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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 01340-23

**IN THE MATTER OF STANLEY PRINCIPE,
CITY OF JERSEY CITY, LAW DEPARTMENT.**

Michael A. Bukosky, Esq., for appellant Stanley Principe (Loccke, Correia & Bukosky, LLC, attorneys)

Kyle J. Trent, Esq., for respondent City of Jersey City (Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys)

Record Closed: May 12, 2023

Decided: June 29, 2023

BEFORE LESLIE Z. CELENTANO, ALJ:

STATEMENT OF THE CASE

Appellant Stanley Principe was resigned not in good standing, and removed effective January 5, 2023, by respondent City of Jersey City Law Department based upon allegations of failure to comply with leave policy, and absences without leave. N.J.A.C. 4A:2-6.2. The matter was filed at the Office of Administrative Law (OAL) on February 14, 2023. Appellant's union has appealed on his behalf from the resignation not in good standing imposed based upon allegations of failure to comply with leave policy and appellant's absence from work. At issue is whether appellant engaged in the alleged

conduct, and if so, whether it constitutes actions for which a penalty of resignation not in good standing is warranted.

PROCEDURAL HISTORY

The County issued a Preliminary Notice of Disciplinary Action (PNDA) dated November 24, 2022, informing appellant of the following charges issued against him: violating Article XVII—Section 2 of the Jersey City Fire Department Book of Rules—Any member, clerk or employee shall be subject to reprimand, loss of furlough days, suspension, deduction of pay, reduction in rank or dismissal according to the nature and aggravation of his offense for any of the following causes:

Charge #1—Conduct not becoming a city employee
Charge #2—Absence without leave

[R-1.]

The charges were based on the following incidents set forth in the PNDA:

On November 22, 2022, FF Principe failed to report for duty and was absent without leave (AWOL). FF Principe was previously AWOL on July 19, 23 and 27, 2022. He has failed to communicate with the Jersey City Fire Department after July 19, 2022, but has been afforded the use of his accrued and vacation time as approved by Local 1066. He used his last accrued vacation time on November 20, 2022, and [has] no time left.

[ibid.]

Subsequently, the City issued a Final Notice of Disciplinary Action (FNDA) dated January 5, 2023, sustaining the charges, and providing for appellant's removal effective January 5, 2023. (R-2.)

Appellant filed an appeal, and the matter was filed at the Office of Administrative Law. On February 27, 2023, a telephone prehearing conference was held. Counsel for Union IAFF Local 1066 advised that appellant is believed to be in Ukraine, fighting in the

war, and that he is "specially appearing" on behalf of appellant. He asserted that appellant was not properly served with the FNDA. Counsel for the City asserted that the service is valid according to civil service rules if sent to the appellant by certified and regular mail at his last known address, which was done in this case. The parties were advised that the matter needed to proceed on one of several dates offered, and based upon the availability of the parties was heard on March 29, 2023. At the conclusion of the hearing the parties requested the opportunity to submit post-hearing briefs. Following receipt of all submissions and exhibit lists, the record was closed.

FACTUAL DISCUSSION AND TESTIMONY

The undisputed facts are as follows:

1. Stanley Principe worked as a Jersey City firefighter.
2. Principe did not showing up to work as scheduled on July 19, 2022, and has not been seen since.
3. Principe failed to provide the City with any notice regarding his absence. He did not communicate with the City at all following July 19, 2022.
4. The City made efforts to contact Principe, including by contacting his significant other, but she too was unable to locate him.
5. Rather than move to terminate Principe's employment when he stopped showing up for work in July 2022, the City, after discussions with and at the urging of his union, Local 1066, agreed to use his accrued leave time to maintain his payroll status despite his absence.
6. Principe used his last accrued vacation day on November 20, 2022.
7. Principe did not return to work as scheduled on November 24, 2022, or any date thereafter.

8. The City filed disciplinary charges seeking Principe's termination, and served those charges by sending them via certified mail to Principe's address on file.

