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STATE OF NEW JERSEY

In the Matter of Eduardo Rivera
City of Hoboken
Department of Public Safety

CSC DKT. NO. 2014-3078
OAL DKT. NO. CSV 07279-14

DECISION OF THE
CIVIL SERVICE COMMISSION

ISSUED: October 22, 2014 PM

The appeal of Eduardo Rivera, a Public Safety Tele-Communicator with the City of Hoboken, Department of Public Safety, of his removal effective December 2, 2013, on charges, was heard by Administrative Law Judge Jesse H. Strauss, who rendered his initial decision on September 11, 2014, reversing the removal. 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 Civil Service Commission, at its meeting on October 22, 2014, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, unpublished, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay and counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

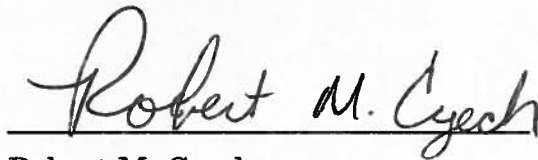
ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Eduardo Rivera. The Commission further orders that appellant be granted back pay, benefits, and seniority for the period of separation to the actual date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. 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.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C. 4A:2-2.12*. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2-2.10* and *N.J.A.C. 4A:2.12*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay and counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R. 2:2-3(a)(2)*. After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
OCTOBER 22, 2014

A handwritten signature in cursive script, reading "Robert M. Czech", is written over a horizontal line.

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 07279-14

AGENCY DKT. NO. 2014-3078

**IN THE MATTER OF EDUARDO RIVERA,
CITY OF HOBOKEN DEPARTMENT OF
PUBLIC SAFETY.**

Merick H. Limsky, Esq., for appellant Eduardo Rivera (Loccke, Correia, Limsky
& Bukosky, attorneys)

Alysia M. Proko, Esq., Assistant Corporation Counsel for respondent City of
Hoboken Department of Public Safety

Record Closed: August 4, 2014

Decided: September 11, 2014

BEFORE **JESSE H. STRAUSS, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The City of Hoboken Department of Public Safety (Police Department) removed Public Safety Telecommunicator Eduardo Rivera for conduct unbecoming a public employee arising out of an alleged involvement in a domestic violence dispute. A public employee may be disciplined for conduct unbecoming a public employee under the civil service law and related regulations. N.J.A.C. 4A:2-2.2 and -2.3(a)(6).

The issues are whether Rivera engaged in the alleged conduct, and, if so, what is an appropriate penalty.

On December 2, 2013, the City served upon Rivera a Preliminary Notice of Disciplinary Action (PNDA) removing him effective December 2, 2013. After an April 22, 2014, departmental hearing, the City issued a Final Notice of Disciplinary Action (FNDA) on May 13, 2014, removing Rivera effective December 2, 2013. Rivera filed an appeal with the Civil Service Commission on June 8, 2014. The OAL filed the matter as a contested case on June 12, 2014, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. I heard the matter on August 4, 2014, and closed the record that day.

FACTUAL DISCUSSION

Background

I **FIND as FACT** the following undisputed background information.

Since April 2001 Rivera had been a communications officer for the Hoboken Police Department. He accepted calls from the public and communicated with police officers in the field.

Rivera is married to Dimitra Rivera (Dimitra). They have a two and one-half-year-old child and are expecting a second child.

On November 28, 2013, Thanksgiving Eve, Rivera worked the 4:00 p.m. to midnight tour of duty. He and Dimitra had planned to and did go the Havana Café for a few drinks two blocks from their home after quitting time as they had arranged for a baby sitter.

