SHARON KENNEDY,
Appellant,

v.

DEPARTMENT OF FINANCE, CITY OF BURLINGTON,
Respondent

Initial Decision: May 11, 1988
Final Agency Decision: June 21, 1988
Approved for Publication by the Merit System Board: June 22, 1988

SYNOPSIS

Advised that she would be suspended for 10 days from her position as account clerk, appellant requested a hearing and the matter was transmitted to the Office of Administrative Law. The suspension was stayed pending the hearing.

Appellant's job duties included responsibility for making bank deposits. The disciplinary charges arose from two incidents: (1) failure to make a $700,000 deposit within the 48-hour period required by N.J.S.A. 40A:5-15; (2) late deposit by mail of some $355,000.

The administrative law judge assigned to the case dismissed the charges relating to the mail deposit because there was no competent evidence proving when the deposit was mailed and when it was received by the bank. Regarding the other deposit, appellant acknowledged violation of the 48-hour requirement. However, she argued that she should be exonerated for several reasons, including the fact that she did not know the account was interest-bearing and, therefore, did not know a late deposit would result in loss of earnings. The administrative law judge found that the fact that appellant was unaware of the consequences of her failure to perform her assigned duties did not excuse her neglect, but should be given some consideration in assessing a proper penalty.

The administrative law judge concluded that an appropriate penalty would be a fine, which would serve to reimburse respondent in part for its loss without depriving respondent of appellant's services. It would also impress upon appellant and other employees the necessity for complying with statutory time requirements. Accordingly, appellant was ordered to pay a fine of $500.

Upon review, this initial decision was adopted by the Merit System Board.
John A. Sweeney, Esq., for appellant (Sweeney & Sweeney, attorneys)
John T. Barbour, Esq., for respondent (Barbour & Costa, attorneys)

DUNCAN, ALJ:

This matter concerns the appeal of Sharon Kennedy from the determination of the City of Burlington suspending her from her position Account Clerk for ten working days beginning December 7, 1987 and ending December 19, 1987, on charges*.

Appellant was notified of the following charges by Preliminary Notice of Disciplinary Action, dated October 6, 1987:

1. Failure to perform necessary and crucial job duties.
2. Failure to properly handle city property entrusted to your possession.
3. Failure to properly dispose of city property entrusted to your possession.
4. Waste of city property and assets.

An intradepartmental hearing was conducted on October 27, 1987, and by Final Notice of Disciplinary Action, dated November 6, 1987, appellant was advised that the charges were sustained and that a 10-day suspension had been imposed as a result thereof. By letter dated November 10, 1987, appellant's representative requested a hearing on her behalf and on December 18, 1987, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

A hearing was scheduled and was conducted on February 24, 1988, at the Chesterfield Township Municipal Building, Chesterfield, New Jersey. Following the conclusion of the hearing the record remained open for the receipt of written submissions. A letter memorandum on behalf of appellant was received on March 4, 1988. A letter memorandum on behalf of respondent was received on March 15, 1988. A reply to appellant's memorandum was received from respondent on March 22, 1988. No reply memorandum having been received from appellant within the time allocated, the record closed on March 28, 1988.

FINDINGS OF FACT

The relevant facts in this matter are not in dispute and I, therefore, FIND the following as uncontested facts.

*The suspension was stayed pending the outcome of appellant's appeal herein.
Appellant commenced employment with the City of Burlington in the Treasurer's Office in 1979 as a part-time summer employee. Thereafter she became a permanent part-time employee in January 1983, and following her graduation from Rider College with a Bachelor of Science Degree in Accounting, she became a permanent full-time Account Clerk in 1983. In or about July 1987, James Graham, the newly appointed Director of Finance for the City, asked appellant to assume the additional duties of making bank deposits. Prior to this time deposits had been handled by a part-time person and Mr. Graham had determined that the job could be handled without the expenditure of resources required for the additional person. Appellant agreed to accept the additional responsibilities and began going to the bank and making deposits in July or August 1987.

N.J.S.A. 40A:5-15 requires that all monies received by local government units must be deposited within 48 hours after receipt. Appellant acknowledges that at all times relevant to the within matter she was aware of the existence of this statutory requirement. On September 16, 1987, however, Mr. Graham discovered, in one of appellant's desk drawers, a bank bag containing a small amount of cash and numerous checks totalling approximately $700,000 most of which had been in appellant's possession for varying amounts of time in excess of the 48 hour period. Mr. Graham made photocopies of the checks and locked them in his own desk until the next day when the checks were deposited in the bank. When Mr. Graham spoke with appellant about the undeposited checks on September 17, 1987, appellant advised him that it had been her intention to deposit them that day and that she had not deposited them before then because she had been very busy with her other responsibilities, including adapting to the new computer system. Appellant acknowledges that she did not advise Mr. Graham before September 17, 1987, that she had been too busy to make the deposits in a timely fashion.

