

dates that are inconsistent with and in conflict with the April 13, 2020, selected by Shapiro for the effective dates. Thus, I **CONCLUDE** the NJDOT has not shown by a preponderance of the credible evidence that it has sustained the charges in the FNDA.

As the ALJ indicated that the appellant was authorized to receive Workers' Compensation Benefits as of April 15, 2023, he therefore, could not be separated.

The Commission disagrees with the ALJ's analysis of the facts presented. Specifically, the Commission finds that the ALJ's determination that the effective date of the resignation not in good standing was April 16, 2023, is in error. Rather, the resignation not in good standing should have been considered effective, **at the latest**, on April 14, 2020.¹ As such, there would be no meritorious reason to find that the appellant had not abandoned his position under *N.J.A.C. 4A:2-6.2(b)*.

N.J.A.C. 4A:2-6.2(b), provides, in pertinent part, 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" (emphasis added). The Commission notes the usage of the word "shall" in the above rule.

In his initial decision, the ALJ found the following:

On April 7, 2020, Kujtim Ismailovski (Tim), Assistant Crew Forman at NJDOT, testified that he called Bartos at 7:45am, and left him a voicemail to inform Bartos that he was to report in for work at the yard (R-10). Tim stated that Bartos called him back at 12:45pm, and informed Tim that he would not be coming in because he was concerned about contracting Covid-19. Tim testified that he explained to Bartos that he would need a "doctor's note" if he was not coming to work. (R-10). Following his telephone call with Bartos, Tim emailed Christopher Feintheil to report the contents of his telephone conversation with Bartos. Id.

Vannozzi and Janice Nelson (Nelson), Deputy director of NJDOT's Human Resources Department, testified that on April 7, 2020, they spoke with Bartos and that they explained to him that all NJDOT employees were operating under Reactionary Mode, and that there was no mechanism by which he could remain out of work indefinitely due to his fear of contracting the Covid-19 virus, and future absences would require medical documentation. On April 7, 2020, Vannozzi and Nelson

¹ This is giving the appellant the benefit of the overnight letter mailed by Shapiro. Clearly, the April 13, 2020, date could also be supported given that he was advised by his superior on that date.

reported via email to Michele A. Shapiro (Shapiro), (footnote omitted) who was the Director of the NJDOT's Division of Human Resources regarding their communications with Bartos (R-11). Shapiro was the designated NJDOT Covid "lead person" for the State of New Jersey during the initial Covid State of Emergency.

On said date, Shapiro prepared a letter to Bartos, which was mailed to him by overnight mail (R-13). Bartos did not respond to the letter. . . .

What the ALJ ignores in this matter is that the five-day threshold *begins* once the employee is advised of being absent without authorization. In this case, at the latest, the appellant knew from his superior, on April 7, 2020, that his continued absence was unauthorized without medical documentation. Moreover, none of the other communications from any of the appointing authority representatives, from his direct supervisor through the Commissioner, indicated that any of his absences from April 7, 2020, beyond, were approved, unless he produced appropriate medical documentation covering those absences. Nor did the specifications in the Preliminary Notice of Disciplinary Action, as it indicated that he could have extended his leave to April 14, 2020, if he provided medical documentation to cover the days he was out from April 6, 2020, to that date. No such documentation was ever provided. In this matter, the medical documentation provided would only be considered valid beginning on April 15, 2020, the date he began receiving Workers' Compensation benefits for a medical condition unrelated to the reasons for his failure to return on April 6, 2020. Accordingly, given the above, the five consecutive business days, for the purposes of *N.J.A.C.4A:2-6.2(b)* would end on April 14, 2020. Given that conclusion, there is no basis to dismiss the charge that the appellant abandoned his position under *N.J.A.C.4A:2-6.2(b)*. Moreover, as the appointing authority gave the appellant multiple opportunities to present valid documentation for his absences from April 7, 2020 to April 14, 2020, which he did not do, it cannot be concluded that it acted unreasonably in not authorizing the absences and resigning him not in good standing pursuant to *N.J.A.C.4A:2-6.2(b)*.

ORDER

The Civil Service Commission finds that the action of the appointing authority in resigning the appellant not in good standing was justified. Accordingly, it upholds that action and dismisses the appeal of James Bartos.

