



STATE OF NEW JERSEY

In the Matter of Homero Almanzar,
Union County, Department of Public
Safety

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket No. 2022-3090
OAL Docket No. CSV 04673-22

ISSUED: OCTOBER 11, 2023

The appeal of Homero Almanzar, County Police Sergeant, Union County, Department of Public Safety, nine working day suspension, on charges, was heard by Administrative Law Judge Kimberly A. Moss (ALJ), who rendered her initial decision on August 28, 2023. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, including a thorough review of the exceptions and reply, the Civil Service Commission (Commission), at its meeting on October 11, 2023, adopted the ALJ's Findings of Facts and Conclusion and her recommendation to modify the nine working day suspension to a six working day suspension.

The Commission makes the following comments. This matter is a question of penalty as there is no serious challenge as to the sufficiency of the charges. In its exceptions, the appointing authority argues that no reduction in penalty is warranted and contends an increase could be supported. In his reply, the appellant minimizes the severity of his misconduct and argues a minor disciplinary action is warranted, at most.

The Commission's review of the penalty is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's 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. It is settled that the theory of progressive discipline is not a “fixed and immutable rule to be followed without question.” See *Carter v. Bordentown*, 191 N.J. 474 (2007). In this regard, the Commission emphasizes that a Police Officer is held to a higher standard than a civilian public employee. See *Moorestown v. Armstrong*, 89 N.J. Super. 560 (App. Div. 1965), cert. denied, 47 N.J. 80 (1966). See also, *In re Phillips*, 117 N.J. 567 (1990).

In this matter, the Commission upholds the ALJ’s recommendation to modify the nine working day suspension to a six working day suspension. Initially, the ALJ provides the following:

In this matter Almanzar has been employed by Union for twenty-two years. However, Almanzar had a one-day discipline in 2017, a five day discipline in 2019, a two day discipline in 2020 and an eight day discipline in 2021. He has had four disciplines in the last six years.

As of July 2021, IA no longer investigates late or absent from assignments, which is the basis of Almanzar’s charges. It is now done by the commanding officer. Almanzar admitted to missing the assignment because he was home with his nine-year-old daughter who was doing virtual learning. In light of the above a six day suspension is the appropriate discipline.

Clearly, the appellant’s misconduct warrants major discipline based on the appellant’s status as a supervisor. However, given the above circumstances, the Commission affirms the slight reduction in penalty as the reduction to a six working day suspension is still a major discipline under Civil Service law and rules, and will serve as a warning to the appellant that any future misconduct will incur more severe disciplinary penalties up to removal from employment.

Since the suspension has been modified, the appellant is entitled to three working days of back pay, benefits, and seniority pursuant to N.J.A.C. 4A:2-2.10. However, he is not entitled to counsel fees. N.J.A.C. 4A:2-2.12(a) provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in the disciplinary appeal is the merits of the charges. See *Johnny Walcott v. City of Plainfield*, 282 N.J. Super. 121,128 (App. Div. 1995); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, charges were sustained, and discipline was imposed. Consequently, as appellant has failed to meet the standard set forth at N.J.A.C. 4A:2-2.12, counsel fees must be denied.

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore modifies the nine working day suspension to a six working day suspension. The Commission further orders that the appellant be granted three working days of back pay, benefits and seniority. The amount of back pay awarded is to be reduced as provided for in *N.J.A.C. 4A:2-2.10(d)3*. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

Counsel fees are denied pursuant to *N.J.A.C. 4A:2-2.12*.

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 11TH DAY OF OCTOBER, 2023



Allison Chris Myers
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P.O. Box 312
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 04673-22

AGENCY DKT NO. N/A
2022-3090

**IN THE MATTER OF HOMERO
ALMANZAR, UNION COUNTY
DEPARTMENT OF PUBLIC SAFETY,**

Marc P. Schwartzbach, Esq. for appellant (Donald A. GiGioia Law Group,
attorneys)

Brian M. Hak, Esq. for respondent (Eric M. Bernstein & Associates, attorneys)

Record Closed: August 21, 2023

Decided: August 28, 2023

BEFORE KIMBERLY A. MOSS, ALJ:

Homero Almanzar (Almanzar or appellant) appeals the decision of respondent Union County Department of Public Safety (Union) to suspend him for nine days on charges of incompetency, inefficiency, or failure to perform duties, inability to perform duties, conduct unbecoming a public employee, neglect of duty and other sufficient cause for failing to appear at an overtime assignment.

