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STATE OF NEW JERSEY

In the Matter of Michael Hoyer, Department of Transportation

CSC Docket No. 2015-2333
OAL Docket No. CSV 02591-15

**DECISION OF THE CIVIL SERVICE COMMISSION**

**ISSUED:** DEC 21 2015 (LDH)

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The appeal of Michael Hoyer, a Sign Technician 3 with the Department of Transportation (DOT), of his removal, effective October 16, 2014, on charges, was heard by Administrative Law Judge Sarah Crowley (ALJ), who rendered her initial decision on October 19, 2015. 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, the Civil Service Commission (Commission), at its meeting on November 18, 2015 accepted and adopted the Findings of Fact as contained in the initial decision, but did not adopt the ALJ's recommendation to modify the removal to a 60 working day suspension. Rather, the Commission modified the removal to a 120 working day suspension.

## DISCUSSION

The appointing authority presented the appellant with a Final Notice of Disciplinary Action (FNDA) which indicated that he was removed on charges of conduct unbecoming a public employee and other sufficient cause. Specifically, the appointing authority asserted that, on several occasions between January 2, 2014 and March 26, 2014, the appellant harassed and assaulted a co-worker, Jose Perez, by picking him up and throwing him screaming, head first, into a garbage container and on another occasion by picking him up and slamming him onto a table. It also asserted on that on another occasion the appellant chased Perez and punched him

in the leg. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In her initial decision, the ALJ indicated that it was undisputed that there was ongoing "horseplay" between the appellant and Perez. The ALJ noted that the appellant acknowledged that he picked Perez up and put him into a garbage container. However, the appellant claimed that he and Perez were friends and that his actions were simply in jest. The appellant and Perez both testified that they joked around and Perez would tease the appellant and bang on the restroom stall while the appellant was inside. Based on the testimony of the witnesses, the ALJ found that Perez was not injured during any of these incidents and that Perez never complained or filed a complaint. Rather, the horseplay was found as a result of an unrelated investigation. The ALJ also found that after the appellant was advised that his conduct was inappropriate, he ceased any physical contact with Perez. The ALJ found that the appellant's testimony was credible as he was honest and sincere in his testimony. Finally, the ALJ found that the appellant had no prior major discipline in his nine years of employment with the appointing authority, except for one warning for tardiness. Thus, the ALJ determined that a 60 working day suspension was appropriate.

In its exceptions, the appointing authority argues that the ALJ erred in reducing the penalty from removal to a 60 working day suspension because of the severity of the horseplay. In pertinent part, the appointing authority argues that the ALJ erred by only making a finding about the incidents that the appellant admitted he caused. Rather, it asserts that the ALJ should have taken into account all of the incidents that the other witnesses testified about. Second, it asserts that the ALJ failed to take into account the dangerous conditions that could have injured Perez each time he was tossed into the garbage container. Finally, it maintains that the ALJ erred when she emphasized that because Perez did not file a complaint, removal was inappropriate. Thus, it argues that the Commission should uphold the removal.

In the appellant's reply to exceptions, he argues that the ALJ's decision was appropriate since the appellant had no significant disciplinary history. Moreover, he contends that the ALJ made appropriate credibility determinations and therefore, the ALJ correctly only made findings for the incidents that he admitted to. Additionally, the appellant asserts that any consideration of dangerous conditions that could have injured Perez would only be speculative and thus, were properly disregarded by the ALJ. Finally, the appellant argues that the ALJ correctly concluded that the multiple incidents at issue were the result of ongoing horseplay between the appellant and Perez.

Based on its *de novo* review of the record, the Commission agrees with the ALJ that the charges should be upheld. In her initial decision, the ALJ found, after

an opportunity to assess the witnesses and their testimony, that the testimony of the appellant was credible. In this regard, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' 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." *See In re Taylor*, 158 *N.J.* 644 (1999) (quoting *State v. Locurto*, 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). In this case, there is nothing in the record or in the appointing authority's exceptions which convinces the Commission that the ALJ's assessment of the credibility of the witnesses, including the appellant, was not based on the evidence, or was otherwise in error, or that her conclusions were improper. In this regard, the ALJ found that the appellant had conducted himself inappropriately by engaging in horseplay, which included physical contact with Perez on multiple occasions.