Testimony

Rivera testified that there was a large crowd of holiday celebrants at the bar when they arrived around 12:45 a.m. He had two drinks and a shot and recalled that Dimitra had three to four shots and other drinks. Dimitra testified that she had five to six drinks and a few shots on the house over the course of two hours, which she acknowledged was an excessive amount of alcohol for her. Dimitra and Rivera got into an argument over whether to have another child, which Dimitra testified she intensified as she became more intoxicated. They decided to continue the discussion in private at home. They left the café. Rivera went to a store to pick up some food for Thanksgiving Day, and Dimitra angrily walked home alone with their key. Dimitra testified that, when Rivera arrived at their building and entered the vestibule, she was already inside the locked entry door. She taunted him by walking away, because she had the key. Dimitra further testified that she went into the vestibule, still in an intoxicated state, and "got in his face" while cursing, yelling, and crying. She added that her crying actions caused her mascara to run all over her face, and her eyes were puffy because she was drunk and crying, not because of any blow to her face from Rivera. Dimitra continued that she was the angry aggressor and was pushing, hitting, and punching Rivera multiple times on the arms and stomach and that Rivera merely pushed her away and suggested that they continue the conversation the next day. Dimitra testified that Rivera never made contact with her face. In anger she made a 911 call in front of Rivera although he advised her not to make the call saying, "you don't know what you're going to say." According to Dimitra, Rivera never pulled the phone from her but instead walked outside the building.

Rivera gave a similar description of the evening. Dimitra teased him with the key when he arrived at the building and then let him in, and she continued the argument they had had at the café. Although he said he just wanted to go upstairs, she started punching and hitting him and saying she wanted to have a baby, and she continued to cry hysterically. Rivera testified that his only reaction was to push her arms away numerous times as she was hitting him. He never touched her face. She said, "if you won't talk to me, I'll make a reason to call the police." As he walked away from her, he

saw Dimitra on the phone as she said she was calling the police. Rivera additionally testified that twice in the past when Dimitra had engaged in feisty arguments, he called the police, not on the 911 line, and asked someone to come over as a courtesy to calm her down. She had never called 911 before that night.

On November 28 Communications Dispatcher Zenaida Tavares received the 911 call from Dimitra. It was transcribed. (R-4.) In the call Dimitra said that she needed a cop at 75 Bloomfield Street; that Eddie Rivera just hit her; "I'm his wife, Eddie Rivera; he just hit me really - - like a few times. I hit him once inside (discernible). He just hit me a few times. Can you send somebody right now, please." Tavares told her to calm down. Tavares testified that it sounded like Dimitra was crying.

Patrolman David Montanez arrived at the Rivera's building with Officer Rosa Francisco. He had worked with Rivera from time-to-time over the years. Rivera was standing outside. Montanez entered the foyer to speak to Dimitra. He testified that Dimitra told him and Sergeant Dennis Figueroa that she and Rivera had had a verbal argument at the Havana Café, and she wanted to speak to Rivera at home but, he would not go up to their apartment and speak to her. As Montanez drove Dimitra to headquarters, he noticed that she smelled of alcohol. She told him that she had been drinking at the Havana Café. She continued to cry hysterically. Figueroa drove Rivera to headquarters in another police vehicle. Montanez spoke to both of them at headquarters. He testified that Dimitra told him that Rivera had struck her once with an open hand on the left side of the face during an argument over a personal issue. Sergeant Christopher La Bruno also attended some of the interview. He testified that he and Rivera knew each other for years and had socialized. At headquarters Dimitra told him that the argument between her and Rivera was over her desire to have another child and his aversion to do so. Montanez recalled that, at headquarters, Dimitra was loud, and Rivera was calm. La Bruno agreed that Dimitra had reported being struck once, but he also recalled that she said she had had pain. In her testimony, Dimitra admitted that she told Montanez and La Bruno that Rivera had hit her but now claimed that she had lied because she was still angry, drunk, and crying because of the earlier argument; that in fact Rivera had simply pushed her away from him as she was hitting him. No one placed Rivera under arrest at that time. Instead, a patrol car returned

Rivera to his residence so he could retrieve some personal items. According to Montanez and La Bruno, after Rivera left, Dimitra said that it had happened before, and the police had come to their house but did nothing because Rivera worked with them. In her testimony Dimitra also admitted that, although she told the officers that police had been called to her house before, that was not true but that, on one occasion, Rivera had called to have an officer calm Dimitra down during an argument in their home. Neither Montanez nor La Bruno ever checked police records to ascertain if there had ever previously been domestic violence calls involving Rivera and Dimitra. As Rivera was being transported home, Montanez's duty officer told him to arrest Rivera because of Dimitra's statement that there had been more than a verbal argument and that it had happened before. No photographs were taken of Dimitra that night because the camera at headquarters was broken. No one took any cell phone photographs of her.