This matter was transmitted to the Office of Administrative Law (OAL) and filed on June 9, 2022. The hearings were held on May 30, 2023. Closing briefs were submitted on August 21, 2023, at which time I closed the record.

I FIND the following Stipulated FACTS:

1. Appellant, Homero Almanzar ("Almanzar") is employed by the County of Union ("County") as a Sergeant with the Union County Police Department ("UCPD").
2. On March 11, 2021, Almanzar was scheduled to work an overtime detail at 40 Parker Road, Elizabeth, New Jersey from 0800 to 1700 hours.
3. When Sergeant Bernard Gerrity ("Gerrity") did not hear Almanzar call on duty for his shift, at 0804 hours Gerrity called Almanzar.
4. Almanzar stated to Gerrity that he did not have the 40 Parker Road assignment that day.
5. However, Gerrity informed Almanzar that he was scheduled for the assignment in the POSS system.
6. Almanzar stated to Gerrity that he did not realize he had the assignment that day and that he was with his daughter. Almanzar then asked Gerrity to put the overtime back out.
7. Patrol Officer Mathis had to cover the post until the UCPD was able to fill the shift with Captain McGuire.
8. Patrol Overtime Assignments are defined as police-related employment originating from entities that are part of the government of the County and are performed during off-duty hours.
9. 40 Parker Road is a county facility that must be covered by Patrol Overtime Assignments.
10. All officers engaged in Patrol Overtime Assignments are "on-duty".
11. Almanzar was not on post at the scheduled start time for the Patrol Overtime Assignment at 40 Parker Road on March 11, 2021.
12. Almanzar did not notify the UCPD that he had childcare issues on March 11, 2021, until after the Patrol Overtime Assignment was scheduled to start.

13. On May 10, 2021, Almanzar was suspended for eight (8) days without pay for violating the UCPD's Body Worn Camera (BWC) Policy.
14. On March 26, 2020, Almanzar was suspended for two (2) days without pay regarding an extra duty assignment.
15. On November 7, 2019, Almanzar was suspended for five (5) days without pay after he failed/neglected to perform his duty in documenting an officer call out.
16. On June 6, 2017, Almanzar was suspended for one (1) day without pay for a motor vehicle accident in which he hit a tree stump.

TESTIMONY

Andrew Klein

Andrew Klein is a Lieutenant in Union. He has been assigned to Internal Affairs (IA) for the past two years. On March 11, 2021, Klein spoke to Sergeant Garrity. Garrity informed Klein that Almanzar did not report to his overtime assignment that day. Klein had Garrity write a special report. Klein attempted to contact Lieutenant Kreisberg, Almanzar's supervisor, that day but he was not on duty. Klein left a message with Kreisberg to have Almanzar write a special report. When Almanzar submitted the special report, Klein did not accept it because it was vague. At that time Almanzar retained an attorney.

An overtime assignment is a work assignment. An officer missing an overtime assignment is the same as an officer missing a regular assignment. Missing an assignment and being late for an assignment are treated equally. The overtime assignments are at county owned facilities that must have police coverage. Being late or missing an assignment is sufficient justification for discipline.

After Almanzar missed the March 11, 2021, assignment, the shift was initially covered by a patrol officer. The list went out and no one took the assignment. It then went to the special unit; Captain McGuire took the assignment and relieved the patrolman.

As of July 2021, IA no longer investigates late or absent from assignments. is now done by the commanding officer.

Klien's investigation was to determine whether Almanzar was at the overtime assignment or not. Klein did not look at what assignments had been called out or the call list for March 11, 2021. Almanzar was previously given counseling for being late. Klien did not recommend the length of suspension for Almanzar, that was done by outside counsel.

Homero Almanzar

Almanzar has been employed by Union for twenty-two years. He was in the Army from 1996-2002 on active duty. He was in the army reserves until 2016. He had been loaned from Union to the Union County Prosecutor's office for various assignments.

On March 11, 2021, Almanzar was home with his nine-year-old daughter. She was doing virtual learning at home. He received a call from Sergeant Garrity stating that he was supposed to be on the overtime post at 40 Parker Road. Almanzar did not realize that he was supposed to do the overtime assignment at 40 Parker Road. Almanzar told Garrity that he did not think that he could do the assignment because he had childcare issues.