However, the Commission does not agree with the ALJ's recommendation to modify the removal to a 60 working day suspension. In determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission 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 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. Moreover, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not "a fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 *N.J.* 474 (2007).

In the instant matter, the ALJ concluded that removal was too severe since, although the appellant's conduct was inappropriate, the appellant had been employed by the appointing authority for nine years and had no prior discipline, with the exception of one warning for being tardy. While the Commission notes the appellant's benign prior disciplinary record, the charges that were upheld are

serious. In this regard, the appellant's inappropriate physical contact with Perez was egregious. As he conceded, the appellant on one occasion tossed Perez into a garbage container. Although Perez was never injured, the appellant's need to resort to physical violence is never acceptable, regardless of the relationship between Perez and the appellant. Accordingly, although the Commission agrees that removal is too harsh based on the sustained charges and in light of the appellant's years of service and benign disciplinary history, it does not agree that a 60 working day suspension is sufficient. Therefore, based on the totality of the record, the Commission concludes that a 120 working day suspension is appropriate.

Since the appellant's removal has been modified to a 120 working day suspension, the appellant is entitled to mitigated back pay, benefits and seniority pursuant to *N.J.A.C.* 4A:2-2.10. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), the award of counsel fees is appropriate 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 any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel,* Docket No. A-1489-02T2 (App. Div. Mar. 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, the appellant was found guilty of the charges and the Commission only modified the penalty. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

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,* Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issue concerning back pay is 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.

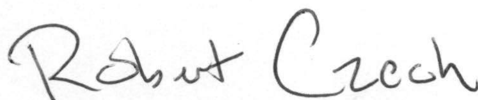
**ORDER**

The Civil Service Commission finds that the appointing authority's action in imposing a removal was not justified. Therefore, the Commission modifies the removal to a 120 working day suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority from the end of the 120 working day suspension to the date of actual 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. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay 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 should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18th DAY OF NOVEMBER, 2015



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Attachment

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. CSV 02591-15

AGENCY DKT. NO. 2015-2333

**IN THE MATTER OF MICHAEL HOYER, STATE OF NEW JERSEY DEPARTMENT OF TRANSPORTATION.**

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**Jeffrey R. Caccese,** Esq., for appellant Michael Hoyer (Comegno Law Group, P.C., attorneys)

**Nonee Wagner,** Deputy Attorney General, for respondent State of New Jersey, Department of Transportation (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: September 22, 2015 Decided: October 19, 2015

BEFORE **SARAH G. CROWLEY**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Michael Hoyer is a Sign Technician for the State of New Jersey, Department of Transportation (NJDOT). He has been employed by the NJDOT for nine years. Respondent seeks to remove appellant from his position as a result of several incidents which occurred between January 2, 2014, and March 26, 2014. He has been

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charged with violating N.J.A.C. 4A:2-2.3(a)12 and N.J.A.C. 4A:2-2.3(a)(6) and the NJDOT Guidelines for Employees Conduct and Discipline Sections III(D) and III(L).

On October 16, 2014, the appellant was suspended without pay and served with a Preliminary Notice of Disciplinary Action, seeking his immediate removal. After no appeal was filed, a Final Notice of Disciplinary Action sustaining the termination was issued on January 6, 2015. The appellant requested a hearing and the matter was transmitted to the Office of Administrative Law (OAL), where it was filed on February 20, 2015, to be heard as a contested case. N.J.S.A. 52:14B-1 to -15 and 14F-1 to -13. The matter was heard on August 12, 2015, and September 8, 2015, and the record closed on September 22, 2015, after written submissions by the parties.

## SUMMARY

All of the disciplinary charges which are the subject matter of the within disciplinary proceeding stem from a series of events which occurred between the appellant and another employee named Jose Perez over a three-month period. Mr. Perez, by his own admission, engaged in horseplay with the appellant and never complained to anyone about the conduct which resulted in the appellant's removal. The matter only came to the attention of the appointing authority when they were investigating another matter which had nothing to do with the appellant or Mr. Perez. Mr. Perez is a deaf mute, but is able to communicate through gestures, writing and is able to articulate sounds.

