-2713

DANIEL FELICIANO,

Appellant

v.

**HUDSON COUNTY, DEPARTMENT
OF ROADS AND PUBLIC PROPERTY,**

Respondent.

Will Hannan, Esq., for appellant, Daniel Feliciano (Oxford Cohen, P.C., attorneys)

Daniel W. Sexton, Esq., for respondent Hudson County (Office of County
Counsel, attorneys)

Record Closed: January 3, 2022

Decided: August 2, 2022

BEFORE JULIO C. MOREJON, ALJ:

STATEMENT OF THE CASE

Appellant, Daniel Feliciano (Appellant or Feliciano) appealed the decision by respondent, Hudson County (Respondent or the County), suspending him from employment for twenty working days, effective June 15, 2020, due to Appellant's alleged negligence in driving a truck on County property that resulted in an accident and resultant property damage.

PROCEDURAL HISTORY

On March 12, 2020 the County issued a Preliminary Notice of Disciplinary Action (PNDA) seeking to suspend Feliciano for twenty working days for alleged violations of the following charges:

- 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
- N.J.A.C. 4A:2-2.3(a)1- Inability and Inefficiency to Perform Duties, and
- N.J.A.C.4A:2-2.3(a)11 – Other sufficient cause

Following a departmental hearing, held on April 15, 2020, the County issued a Final Notice of Disciplinary Action (FNDA), dated June 2, 2020, upholding all of the charges contained in the PNDA and imposed a twenty working day suspension (non-consecutive days) effective June 15, 2020 and ending July 20, 2020.

Feliciano appealed the FNDA, and the matter was filed at the Office of Administrative Law (OAL) on July 1, 2020, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 14F-1 to 13.

The within matter was assigned to the undersigned on July 7, 2020. On August 5, 2020, a prehearing telephonic conference was held, and a prehearing order was issued.

A remote zoom hearing was held on November 5, 2020. At the conclusion of the hearing, the parties requested that the record remain open to allow them to file their respective post-hearing submissions. On or about January 15, 2021, Feliciano filed his submission brief. Counsel for the County requested additional time to file the County's submission brief and the same was filed on or about January 21, 2021.

Pursuant to Executive Order No. 127, the time to file an initial decision was extended until January 3, 2022. Thereafter, extensions to file an initial decision were requested and filed herein.

FACTUAL DISCUSSION AND FINDINGS

Most of the facts in this matter are not in dispute, and I **FIND** the following as **FACT** herein.

On January 6, 2020, at approximately 1:30 PM, Feliciano was operating the County's sewer/clam truck (truck) on County property (R-1). The truck contains a boom that goes up and down. After emptying the contents of the truck, Feliciano drove away with the truck boom in the up position fully extended striking the roof/overhang on the gas island, causing property damage to both the County truck and roof structure (incident) (R-1 and R-3). County employees, Dan Humen, and Joseph Pilla were near Feliciano when the incident occurred yelled at him to stop but he did not hear them, and Feliciano continued to drive the truck away from the gas island area until he eventually stopped (R-3).

Following the incident, the County ordered Feliciano to undergo a fitness for duty physical examination, which included that he be examined by an "otologist" (R-2). On January 9, 2020, Primary Care Medical Group reported that Feliciano had been examined at the ENT Clinic of the NY/NH VA Medical Center, and he was cleared to "return to work without restrictions as of 1/8/2020." (Id.).

The truck sustained damages that total \$87, 549.23 to repair, along with rental cost \$43,328.00 for the time the truck is being repaired. (R-4, R-5 and R-8). Feliciano admits to the accident but denies that he caused the truck to sustain the property damage claimed by the County, as he states that the truck was already damaged from a prior incident that occurred with another County employee. Feliciano was previously suspended from work one day on June 15, 2015 (R-6).

Testimony

The County presented the following individuals to testify: Wally Wolfe, Dan Humen, and Joseph Pella.. Appellant did not present any witnesses and testified in his behalf.

