

**JOHN STEINEL,**  
Appellant,  
v.  
**CITY OF JERSEY CITY,**  
Respondent.

Initial Decision: March 21, 1983      Final Agency Decision: May 12, 1983

Superior Court, Appellate Division Decision Appears at: 193 *N.J. Super.* 629 (1984)

SYNOPSIS

Appellant contested his removal from the position of engineering aide with the City of Jersey City. After an appeal to the Civil Service Commission, the matter was assigned to an administrative law judge.

The judge found that although appellant did not ordinarily do inspection work, he had been assigned to perform inspection work on a road resurfacing project. Almost immediately, the appellant informed his supervisor that the contractor was using the wrong expansion-joint filler; no action was taken and while appellant continued to be aware of the use of the wrong material, he waited for his supervisors to stop it. In addition, appellant had failed to determine if the depth of cement was that required by the specifications.

The judge concluded that the appellant was not guilty of neglect of duty in failing to notify his supervisor that improper joint material was being used but was guilty of neglect of duty in failing to determine if the depth of the cement was correct. The judge rejected the appellant's removal from his position ordering, instead, a six-month suspension without pay with back pay following the period of the six-month suspension.

With the exception of the award of back pay, the Civil Service Commission accepted the judge's findings.

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**Philip Feintuch, Esq.,** for appellant.

**Jay Hamill,** Assistant Corporation Counsel, for respondent (Matthew Burns, Corporation Counsel, attorney).

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### Initial Decision

#### PERSELAY, ALJ:

This is an appeal brought by appellant contesting his removal from the classified service after being found guilty of charges of neglect of duty and incompetence.

A Preliminary Notice of Disciplinary Action, dated November 9, 1981, was served on appellant November 12, 1981, and set a hearing on November 19, 1981. Appellant was suspended pending determination of the hearing. The hearing was apparently postponed to December 17, 1981 (See, Final Notice of Disciplinary Action dated April 19, 1982) and then postponed to January 12, 1982. The Final Notice found the appellant guilty as charged and terminated his service effective April 16, 1982. Appellant appealed to the Civil Service Commission by letter dated April 19, 1982. At its meeting of June 1, 1982, the Civil Service Commission directed that a hearing be held on appellant's appeal. The matter was forwarded to the Office of Administrative Law as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.* and docketed June 22, 1982. A hearing scheduled for December 2, 1982 was adjourned because respondent had not answered interrogatories. Hearing was held January 6, 1983.

#### ISSUES

The issues in this case are as follows:

1. Did appellant fail to perform his assigned duties, which alleged failure constituted neglect of duty or incompetence?
2. Was the action of the respondent in terminating appellant's employment reasonable and proper under the circumstances?

#### STATEMENT OF FACTS

Appellant was an engineering aide in the Division of Engineering and had been so employed since January 1972. In September 1981 the respondent was engaged in resurfacing and reconstructing various streets. One such project was known as "Old Bergen Road." Vacations and other assignments created a shortage of persons who usually served as "project inspectors." The assistant director of engineering, the chief construction inspector and the appellant's section head, a principal engineer, met to discuss the selection of a project inspector

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for Old Bergen Road. They selected the appellant with the knowledge he had not performed in that capacity at any prior time, but with full confidence that he could handle the duties imposed. The duties included measurement of excavations, measurement of materials, collection of delivery receipts on the job site and observation that materials being used and performance by the contractor were in accord with the the plans and specifications for the project. The inspector's duties make him "the eyes and ears of the professional engineer in the field." The assistant director was confident that appellant's prior work as an engineering aide was more than sufficient to prepare him for the assignment as project inspector. Appellant reported to the site as inspector on September 22, 1981, the second day the project was underway. He immediately noticed that the wrong material for sidewalk joint filler was stored on the site and was being used. He told his immediate supervisor, Mr. Slattery, a principal engineer. As the materials were used on the site, appellant failed to act to stop their use, and did not mention the fact on his reports. He believed that having advised his supervisor of the situation the first two days, it was for "one of the big bosses to come down and put a stop to it."

Suffice to say, of 229 sidewalk joints, subsequent inspection revealed 120 to be of insufficient depth. The purpose of the joint filler is to allow for expansion and to prevent cracking and buckling, and must extend to full depth of concrete.