## TESTIMONY

### For respondent

**Richard Cramer** has been employed by the NJDOT for eight years. He works in the sign shop which is located on Parkway Avenue in Ewing, New Jersey. He works in both the overhead sign shop (building 23) and the regular sign shop (building 21). He

was assigned to building 21 where Jose Perez also worked. Sometime in 2014, an investigation was being conducted into employee W.M. He was interviewed by the IGs office in connection with that investigation. During the questioning, the events between Mr. Perez and Mr. Hoyer came up and he told them what he observed. He saw Mr. Hoyer throw Mr. Perez into a dumpster on two separate occasions. He testified that Mr. Hoyer picked up Mr. Perez and threw him in the trash can, head first. Mr. Cramer testified that Mr. Perez was upset and was mumbling loudly and making hand gestures. He also witnessed Mr. Hoyer putting Mr. Perez in an outside dumpster between the buildings. Mr. Cramer further testified that he told Mr. Hoyer to stop messing with him because Mr. Perez did not like it. Mr. Perez is a little guy and he is a deaf mute. He can make noises but does not really speak.

**Jose Perez** , was assisted by certified sign language interpreters Kevin Scott Jones and Kymme VanCleef in his testimony. He testified that he worked at the NJDOT sign shop through a program at his school, Marie Katzenbach School for the Deaf. He was hired to work at the sign shop in 2013. He works in building 21. He testified that Mr. Hoyer threw him in the dumpster in building 21, and it was dirty and gross. He testified that Mr. Hoyer did help him out of the dumpster. He testified that there was another time when he threw him in the white dumpster with a flip lid, outside of building 21, close to the fence. He testified that this time, Mr. Hoyer did not help him out and that he climbed out himself.

Mr. Perez testified that he teases Mr. Hoyer about his teeth and the way he walks, and that they joke around, but he did not like being thrown in the dumpster. Mr. Perez acknowledged that he would throw wet paper towels over the stall in the bathroom and bang on the door when Mr. Hoyer was in there. He testified that one day after he was making fun of Mr. Hoyer's teeth and how he walked, Mr. Hoyer chased him around the building and when he caught him, Mr. Hoyer hit his leg, and it hurt. On another occasion, Mr. Hoyer picked him up and put him on the table after he made fun of Mr. Hoyer's teeth. He testified that he did not like to be picked up and he felt like he

was picking on him, but he never hurt him except the time when he hit his leg, which did hurt.

Mr. Perez testified that he can make noises but he cannot articulate words very well. He does not speak much because his voice sounds funny. He acknowledged that he would curse at Mr. Hoyer and make gestures at him with his middle finger. He can write notes and communicate with signing. Mr. Perez testified that he never complained to anyone about the conduct. He testified that he gave a statement to someone from IG after they asked him about the incident, but he did not report it. He further testified that he used to be friends with Mr. Hoyer, but then he became a little afraid of him after he picked on him and since he was a little bit of a redneck. Mr. Perez testified that after he spoke to the woman from IG, Mr. Hoyer never bothered him again.

**Floyd Kirkland** was employed by NJDOT and worked in the machine shop. He testified that he now knows who initiated the incident, but he did see Mr. Hoyer pick up Mr. Perez and put him in the dumpster. He testified that the two of them used to communicate with gestures and he was not sure if they were insulting each other or not. He testified that Mr. Perez could not talk but he could make noises, which he did.

**Vashawn Love** has worked for NJDOT for nine years and eleven months. He works in the lettering room of the sign shop. He testified that Mr. Perez was making fun of Mr. Hoyer's teeth and Mr. Hoyer started chasing him around the building. He testified that when appellant came back in the building a little later, he said "I got him." On another occasion, he saw Mr. Hoyer pick up Mr. Perez and put him in the dumpster. He testified that he told some of his colleagues, but never reported it. He testified that it was clear that Mr. Perez did not like it, and he was screaming and kicking the whole time Mr. Hoyer picked him up and threw him in the dumpster. He confirmed that Mr. Perez was yelling and making gestures to Mr. Hoyer about his teeth, but he could not tell what he was yelling. He testified that there was a lot of joking going on between them, but he thought that Mr. Hoyer went too far. He did state that Mr. Hoyer helped him out of the bin and brushed him off after the incident.