Dan Humen

Dan Humen (Humen) is a traffic manager with the County. He testified that on January 6, 2020, he was in the mechanic shop speaking with Joseph Pella, when he observed “someone” unloading the truck and then proceeded to drive toward the gas station area with the “boom up”. Humen testified that he “yelled” to the truck driver to stop as the truck boom was up and had struck the roof near the gas area.

On cross-examination, Humen testified that he was approximately seventy-five feet from the truck when he saw it drive away with the boom up. Humen also stated that he did not remember if the truck windows were up. He also testified that the area where the incident occurred is a “noisy area”. On re-direct examination, Humen identified the areas of the truck that were damaged and that the tuck boom was up “fifteen feet” (R-5).

Joseph Pella

Joseph Pella (Pella) testified that he is a supervisor and has been employed for over twenty-three years. He stated that he was not Feliciano’s supervisor. He testified that on January 6, 2020, he observed Feliciano “doing his job” on the truck. Pella testified that he saw Feliciano driving away with the boom up and he yelled at him “yo-yo, put the boom down!”, and then he saw the truck boom strike the overhang.

Pella testified that he was talking with Humen and standing “thirty to thirty-five yards” from where Feliciano was working when the incident occurred. Pella drew a diagram (R-7) to demonstrate where he and Humen were standing and where Feliciano was when the truck struck the overhang. Pella also identified the truck that was involved in the incident, the damages that the truck sustained, and further explained about the truck boom being extended as Feliciano drove away (R-5).

On cross-examination, Pella testified that he was talking to Humen and standing near the garage doorway and that he was looking at the driver side window when he saw Feliciano drive away with the boom extended. Pella stated that he was focused on the truck driving with the boom extended and not the gas pumps, which was the direction in

which Feliciano was driving. Pella testified that he gave a statement to his supervisor, Wally Wolfe, on the date of the incident (R-3).

In response to questions from the undersigned, Pella testified that he knew Feliciano and had no animus toward him.

Wally Wolfe

Wally Wolfe (Wolfe) testified that he has been a Division Chief, in the county department for roadway for the past ten years, and that he was previously employed as a police officer in the Jersey City Police Department for over thirty-years, where he reached the rank of Sargent. Wolfe testified that he manages the day-to-day operations at the County garage where Feliciano was assigned. Wolfe stated that he did not see the incident occur, but that Humen and Pella reported the same to him. Wolfe testified that as part of his duties, he interviewed Humen and Pella; assessed the property damage to the truck and work area and took the necessary steps to have the truck repaired.

Wolfe testified that the truck sustained damage to the "rod and wheel" (R-5), due to Feliciano not lowering the boom when the truck struck the overhang above the gasoline island. Wolfe stated that as a result of the incident, the truck was not operational, and he obtained an estimate for the repairs for \$87, 549.23 (R-4). Wolfe testified that in addition to the repair cost for the truck, there would be rental costs while the truck was being repaired in the amount of (R-8).

Wolfe testified that the truck had sustained a "fender bender" damage a "few years prior" and that the truck had been repaired and put back in service. He stated that the damage on January 6, 2020, was not the same damage to the truck that occurred prior.

Wolfe also testified concerning the property damage to the overhang of the gasoline island, which he stated was about "\$1,000" to repair the overhang.

Wolfe testified that he spoke with Feliciano on the date of the incident, and Feliciano told Wolfe that the accident had occurred due to "lapse in judgment". Wolfe

testified that he prepared a written report containing his recommendation that Feliciano obtain a fitness for duty examination, including that he be examined by an otologist (R-2), and the eye-witness report from Humen and Pilla (R-3). Wolfe testified that the fitness for duty evaluation showed that Feliciano had not consumed drugs or alcohol, and his hearing was not impaired (R-2). Wolfe testified further that Feliciano had a prior incident on June 15, 2015, involving an accident and Feliciano was suspended one-day (R-6).