Normally officers carry a planner with them that denotes when they are scheduled to work. On March 11, 2021, Almanzar did not consult his planner. He admits that he made a mistake. The March 11, 2021, overtime assignment was as a result of a swap that he made with another officer. He did not put the March 11, 2021, assignment in his planner. This is the only time that he missed an assignment. He had previously been late for an assignment and received counseling.

Almanzar has done hundreds of overtime assignments. He does ten to twenty overtime assignments per year. He makes a significant amount of money doing

overtime. The officer is responsible for maintaining his overtime schedule. Missing an overtime assignment is the same as missing a regular assignment.

FACTUAL DISCUSSIONS

After hearing the testimony and reviewing the evidence, I **FIND** the following **FACTS**:

On March 11, 2021, Almanzar was home with his nine-year-old daughter. He was getting her ready for virtual learning. Almanzar did not realize that he had an overtime assignment at 40 Parker Road on March 11, 2021 at 8:00 a.m. Almanzar could not do the assignment because he had his daughter with him who was doing virtual learning.

When an officer is assigned an overtime assignment, it is the same as being assigned an assignment while on duty.

Klein, a Lieutenant in IA investigated whether Almanzar was at the overtime post as scheduled or not. Almanzar wrote a special report about the incident which Klein did not accept because it was too vague. Klein told Almanzar to write another special or he would take a statement. At that time Almanzar retained counsel.

Union rules and regulations rule 2:2-3 states:

Absence from Duty W/O official Leave

Every employee who fails to appear for duty at the date, time and place specified without the consent of competent authority is "absent without official leave." Such absences must be reported in writing to the supervisor immediately. Absences without leave in excess of one day must be reported in writing to the Chief of Police (or when none exists the OIC) Any member who is absent without leave for a continuous period of five days shall cease to be a member of the department, pursuant to N.J.S.A. 40A:14-122.

Union General Order XI regarding patrol overtime assignments states

- A. Patrol overtime assignment is defined as police related employment originating from entities that are part of the government of the County of Union, performed during off duty hours and which is conditioned on the

actual or potential use of law enforcement powers by a police officer.
(Examples ESS, PSS, 40 Parker and other County sponsored events)

D. All officers working in an Overtime capacity shall be classified as "on-Duty" and as such will be subject to the authority of the supervisor or other competent authority.

As of July 2021, IA no longer investigates late or absent from assignments. It is now done by the commanding officer.

LEGAL ANALYSIS AND CONCLUSION

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the charges of incompetency, inefficiency, or failure to perform duties, inability to perform duties, neglect of duty, conduct unbecoming a public employee and other sufficient cause are **SUSTAINED**.

The purpose of the Civil Service Act is to remove public employment from political control, partisanship, and personal favoritism, as well as to maintain stability and continuity. Connors v. Bayonne, 36 N.J. Super. 390 (App. Div.), certif. denied, 19 N.J. 362 (1955). The appointing authority has the burden of proof in major disciplinary actions. N.J.A.C. 4A:2-1.4. The standard is by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962). Major discipline includes removal or fine or suspension for more than five working days. N.J.A.C. 4A:2-2.2. Employees may be disciplined for insubordination, neglect of duty, conduct unbecoming a public employee, and other sufficient cause, among other things. N.J.A.C. 4A:2-2.3. An employee may be removed for egregious conduct without regard to progressive discipline. In re Carter, 191 N.J. 474 (2007). Otherwise, progressive discipline would apply. W. New York v. Bock, 38 N.J. 500 (1962).

Hearings at the OAL are de novo. Ensslin v. Twp. of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994), certif. denied, 142 N.J. 446 (1995).

Under N.J.A.C. 4A:2-2.3(a)(1), an employee may be subjected to major discipline for "incompetency, inefficiency, or failure to perform duties."

Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See *In re Herrmann*, 192 N.J. 19, 32 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline).

"There is no constitutional or statutory right to a government job." *State-Operated Sch. Dist. of Newark v. Gaines*, 309 N.J. Super. 327, 334 (App. Div. 1998). (NOTE: Gaines had a substantial prior disciplinary history, but the case is frequently quoted as a threshold statement of civil service law.)