Subsequent investigation revealed that at six random locations the depth of cement was less than the required eight-inch depth required by specifications. The evidence of these irregularities was not refuted by appellant.

Appellant stated that he measured some of the forms for the concrete pouring and that he made visual observations in which the depth "seemed adequate."

Appellant acknowledged receipt of the plans and specifications and exhibited a knowledge of them. He indicated that the contractor was cooperative at times and difficult at other times when he suggested deeper forms to meet the required depth. He knew how to use a carpenter's ruler and walking tape. He was taught how to perform a slump test (measuring the amount of water in concrete mix) and how to take concrete cylinders for testing.

The irregularities on the project were discovered on a random inspection by the director of engineering on October 21, 1981.

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The chief construction inspector testified that he did not see anything irregular in his almost daily inspections and did not observe the differences in the joint material everyday. The difference in the materials is obvious to the eye of those familiar with the two materials (cellular versus bituminous). Only preformed bituminous material was specified.

Mr. Slattery, appellant's immediate supervisor, was charged with disciplinary action containing the same charges. He was not suspended pending hearing, was found guilty as charged, and was demoted to senior engineer effective April 16, 1982. He was subsequently promoted in November or December 1982 to principal engineer based upon his performance. The reduction in title was the penalty sought by respondent.

The apparent disparate discipline was based on prior disciplinary records, Slattery having had none, and appellant having a record of five prior disciplinary actions. These will be discussed later in this decision.

I adopt the foregoing as the findings of fact in this case.

#### STATEMENT OF LAW

In an appeal to the Civil Service Commission, a *de novo* hearing requires an independent proceeding and a determination of the merits on testimony taken before it. *East Paterson v. Civil Service Dept. of N.J.*, 47 N.J. Super. 55 (App. Div. 1957). It is not merely a new hearing on the record below, but a new plenary hearing at which evidence and testimony are presented. *In re Darcy*, 114 N.J. Super. 454, 459 (App. Div. 1971). The Commission is expected to seek out information and evidence regarding the case. On appeal, it makes its own findings and substitutes its judgment for that of the appointing authority regarding guilt or innocence and any penalty to be imposed. *Henry v. Rahway State Prison*, 81 N.J. 571 (1980).

The use of an employee's past record in a disciplinary proceeding may be resorted to for guidance in determining the appropriate penalty for the current specific offense or offenses. Such past record is inherently relevant. *See, West New York v. Bock*, 38 N.J. 500 (1962).

Unless a penalty is unreasonable, arbitrary, or offensively excessive under all of the circumstances, it should be permitted to stand. *Dutcher v. Dept. of Civil Service*, 7 N.J. Super. 156 (App. Div. 1950). *Bock, supra*, held that recent history of employment, formally adju-

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dedicated disciplinary actions as well as instances of misconduct informally adjudicated which were called to the attention of the employee, are proper matters to be considered in determining appropriate penalty. In accordance with the standards of review enunciated in *Bock*, the appellant's record of performance can, and should be, considered when attempting to determine if the judgment below as to penalty was unreasonable, arbitrary, or capricious.

The appellant has been charged with neglect of duty. The word *neglect* is defined in *Black's Law Dictionary* to mean "fail or to forebear to do a thing that can be done, or that is required to be done." It may also "import an absence of care or attention in the doing or omission of a given act." It is defined as an omission to do or perform some work, duty, or act; failure to perform or discharge a duty, covering positive official misdoing or official misconduct as well as negligence.

In general terms neglect of duty is not performing one's job. That duty may arise by specific statute or may arise from the very nature of the position itself.

Neglect of duty is sometimes equated with the common law crime of nonfeasance in office. We do not reach that level in this case. However, the definition of misconduct in office includes any act or omission in breach of a duty of public concern by one who has accepted public office. *State v. Weleck*, 10 N.J. 355 (1952). Failure of a public officer to perform any ministerial duty, which by law he is required to perform, constituted the crime at common law. *State v. Winne*, 21 N.J. Super. 180 (Law Div. 1952), rev'd, 12 N.J. 152 (1953).

### ANALYSIS

At the outset, it is the opinion of this court that the appellant was not incompetent in the performance of his duties. He did not lack the ability nor the qualifications to perform the duties imposed upon him as project director.