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 19TH DAY OF JULY, 2023

Allison Chris Myers

Allison Chris Myers
Acting Chairperson
Civil Service Commission

Inquiries
and
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 08374-20

AGENCY DKT. NO. 2021-177

JAMES BARTOS,

Appellant,

v.

NEW JERSEY DEPARTMENT

OF TRANSPORTATION,

Respondent.

Herbert L. McCarter, Esq., (Wind & McCarter, P.A., attorneys) for appellant,
James Bartos

Nonee Lee Wagner, Deputy Attorney General, (Matthew T. Platkin, Attorney
General of New Jersey), attorneys, for respondent New Jersey Department
of Transportation

Record Closed: April 17, 2023

Decided: May 22, 2023

BEFORE JULIO C. MOREJON, ALJ:

STATEMENT OF THE CASE

Appellant, James Bartos (appellant or Bartos), appeals the Final Notice of Disciplinary Action (FNDA) dated July 2, 2020, issued by the respondent, New Jersey

Department of Transportation (respondent or NJDOT), as a resignation not in good standing effective April 13, 2020.

PROCEDURAL HISTORY

On June 10, 2020 the NJDOT issued a Preliminary Notice of Disciplinary Action (PNDA) seeking a determination of resignation not in good standing against Bartos, effective date to be determined. The NJDOT alleged the following charges in the PNDA:

- N.J.A.C.4A:2-6.2 (B), resignation not in good standing, and
- NJNJDOT Guidelines for Employees Conduct and Discipline, Section 1.B, Resignation not in good standing.

The incident giving rise to the charges (specifications) in the PNDA were as follows:

Specification(s):

You were on approved paid leave from 3/20/2020 through 4/3/2020 [sic] On 4/7/2020 you were mailed correspondence from the Office of Human Resources (HR) advising you that your medical documentation had expired. You were directed to return to work for duty immediately, to submit medical documentation to extend your absences by 4/14/2020, or to alternatively resign in good standing from your position. You failed to avail yourself to [sic] these options and refused to return to work. You were also mailed correspondence from the Commission [sic] both by e-mail and overnight delivery directing you to respond to HR regarding your employment status by 4/9/2020 and 4/16/2020 respectively. You failed to respond. Consequently you have been absent from work for five (5) or more consecutive business days without authorization and therefore you are considered to have resigned from your position not in good standing.

Bartos did not request a departmental hearing, as he alleges that he was not served with the PNDA, and on July 2, 2020, the NJDOT issued the FNDA sustaining the

charges of the specifications contained in the PNDA and determining that Bartos resigned not in good standing effective April 13, 2020.

On or about July 22, 2020, Bartos appealed the FNDA. On September 2, 2020, the Civil Service Commission (CSC) transmitted this matter to the Office of Administrative Law (OAL), 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. This matter was then filed with the OAL on September 3, 2020.

A telephonic settlement conference was held on December 2, 2020, with an Administrative Law Judge (ALJ). On February 21, 2021, this matter was assigned to ALJ Kimberly Moss, who held a telephone status conference on March 22, 2021. However, on March 23, 2021, this matter was assigned to the undersigned due to a conflict with ALJ Moss and a witness in this matter. On April 14, 2021, I conducted a prehearing telephonic conference, and a prehearing order was issued therein.

A remote zoom hearing was scheduled and held on August 25, 2021. The NJDOT presented the following individuals to testify herein: Patrick Vannozzi, Janice Nelson, Kujtim "Tim" Ismailovski, Alan Tanni, II, Christopher Feintheil, and Michele Shapiro. Bartos did not present any witnesses and testified on his behalf.

At the conclusion of the hearing, the parties requested that the record remain open to allow them to file their respective post-hearing submissions. Thereafter, on October 6, 2021, Bartos filed his written summation and on November 1, 2021, the NJDOT filed its written summation.

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 on February 17, 2022, and April 4, 2022. The record was reopened on May 19, 2022, as there was difficulty with the audio of the zoom recording, and as no transcript was ordered by the parties, it resulted in a delay in my ability to review the record to prepare the Initial Decision. The record was then closed on April 17, 2023.

FACTUAL DISCUSSION AND FINDINGS

The NJDOT presented the following individuals to testify herein: Patrick Vannozi, Janice Nelson, Kujtim "Tim" Ismailovski, Alan Tanni, II, Christopher Feintheil, and Michele Shapiro. Bartos did not present any witnesses and testified on his behalf. Prior to conducting a legal analysis and making conclusions, it is necessary to address the credibility of the testimony of the witnesses called to testify herein. 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).