**Michelle Shapiro,** Director of DOT Human Resources testified that she reviewed the reports and made the determination regarding what discipline to impose on appellant. She testified that she felt the penalty of removal was appropriate because "she thought" Mr. Hoyer received a directive of cease and desist, which he did not follow. However, on cross examination she was unclear if any such directive had gone to Mr. Hoyer and was not even sure if the directive she was thinking of related to Mr. Hoyer or the incidents in question. She testified that she only reviewed the reports of others and never met with Mr. Hoyer or Mr. Perez regarding the events. Counsel for the appointing authority was given an opportunity to produce the document or any evidence that appellant was given a warning, and no such evidence could be produced. She testified that because Mr. Perez was a deaf mute and the response to his teasing by throwing him in the dumpster was disproportional. However, she was uncertain as to the extent of his disability as she never met with him and never discussed anything with him or Mr. Hoyer.

**For Appellant**

**Michael Hoyer** testified that he and Mr. Perez were friends. He would talk to him about cars, since he knew Mr. Perez liked cars. He would use his phone to communicate or write things down. He also made a lot of hand gestures. He testified that he could speak a little and he would curse at him a lot when they were joking around. Mr. Hoyer did not deny that he threw Mr. Perez in the dumpster, but he said it was not the food dumpster, and that it was all in jest. He helped him out, bushed him off and shook his hand. He said there was a lot of horseplay going on and Mr. Perez used to make fun of his teeth and the way he walked because he is pigeon-toed. He said he chased him around the building once and when they came in the door they both tripped and fell. He said he jokingly punched him on the leg, but not enough to hurt him, and that it was just a joke. He testified that Mr. Perez never complained, and he thought it was all horseplay. One time he did pick him up and place him on the drafting table, but again it was just a joke and he did not hurt him.

Mr. Hoyer testified that when IG came to talk to him, this was the first time he knew that Mr. Perez had complained, and he never touched him again. He testified that Mr. Perez would make fun of him all the time and when he was in the bathroom he would throw wet paper over the stall door and pound on the door. He testified that Mr. Perez would curse all the time, saying "fuck you" or "pussy" to him and gave him the middle finger all the time. However, he never thought it was anything more than horseplay and the minute someone told him that Mr. Perez had complained, he never touched him again. He denied ever receiving a warning or a cease and desist letter.

## FINDINGS OF FACT

In view of the contradictory testimony presented by the parties, the resolution of the charges against Michael Hoyer requires that I make credibility determinations in order to find the critical facts. 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). 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 fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth. In re Perrone, 5 N.J. 514, 521–22 (1950) see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to carefully observe the demeanor of Mr. Hoyer, it is my view that Mr. Hoyer was honest and sincere in his testimony. Mr. Hoyer conceded that he threw Mr. Perez in the dumpster on two occasions and that he chased him

around the building and hit his leg. He also admitted that he placed him on the table. His testimony about the horseplay between the two was corroborated by Mr. Perez as well as the other employees. Mr. Perez conceded that he would make fun of Mr. Hoyer's teeth and the way he walked. Mr. Perez conceded that there was horseplay in the office and that he never complained about Mr. Hoyer's conduct. Mr. Perez admitted to throwing things over the restroom stall and banging on the door when Mr. Hoyer was in the bathroom. Mr. Perez also conceded that he never complained of the conduct and it is further clear that although Mr. Perez is a deaf mute, he is clearly able to communicate through sounds, non-verbal gestures and writing. Finally, I found that Ms. Shapiro was credible, but she conceded that she imposed the penalty of removal because she thought Mr. Hoyer had received a warning. However, upon cross examination it is clear that she may have been mistaken and there was no evidence of any prior warning.

I am left with making a determination as to whether this was horseplay, which may have gone too far, or whether the conduct rose to a level of constituting assault and battery and conduct unbecoming. Based on the testimony of the parties and the relative credibility of the witnesses, I **FIND** as follows:

1. There was ongoing horseplay between Mr. Hoyer and Mr. Perez.

2. Mr. Perez is a deaf mute, but is able to communicate through writing, signing and gestures, and is able to make some sounds.

3. Mr. Perez made fun of Mr. Hoyer's buck teeth and being pigeon-toed on a regular basis. Mr. Perez also tormented Mr. Hoyer when he was in the bathroom by banging on the door and throwing wet towels into the stall.

