



STATE OF NEW JERSEY

In the Matter of Peter Gobel, Linden,
 Department of Public Property and
 Community Service

FINAL ADMINISTRATIVE ACTION
 OF
 CIVIL SERVICE COMMISSION

CSC Docket Nos. 2023-784 and 2023-
 785

OAL Docket Nos. CSV 02767-23 and
 CSV 02764-23

(Consolidated)

ISSUED: JANUARY 17, 2024

The appeals of Peter Gobel, Laborer 1, Linden, Department of Public Property and Community Services, 20 and 40 working day suspensions, on charges, were heard by Administrative Law Judge Thomas R. Betancourt (ALJ), who rendered his initial decision on November 29, 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 January 17, 2024, adopted the ALJ's Findings of Facts. Additionally, it adopted his recommendation to modify the 20 working day suspension to a 10 working day suspension. However, it did not adopt his recommendation to modify the 40 working day suspension to a 10 working day suspension. Rather, the Commission upheld the 40 working day suspension.

In these matters, the question is the proper penalty to be imposed as the ALJ's findings regarding the charges are amply supported in the record. Thus, upon its *de novo* review, the Commission adopts those findings. However, similar to the Commission's review of the charges, its 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 matter, the Commission notes that the ALJ does not provide extensive analysis of the penalties in these matters. In this regard, the ALJ stated, regarding the 20 working day suspension:

Petitioner has a prior disciplinary history consisting of a written warning for not timely reporting a work injury, dated September 15, 2021; a one day suspension for calling in sick outside the time frame to do so, dated June 3, 2022; and, a one day suspension for calling in sick outside the time frame to do so, dated May 22, 2022.

Mr. Gobel has been employed by the City of Linden since April 2020. I do not find his prior disciplinary history to be significant.

However, Mr. Gobel disobeyed a direct directive from his supervisor. This I find to be a serious infraction. Ten days suspension is appropriate for the sustained charges in FNDA#1.

Notwithstanding the relatively scant discussion above, the Commission agrees that the proper penalty for that matter should be reduced from a 20 working day suspension to a 10 working day suspension. In this regard, the Commission finds that, while the appellant’s insubordination was unwarranted, a 10 working day suspension, the appellant’s first major discipline, is sufficient under the circumstances, to impress upon the appellant that any similar future misconduct will result in increased disciplinary action, up to removal from employment.

Regarding the second matter, the Commission does not agree that the 40 working day suspension should be reduced to a 10 working day suspension. In this regard, in his relatively short employment history, the appellant has accrued two previous minor disciplinary suspensions and the 10 working suspension imposed for the above matter. Thus, it is appropriate, under the tenets of progressive discipline, to impose a more significant penalty to clearly indicate to the appellant that his repeated infractions cannot be continued, and as indicated previously, will merit increased disciplinary penalties. Given the infractions and the disciplinary history cited, the 40 working day suspension is appropriate.

Since the 20 working day suspension have been modified, the appellant is entitled to 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 these cases, although the penalty were modified by the Commission, the charges were sustained, and major discipline was imposed. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C. 4A:2-2.12*, counsel fees must be denied.

ORDER

Order as to 20 working day suspension

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was justified. The Commission therefore modifies that suspension to a 10 working day suspension. The Commission further orders that the appellant be granted 10 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*.

Order as to 40 working day suspension

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant for 40 working days was justified. The Commission upholds that action and dismisses the appeal of Peter Gobel.

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 17TH DAY OF JANUARY, 2024



Allison Chris Myers
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

(CONSOLIDATED)

INITIAL DECISION

OAL DKT. NO. CSV 02764-23

AGENCY REF. NO. 2023-785

PETER GOBEL,

Appellant,

vs.

**CITY OF LINDEN, DEPARTMENT OF
PUBLIC PROPERTY AND COMMUNITY SERVICES,**

Respondent.

PETER GOBEL,

Appellant,

OAL DKT. NO. CSV 02767-23

AGENCY REF. NO. 2023-784

vs.

**CITY OF LINDEN, DEPARTMENT OF
PUBLIC PROPERTY AND COMMUNITY SERVICES,**

Respondent.

Seth B. Kennedy, Esq., for appellant (Kroll, Heineman, Ptasiewicz & Parsons,
attorneys)

Robert J. Merryman, Esq., for respondent (Apruzzese, McDermott, Mastro &
Murphy, attorneys)

Record Closed: September 29, 2023

Decided: November 29, 2023

BEFORE THOMAS R. BETANCOURT, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Peter Gobel, appeals a Final Notice of Disciplinary Action (FNDA), dated June 6, 2022, imposing a penalty of 40 working days suspension under Docket No. CSV 02767-23; and, appeals a FNDA dated June 6, 2022, imposing a penalty of 20 working days suspension under Docket No. CSV 02764-23.