Montanez memorialized his involvement that evening in a report. (R-5b.) Montanez testified that he was unable to ascertain if Dimitra had any injury to her face due to the fact that she had been crying a lot and both sides of her face was puffy, and her makeup was smeared and running down her face. Montanez repeated that he saw no sign of injury. La Bruno contrasted Montanez's testimony in that he believed the left side of Dimitra's face was puffier than the right side and so told Montanez. Dimitra testified that neither Montanez nor La Bruno inspected her face that night. Despite Dimitra's statement of being slapped, no one at headquarters, including Montanez and La Bruno, called EMTs or sought medical attention for Dimitra. Although La Bruno, unlike Montanez, claimed that Dimitra expressed the existence of some pain, he did not offer her any ice or secure medical attention for her. Dimitra denied that she said anything about pain to either Montanez or La Bruno. Despite the headquarters camera being broken, neither Montanez nor La Bruno used a cell phone to record any injuries. Montanez's report did not indicate that Dimitra had declined medical attention, although he acknowledged that such a "decline" is typically put into a domestic violence report. Montanez's report also reflects that, while he was placing Rivera under arrest for simple assault, Rivera told him "that he was only defending himself by mushing [Dimitra] away from him while she struck him in the face and chest." Dimitra refused to file a complaint against Rivera and refused to file for a temporary restraining order. La Bruno and Montanez again conflicted over whether each smelled alcohol on Dimitra.

Although the arrest complaint prepared by La Bruno (R-5d) and signed by Montanez indicates that there was "swelling in the area" of the left side of Dimitra's face as a result of her being struck, Montanez testified again that he observed no swelling because of the condition of her face due to crying and streaking makeup. He stressed that he did not author the Complaint.¹

Discussion

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963).

Dimitra, indeed, would have reason now to disavow the claim of having been hit by Rivera on November 28, because that allegation has caused her family to lose its means of support. I am also mindful that true domestic violence allegations are often disavowed because of a continuing fear of retaliation or recurrence. However, after having carefully examined and evaluated Dimitra's credibility in its own right as well as against the other evidence, I am convinced that her recent testimony, rather than her claims on the night of November 28, is credible in contending that she fabricated the domestic violence allegation that night because of her inebriation and extreme anger over Rivera's position on having another child and his refusal to continue the conversation with her. Her inconsistent statements and physical condition that night are more suggestive of an inebriated and angry individual rather than an abused one.

¹ The Jersey City Municipal Court dismissed the Complaint against Rivera.

In her 911 call, Dimitra claimed twice that Rivera had hit her a few times. However, in her discussion with Montanez, she stated that she was slapped with an open hand only once on the left side of her face. Importantly, when Montanez first arrived on the scene and initially spoke with Dimitra, his testimony was that, rather than report to him that she had been struck as Dimitra had reported to the dispatcher, Dimitra told him that they had had a verbal argument but that Rivera would not go up to their apartment to continue to discuss the issue. Such a statement is more consistent with Dimitra's current testimony that she was angry because Rivera refused to continue the argument upstairs, and that is why she called the police. That statement better supports a motive for Dimitra to lie that night than a motive for Rivera to strike her. The making of a credibility determination with regard to Dimitra is complicated by the fact that she claims that she was lying then but is telling the truth now. The testimony and report of Montanez supports a resolution of this dilemma in favor of Dimitra's current story. Although there are inconsistencies between the testimony of Montanez and LaBruno, I place more weight on that of Montanez in that it is supported by a report made almost contemporaneously with the events of the night of November 28.

Montanez observed puffiness to both sides of Dimitra's face and attributed it to crying and smeared makeup. Although LaBruno thought one side was puffier than the other, neither he nor Montanez took photographs, called for medical attention, or offered ice. The more logical determination is that the condition of Dimitra's face was due to the alcohol consumption, the smearing of her makeup, and her continual crying rather than as a result of a blow from Rivera. A slap on one's left side would not cause puffiness on both sides of one's face. Although LaBruno testified that Dimitra had said she had pain, Montanez did not so testify and Dimitra denied having said that. Again, had she expressed pain that night, it is implausible that LaBruno would not have sought some medical attention for her or offered ice. Montanez's observation of the smell of alcohol on Dimitra that night supports her current story that she fabricated the charge against Rivera that night because of her anger and her inebriation. Finally, it is more credible that, as Dimitra now testifies, she made no previous domestic violence calls to the police as opposed to the claim she made the night of November 28. The Police Department produced no record of prior calls. Had she initiated calls on previous

occasions, it is inconceivable that there would be no 911 recording or police response report even in light of Rivera's position with the police department.