That he did not perform his duties, as is obvious from the evidence and his own testimony, is another question. He understood his job was "to keep my eye on the contractor." He knew how to take measurements. He knew how to make visual observations. He believed he followed his instructions to the best of his abilities.

Unfortunately, his visual observations were inaccurate to the detriment of his employer. The respondent received less concrete than that

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for which it had paid. The fact there was a subsequent adjustment in price with the contractor does not mitigate closer inspection which was required of the appellant.

Appellant must accept, or be charged with, the responsibility of the sidewalk expansion joints being of improper material and improper depth. He allegedly observed the installation and knew, or should have known, that the joints were short in depth. He stated he knew the wrong material was being used, but he reported that to his immediate supervisor on several occasions.

The specification of the charges in the Preliminary Notice of Disciplinary Action, in part, reads:

As the engineering aide assigned to inspect the construction work on Old Bergen Road, you failed to bring these deficiencies to the attention of your immediate supervisor or to record them in your daily inspection reports.

While appellant may not have brought all deficiencies to the attention of his immediate supervisor, he did in fact advise his supervisor, Mr. Slattery, of the improper material being stored on the site and being used as the filler. He did not record that information in his inspection reports. Appellant's neglect of duty involved his inaccurate measurements of depth of concrete as required in the specifications. He did not know of the insufficient depth, so he could not report that to his supervisor nor include such information in the inspection reports.

It is noted in passing that the chief construction supervisor testified he visited the job site almost daily. He acknowledged that a knowledgeable person could tell by looking at the filler material whether it was cellular bituminous joint filler (not allowed) or bituminous joint filler (required). His testimony was that on his visits he did not see anything irregular about the job. From the evidence I heard, this testimony is that of a person who does not know the difference in the material, did not care to notice the difference, or noticed the difference and chose to close his eyes to what he saw. There was no evidence of any disciplinary action being taken against him, but by his own testimony he was on site daily. His testimony in this regard was an affront to this court.

This court had the opportunity to observe the appellant on the witness stand and in court. Like many civil servants who hold ministerial employment, appellant exhibits a bravado of self-importance, independence and self-confidence. Additionally, he was defensive,

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naturally, to the challenge of his ability. His is not a personality which is easily assimilated by those working with him or supervising him. When asked questions by the court, the appellant became argumentative and belligerent, and totally misunderstood the nature of the inquiry. His attitude was somewhat antagonistic and it was easy to observe the appellant's personality. Appellant honestly felt he had done all he could do when he advised his supervisor of the problem as he knew it. He had done his job. The matter was no longer in his hands. If his boss didn't do anything about it, why should he?

This attitude does not excuse his conduct nor shift the blame.

### *CONCLUSIONS*

Based upon the foregoing, I **CONCLUDE** as follows:

1. The appellant was not guilty of neglect of duty in failing to notify his immediate supervisor that improper joint material was being used on the project.
2. The appellant was guilty of neglect of duty in failing to determine properly that driveway drop curb was constructed with insufficient depth, concrete driveways were constructed of insufficient thickness and joint material was of insufficient depth.

### *PENALTY*

The respondent contends that appellant's disciplinary record warrants removal. The record is as follows:

<u>Date</u>	<u>Charge</u>	<u>Penalty</u>
December 30, 1976	Conduct unbecoming an employee in the public service	Written reprimand
February 26, 1979	Disorderly Conduct (using vituperatory language in front of the office personnel, including women, and walking off the job)	Written warning suspension 3 days
July 7, 1980	Insubordination (refusal to carry out assigned duty)	Written warning suspension 2 days
January 31, 1981	Made disparaging remarks, was abusive, used profanity and disruptive at the offices of the Division of Engineering in the presence of secretaries and other employees	Written warning suspension 3 days

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July 31, 1981	Conduct unbecoming public works employee, disorderly conduct	Written warning suspension 3 days
October 26, 1981	Conduct unbecoming a Civil Service employee (accepted monetary gift from contractor)	Suspension 5 days

The record bespeaks the attitude and personality of the appellant. The issue to be considered is whether it forms sufficient background to justify removal upon the finding of neglect of duty in this case.

This court is of the opinion that, under the circumstances of this case, removal is offensively excessive and harsh. What did appellant really fail to do? He failed to measure accurately the excavation depth for the concrete pouring. He made visual observations which proved to be inaccurate.