The Civil Service Commission transmitted both contested matters pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where they were filed on March 28, 2023.

A prehearing conference was conducted on December 4, 2023, and a prehearing order entered on the same date by the undersigned.

The two matters were consolidated sua sponte in the above noted prehearing order.

A hearing was held on July 13, 2023. The record was kept open for counsel to submit written summations. Written summations were received from both petitioner and respondent on September 29, 2023, whereupon the record closed.

ISSUES

Whether there is sufficient credible evidence to sustain the charges set forth in the two FNDAs; and, if sustained, whether the penalties imposed, 20 and 40 working days suspensions, respectively, are warranted.

SUMMARY OF RELEVANT TESTIMONY

Respondent's Case

DIRECT EXAMINATION

David Martinez testified as follows:

He is employed by the City of Linden as assistant superintendent of the Public Works Department (DPW).

He knows Mr. Gobel as he is employed as a laborer in the Sanitation Department. The work shift is 6:00 a.m. to 2:30 p.m. Mr. Martinez then described a typical workday for a sanitation worker. Employees contractually get a fifteen minute break, half hour lunch, and another fifteen minute break.

On August 24, 2022, Mr. Martinez pulled into the public works yard and saw Mr. Gobel and a co-worker work on a car at approximately 1:00 p.m. Mr. Martinez called them over and told them this was unacceptable. Mr. Gobel's responded he was trying to help someone out.

On August 25, 2022 Mr. Martinez sent an email to personnel about what he observed the day prior. He looked at security footage to see when they started working on the vehicle. He took a screenshot photograph of Mr. Gobel under the hood of a vehicle on city time.

Mr. Martinez had previously spoken to Mr. Gobel about working on personal vehicles on city time. He stated that he had done so twice.

Mr. Martinez then reviewed Mr. Gobel's time card for August 24, 2022 and noted he clocked in at 5:48 a.m. and clocked out at 2:32 p.m. He did not clock out prior to working on the vehicle.

Mr. Martinez then reviewed Mr. Gobel's prior disciplinary history.

CROSS EXAMINATION

Employees punch in and out using a physical time clock. Normally employees do not punch out for breaks.

When out on a truck employees can pick up garbage anywhere between five to seven hours. It depends on the crew. If done sooner then the end of a shift the employees will usually clean the truck, service the truck and get ready for the next day, or do maintenance.

There is no written record of the two conversations Mr. Martinez had with Mr. Gobel about working on private vehicles while on city time. Neither of these two conversations were reduced to verbal warnings in writing.

The screen shot of the video footage he took with his cell phone does not show what time it was.

The video footage is maintained by the police department. He did not request a copy of it.

RE-DIRECT EXAMINATION

Employees who have a shift that ends at 2:30 p.m. are expected to work until 2:30 p.m. Employees do have a one-half hour washup prior to the end of the shift. They work until 2:00 p.m. They are not free to perform personal errands.

DIRECT EXAMINATION

Linda Medvec testified as follows:

She is employed by Medlogix. Medlogix is a manage care organization that handles medical treatment for injured workers for the City of Linden. She works with the City of Linden.

Kessler is a rehabilitation provider where an injured person receives physical therapy. Medlogix coordinates treatment in network and utilizes Kessler. A referral is sent to Kessler Rehab, and an initial evaluation for physical therapy is scheduled.

Ms. Medvec reviewed the referral form for Mr. Gobel, who was referred to Kessler. His initial evaluation was scheduled for January 27, 2022. This is a lengthier appointment. Mr. Gobel was approved for twelve sessions of physical therapy.

Ms. Medvec then reviewed the appointment schedule for Mr. Gobel, which was given to him at the initial evaluation. Protocol for the City of Linden is for workers to go at 2:00 p.m. Kessler is aware of this protocol.

Ms. Medvec then reviewed three no show forms from Kessler regarding Mr. Gobel. The dates were February 1, 2 and 4, 2022. The forms indicate Mr. Gobel did not show up for his appointments or call ahead.

Ms. Medvec then reviewed the appointment list for Mr. Gobel which show he arrived for his initial appointment on January 27, 2022 at 1:00 p.m. It also shows the three no shows for February 1, 2 and 4, 2022. The form further shows that on February 7, 2022 Mr. Gobel arrived at 1:00 p.m. when he was scheduled for 2:00 p.m. On February 9, 2022 he arrived at Noon when he was scheduled for 2:00 p.m. On February 11, 2022 he arrived at 1:00 p.m. when he was scheduled for 2:00 p.m. She stated that no appointments were changed.