9. Principe's union, Local 1066, also made efforts to locate Principe, including by contacting the Red Cross and the U.S. Consulate based on the belief that Principe may have traveled to Ukraine, but the union was also unable to locate or contact Principe.

10. Principe's attorney of record in this matter and Local 1066's counsel represented on the record that although he filed the civil service appeal in this matter, he actually represented the union and only "derivatively" represented Principe in this case, so he could not produce him, as he had never spoken with him despite filing this appeal.

11. Principe failed to appear for the Office of Administrative Law hearing in this matter.

Testimony

What follows is not a verbatim accounting of the testimony, but rather a summary of the testimonial and documentary evidence I find relevant to resolving the issue in this matter.

Testifying for respondent was James Shea. Mr. Shea has been employed by the City of Jersey City as public safety director since the summer of 2013. He is responsible for all operations in the police department, fire department, traffic department, and office of emergency management. He was with the New York Police Department for twenty-five years and was deputy chief. He knows of Mr. Principe only by name.

In 2022 he was notified that Mr. Principe had used up all of his compensatory time and was still not coming to work. The union came to talk to him and advised that

Mr. Principe had gone to Ukraine to participate in the war and that his fellow firefighters were no longer able to do what is called "mutuals," where they cover his shifts. Other firefighters felt that at that point he would never cover the time that they had covered for him, and they were no longer willing to do it.

Mr. Shea referenced the Final Notice of Disciplinary Action, R-2, which notes that on July 19, 2022, appellant did not appear for work, nor did he appear on July 23 or July 27, 2022. He continued to fail to report for duty, and on November 24, 2022, was considered to be absent without leave (AWOL). He has not communicated with anyone in the Department since prior to July 19, 2022, and the Department permitted him to use all of his accrued vacation and sick time before moving forward with disciplinary action. The Department did this because appellant was known to have a wife and child. The union requested that he be allowed to use his vacation and sick time so that he could stay on the payroll for the benefit of his wife and child. Once his time ran out in November, he was required to report and did not.

The union tried to find him. His wife had no idea where he was, nor did the union. His coworkers indicated he might be in Ukraine. He could not be reached via his cell phone.

Mr. Shea referenced the Jersey City Fire Department Book of Rules, Article XVII—Section 2, which notes the following:

Any member, clerk or employee shall be subject to reprimand, loss of furlough days, suspension, deduction of pay, reduction in rank or dismissal according to the nature and aggravation of his offense for any of the following causes:

Charge #1: conduct not becoming a city employee

Charge #2: absence without leave

N.J.A.C. 4A:2-6.2 resignation not in good standing

Between November 24, 2022, and the date of hearing there had been no contact from appellant whatsoever, and he has never returned to work. Mr. Shea signed the

FNDA and it was sent to appellant, certified and regular mail at his last known address. There had never been any change of address provided. The FNDA was also provided to the union, which indicated they were trying to find him as well.

Asked on cross-examination about the forty-five-day rule, Mr. Shea indicated that appellant was not AWOL until November, because he was left on the payroll at the request of the union.

Mr. Shea also indicated that no one had contacted him to advise that appellant had entered Ukraine, and it was only when appellant stopped coming to work that other firefighters indicated they believed that's where he had gone. Mr. Shea has never heard anything else about appellant's whereabouts.

Positions of the parties

Mr. Bukosky indicated that he learned from the City that his client was in Ukraine and that no one has heard from him since he last appeared at work. He represents the union, so therefore all firefighters, and when appellant was served with the charges he received a copy. He wrote to the City, but indicated that he is specially appearing on appellant's behalf, and indicated that the City needs to serve him. They only sent a copy to appellant's address, but they knew he was already in Ukraine. He is appearing on behalf of the union, and derivatively the appellant, but urges that the City must serve the appellant and give him an opportunity to defend against the charges. Mr. Bukosky made clear at the municipal level that he represents the union. He stated that the contract with the union notes that the union has a right to be present at disciplinary proceedings, and they were present at the hearing below. He states that appellant has a statutory right pursuant to N.J.S.A. 40A:14-19 to be served, and the City is required to try and serve him. Until then the matter should be held in abeyance and the City should contact Ukrainian authorities to see where he is. Mr. Bukosky indicated that he has never met appellant and has never been in contact with him, but that the charges should be dismissed and the City should be required to find him.