Had the checks in question been deposited in a timely fashion they would have earned interest between the date of deposit and September 17, 1987, since the account into which they were being deposited was an interest bearing account. Prior to July 1986, the account into which these checks would have been deposited was a non-interest bearing account; the City changed the account to an interest bearing account sometime between July 1986, when appellant commenced her maternity leave, and November 1986, when she returned from maternity leave, and appellant was not informed that the account had been converted into an interest bearing account. Appellant first learned that
the account was an interest bearing account sometime after October 27, 1987, when she had her intradepartmental hearing in the within matter. No calculations concerning the amount of lost interest were offered at the hearing. Respondent asserts that the lost interest totalled approximately $1500 and appellant has made no effort to refute the amount.

Evidence offered by appellant reveals, and it is not disputed by respondent, that on other occasions in other departments within the City, deposits were not always made within the time limits of the 48-hour requirement of receipt. Louise Razgatis, the Acting Director of Finance from December 1986 to July 1987, acknowledges that she was aware that there were occasional violations of the 48-hour rule when she ran the Treasurer’s Office in spite of her efforts to supervise those whose responsibility it was to make timely deposits. The amounts involved in these other occasional violations were apparently small and did not result in the loss of any substantial interest payments.

Also in September 1987, it was appellant’s responsibility to make a deposit in the amount of $355,874.17 with the New Jersey National Bank. It was the practice at the time that deposits into this particular account were made by mail. Appellant completed the deposit slip and placed it with the deposit in a preaddressed envelope provided by the New Jersey National Bank on September 11, 1987. Appellant then placed the envelope with the rest of the regular mail to be processed from her office that day. She does not know whether she personally ran the mail through the mail machine and took it to the post office or whether a co-worker who sometimes performed that same duty did it on September 11, 1987. Thereafter Mr. Graham received repeated calls from the Vice President of New Jersey National Bank reporting overdrafts on the account in question until September 18, 1987, when the Vice President reported that the deposit to cover the overdrafts had been received. Respondent offered no competent evidence at the hearing from which it would be possible to make a finding of fact concerning the dates that the deposit was actually mailed to or received by the New Jersey National Bank. Although there was hearsay evidence from the Bank Vice President concerning the alleged postmark on the envelope which contained the deposit, no competent evidence was offered by respondent concerning said postmark. The Bank continued to pay the alleged overdrafts as they occurred, and there were no adverse consequences as a result of the overdrafts.
APPLICABLE LAW AND DISCUSSION

The issues for determination at the de novo hearing on this appeal are limited to the charges made by respondent at the intradepartmental level. West New York v. Bock, 38 N.J. 500, 552 (1962). Those charges are set forth in full hereinabove. The burden of proving the charges by a preponderance of the competent and credible evidence is upon respondent. N.J.A.C. 4A:2-1.4.

Although the Preliminary Notice of Disciplinary Action listed four separate offenses, the evidence at hearing and the post-hearing submissions focus on two specific alleged acts of wrongdoing.

Addressing the second allegation first, it is clear that respondent has failed to establish by a preponderance of the competent and credible evidence that appellant was in any way responsible for the alleged overdrafts on the New Jersey National Bank account. The evidence offered by respondent on this issue did not establish what date appellant should have mailed the deposit, what date the deposit was in fact mailed, or what date the deposit was received. Appellant testified that she had followed the usual customs for mailing the deposit on September 11, 1987. The only competent evidence offered by respondent concerning this issue was the testimony of James Graham who indicated that when he received the first call from the Bank Vice President, he asked appellant whether the deposit had been mailed and she advised him that, in fact, the deposit had been mailed. A letter from the bank Vice President sets forth dates of alleged overdrafts in addition to alleged receipt and postmark dates. This document, however, is clearly hearsay evidence and may not be used to establish the truth of the allegations contained therein in the absence of some legally competent evidence to support each finding of fact. N.J.A.C. 1:1-15.5. Accordingly, I CONCLUDE that respondent has failed to establish appellant’s failure to perform any necessary and crucial job duties, any failure to properly handle city property entrusted to her possession, any failure to properly dispose of city property entrusted to her or any waste of city property and assets in connection with the New Jersey National Bank deposit.

With respect to the acknowledged violation of N.J.S.A. 40A:5-15 and the acknowledged economic loss to the City as a result thereof, appellant argues that the infraction is de minimus and that no penalty should be imposed as a result thereof. Respondent’s reply memorandum accurately summarizes appellant’s defenses to the charges as follows:
1. Appellant should be exonerated from her admitted and knowing violations of N.J.S.A. 40A:5-15 because she was overworked.

2. Appellant should be exonerated from her admitted and knowing violation of N.J.S.A. 40A:5-15 because she was not properly trained.

3. Appellant should be exonerated from her admitted and knowing violation of N.J.S.A. 40A:5-15 because she was only an Account Clerk.

4. Appellant should be exonerated from her admitted and knowing violation of N.J.S.A. 40A:5-15 because no funds were lost or stolen and she was not aware that interest would not accrue on the undeposited checks.

5. Appellant should be exonerated from her admitted and knowing violation of N.J.S.A. 40A:5-15 because her Department Head should bear the ultimate responsibility.