4. Mr. Hoyer picked up Mr. Perez and put him in a dumpster and a garbage can after he was making fun of him. Mr. Hoyer did not injure Mr. Perez when he did this and on at least one occasion, helped him out and brushed him off.

5. Mr. Hoyer chased Mr. Perez around the building on one occasion, and after they both fell to the floor, Mr. Hoyer hit Mr. Perez in the leg. No injury resulted.

6. Mr. Perez never complained to anyone about this conduct and never received any medical attention for any injury sustained.

7. The incidents which give rise to this disciplinary action were discovered only through a completely unrelated investigation, and Mr. Perez never complained or filed a complaint against Mr. Hoyer.

8. After Mr. Hoyer was advised by IG that his conduct was inappropriate, his horseplay with Mr. Perez ceased.

9. Mr. Hoyer has no prior major discipline in his nine years of employment. He received one warning for being late.

10. There is no evidence that Mr. Hoyer was given a cease and desist warning or letter and I find that there was no such warning or letter ever issued to Mr. Hoyer.

11. Mr. Hoyer did not physically injure or harm Mr. Perez.

## LEGAL DISCUSSION AND CONCLUSION

A civil service employee's rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to 12.6. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointment and broad tenure protection. See Essex Council Number 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 Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide public officials with appropriate appointment, supervisory and other personnel authority in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). A public employee who is thus protected by the provisions of the Civil Service Act may nonetheless be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are enumerated in N.J.A.C. 4A:2-2.3.

In an appeal concerning major disciplinary action, the burden of proof is on the appointing authority to show that the action taken was justified. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). This applies to both permanent career service employees and those in their working test period relative to such issues as removal, suspension, or fine and disciplinary demotion. N.J.S.A. 11A:2-14, 2-6. The State has the burden to establish by a preponderance of the competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk License Revocation, 90 N.J. 550 (1982).

This matter involves a major disciplinary action brought by the respondent appointing authority against appellant seeking his removal. Specifically, Mr. Hoyer has been charged with the following offenses: 1) conduct unbecoming an employee; 2) assault and battery on another employee; 3) harassment, intimidation, and discrimination.

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)).

Based upon the testimony and findings, I **CONCLUDE** that the respondent has not satisfied its burden of proving by a preponderance of the evidence that appellant is guilty of assault and battery of a fellow employee. I also **CONCLUDE** that the respondent has not satisfied its burden of proving harassment, intimidation or discrimination by a preponderance of the evidence. However, I **CONCLUDE** that the respondent has satisfied its burden of proving that appellant conducted himself in a manner unbecoming a public employee in violation of civil service rules regarding appropriate conduct in the workplace by engaging in such horseplay which included physical contact with a fellow employee on several occasions. The issue then becomes the level of discipline to be imposed for conduct in question.

**PENALTY**

Once a determination is made that an employee has violated a statute, regulation or rule concerning his employment, the concept of progressive discipline must be considered. When dealing with the question of penalty in a de novo review of a disciplinary action against a civil service employee, the Civil Service Commission is required to evaluate the proofs and penalty on appeal, based on the charges. N.J.S.A. 11A:2-19; West New York v. Bock, 38 N.J. 500 (1962). With respect to the discipline, under the precedent established by West New York v. Bock, courts have stated, "[a]lthough we recognize that a tribunal may not consider an employee's past record to prove a present charge, that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990) (citing West New York v. Bock, supra, 38 N.J. at 523). Ultimately, however, "it is the

appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

The concept of progressive discipline seeks "to promote proportionality and uniformity in the rendering of discipline of public employees." Stallworth, supra, 208 N.J. at 195. The concept of progressive discipline has been utilized in two ways": (1) to "ratchet-up" or "support [the] imposition of a more severe penalty for a public employee who engages in habitual misconduct"; and (2) "to mitigate the penalty" for an employee who has a record largely unblemished by significant disciplinary infractions. [Id. at 196 (quoting In re Herrmann, 192 N.J. 19, 30-33, 926 A.2d 350 (2007).]