The City urges that in a civil-service matter the service is valid if sent to the individual's last known address. Because counsel represents the union and does not represent the appellant there is no valid appeal pending. Appellant was properly served and was allowed to use up his sick-leave and vacation time. They could have filed charges immediately. Mr. Trent, counsel for the City, urges that the union has no standing to file an appeal for someone, and that if they have not filed a motion to intervene then there is no standing, there is no ability to cross-examine witnesses, and the appeal should be dismissed. Mr. Trent indicates that N.J.S.A. 40A:14-19 also notes "[e]xcept as otherwise provided by law," and the civil-service rules are clear as they relate to service of process.¹ He asserts that the City has no obligation to chase appellant to Ukraine, and that they did everything they should have done, even if they did not find him. The appeal should be dismissed. Appellant has not appeared for work for more than six months, and is clearly absent without leave.

LEGAL DISCUSSION

The Civil Service Act, N.J.S.A. 11A:1-1 et seq., governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576, 581 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). The Act sets forth that State policy is to provide appropriate appointment, supervisory, and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). To carry out this policy, the Act authorizes the discipline (and termination) of public employees. N.J.S.A. 11A:2-6.

A civil-service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A.

¹ N.J.A.C. 4A:2-2.6(d) provides that "[w]ithin 20 days of the hearing, or such additional time as agreed to by the parties, the appointing authority shall make a decision on the charges and furnish the employee either by personal service or certified mail with a Final Notice of Disciplinary Action. See N.J.A.C. 4A:2-2.13 for the issuance of a Final Notice in removal appeals by certain law enforcement officers and firefighters."

11A:2-20; N.J.A.C. 4A:2-2.2, -2.3. 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 relied 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, 149 (1962); In re Polk, 90 N.J. 550, 561 (1982).

The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 275 (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. Delaware, Lackawanna & W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). Evidence is said to preponderate if “it establishes ‘the reasonable probability of the fact.’” Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citations omitted). Precisely what is needed to satisfy this burden must be judged on a case-by-case basis.

The reasons supporting disciplinary action must be sufficient and not arbitrary, frivolous, or “likely to subvert the basic aims of the civil service program.” Prosecutor’s Detectives & Investigators Ass’n v. Hudson Cty. Bd. of Freeholders, 130 N.J. Super. 30, 42 (App. Div. 1974) (quoting Kennedy v. Newark, 26 N.J. 178, 189–90 (1959)).

N.J.A.C. 4A:2-6.2 provides, in salient part:

(b) 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.

The PNDA (R-1) charged Principe with the following serious infractions:

Jersey City Fire Department Book of Rules, Article XVII—
Section 2—Any member, clerk or employee shall be subject to reprimand, loss of furlough days, suspension, deduction of pay, reduction in rank or dismissal according to the nature and aggravation of his offense for any of the following causes:

Charge #1—Conduct not becoming a city employee
Charge #2—Absence without leave

The specifications in support of the charges are:

On November 22, 2022, FF Principe failed to report for duty and was absent without leave (AWOL). FF Principe was previously AWOL on July 19, 23 and 27, 2022. He has failed to communicate with the Jersey City Fire Department after July 19, 2022, but has been afforded the use of his accrued and vacation time as approved by Local 1066. He used his last accrued vacation time on November 20, 2022, and [has] no time left.

Conduct unbecoming a public employee has been described as an “elastic” phrase that includes “conduct which adversely affects the morale or efficiency” of the public entity or “which has a tendency to destroy public respect for [public] employees and confidence in the operation of [public] services.” In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (citation omitted); see Karins v. City of Atl. City, 152 N.J. 532 (1998).