I **FIND** that the testimony of Patrick Vannozi, Janice Nelson, Kujtim "Tim" Ismailovski, Alan Tanni, II, Christopher Feintheil, to be credible, as the same was corroborated by evidence in the form of business records and communications among the witnesses during all relevant times herein. I will discuss in more detail below the testimony of Michele Shapiro and Bartos.

Based on the evidence presented at the Zoom hearing, as well as on the opportunity to observe the witnesses and assess their credibility, I **FIND** the following as **FACT** herein:

Bartos was employed as a Highway Operations Technician 1 (HOT-1) assigned to the NJDOT's Ramsey maintenance yard. In March 2020, the Ramsey yard closed after an employee tested positive for Covid-19. For the next two weeks, all of its employees, including Bartos, were required to quarantine. Bartos was granted a paid leave of absence due to Covid-19 from March 20, 2020 to April 3, 2020 (R-2).

During the time Bartos was out on quarantine, the Ramsey yard went into "Reactionary Mode". This meant that Bartos and his co-workers at the Ramsey yard were not to report to work, unless instructed to do so. All of the Ramsey yard employees, including Bartos, were to remain at home and only come to the yard if they were called by their supervisor regarding a reported emergency, such as problems due to weather or a car accident (R-4). NJDOT employees, including Bartos were categorized essential

and listed by NJDOT as "WB," meaning, they were considered essential for weather-related emergencies and business continuity. (R-27) Weather-related essential employees "are required to report to work when State offices are closed due to inclement weather and/or adverse conditions. Weather essential employees are required to report at their regular starting time." (R-25) Those essential to business continuity "are required to report to work to maintain operations necessary for public health, safety or welfare during a business interruption." (R-25)

The Reactionary Mode policy that was in place required essential employees, such as Bartos, to be on standby at their homes. Employees would be called by their supervisors, three times daily at 7:30 AM, 11:30 AM, and 3:30 PM, to confirm their work-ready status. (R-4) These employees were required to confirm their work-ready status at the regularly scheduled call-ins, and they were required to report for work to, in this case the Ramsey yard, if warranted by an emergency id. In the event an essential employee was called into the Ramsey yard the employees were not required to work together in confined spaces, and facemasks and social distancing were required. For example, only one employee would be in a truck at a time, rather than the usual two or three, as a means of ensuring social distance was maintained. NJDOT employees were made aware of these precautions. Id.

On Friday, April 3, 2020, the quarantine under which Bartos and other NJDOT employees at the Ramsey yard expired. As a result, on Monday, April 6, 2020, Bartos and all NJDOT personnel were required to be available for duty at the Ramsey yard under the Reactionary Mode. On April 6, 2020, Patrick Vannozzi (Vannozzi), Manager, Human Resources at NJDOT, testified that he spoke to Bartos by telephone. Bartos informed Vannozzi that although he tested negative for Covid-19, he did not intend to return to work. Vannozzi explained to Bartos that he could not use vacation time or sick time to avoid returning to work under Reactionary Mode. Bartos also left Vannozzi a voicemail in which he stated that if there were a "weather-related" emergency, he would be prepared to come in, but because Bartos was not a "healthcare worker", he believed he was not "essential" during the Covid-19 pandemic.

The NJDO provided an audio recording of Bartos' voicemail where he is heard to say: "This is not my criteria...I am not a healthcare worker. If it was weather-wise related or had something to do with some accident, no problem, I'm there 'till the cows come home. But I can't help you with this, man. Alright guys? So, whatever happens, I will take it on the chin." (R-36).

On April 7, 2020, Kujtim Ismailovski (Tim), Assistant Crew Forman at NJDOT, testified that he called Bartos at 7:45am, and left him a voicemail to inform Bartos that he was to report in for work at the yard (R-10). Tim stated that Bartos called him back at 12:45pm, and informed Tim that he would not be coming in because he was concerned about contracting Covid-19. Tim testified that he explained to Bartos that he would need a "doctor's note" if he was not coming to work. (R-10). Following his telephone call with Bartos, Tim emailed Christopher Feintheil to report the contents of his telephone conversation with Bartos. Id.