On February 22, 2022 the form shows that the appointment was cancelled. The no show forms do not indicate they were cancelled.

CROSS EXAMINATION

She is not involved in the billing process. She does not believe bills were submitted for the dates of February 1, 2 and 4, 2022.

She is not aware of any conversation had between Mr. Gobel and Kessler personnel. She does not know if anyone at Kessler told Mr. Gobel he should not show up earlier than the appointment time.

She knows Mr. Gobel received a copy of the schedule as that is the protocol to provide one to the patient. Kessler confirmed that a copy was provided to Mr. Gobel.

Medlogix is not involved in scheduling appointments. They are involved with the initial scheduling.

DIRECT EXAMINATION

Jessica Sheehy testified as follows:

She is employed by the City of Linden as a personnel officer, and has been since 2005. She is familiar with Mr. Gobel, who has been employed by the City of Linden for approximately two to two and one half years. He has had quite a few Worker's Compensation injuries.

When a worker is injured they are to immediately report the injury. The worker is then sent to an urgent care facility that treats them. From that point Medlogix is involved. They are point of contact for the employee for any issues, for further treatment and scheduling. Medlogix would arrange for a doctor to examine Mr. Gobel. She is familiar with Dr. Warshauer, an orthopedist, who examined Mr. Gobel.

For physical therapy the City of Linden uses Kessler. Kessler is located probably less than two miles from DPW.

The City has a policy that physical therapy appointments are to be made at the end of the day at 2:00 p.m. Employees know this.

Ms. Sheehy reviewed two Employer's First Report of Accidental Injury or Occupational Illness forms. She is the person who reviews these forms. The first form had a date of injury of January 9, 2020. The second form had a date of injury of December 29, 2021. The injuries are within ten days of each other. Both reference neck and back.

Ms. Sheehy then reviewed Mr. Gobel's physical therapy appointments list. They are scheduled on workdays. They are listed for 2:00 p.m.

She became aware of an issue with Mr. Gobel's attendance at physical therapy appointments. The second week of physical therapy he was coming in at different times. DPW brought it to her attention. He had not shown up for three scheduled appointments.

Ms. Sheehy received an email from Karen Kofoet at Medlogix which confirmed Mr. Gobel changed the appointments to an earlier time. The appointments were scheduled for 2:00 p.m. This was in reply to Ms. Sheehy's inquiry.

Ms. Sheehy then reviewed Mr. Gobel's time sheets for the period in question. The writing on the time sheets is by Robin from DPW. On February 2, 2022, Mr. Gobel is listed as "sick". Even if sick he still has an obligation to go to physical therapy. On February 7, 2022 Mr. Gobel left work at 12:30 p.m. His typical work day ends at 2:30 p.m. The notation on the card indicates he left for PT at 12:30 p.m. for a 1:00 p.m. appointment. The appointment was scheduled for 2:00 p.m. On February 9, 2022, Mr. Gobel left at 11:30 a.m. and attended physical therapy at noon. The appointment was scheduled for 2:00 p.m. On February 11, 2022, he left work at 12:30 p.m. Physical therapy was scheduled for 2:00 p.m. On February 17, 2022, he left at 12:31 p.m. On those days he left early he did not return to work, as noted on the time sheet.

Ms. Sheehy then reviewed the collective negotiations agreement, which covers blue collar employees like Mr. Gobel. She reviewed the section referencing workers compensation appointments which stated the City will not deduct leaves. It further states employees shall return to work upon completion whenever possible.

CROSS EXAMINATION

She did not prepare the disciplinary notices. They were prepared by Alan Roth. She did not consult with Mr. Roth regarding the notices for Mr. Gobel.

It is the job of Medlogix to oversee the physical therapy schedule. If there is a problem, then the City gets involved.

A typical sanitation worker's day is report to work, get their sheet for the day and go out on the road. They return to the garage at the end of the day. The return time to the garage varies depending on what is being picked up, what wards, what items.

Employees are authorized to leave work at 1:30 p.m. for 2:00 p.m. appointments. She cannot say that trucks are always back in the yard by 1:30 p.m. If a crew is aware that an employee has a 2:00 p.m. appointment they are to make sure the employee is back in time to attend the appointment. Supervisors are involved in this process.

The email exchange on February 9, 2022, was the first time she was aware of any issues with Mr. Gobel's appointments.¹

Mr. Gobel was aware of the practice of end of the day appointments.

Time cards are not reviewed after the date as that is how payroll is processed.

Supervisors are generally around at punch in and punch out times.