On cross-examination, Wolfe testified that he did not witness the incident but relied upon the eye-witness report of Humen and Pella. Wolfe also testified as to the cost for repair of the truck, including the rental cost. Wolfe stated that the truck was out of commission and could not be driven due to the damages sustained on January 6, 2020.

On re-direct, Wolfe testified as to the cost for repair to the truck and rental cost (R-3 and R-8). He also testified as to the prior damage to the truck caused by another County employee, he testified that the truck was repaired, and he was not aware that the truck was still damaged as claimed by Feliciano. Wolfe testified that there was no report that the truck was still damaged from the prior accident.

Wolfe was recalled as a witness by the County to correct and supplement his testimony concerning the rental of a replacement truck. He confirmed that the \$87,549.23 figure was for the repair of the County vehicle involved in the accident (in R-4). He stated the rental for the replacement was \$8,000.00 per month that the truck was being repaired and would total approximately \$42,328.00. (R-8).

Daniel Feliciano

Daniel Feliciano testified that he was an Equipment Operator with the County since August 2009. He testified that he drove the truck that was referred to as "clam digger", and the reference to the truck as a "boom truck" is due to the equipment attached to it and the duties performed by the truck. Specifically, Feliciano testified that as part of his duties he would drive and pick up sludge and return to the garage at 549 Duncan Avenue, Jersey City, to drop off the sludge in the "pit for dumping sludge".

Feliciano confirmed that when emptying the contents of the truck at the pit in the garage, the boom must be elevated to ninety degrees from the truck. He stated that it was a "one-person" job. Feliciano testified that on January 6, 2020, he arrived at the garage and backed up the truck into the pit. He confirmed that he elevated the boom ninety-degrees as he backed up but that he did not lower the boom after dumping the truck contents and driving away. Feliciano testified that he was driving "three miles per hour" when he pulled the truck forward with the boom not lowered. He stated that he did not hear anyone yell at him to stop but knew he forgot to lower the boom when the truck struck the roof overhang on the gasoline island.

Feliciano admitted that it was a "mistake" on his part not to lower the boom and that it had occurred because he was "preoccupied" with a cellphone call that he was having. Feliciano testified that the boom was damaged prior to the incident when the fly-wheel was damaged about one year prior by a County employee whom he did not want to name. Feliciano also testified that as a result of the prior damage to the truck a County mechanic had been working to repair a "tilted boom" on the truck.

On cross-examination, Feliciano testified concerning a motor vehicle accident that he was involved in late 2009, which was not related to his work. Feliciano testified that he was not going to the fuel station, which he stated was 200-300 hundred feet away" when he was pulling out of the pit but was going to the garage. He stated that he applied the truck brakes when he heard the noise overhead as he pulled the truck out.

In response to questions by the undersigned, Feliciano testified that the boom must be raised and moved ninety-degrees to empty the truck, and that this is done externally, not from inside the truck. He stated that the body of the truck was brought completely down after dumping, but that he forgot about the boom. Feliciano testified that he was not on his phone at the time of the accident, but that he was a "little off mentally" because he had not heard from his wife, who was serving in the military overseas, for two days prior. Feliciano stated that at the time he left the pit, he was driving to store the truck for the day and had to drive by the gas pumps to do so. He stated that the damage from the prior accident did not disable the truck, but it did require the operator to have to play with

the controls a little bit for the boom to operate properly. Feliciano testified that employees need a commercial driver license to drive the clam digger truck.

Credibility Determination

Prior to conducting a legal analysis and making conclusions, it is necessary to address the credibility of testimony of the witnesses, in order to evaluate the alleged violations against Feliciano.

“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). The choice of accepting or rejecting the witness’s testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). A credibility determination requires an overall assessment of the witness’s story in light of its rationality, internal consistency, and the manner in which it “hangs together” with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). A fact finder “. . . is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth.” In re Perrone, 5 N.J. 514, 521–22 (1950); see D’Amato by McPherson v. D’Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Both Humen and Pella described in detail the events that occurred on January 6, 2020, and I **FIND** their testimony credible and consistent with the statements made to Wolfe on the date of the incident, and I, therefore, **FIND** their testimony to be **FACT** herein.