Vannozzi and Janice Nelson (Nelson), Deputy director of NJDOT's Human Resources Department, testified that on April 7, 2020, they spoke with Bartos and that they explained to him that all NJDOT employees were operating under Reactionary Mode, and that there was no mechanism by which he could remain out of work indefinitely due to his fear of contracting the Covid-19 virus, and future absences would require medical documentation. On April 7, 2020, Vannozzi and Nelson reported via email to Michele A. Shapiro (Shapiro),¹ who was the Director of the NJDOT's Division of Human Resources regarding their communications with Bartos (R-11). Shapiro was the designated NJDOT Covid "lead person" for the State of New Jersey during the initial Covid State of Emergency.

On said date, Shapiro prepared a letter to Bartos, which was mailed to him by overnight mail (R-13). Bartos did not respond to the letter. Shapiro's letter to Bartos confirmed that he had spoken to Tim, Vannozzi and Nelson, and that Bartos had informed them that he was not returning to work because of his concerns with Covid-19. Id. The letter then states:

¹ Shapiro retired from NJDOT on July 1, 2021.

Please understand[,] that your refusal to return to work status, constitutes abandonment of your position as a Highway Operations Technician 1 with the Department. If, however, there is a medical reason for your need for continued absence, medical documentation must be submitted to the Leave Management mailbox no later than Tuesday, April 14, 2020 at ... You may alternately resign your position.

You are hereby direct to contact HR Manger, Patrick Vannoizzi by the close of business April 9, 2020 at ... to advise of your intended action. Failure to follow this directive, or any of the options provided, will leave the Department no recourse but to pursue your separation for reason of job abandonment. [emphasis added]

[R-13]

On April 9, 2020, NJDOT confirmed that Bartos had not responded to Shapiro's letter, and he had not contacted anyone at NJDOT (R-16). On said date the Commissioner of the NJDOT, Diane Gutierrez-Scaccetti (Commissioner) called Bartos and also emailed him (R-16). The Commissioner's email provided Bartos until "the close of business" `April 9, 2020, for him to inform NJNJDOT of his decision (R-16).

Bartos did not respond to the Commissioner's email of April 9, 2020, and thereafter, on April 14, 2020, the Commissioner wrote to Bartos via overnight mail extending him an additional opportunity contact her and/or the NJDOT (R-17 and R-19) The letter provides as follows:

Please advise if you intend to comply with the Temporary Alternate Work Location program. There is no program that permits you to remain out of work until May 1st. Transportation has been deemed an essential service. We need your decision by [the] close of business Thursday, April 16, 2020. if we do not hear from you by that time, we will take that as your decision to no longer be employed by NJDOT. You may communicate your decision to Michele Shapiro, Director of Human Resources by phone ... or by e-mail... [emphasis supplied]

[R-17]

Testimony of Michele Shapiro

Shapiro testified that on April 17, 2020, she had not heard from Bartos as the Commissioner had requested in her letter, and she commenced preparing the disciplinary proceedings (R-18). However, later in the day on April 17, 2020, Shapiro reported in an email to among others, Feintheil and Nelson, the following: "I regret to inform you that we received medical documentation this afternoon, which placed Mr. Bartos on Temporary Worker's Compensation effective April 15, 2020." (R-18).

In her email, Shapiro stated that the medical documentation Bartos submitted concerned a matter that pre-dated March 2020 (Covid), and therefore the decision was made to separate the two matters: disciplinary matter related to work abandonment and worker's compensation claim (R-21). Shapiro testified that Bartos never intended to return to work because of his concerns with Covid-19 and that is why she prepared the PNDA charging Bartos with a "Resignation Not In Good Standing and NJDOT Guidelines for Employees Conduct and Discipline" (R-23), which PNDA charges were then sustained in the FNDA (R-24).

On cross-examination, Shapiro testified that as the appointing authority for the NJDOT, she was responsible for charging NJDOT employees with disciplinary violations, and that included preparing the PNDA (R-23) and FNDA (R-24) charges in this matter. Shapiro stated that on April 17, 2020, she was made aware that Bartos had reopened a previous workplace injury claim stemming from a February 20, 2014 incident (P-1). She also acknowledged that Bartos acquired medical documentation related to that claim and pre-paid his health benefits for three pay periods (P-1, P-2, and P-3). As for the NJDOT employee who processed the insurance pre-payments, Shapiro testified that the employee did so without the knowledge of the pending discipline related to separation from the NJDOT.