She is not aware if anyone spoke with Mr. Gobel on February 10, 2022; February 11, 2022; or, February 17, 2022.

Appellant's Case

DIRECT EXAMINATION

Peter Gobel, Appellant, testified as follows:

He was hired by the City of Linden on April 13, 2020. He works as a laborer. Presently he is working sanitation. Mr. Gobel then described his work day, and how it may vary. Lunch break is one-half hour. There are also two fifteen minute breaks. There is also a wash up time at the end of the day.

¹ R-12 in evidence. Email between Ms. Sheehy and Karen Kofot at Medlogix.

Mr. Gobel stated that the incident of August 24, 2021 occurred around 1:30 or 1:40 p.m. He had finished his route. Everyone was unwinding, taking their breaks and getting cleaned up. There were no other assignments.

He stated he was inspecting his co-worker's vehicle at this time. His co-worker asked him to take a look at it as it would not start. Mr. Gobel has experience as a mechanic. The car was in the DPW parking lot. He did not use any DPW equipment to look at the car. He did not remove or replace any parts. He was trying to give his co-worker a diagnosis as to why the car would not start. Mr. Gobel stated this took about ten minutes.

David Martinez approached him and asked what he was doing, stating "what are you running, a chop shop?" Mr. Martinez made no mention of disciplinary action. Mr. Martinez did not make any reference to previous conversations with Mr. Gobel at this time.

Mr. Gobel did mention an instance where he moved his car to put water in and was told not to move his car during work hours. He denied having any issue with Mr. Martinez regarding changing a tire.

Mr. Gobel stated he was unsure as to dates for his appointments at Kessler. He was also unsure as to time. When January 27, 2022 was mentioned he indicated that sounds right. Mr. Gobel then went on to describe his initial visit at Kessler.

He denied receiving an appointment schedule from Kessler after his initial visit, stating that Kessler said they would notify Medlogix.

He stated he was unaware he had an appointment on February 1, 2 or 4, 2022.

After a week went by he asked and was told of the appointments schedule.

He denied ever asking to change an appointment time, except to maybe cancel an appointment. He denied ever going to an appointment earlier than scheduled.

He stated after therapy he was relieved for the day.

Referring to February 9, 2022, his appointment was at noon and was over at 1:00 p.m.

On days with therapy they wouldn't take breaks to try and get the route done to go to therapy. If he did return he would still have lunch and other breaks available.

He stated he would always talk to a supervisor and let them know he was going to therapy. He was never told by a supervisor that he was leaving too early for therapy.

On those days he left early for therapy he always talked to a super before he punched out.

CROSS EXAMINATION

When asked why he thought he could work on a car during the workday Mr. Gobel replied he thought he would be able to do whatever on his break. He stated he was "technically on my break". He stated he did not tell Mr. Martinez he was on break as he did not want to be "rude".

Regarding the January 27, 2022 initial appointment at Kessler Mr. Gobel reviewed his appointment list, which showed he arrived at 1:00 p.m.

Referring to other appointments, Mr. Gobel states that the times vary. He noted the appointment list shows all times to be 2:00 p.m. Noting that the list shows that a voicemail was left for his missed February 1, 2022, appointment, Mr. Gobel denied ever receiving said voicemail. He stated he also did not receive a voicemail for the missed February 2, 2022, appointment. He stated the same for the missed February 4, 2022, appointment.

Eventually he received a printed schedule for the appointments. He denied receiving it until after he missed the first three appointments.

He did not have anything in writing regarding the change in times for appointments.

CREDIBILITY

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

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

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

I had no issues with the testimony of David Martinez, Linda Medvec or Jessica Sheehy. All three testified in a direct, straightforward and professional manner. None

showed any hesitation when answering. Nothing about their comportment or demeanor indicated anything other than truthfulness.

I found the testimony of Mr. Gobel problematic. Much of what he stated was nonsensical. His denial of receiving voice mails for his three missed appointments was based on his speculation that whoever noted that a voice mail was left did so but did not actually leave the voice message.

His reply to the undersigned's question regarding how it would be rude if he told Mr. Martinez he was on a break while working on a co-worker's care made little sense. His explanation as to appointment times was convoluted and also made little sense. He denied changing the appointment times, but showed up early when Kessler did not change the times. His blanket denial of receiving a schedule of appointments is simply not believable. I did not find him credible.