6. Appellant should be exonerated from her admitted and knowing violation of N.J.S.A. 40A:5-15 because there were other violations of this statute in other departments of City government and the dollar level left undeposited should not be considered.

7. Appellant should be exonerated from her admitted and knowing violation of N.J.S.A. 40A:5-15 because she is no longer responsible for making these deposits.

Although it appears to be true that appellant's various job duties kept her very busy in September 1987, that she was not closely supervised, and that the 48-hour rule upon occasion had been violated by other City employees, I am not in the least persuaded that any of these factors should mitigate in appellant's favor in assessing a proper sanction for her admitted failure to properly perform her duties. The uncontested facts in this matter reveal that appellant was fully aware in September 1987, of the requirement that the checks which were entrusted to her for deposit were required by statute to be deposited within 48 hours of her receipt of them. As a direct consequence of appellant's knowing failure to deposit the checks in question in a timely fashion as required by statute, the City of Burlington lost a substantial amount of money which would otherwise have accrued as interest on the deposited checks. The only factor which weighs in appellant's favor in assessing responsibility for this loss is the fact that appellant's supervisors failed to notify her when she returned to work after a leave of absence that in her absence the account in question
had been converted to an interest bearing account. Had appellant been provided with this relevant information, she might have established different priorities in performing her many job related functions. The fact that appellant was unaware of the consequences of her failure to perform her assigned duties in a timely fashion cannot excuse her neglect, but I CONCLUDE that it should be given some consideration in assessing a proper penalty.

Pursuant to West New York v. Bock, supra, respondent introduced evidence of a written warning received by appellant on April 21, 1987, concerning excessive absenteeism. Appellant argues that this written warning should not be considered because as a result of a grievance filed by appellant it was agreed that the written warning would be removed from her file on February 1, 1988, if her attendance continued to improve to a reasonable level. Evidence reveals that appellant was notified by letter dated February 11, 1988, that the City Council had determined that there had been insufficient improvement in her attendance record and that the disciplinary document would remain in her file. Appellant notified the Council in writing that she did not agree with this assessment and there was substantial evidence offered at the hearing by both sides concerning whether, in fact, her attendance record had improved. This is not the proper forum for resolution of the disputes between appellant and her employer concerning charges other than those transmitted by the Department of Personnel in the within matter. West New York v. Bock, supra, at 524 holds that in assessing an appropriate sanction the following aspects of an employee's record may be considered:

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 called to the attention of and admitted by the employee. (emphasis added)

Appellant has definitely not admitted that her attendance failed to improve. It appears that an unadjudicated grievance still exists with respect to the attendance question and accordingly, I therefore decline to consider the April 21, 1987 letter in determining a proper penalty for the within offense.

N.J.A.C. 4A:2-2.2 itemizes the major types of discipline which may be imposed upon Civil Service employees. Listed among those are a suspension or fine for more than five working days at any one time. Respondent urges the imposition of a 10-day suspension as the ap-
propriate sanction for appellant's neglect of duty herein. Presumably respondent also considered the April 21, 1987 written warning in determining an appropriate penalty. It seems to me that a far more appropriate penalty and form of remediation in this matter would be the imposition of a fine which would serve to reimburse respondent in part for its loss without depriving respondent of appellant's services and at the same time serve to impress upon appellant and other City employees the necessity for complying with statutory time requirements. Considering the fact that respondent supplied no proof of the actual amount of lost interest and considering the fact that appellant's supervisor was in part responsible for this loss by failing to advise appellant that the account had been converted to an interest bearing account, I CONCLUDE that a fine in the amount of $500 is an appropriate sanction.

For all the foregoing reasons, it is hereby ORDERED that the charges related to the New Jersey National Bank deposit are hereby DISMISSED. It is further ORDERED that the charges related to appellant's violations of N.J.S.A. 40A:5-15 are hereby sustained and a fine in the amount of $500 is hereby imposed as a result thereof. It is further ORDERED that appellant be permitted to satisfy this fine in ten equal installment payments to be deducted by respondent from her regular paychecks.

This recommended decision may be adopted, modified or rejected by the MERIT SYSTEM BOARD, which by law is empowered to make a final decision in this matter.

FINAL DECISION BY THE MERIT SYSTEM BOARD:

The appeal of Sharon Kennedy, Account Clerk, Department of Finance, City of Burlington, suspension for ten (10) working days, beginning December 7, 1987 and ending December 19, 1987, on charges, was heard by Administrative Law Judge M. Kathleen Duncan, who rendered her initial decision on May 11, 1988. Exceptions were filed on behalf of the appellant. Cross exceptions were filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Merit System Board at its meeting on June 21, 1988, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge’s initial decision.
ORDER

The Merit System Board modifies the action of the appointing authority in its ten (10) day suspension of appellant to a fine in the amount of $500 to be deducted in ten equal installment payments from appellant's regular pay checks for the reasons expressed by the Administrative Law Judge.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

You must check the New Jersey Citation Tracker in the companion looseleaf volume to determine the history of this case in the New Jersey courts.