Although the regulation does not define when absenteeism will rise to the level of chronic or excessive, it is generally understood that chronic conduct is conduct that continues over a long time or recurs frequently, Good v. N. State Prison, 97 N.J.A.R.2d (CSV) 529, 531, and “excessive” is defined as “exceeding what is usual, proper, necessary, or normal,” Merriam-Webster online dictionary, <https://www.merriam-webster.com/dictionary/excessive> (last visited June 22, 2023). Appellant did not report for work on July 19, 2022. All of his vacation and sick leave was applied to his attendance, and his leave time expired on November 20, 2022. He has never reported or called out since.

Based upon the foregoing, I **CONCLUDE** that the Department has amply met its burden of proving, by a preponderance of the credible evidence, that appellant’s failure to report to work from and after November 24, 2022, after being permitted to use up all of his leave time, constitutes conduct unbecoming a City employee, absence without leave, and a resignation not in good standing, due to his absence from work. I further

CONCLUDE that appellant's actions relating to his absence from work amount to a violation of Article XVII—Section 2 of the Jersey City Fire Department Book of Rules.

When dealing with the question of penalty in a de novo review of a disciplinary action against a civil-service employee, the Civil Service Commission is required to reevaluate the proofs and "penalty" on appeal based upon the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500, 519 (1962).

In a disciplinary proceeding, an employee's past record may be resorted to "for guidance in determining the appropriate penalty for the current specific offense." Bock, 38 N.J. at 523. This past record includes "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." Id. at 524. However, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. Henry, 81 N.J. at 580.

An employer has a legitimate right to expect that its employees will attend work as scheduled. Appellant's absence from work caused frequent disruption of the workplace and created a hardship to the Department in that other firefighters had to absorb appellant's job duties. The absences also created potential safety issues for the Department and the community it is sworn to protect. Appellant's failure to work his assigned shifts is conduct that adversely affects the morale of other governmental-employee firefighters who had to undertake appellant's work and adversely affects the efficient operations of the Department. Appellant's failure to perform his mandated duties due to his absence from work constitutes conduct unbecoming a public employee.

The Department resigned Mr. Principe not in good standing for being absent from duty for more than five consecutive business days without approval, thereby deeming him to have abandoned his position, N.J.A.C. 4A:2-6.2(b). Appellant abandoned his position when he was absent, no call, no show, on July 19, 23 and 27, 2022, and continuing through November 24, 2022. As such, the termination of his employment was warranted. The City had no obligation to apply his leave time to his AWOL status before charging him

with a resignation not in good standing, yet it did so. The respondent benevolently exhibited great patience towards the appellant, who has shown little concern for responsibility to his colleagues and superiors, and to the safety of the public.

The County permitted him to use his vacation and sick time, yet despite accommodating appellant at every turn, he failed to follow procedures for taking leave and failed to comport with the rules of the Department. I **CONCLUDE** that the Department has met its burden in sustaining the charges.

Based upon all of the foregoing, I **CONCLUDE** that the Department appropriately applied progressive discipline in this matter and that a resignation not in good standing is appropriate.

ORDER

It is hereby **ORDERED** that the charges of violation of Article XVII—Section 2 of the Jersey City Fire Department Book of Rules are **SUSTAINED** and the remaining charges of conduct not becoming a City employee and of absence without leave are also **SUSTAINED**. Appellant's appeal is hereby **DISMISSED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

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.

June 29, 2023

DATE



LESLIE Z. CELENTANO, ALJ

Date Received at Agency:

June 29, 2023

Date Mailed to Parties:

June 29, 2023

dr

APPENDIX

Witnesses

For Appellant:

None

For Respondent:

James Shea

Exhibits

For Appellant:

None

For Respondent:

R-1 Preliminary Notice of Disciplinary Action

R-2 Final Notice of Disciplinary Action