"In addition, there is no right or reason for a government to continue employing an incompetent and inefficient individual after a showing of inability to change." *Klusaritz v. Cape May Cnty.*, 387 N.J. Super. 305, 317 (App. Div. 2006) (termination was the proper remedy for a County treasurer who couldn't balance the books, after the auditors tried three times to show him how).

In reversing the MSB's insistence on progressive discipline, contrary to the wishes of the appointing authority, the *Klusaritz* panel stated that "[t]he [MSB's] application of progressive discipline in this context is misplaced and contrary to the public interest." The court determined that *Klusaritz's* prior record is "of no moment" because his lack of competence to perform the job rendered him unsuitable for the job and subject to termination by the county. [*In re Herrmann*, 192 N.J. 19, 35–36 (2007) (citations omitted).]

There is no definition in the administrative code of the term "inefficiency," and therefore, it has been left to interpretation. In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. *Clark v. New Jersey Dep't of Agric.*, 1 N.J.A.R. 315 (1980).

The fundamental concept that one should be able to perform the duties of the position is stated in Briggs v. Department of Civil Service, 64 N.J. Super. 351, 356 (App. Div. 1960), which happens to be a probationary period case involving a nurse:

Manifestly, the purpose of the probationary period is to further test a probationer's qualifications. Neither the Legislature nor the Commission has given the courts any guidance in determining the extent of assistance or orientation which a probationer must receive. Undoubtedly her duties must be explained to her, and she must be given reasonable opportunity to perform the duties expected of her. But this does not mean she is entitled to on-the-job training in the manner of performing her duties. This is what she must be qualified for -- the proper performance of her duties as outlined by the appointing authority.

"Unbecoming conduct" is broadly defined as any conduct which adversely affects the morale or efficiency of the governmental unit, or which has a tendency to destroy public respect and confidences in the delivery of governmental services. The conduct need not 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. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

The charges of Incompetency, inefficiency, or failure to perform duties, inability to perform duties and neglect of duty and conduct unbecoming a public employee can be merged in this matter. Almanzar admitted that he forgot that he had an overtime assignment on March 11, 2021. He was with his daughter and could not go to the overtime assignment because he could not leave his daughter alone for virtual instruction. He was unable to do his assignment because he forgot he had the assignment and could not leave his daughter home alone.

I CONCLUDE the charges of Incompetency, inefficiency, or failure to perform duties, inability to perform duties, neglect of conduct unbecoming a public employee

and other sufficient cause are sustained because Almanzar did not report to his overtime assignment.

When determining the appropriate penalty to be imposed, the appointing authority must consider an employee's past record, including reasonably recent commendations and prior disciplinary actions. West New York v. Bock, 38 N.J. 500, 523 (1962). Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. *Id.* at 522–24. Major discipline may include removal, disciplinary demotion, suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a); N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.4. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number and proximity of prior disciplinary infractions evaluated by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

In this matter Almanzar has been employed by Union for twenty-two years. However, Almanzar had a one-day discipline in 2017, a five day discipline in 2019, a two day discipline in 2020 and an eight day discipline in 2021. He has had four disciplines in the last six years.

As of July 2021, IA no longer investigates late or absent from assignments, which is the basis of Almanzar's charges. It is now done by the commanding officer. Almanzar admitted to missing the assignment because he was home with his nine-year-old daughter who was doing virtual learning. In light of the above a six day suspension is the appropriate discipline.

ORDER

Based on the foregoing findings of fact and applicable law, it is **ORDERED** that the charges of incompetency, inefficiency, or failure to perform duties, inability to perform duties, conduct unbecoming a public employee, neglect of duty and other sufficient cause are **SUSTAINED**.

It is further **ORDERED** that the suspension is **MODIFIED** from nine days to six days.

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.

August 28, 2023



DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

August 28, 2023

Date Mailed to Parties:

August 28, 2023

ljb

WITNESSES

For Appellant

For Respondent:

Andrew Klein

EXHIBITS

For Appellant

None

For Respondent

- R-1 Final Notice of Disciplinary Action (FNDA) Dated May 16, 2022
- R-2 Not in Evidence
- R-3 Not in Evidence
- R-4 Union County Internal Affairs File Case no. 2021-0015
- R-5 Union County Police Department General Order, Extra Duty Employment Effective September 15, 2015
- R-6 Union County Police Department, Rules and Regulations, Effective February 16, 2018