Critical Findings of Fact

Based on an assessment of the testimony of the witnesses as well as documents entered into the record, I make the following additional critical **FINDINGS OF FACT**. Dimitra fabricated a story to a dispatcher and police officers on the night of November 28, 2013, that she had been physically assaulted by Rivera in the lobby of their apartment building. Rivera did not strike Dimitra on her face or anywhere else. There was puffiness on both sides of her face that was attributable to her heavy consumption of alcohol that night and her prolonged crying due to an argument between her and Rivera over a family matter and his refusal to continue the discussion up to their apartment. In her anger, Dimitra punched Rivera repeatedly on the arms and on his stomach. His response was defensive and measured as he merely pushed her away. Dimitra did not previously report acts of domestic violence. There is no record of such reports.

ANALYSIS AND LEGAL CONCLUSIONS

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (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). For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93,

104 (App. Div. 1959). 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).

Rivera has been charged with conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6). I **CONCLUDE** that Rivera did not engage in unbecoming conduct.

"Conduct unbecoming a public employee" is an elastic phrase, which 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, supra, 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)). Unbecoming conduct may include excessive, violent, or other intemperate behavior. Hannibal v. City of Atl. City Hous. Auth., CSV 971-04, Initial Decision, (February 2, 2006), <<http://njlaw.rutgers.edu/collections/oal/>>

In light of the above findings, I **CONCLUDE** that the City has not sustained its burden of proving by a preponderance of the credible evidence that Rivera engaged in conduct unbecoming a public employee. It is unfortunate that Dimitra chose to act in an irrational and retaliatory manner to access the resources of the Police Department with a fabrication because of anger with her husband. The Police Department responded in good faith. Nevertheless, there is no basis to penalize Rivera because of the indiscretion of his wife.

ORDER

It is **ORDERED** that the removal of Public Safety Telecommunicator Eduardo Rivera is hereby **REVERSED**.

It is further **ORDERED** that Eduardo Rivera be reinstated and awarded back pay in accordance with the guidelines set forth in N.J.A.C. 4A:2-2.10. .

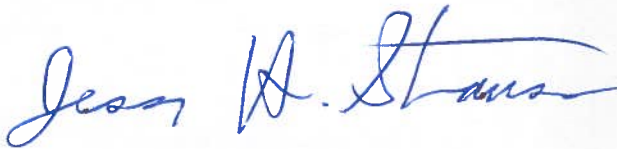
I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

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, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. 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.

September 11, 2014

DATE



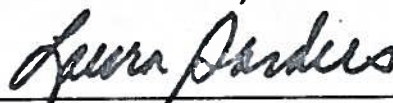
JESSE H. STRAUSS, ALJ

Date Received at Agency:

September 11, 2014

Date Mailed to Parties: September 12, 2014

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DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

LIST OF WITNESSES

For Appellant:

Dimitra Rivera
Eduardo Rivera

For Respondent:

John Tooke
Zenaida Tavares
David Montanez
Francisco Rosa
Christopher LaBruno

LIST OF EXHIBITS IN EVIDENCE

Joint Exhibits:

J-1 Thumb drive of 911 call

For Appellant:

A-1 Preliminary Notice of Disciplinary Action, December 19, 2013

For Respondent:

R-1 Preliminary Notice of Disciplinary Action, December 2, 2013
R-2 Final Notice of Disciplinary Action, May 13, 2014
R-3 Final Notice of Disciplinary Action, March 25, 2014
R-4 Transcript, 911 call
R-5 a. November 28, 2013, Dispatch Record
b. Investigation Report, November 28, 2013
c. Arrest Report, November 28, 2014
d. Complaint Warrant