FINDINGS OF FACT

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

1. Peter Gobel has been employed as a laborer with the City of Linden since April 13, 2020. (Tr. 62:23)
2. He is assigned to the sanitation department. His normal work shift is 6:00 a.m. to 2:30 p.m. (Tr. 6:1-4)
3. On August 24, 2021, Mr. Gobel was assigned to work crew G17. (R-4)
4. At approximately 1:00 p.m. on August 24, 2021, David Martinez, Mr. Gobel's direct supervisor, saw him and a co-worker work on a car. (Tr. 16:9-16)
5. Mr. Martinez had twice prior advised Mr. Gobel not to work on private vehicles during work time. (Tr. 17:7-13; Tr. 18:24-25)

6. Mr. Martinez notified Alan Roth and others via email regarding this incident on August 25, 2021, attaching a screen shot photograph of Mr. Gobel working on the car. (R-3)

7. Mr. Martinez obtained the photograph while watching the security camera video. He observed Mr. Gobel working on the car for approximately one-half hour. (Tr. 18:1-18; Tr. 19:2-17)

8. I do not find that Mr. Gobel was on break while working on the car, notwithstanding his testimony that he was on break. (Tr. 76:20-22)

9. Further, Mr. Gobel worked on the car for approximately one-half hour, while his break is fifteen minutes. (Tr. 18:1-18; Tr. 16:3-8)

10. Mr. Gobel was injured while at work on December 29, 2021 and January 9, 2022. (R-7)

11. Medlogix is a manage care organization that handles the medical treatment for injured employees for the City of Linden. (Tr. 29:19-21)

12. Kessler is a rehabilitation facility used by the City of Linden for those injured employees requiring physical therapy. (Tr. 30:11-22)

13. Mr. Gobel was scheduled for his initial assessment at Kessler on January 27, 2022. (Tr. 30:20-22; R-8; R-11)

14. Mr. Gobel attended this initial assessment. (R-11)

15. Mr. Gobel was scheduled for physical therapy at Kessler on February 1, 2, 4, 7, 9, 11, 14, 16 and 18. All appointments were scheduled for 2:00 p.m. (R-9)

16. The City of Linden policy regarding physical therapy appointments for employees is as follows: Employees are to immediately report the injury; they are then sent to an urgent care facility for treatment; Medlogix becomes involved as the point of contact for the employee, for scheduling and further treatment. Tr. 42:24-25 and Tr. 43:1-5)

17. City policy is to schedule appointments at the end of the day. Appointments are typically scheduled for 2:00 p.m. Employees are made aware of this policy. (Tr. 44:12-25 and Tr. 45:1)

18. Mr. Gobel failed to attend his first three appointments on February 1, 2 and 4, 2022. Kessler followed up by leaving a voice mail with Mr. Gobel on all three occasions. (R-10 and R-11))

19. Mr. Gobel worked a full day on February 1, 2022; was out sick on February 2; and, worked a full day on February 4, 2022. (R-13)

20. I find that Mr. Gobel did receive the appointments schedule notwithstanding his denial of receiving the same. (Tr. 40:4-12; Tr. 70:24-25 and Tr. 71:1-2)

21. Kessler did not change any appointment times. All were scheduled for 2:00 p.m. (R-9, R-11 and R-12)

22. Mr. Gobel did attend his scheduled physical therapy appointments on February 7, 9, 11, 14, 17, 18, 22, 23, 24 and 25, 2022. (R-11)

23. On February 7, 2022, Mr. Gobel arrived at 1:00 p.m. for a 2:00 p.m. appointment. On February 9, 2022, Mr. Gobel arrived at Noon for a 2:00 p.m. appointment. On February 11, 2022, Mr. Gobel arrived at 1:00 p.m. for a 2:00 p.m. appointment. On February 17, 2022, Mr. Gobel arrived at 1:00 p.m. for a 2:00 p.m. None of the appointment times were changed by Kessler. They were changed by Mr. Gobel. (R-11 and R-12)

24. Mr. Gobel failed to return to work on those days he changed his appointments from 2:00 p.m. to earlier times and was required to do so. (R-12, R-13, Tr. 51:16-25, Tr. 52:1-25 Tr. 53:1-13 and R-15)

25. Mr. Gobel was permitted to leave work for his 2:00 p.m. appointment at 1:30 p.m. (Tr. 49:8-10)

26. The Agreement Between the City of Linden and Teamsters Local Union No. 469, Article XXIII D. provides in pertinent part as follows: The City agrees not

to deduct wages from time spent by an employee during regular work hours to receive medical treatment arising from an on-the-job injury. Such employee shall return to work upon completion of medical treatment whenever it is possible to do so. (R-15)

27. Kessler is located approximately two miles from DPW and takes about fifteen minutes to drive to, depending on traffic. (Tr. 43:23-25 and Tr. 44:1-9)

LEGAL ANALYSIS AND CONCLUSION

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a civil service employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). In order to carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

A public employee who is protected by the provisions of the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2 2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del.

Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). This burden of proof falls on the agency in enforcement proceedings to prove violations of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987).

In the instant matter the sustained charges as set forth in the FNDA (FNDA#1) regarding the allegation he was working on a co-worker's car during work hours, were:

- N.J.A.C. 4A:2-2.3(a)1 – Incompetency, inefficiency or failure to perform duties;
- N.J.A.C. 4A:2-2.3(a)2 - Insubordination;
- N.J.A.C. 4A:2-2.3(a)4 – Chronic or excessive absenteeism or lateness;
- 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)8 – misuse of public property; and
- N.J.A.C. 4A:2-2.3(a)(12) - Other sufficient cause; violations of City Policies.

The sustained charges as set forth in the FNDA (FNDA#2) regarding the allegation he failed to appear for workers compensation appointments and left work early for appointments and did not return, were:

- N.J.A.C. 4A:2-2.3(a)1 – Incompetency, inefficiency or failure to perform duties;
- N.J.A.C. 4A:2-2.3(a)2 – Insubordination;
- N.J.A.C. 4A:2-2.3(a)4 – Chronic or excessive absenteeism or lateness;
- N.J.A.C. 4A:2-2.3(a)6 – conduct unbecoming a public employee;
- N.J.A.C. 4A:2-2.3(a)7 – Neglect of duty; and
- N.J.A.C. 4A:2-2.3(a)(12) - Other sufficient cause; violations of City Policies.

N.J.A.C. 4A:2-2.3(a)1 – Incompetency, inefficiency or failure to perform duties

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). Incompetence means that an individual lacks the ability or the qualifications to perform the duties required of him or her. Rivera v. Hudson

Cty. Dep't of Corr., CSR 6456-16, Initial Decision (October 24, 2016) < https://njlaw.rutgers.edu/collections/oal/html/initial/csr06456-16_1.html>, adopted, CSC (November 28, 2016).

I find that the City has met its burden of proof as to this charge in both FNDA#1 and FNDA#2. Mr. Gobel, by working on a co-worker's car during work hours, and by changing physical therapy appointments to earlier times and then not returning to work made him unable to perform his duties during those times.

N.J.A.C. 4A:2-2.3(a)2 – Insubordination

Black's Law Dictionary 802 (11th Ed. 2019) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Similarly, the Disciplinary Action Program definition of "insubordination" includes "intentional disobedience or refusal to accept a reasonable order." (J-12 at 37.) The above definitions incorporate acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the alleged insubordinate person. Insubordination is always a serious matter. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

I find the City has carried its burden as to the charge of insubordination as to FNDA#1. Mr. Gobel was advised twice by his supervisor, Mr. Gonzalez, to not work on cars during work hours. Notwithstanding the same, Mr. Gobel chose to work on a co-worker's care during work hours.

I do not find the City has carried its burden as to the charge of insubordination as to FNDA#2. There was no testimony that Mr. Gobel was told by a supervisor not to change appointment time or that he had to return to work after changing a time to an

earlier appointment. The contract between the City and the Union states this, but it is not a form of standing order.

N.J.A.C. 4A:2-2.3(a)4 – Chronic or excessive absenteeism or lateness

Under N.J.A.C. 4A:2-2.3(a)(4), an employee may be subject to discipline for chronic or excessive absenteeism. While there is no precise number that constitutes “chronic,” 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. Courts have consistently held that excessive absenteeism need not be accommodated, and that attendance is an essential function of most jobs. See, e.g., Muller v. Exxon Rsch. & Eng'g Co., 345 N.J. Super. 595, 605–06 (App. Div. 2001); Svarnas v. AT&T Commc'ns, 326 N.J. Super. 59, 78 (App. Div. 1999) (“[a]n employee who does not come to work cannot perform any of her job functions, essential or otherwise”).

In general, employers cannot be expected to find a way to accommodate the unpredictable nature of an employee's sporadic and unscheduled absences. Svarnas, 326 N.J. Super. at 77. As noted by the New Jersey Supreme Court, “[j]ust cause for dismissal can be found in habitual tardiness or similar chronic conduct.” Bock, 38 N.J. at 522. While a single instance may not be sufficient, “numerous occurrences over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference amounting to neglect of duty.” Ibid. As the Appellate Division summarized, “[w]e do not expect heroics, but ‘being there,’ i.e. appearing for work on a regular and timely basis is not asking too much” of an employee. State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 333 (App. Div. 1998).