Shapiro testified further after being made aware of Bartos' worker's compensation claim, she decided to separate Bartos' disciplinary file and his worker's compensation file because they were two different issues. Shapiro testified that her decision was consistent

with NJDOT past practice concerning said matters. Shapiro testified that as a result of being made aware of Bartos' worker's compensation claim on April 17, 2020, she decided to review everything and therefore she concluded her evaluation of the disciplinary charges against Bartos on April 24, 2020.

Shapiro further testified that when she prepared the PNDA on June 10, 2020 (R-23), and the FNDA on July 2, 2020, (R-24), she did so knowing the Commissioner had written to Bartos asking him to contact the NJDOT by April 16, 2020, as to his decision to return to work, and that Bartos' worker's compensation claim had been re-opened on April 15, 2020.

Shapiro testified that the FNDA effective date of April 13, 2020, was appropriate despite the Commissioner's letter giving Bartos until April 16, 2020, and the NJDOT re-opening of Bartos' worker's compensation case on April 15, 2020, because after April 3, 2020, Bartos had communicated to NJDOT that he had no intention of coming back to work due to his concerns with Covid-19. In addition, Shapiro stated that the April 13, 2020, date selected because that is the date NJDOT had calculated as Bartos' return to work from his quarantine that had ended on April 4, 2020.

As to the communications of Tim and Vannozzi with Bartos, Shapiro testified that she had no independent knowledge other than what was communicated to her by them that Bartos had refused to return to work after the quarantine of April 4, 2020. Shapiro confirmed that the only proof the NJDOT had that Bartos would not return to work was the telephone calls with Bartos and his voicemail message to Vannozzi in response to the same (R-36). Shapiro stated further that having no response from Bartos to her letter of April 7, 2020 (R-13) and the Commissioner's email (R-16) and letter of April 14, 2020, (R-17), was confirming Bartos' telephone communications with Vannozzi and Tim of April 6 and 7, 2020, respectively that he was not returning to work, despite the subsequent communications between NJDOT and Bartos.

I **FIND** Shapiro's testimony demonstrates that she was very knowledgeable of NJDOT policies concerning Reactionary Mode, disciplinary proceedings, and the

worker's compensation procedures in place at the time, and therefore, I **FIND** her testimony credible concerning the implementation of said policies.

I **FIND** Shapiro's testimony concerning the effective date of April 13, 2020 contained in the FNDA to be inconsistent with the dates stated in the specifications of the PNDA and FNDA, and that the same are in contradiction with the dates provided Bartos to inform the NJDOT of his decision to return to duty. I further **FIND** that Shapiro's reason for sending her email of April 17, 2020, that "I regret to inform you that ..." to be insincere that she meant to inform the recipients of the email and nothing more.

I therefore **FIND** that the effective date by which Bartos' is deemed to have resigned not in good standing is April 16, 2020, which is the date the Commissioner provided Bartos in her correspondence of April 14, 2020, and which is the last communication from the NJDOT to Bartos regarding this matter.

Testimony of James Bartos

Bartos testified that he was very concerned about not getting infected with the Covid-19 virus. He stated that the basis for his concerns was that he had been exposed to a co-worker on March 19, 2020, who then testified positive and was hospitalized, and the news reports that he was following on a daily basis, along with the New Jersey Governor's executive orders that were issued at the time (R-31 to R-35). Bartos testified that he did not want to return to work at the Ramsey Yard because he believed the same was not equipped to handle a return to work by NJDOT employees because they did not have proper "PPE equipment".²

Bartos confirmed that he spoke with Tim at "least two times", as well as Vannozzi in April, 2020, and that he told them that he was not returning to work because of his concerns for his safety since NJDOT did not have proper PPE equipment. Bartos testified that called the Commissioner twice but could not get through to inform her of "what was going on" at the Ramsey Yard and that he was not returning to work because of the lack

² Personal protective equipment

of PPE equipment. Bartos stated that he had a friendship with "Diane" (the Commissioner) from prior events at NJDOT.

As to his understanding of the Reactionary Mode program that was installed by the NJDOT in late March 2020, (R-4), Bartos testified that the same was not "really explained" to him and that he knew "something about it" but, regardless, he had communicated to NJDOT that he was not returning to work because of his safety concerns with Covid.