Similarly, I **FIND** Wolfe’s testimony to be credible and consistent with the statement provided by Humen and Pella. I also **FIND** Wolfe’s testimony to properly describe the damage to the truck and property as contained in the repair and rental estimate submitted in evidence, and I therefore **FIND** the same to be **FACT** herein.

I **FIND** Feliciano's testimony to be candid and accurate regarding the events that unfolded on January 6, 2020, and I **FIND** Feliciano's statement confirm that he was solely responsible for causing the accident and property damage on January 6, 2020. I also **FIND** Feliciano's statement that the truck was already damaged on January 6, 2020, inconsistent with the proofs provided herein, and therefore I **FIND** his statement regarding the same not believable.

Legal Analysis and Conclusion

The Civil Service Act and the implementing regulations govern the rights and duties of public employees. N.J.S.A. 11A:1-1 to 12-6; N.J.A.C. 4A:1-1.1 to 4A:10-3.2. An 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, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). In a civil service disciplinary case, the employer bears the burden of sufficient, competent, and credible evidence of facts essential to the charge. N.J.S.A. 11A:2-6(a)(2), -21; N.J.S.A. 52:14B-10(c); N.J.A.C. 1:1-2.1, "burden of proof"; N.J.A.C. 4A:2-1.4. That burden is to establish by a preponderance of the competent, relevant, and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982).

An appointing authority may discipline an employee on various grounds, including conduct unbecoming a public employee, neglect of duty, and other sufficient cause. N.J.A.C. 4A:2-2.3(a). Such action is subject to review by the Civil Service Commission, which after a de novo hearing makes an independent determination as to both guilt and the "propriety of the penalty imposed below." W. New York v. Bock, 38 N.J. 500, 519 (1962). In an administrative proceeding concerning a major disciplinary action, the appointing authority must prove its case by a "fair preponderance of the believable evidence." Polk, 90 N.J. at 560 (citation omitted); N.J.A.C. 4A:2-1.4(a); Atkinson, 37 N.J. at 149.

The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). The greater weight

of credible evidence in the case—the preponderance—depends not only on the number of witnesses, but “the greater convincing power to our minds.” State v. Lewis, 67 N.J. 47, 49 (1975) (citation omitted). Similarly, credible testimony “must not only proceed from the mouth of a credible witness but must be credible in itself.” In re Estate of Perrone, 5 N.J. 514, 522 (1950).

The County has charged Feliciano with violating the following:

- 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
- N.J.A.C. 4A:2-2.3(a)1- Inability and Inefficiency to Perform Duties, and
- N.J.A.C.4A:2-2.3(a)11 – Other sufficient cause

The charges that Feliciano neglected his duty under N.J.A.C. 4A:2-2.3(a)(7), inability and inefficiency to perform duties under N.J.A.C. 4A:2-2.3(a)1, and other sufficient causes, under N.J.A.C. 4A:2-2.3(a)11, are supported by the record as presented by the County and by Feliciano’s own admission. Although “neglect of duty” is not defined in the N.J. Administrative Code, the charge has been interpreted to mean that an employee has neglected to perform and act as required by his or her job title or was negligent in its discharge. Avanti v. Dep’t of Military & Veterans Affairs, 97 N.J.A.R.2d (CSV) 564 (1996) (sustaining a charge of neglect against an employee who failed to handle a resident’s claim in a timely and competent manner); In re Calio, Camden Cty. Dep’t of Corr., CSV 05868-16, Initial Decision (May 30, 2017), adopted, CSC, (July 17, 2017), <http://njlaw.rutgers.edu/collections/oal/> (sustaining a charge of neglect of duty against a correction officer in a correctional facility who failed to search inmates).