I find the City has carried its burden as to this charge in FNDA#2. Mr. Gobel changed his scheduled appointments to an earlier time without prior approval. He failed to return to work after completing physical therapy on those days he went to his appointments earlier than scheduled. This action deprived the City of his services. I find that the City has not carried its burden as to this charge regarding FNDA#1, as this

only refers to Mr. Gobel working on a co-worker's car during work hours. This action does not comport with a finding of chronic or excessive absenteeism or lateness.

N.J.A.C. 4A:2-2.3(a)6 – conduct unbecoming a public employee

“Conduct unbecoming a public employee” is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also, In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances “be such as to offend publicly accepted standards of decency.” Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily “be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.” Hartmann v. Police Dep’t of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep’t of Civil Serv., 17 N.J. 419, 429 (1955)).

The District has carried its burden as to this charge for both FNDA#1 and FNDA#2. As to FNDA#1, it is expected of employees to follow direction from their supervisor. Here, Mr. Gobel clearly did not. As to FNDA#2, Mr. Gobel is expected to follow City policy and procedure. He knew what it was and chose to not follow it.

N.J.A.C. 4A:2-2.3(a)7 – Neglect of duty

There is no definition in the New Jersey Administrative Code for neglect of duty, but the charge has been interpreted to mean that an employee has failed to perform an act as required by the description of their job title. Neglect of duty can arise from an omission or failure to perform a duty and includes official misconduct or misdoing, as well as negligence. Generally, the term “neglect” connotes a deviation from normal standards of conduct. In In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977), neglect of duty implies nonperformance of some official duty imposed upon a public employee,

not merely commission of an imprudent act. Rushin v. Bd. of Child Welfare, 65 N.J. Super. 504, 515 (App. Div. 1961). Neglect of duty is predicated on an employee's omission to perform, or failure to perform or discharge, a duty required by the employee's position and includes official misconduct or misdoing as well as negligence. Clyburn v. Twp. of Irvington, CSV 7597-97, Initial Decision (September 10, 2001), adopted, Merit System Board (December 27, 2001), <<http://njlaw.rutgers.edu/collections/oal/>>; see Steinel v. Jersey City, 193 N.J. Super. 629 (App. Div.), certif. granted, 97 N.J. 588 (1984), aff'd on other grounds, 99 N.J. 1 (1985).

Again, the District has carried its burden as to this charge as to both FNDA#1 and FNDA#2. One must be in neglect of one's duty if he is working on a co-worker's car instead of performing his job, and punching out early for an appointment and then not returning to work. During these moments he was to be available to do City work and he was not.

N.J.A.C. 4A:2-2.3(a)8 – misuse of public property

Misuse of Public Property is not established. Nothing in the record indicates that Mr. Gobel misused any City property. Rather, he misused his time while on the clock. The City has not carried its burden as to this charge.

N.J.A.C. 4A:2-2.3(a)(12) - Other sufficient cause; violations of City Policies

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

Cleary Appellant's actions violate the implicit standard of good behavior. Mr. Gobel directly ignored a directive from Mr. Martinez as to FNDA#1. He failed to abide by City Policy regarding his physical therapy appointments in FNDA#2. The District has carried its burden as to this charge as well.

This forum has the duty to decide in favor of the party on whose side weight of the evidence preponderates, in accordance with a reasonable probability of truth. Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). bThe evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). The burden of proof falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The respondent must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson, supra, 37 N.J. 143. The evidence needed to satisfy the standard must be decided on a case-by-case basis.

Here it is clear that the evidence preponderates in favor of Respondent that Appellant is guilty of the charges in FNDA#1 and FNDA#2, as set forth above by the undersigned.

What now must be determined is whether a twenty-day suspension for FNDA#1 and a forty day suspension for FNDA#2 are the appropriate penalties.

An appeal to the Merit System Board² requires the Office of Administrative Law to conduct a de novo hearing and to determine appellant's guilt or innocence as well as the appropriate penalty. In the Matter of Morrison, 216 N.J. Super. 143 (App. Div. 1987). In determining the reasonableness of a sanction, the employee's past record and any mitigating circumstances should be reviewed for guidance. West New York v.

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

Bock, 38 N.J. 500 (1962). Although the concept of progressive discipline is often cited by appellants as a mandate for lesser penalties for first time offences,

that is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.

[In re Herrmann, 192 N.J. 19, 33-4 (2007) (citing Henry, supra, 81 N.J. 571).]