As for receiving the PNDA and the FNDA, Bartos denied signing for the same as indicated on the return receipt for each (R-23 and R-24). Bartos attempted to provide an explanation as to how he came to be aware of his termination under the FNDA. Bartos also stated that he did not receive the letter from Shapiro (R-13) and letter from the Commissioner (R-16), as he "was not going to my mailbox" because of his concerns with Covid, yet he did acknowledge calling the Commissioner two times on a telephone conference call number that was provided to him.

As to the re-opening of his worker's compensation claim, Bartos testified that he had initially made a request to re-open his claim for additional treatment in July 2019 (P-4) but did not receive notification from the State until March 2020 acknowledging his claim. (P-2), Bartos testified that he initially had a reexamination appointment with Dr. Michael Benke on March 23, 2020 (Id.) but could not see Dr. Benke because of the Covid shutdown in March but did get to see him on April 15, 2020 (P-3). Bartos stated that he was approved for worker's compensation and was receiving payments and treatment. Bartos stated in the hearing that he had had surgery and was scheduled for additional surgery in September 2020.

I **FIND** Bartos' testimony credible and convincing that he was very concerned about being infected with the Covid virus in March and April 2020, and that the same was the primary reason he did not want to return to work at the Ramsey Yard. I **FIND** Bartos by his own admission did not have had a complete understanding of the Reactionary Mode program in place, and regardless of knowing the full details of the same, he had decided that it was unsafe to return to work at the Ramsey yard. I **FIND** Bartos' testimony not believable that he did not receive a copy of the PNDA and FNDA mailed to him by

regular mail, as his reason provided were not coherent or convincing. I **FIND** Bartos' testimony to be credible and believable that on April 15, 2020, he believed his workers' compensation case to be reopened as per the communications from the State.

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).

In the PNDA and FNDA, the NJDOT alleges that Bartos’ conduct resulted in a resignation not in good standing under N.J.A.C.4A:2-6.2 (b), and NJDOT Guidelines for Employees’ Conduct and Discipline, Section 1.B.

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

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

As testified to by multiple NJDOT witnesses essential employees were required to be on standby at their homes during Reactionary Mode, and ready to respond to their duties. Reporting to the Ramsey yard was only required should an emergency warrant it. (R-4) Here, Bartos was on an approved paid leave from March 20, 2020 until April 3, 2020 due to this quarantine. On Monday, April 6, 2020, the quarantine under which Bartos was placed expired, and Bartos was to be available for duty at the NJDOT. As a result, he was required to return to work under the procedures set forth in the Reactionary Mode policy. However, on April 6 and 7, 2020, Bartos informed Tim and Vannozi that he did not intend to return to the Ramsey yard. Bartos event testified to the same.

Bartos argues that other than Tim calling and speaking with Bartos on three occasions, and Vannozi’s telephone call to Bartos, the NDJOT has failed to establish that Bartos was not at home when the NJDOT conducted its daily calls for readiness. Bartos also argues that the NJDOT did not call Bartos to come in to the Ramsey Yard on an emergency basis. While this is true, the record does reveal that Bartos told Tim and Vannozi, as well as his testimony, that he had no intention of reporting to work at the Ramsey yard because of his concerns with contracting the Covid virus.

N.J.A.C. 4A:2-6.2 (b), does not provide for an employee's wellbeing and certainly no exception when an employee is concerned about his safety because of the Covid virus. I **CONCLUDE** that what is clear from the record before me is that Bartos had no intention to come into the Ramsey yard following the lifting of the April 3, 2020, NJDOT quarantine regardless of how many times Tim, Vannozzi called him in accordance with the Reactionary Mode policy, because of his expressed concerns with contracting Covid-19.

The issue then becomes, what is the "effective date" that the NJDOT can utilize as the date which it can deem Bartos to have "resigned not in good standing"? I **CONCLUDE** that the record reveals that the effective date should have been April 16, 2020, as it was the date communicated to Bartos by the Commissioner, and moreover, it is the date that the NJDOT recognized in the specifications of charges in the PNDA and FNDA. Shapiro's own communications with Bartos provides dates that are inconsistent with and in conflict with the April 13, 2020, selected by Shapiro for the effective dates. Thus, I **CONCLUDE** the NJDOT has not shown by a preponderance of the credible evidence that it has sustained the charges in the FNDA.