In the within case, the County has presented credible evidence in the testimony of Humen and Pella who described in detail the incident involving Feliciano. Both employees described seeing the truck boom in an upright position as it struck the overhead roof as it pulled away. Feliciano does not dispute that the incident occurred, as he admitted that

it was a “mistake” on his part not to lower the boom and that the reason it had occurred was because he was “preoccupied” with a cellphone call that he had made to his wife.

For these reasons, I **CONCLUDE** that the County has proven by a preponderance of the evidence that Feliciano’s conduct in failing to lower the truck boom while driving the truck, resulting in property damage to the vehicle and County property was a neglect of his duty under N.J.A.C. 4A:2-2.3(a), and inability and inefficiency to perform his duty under N.J.A.C. 4A:2-2.3(a)1.

I **CONCLUDE** that the County has failed to present any evidence of “other sufficient cause” to suspend Feliciano under N.J.A.C. 4A:2-2.3(a), other than that he drove the truck in a negligent manner as required of all licensed drivers, and in violation of his duties as an “equipment operator” (R-2, R-3, and R-6).

The next charge is conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6). Conduct unbecoming a public employee is an elastic phrase which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or tends 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)).

I **CONCLUDE** that the County has failed to present any proofs that Feliciano’s neglect of duty resulting in the incident is sufficient to establish a violation of N.J.A.C. of conduct unbecoming a public employee, and the said charge is **DISMISSED** herein.

PENALTY

When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and penalty on appeal based on the charges. N.J.S.A. 11A:2-19. Factors determining the degree of discipline include the employee’s work history, his prior disciplinary record, and the gravity of the

misconduct. In West New York v. Bock, 38 N.J. 500, 522 (1962), 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, 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 called to the attention of and admitted by the employee.” Bock, 38 N.J. 523–24.

In the within matter, the record reveals and I have **CONCLUDED** that Feliciano has violated N.J.A.C. 4A:2-2.3(a)1, inability, inefficiency to perform duties and N.J.A.C. 4A:2-2.3(a)7, neglect of duty, for failing to lower the truck boom and causing property damage to the truck and County property. The record also discloses that Feliciano has one prior infraction resulting in a suspension from work for one day in June 15, 2015.

Based upon the foregoing, I **CONCLUDE** that the decision of Respondent, Hudson County to suspend Appellant Daniel Feliciano for twenty working days for violating N.J.A.C. 4A:2-2.3(a)1 and N.J.A.C. 4A:2-2.3(a)7 is consistent with the provisions of progressive discipline as established in West New York v. Bock, and I therefore **CONCLUDE** that the decision to suspend Feliciano for twenty working days is **AFFIRMED**, but is **DENIED** as to N.J.A.C. 4A:2-.3(a)6 and N.J.A.C. 4A:2-.3(a)12.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that the decision of Respondent, Hudson County to suspend Appellant, Daniel Feliciano twenty working days for violating N.J.A.C. 4A:2-2.3(a)1 and N.J.A.C. 4A:2-2.3(a)7 is **AFFIRMED**, and **DENIED** as to N.J.A.C. 4A:2-.3(a)6 and N.J.A.C. 4A:2-.3(a)12.

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, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, UNIT H, Civil Service Commission, 44 South Clinton Avenue, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 2, 2022
DATE

Julio Morejon
JULIO C. MOREJON, ALJ

Date Received at Agency:

August 2, 2022

Date E-Mailed to Parties:

August 2, 2022

lr

APPENDIX

Witnesses

For Appellant:

Daniel Feliciano

For Respondent:

Daniel Humen

Joseph Pella

Wally Wolfe

Exhibits

Appellant

None

Respondent

- R-1 PNDA and FNDA
- R-2 Fitness for Duty Form
- R-3 Memorandum from Wally Wolfe dated 1/8/2020
- R-4 Work Order for Jack Doheny Company dated 3/3/2020
- R-5 Photos (7) of damage to truck
- R-6 Feliciano employee/personnel records
- R-7 Written diagram of garage/incident area
- R-8 Rental Agreement for Jack Doheny Company with Memo to Insurance Fund Commissioners dated 6/23/2020