Although the focus is generally on the seriousness of the current charge as well as the prior disciplinary history of the appellant, consideration must also be given to the purpose of the civil service laws. Civil service laws "are designed to promote efficient public service, not to benefit errant employees . . . The welfare of the people as a whole, and not exclusively the welfare of the civil servant, is the basic policy underlining the statutory scheme." State Operated School District v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). "The overriding concern in assessing the propriety of the penalty is the public good. Of the various considerations which bear upon that issue, several factors may be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record." George v. North Princeton Developmental Center, 96 N.J.A.R. 2d. (CSV) 463, 465.

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

Petitioner has a prior disciplinary history consisting of a written warning for not timely reporting a work injury, dated September 15, 2021; a one day suspension for calling in sick outside the time frame to do so, dated June 3, 2022; and, a one day suspension for calling in sick outside the time frame to do so, dated May 22, 2022.

Mr. Gobel has been employed by the City of Linden since April 2020. I do not find his prior disciplinary history to be significant.

However, Mr. Gobel disobeyed a direct directive from his supervisor. This I find to be a serious infraction. Ten days suspension is appropriate for the sustained charges in FNDA#1.

Mr. Gobel violated City policies by not attending scheduled appointments at Kessler and by changing those appointment times to an earlier time thereby depriving the City of his services by not returning to work. He was required to return to work. Following proscribed City policies is important to the smooth operation of City business. Ten days suspension is appropriate for the sustained charges in FNDA#2.

Based upon the above, I **CONCLUDE** that Respondent has demonstrated by a preponderance of the credible evidence that Appellant is guilty of the sustained charges in the FNDA#1 and FNDA#2, as set forth above by the undersigned, and that the appropriate penalty is ten working days suspension for FNDA#1 and ten working days suspension for FNDA#2, for a total of twenty working days suspension.

ORDER

It is hereby **ORDERED** that the following charges set forth in **FNDA#1** are **SUSTAINED**:

- N.J.A.C. 4A:2-2.3(a)1 – Incompetency, inefficiency or failure to perform duties;
- N.J.A.C. 4A:2-2.3(a)1 – Incompetency, inefficiency or failure to perform duties
- N.J.A.C. 4A:2-2.3(a)2 - Insubordination
- 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)(12) - Other sufficient cause; violations of City Policies

It is further **ORDERED** that the following charges set forth in **FNDA#1** are **DISMISSED**:

N.J.A.C. 4A:2-2.3(a)4 – Chronic or excessive absenteeism or lateness

N.J.A.C. 4A:2-2.3(a)8 – misuse of public property

It is further **ORDERED** that the following charges set forth in **FNDA#2** are **SUSTAINED**:

N.J.A.C. 4A:2-2.3(a)1 – Incompetency, inefficiency or failure to perform duties

N.J.A.C. 4A:2-2.3(a)4 – Chronic or excessive absenteeism or lateness

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)(12) - Other sufficient cause; violations of City Policies

It is further **ORDERED** that the following charge set forth in **FNDA#2** are **DISMISSED**:

N.J.A.C. 4A:2-2.3(a)2 – Insubordination

It is further **ORDERED** that the appropriate discipline for FNDA#1 shall be ten working days; and the appropriate discipline for FNDA#2 shall be ten working days. The total working day suspension shall be twenty 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.



November 29, 2023
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____
db

APPENDIX

List of Witnesses

For Appellant:

Peter Gobel, Appellant

For Respondent:

David Martinez

Linda Medvec

Jessica Sheehy

List of Exhibits

For Appellant:

P-1 Patient appointment list for Appellant

For Respondent:

R-1 FNDA dated June 6, 2022

R-2 Email from David Martinez dated August 25, 2021 regarding conduct of Peter Gobel

R-3 Email from David Martinez dated August 25, 2021 with photo

R-4 list of work crews August 24, 2021

R-5 time card August 21 to August 27, 2021

R-6 FNDA dated June 6, 2022, Physical Therapy appointments

R-7 reports of workplace injury, 12/28/21 and 1/19/22

R-8 Medlogix referral form from physical therapy for Peter Gobel

R-9 Physical therapy appointment schedule for Peter Gobel 2/1/22 through 2/18/22

R-10 Kessler Rehabilitation notices of missed appointments, February 1, 2 and 4, 2022

OAL DKT. NO. CSV 02764-22 and CSV 02767-23

- R-11 Summary or appointments and attendance by Peter Gobel, 1/7/22 through 2/25/22
- R-12 Email correspondence between Karen Kofoet and Jessica Sheehy, February 9, 2022
- R-13 Time cards for Peter Gobel, January 30, 2022 through February 25, 2022
- R-14 Peter Gobel, work calendar, 2022
- R-15 Collective Negotiations Agreement, Teamsters Blue Collar Unit, 1/1/2020 – 12/31/2023
- R-16 Prior discipline/warnings for Peter Gobel