The PNDA and FNDA specifications of charges provides:

You were on approved paid leave from 3/30/2020 through 4/3/2020. On 4/7/2020, you were mailed correspondence from the Office of Human Resources (HR) advising you that your medical documentation had expired. You were directed to return to work for duty immediately, to submit medical documentation to extend your absences by 4/14/2020, or to alternatively resign in good standing from your position. You failed to avail yourself to [sic] these options and refused to return to work. You were also mailed correspondence from the Commission [sic] both by e-mail and overnight delivery directing you to respond to HR regarding your employment status by 4/9/2020 and 4/16/2020 respectively. You failed to respond. Consequently you have been absent from work for five (5) or more consecutive business days without authorization and therefore you are considered to have resigned from your position not in good standing.

[emphasis supplied] [R-24]

How can one ignore the specifications in both the PNDA and FNDA that informs Bartos that he has until "4/14/2020" to submit medical documentation to extend your absences, as requested by Shapiro, and that Bartos had until "4/9/2020 and 4/16/2020" to respond regarding his employment status, when contrasted with the FNDA "effective date" of April 13, 2020, and as testified to by Shapiro? The answer to this question is critical because of the fact that the State of New Jersey and the NJDOT specifically, acknowledges that on April 15, 2020, Bartos' claim to reopen his worker's compensation case of February 2014 was granted.

Shapiro testified that in an attempt to distinguish Bartos' decision not to report to duty because of his concerns with Covid and the State's determination to re-open his worker's compensation claim the decision was made to "keep the two cases separate". I **CONCLUDE** that the NJDOT's decision to do the same was nothing more than an attempt to remove Bartos because of his stated intention not to report to duty due to his concerns for Covid. This conclusion is underscored by Shapiro's email of April 17, 2020, that states, "I regret to inform you that we received medical documentation this afternoon, which placed Mr. Bartos on Temporary Workers' Compensation effective April 15, 2020." (R-18).

I **CONCLUDE** the record reveals that on April 17, 2020, the NJDOT had already determined that Bartos' conduct was tantamount to an abandonment of his work duties, and that the NJDOT selected April 13, 2020, as the "effective date" date of the same because selecting April 16, 2020 (which it selected in the FNDA) would have resulted in their inability to charge him with N.J.A.C.4A:2-6.2 (b) in obtaining his separation date.

For the reasons stated herein, I **CONCLUDE** that the NJDOT has failed to prove by a preponderance of the credible evidence the charges contained in the FNDA that Bartos was absent from duty for five or more consecutive business days without the approval of his superior, and as a result the NJDOT's decision contained in the FNDA to remove Bartos is **REVERSED**. I, therefore, **CONCLUDE** that while Bartos' communicated to the NJDOT, that he was not returning to work because of his concerns for his safety in contracting Covid-19, the NJDOT provided Bartos until at least April 16,

2020, to decide if he would report for duty, which became moot because on April 15, 2020, the NJDOT recognized Bartos' worker's compensation claim.

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."

As the record reveals the NJDOT has not sustained its burden of proof of any the charges contained in the FNDA under N.J.A.C.4A:2-6.2 (b), Bartos' conduct as alleged therein is deemed a resignation not in good standing effective April 13, 2020. I therefore **CONCLUDE** that the NJDOT's decision removing Bartos effective April 13, 2020, is **REVERSED** and Bartos should be restored to his position of Highway Operations Technician 1 (HOT-1) assigned to NJDOT's Ramsey maintenance yard.

ORDER

Having concluded that the NJDOT has not sustained its burden of proof of any the charges contained in the FNDA, I **ORDER** that the charges contained in the FNDA dated July 2, 2020, **ARE NOT SUSTAINED**, I further **ORDER** the penalty of removal by the NJDOT is **REVERSED** in its entirety. It is further **ORDERED** that Bartos be awarded back pay, benefits, and seniority in accordance with the guidelines set forth in N.J.A.C. 4A:2-2.10, taking into account, however, his disability and/or workers' compensation status.

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.