His conduct must be measured against that of his immediate supervisor. Having been told of the irregularity, the supervisor failed to perform his duty in enforcing corrective action or stopping the work. The supervisor's superior, the chief construction inspector, saw no irregularities on the job site.

This is an instance where the low man on the totem pole has received the most severe penalty. Under the facts of this case, it appears to be basically unfair.

The five day suspension of October 26, 1981 involved the voluntary admission by appellant that he received a 20-dollar bill from the contractor, that he had refused it, and that it was placed in his shirt pocket and the donor walked away.

There is a great distance in the difference of moral standards involved in the conduct unbecoming a Civil Service employee offense of October 26, 1981 and the neglect of duty offense which forms the basis of this case.

Principles of progressive discipline ought to be applied. The leap from a five-day suspension to removal is just too great.

This court believes a suspension of six months would be appropriate in this case. Any offense in the future would justify removal and appellant is so warned.

Accordingly, I **CONCLUDE** that the penalty imposed by the appointing authority was improper and inappropriate and is **NOT AP-PROVED**.

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It is hereby **ORDERED** that appellant be suspended without pay for a period of six months, effective November 9, 1981.

It is hereby **ORDERED** that appellant immediately be reinstated.

*BACK PAY*

The issue here to be determined is whether an employee who is not exonerated on the merits is entitled to back pay for the period following a date six months after the suspension becomes effective.

In this case such date would be May 9, 1982 and the issue is: "Should back pay be awarded to appellant from that date to date of reinstatement?" The most recent statement of our courts on the subject is contained in *Town of Belleville v. Coppla, et al.*, 187 N.J. Super. 147 (App. Div. 1982).

As I read that decision, absent special circumstances or equitable considerations, the appellant is entitled to an award of back pay, subject to mitigation for income earned or which could have been earned during the separation. *N.J.A.C. 4:1-5.17*.

The special circumstances and equitable considerations, as seen by this court, all bend in favor of the appellant and against the public body if we are to balance the equities.

I refer to the fact that appellant's immediate supervisor was not suspended pending the determination of the hearing and suffered no dollar loss in that regard. The hearing was set for November 19, 1981 but was not held until January 12, 1982. There was no explanation for the delay, but the Final Notice was dated April 19, 1982 and terminated appellant's employment as of April 16, 1982. The appointing authority must be charged with that delay. The respondent failed to answer interrogatories which caused the adjournment before this court and must be charged with the delay.

There are no special circumstances or equitable considerations which weigh in favor of the respondent.

Accordingly, it is hereby **ORDERED** that appellant be awarded back pay for the period from May 9, 1982, up and to the date of reinstatement.

The amount of back pay shall be offset and reduced by the amount of any income received by the appellant, any benefits received by the appellant in lieu of income which need not be reimbursed, or any income which could have been earned by the appellant, during this period.

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The appellant has not been exonerated of the charges against him. He is not entitled to the award of counsel fees.

This initial decision may be affirmed, modified, or rejected by the Civil Service Commission, which by law is empowered to render a Final Decision in this matter.

**FINAL DECISION BY THE CIVIL SERVICE COMMISSION:**

The appeal of John J. Steinel, Engineering Aide, Administration and Finance, Jersey City, removal effective April 16, 1982, on charges, was heard by Administrative Law Judge George Perselay, who rendered his initial decision on March 21, 1983. Exceptions were filed on behalf of the appointing authority. Cross exceptions were filed on behalf of appellant.

Having considered the record and the administrative law judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, with the exception of the recommendation pertaining to back pay, at its meeting on May 2, 1983, accepted and adopted the findings as contained in the attached administrative law judge's initial decision.

The Civil Service Commission finds that the action of the appointing authority in removing appellant was not justified. The Commission therefore modifies that action and Orders that appellant be suspended for six months. The record demonstrates that appellant was guilty of neglect of duty in failing to properly measure construction. Such charges were the result of appellant's own misconduct. The Commission finds that under the circumstances of this case, the application of equitable considerations and the balancing of the interest of the employee against the public, it is fair and just that the loss of back pay be borne by appellant. *See, Feldman v. Toron of Irvington*, 162 N.J. Super. 177 (App. Div. 1978). Therefore the Civil Service Commission

**ORDERS**

that appellant be suspended for six months. Further it is ordered that back pay be denied.