May 22, 2023
DATE

Julio Morejon
JULIO C. MOREJON, ALJ

Date Received at Agency:

May 22, 2023

Date E-Mailed to Parties:

May 22, 2023

lr

APPENDIX

Witnesses

For Appellant:

James Bartos

For Respondent:

Patrick Vannozzi

Janice Nelson

Kujtim "Tim" Ismailovski

Alan Tanni, II

Christopher Feintheil

Michele Shapiro

Exhibits

Appellant

- P-1 Leave of Absence-Pre Pay Schedule
- P-2 State of NJ Letter dated 3/20/2020
- P-3 Notice from Dr. Michael Benke, dated 4/15/2020
- P-4 Application for Renewal of Award
- P-5 Jaime Hall, email dated 6/10/2020, regarding submission of PNDA
- P-6 Freida Sessom, email dated 7/7/2020, regarding submission of FNDA

Respondent

- R-1 Text Messages: James Bartos to Alan Tanni, II (March 18th, 2020)
- R-2 Doctor's Note Signed by Dr. Alan K. Briker, M.D. (March 20th, 2020)
- R-3 Text Messages (Group): James Bartos, Kujtim "Tim" Ismailovski, et al. (March 2020)

- R-4 E-Mail: Christopher Tomlin to North Region Leadership (March 20th, 2020)
- R-5 E-Mail: Patrick Vannozzi to Michele Shapiro (April 6th, 2020)
- R-6 E-Mail: Harry Greenhalgh to Michele Shapiro (April 6th, 2020)
- R-7 E-Mail: Christopher Feintheil to Andrew Tunnard, Michele Shapiro (April 6th, 2020)
- R-8 Text Message: James Bartos to Kujtim "Tim" Ismailovski, et al. (March 18th, 2020 - April 6th, 2020)
- R-9 Text Message: James Bartos to Kujtim "Tim" Ismailovski, et al. (April 6th, 2020)
- R-10 E-Mail: Kujtim "Tim" Ismailovski to Harry Greenhalgh (April 7th, 2020)
- R-11 E-Mail: Patrick Vannozzi to Michele Shapiro, et al. (April 7th, 2020)
- R-12 E-Mail: Christopher Feintheil to Michele Shapiro, et al. (April 7th, 2020)
- R-13 Letter: Michele Shapiro to James Bartos (April 7th, 2020)
- R-14 Return to Work Spreadsheet (April 7th, 2020)
- R-15 E-Mail: Christopher Feintheil to Michele Shapiro, et al. (April 7th, 2020)
- R-16 E-Mail: Commissioner Diane Gutierrez-Scaccetti to Joseph Bertoni, et al. (April 9th, 2021)
- R-17 Letter: NJNJDOT Commissioner Diane Gutierrez-Scaccetti to James Bartos (April 14th, 2020)
- R-18 E-Mail: Michele Shapiro to Andrew Tunnard, et al. (April 17th, 2020)
- R-19 E-Mail: UPS Delivery Confirmation/Tracking (April 20th, 2020)
- R-20 Letter: Ivette D. Santiago-Green to James Bartos (April 21st, 2020)
- R-21 E-Mail: Michele Shapiro to Christopher Feintheil, et al. (April 24th, 2020)
- R-22 E-Mail: Christopher Feintheil to Michele Shapiro, et al. (May 28th, 2020)
- R-23 Preliminary Notice of Disciplinary Action (June 10th, 2020)
- R-24 Final Notice of Disciplinary Action (July 2nd, 2020)
- R-25 Document: Central Dispatch Unit *Incident Types/Emergency or Non-Emergency*
- R-26 Department of Transportation – *Identification Card* info for James Bartos
- R-27 Department of Transportation – "Datalines" info for James Bartos
- R-28 Document: Department of Law & Public Safety *Protocol for Processing and Issuing I.D. Cards* (November 7th, 2013)
- R-29 Department of Transportation *Policy & Procedure: On the Job Injury, Sick Leave, or Workers' Comp Benefits* (December 1st, 2009)
- R-30 Central Dispatch – Emergency Types

- R-31 Executive Order No. 103 (March 9th, 2020)
- R-32 Executive Order No. 107 (March 21st, 2020)
- R-33 Executive Order No. 119 (April 7th, 2020)
- R-34 Executive Order No. 138 (May 6th, 2020)
- R-35 Executive Order No. 151 (June 4th, 2020)
- R-36 Voicemail recording: James Bartos to Patrick Vannozzi