Under the concept of progressive discipline, one act of misconduct may result in minor discipline merely because it was a first offense, whereas the same misconduct, if repeated, could justify the imposition of major discipline, including termination. Id. at 198. "To assure proper 'progressive discipline,' and a resulting penalty based on the totality of the work history, an employee's past record with emphasis on the 'reasonably recent past' should be considered." [*7] Id. at 199 (citation omitted). "[T]he existence of a dismal disciplinary record can support an appointing authority's decision to rid itself of a problematic employee based on charges that, but for the past record, ordinarily would have resulted in a lesser sanction." Herrmann, supra, 192 N.J. at 32.

In this case, the appellant has been employed by the NJDOT for nine years. He has no prior discipline, with the exception of one warning for being tardy. The respondent has demonstrated that appellant and another employee engaged in horseplay with one another on a regular basis. The other employee was a deaf mute, but by his own admission would taunt Mr. Hoyer about his buck teeth and being pigeon-toed. He also clearly had the ability to communicate through signing, writing and other gestures, and never complained to anyone about this conduct. Mr. Perez is capable of cursing and making inappropriate hand gestures which he did a regular basis. Although the respondent has failed to prove that the appellant was guilty of physical assault or battery on Mr. Perez, nor did they demonstrate harassment, intimidation or

discrimination, I find that the physical contact, albeit not assault and battery and not resulting in any injury was inappropriate in the workplace and constituted conduct unbecoming. I also **CONCLUDE** that the taunting and engagement in horseplay by Mr. Perez constituted a mitigating factor, as did the fact that when the complaint was articulated to the appellant, the conduct immediately ceased. I also **CONCLUDE** that there was no warning or cease and desist letter every served on Mr. Hoyer, and the mistaken belief that it had been was an integral part of the repondant's decision to remove the appellant. Accordingly, I **CONCLUDE** that an appropriate penalty for these violations is a sixty day suspension.

## ORDER

I **ORDER** that the penalty of removal imposed by the appointing authority is **MODIFIED** to a sixty-day suspension.

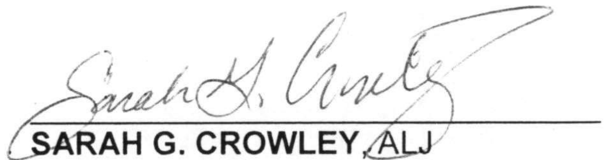
Since the penalty has been modified, I **ORDER** that appellant is entitled to back pay, benefits, and seniority pursuant to N.J.A.C. 4A:2-2.10. However, the appellant is not entitled to counsel fees. Pursuant to N.J.A.C. 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all, or substantially all, the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. See Walcott v. City of Plainfield, 282 N.J. Super. 121, 128 (App. Div. 1995); Smith v. Dep't of Personnel, No. A-1489-02T2 (App. Div. March 18, 2004). In the case at hand, while the penalty was modified and two of the charges were dismissed, one of the remaining charges has been sustained and major discipline imposed. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. See In re Bergus, CSV 5039-98 and CSV 9688-98, Final Decision (January 23, 2001), <http://njlaw.rutgers.edu/collections/oal/>, aff'd, Bergus v. City of Newark, No. A-3382-00T5 (App. Div. June 3, 2002); In re Simmons, CSV 3750-98 (January 13, 2000), <http://njlaw.rutgers.edu/collections/oal/>; In re Rhoads, Final Decision (October 15, 2002), 2002 N.J. AGEN LEXIS 1642 (N.J. AGEN 2002) (counsel

fees denied where removal on charges of insubordination, inability to perform duties, conduct unbecoming a public employee, and neglect of duty was modified to a fifteen-day suspension on the charge of neglect of duty).

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.



October 19, 2015
DATE

**SARAH G. CROWLEY, ALJ**

Date Received at Agency: 10/19/15

Date Mailed to Parties: 10/19/15

SGC/vj

## APPENDIX

## WITNESSES

**For appellant:**

Jose Perez

**For respondent:**

Michael Hoyer

## EXHIBITS

**For respondent:**

R-1 Memorandum of Interview (Richard Cramer and Howard Williams)

R-2 Map of DOT Headquarters

R-3 Preliminary Notice of Discipline

R-4 DOT Policy/Procedure No. 532

R-5 DOT Policy No. 922

R-6 Letter, dated April 5, 2007 to Michael Hoyer

R-7 Memorandum of Interview (Vashawn Love), dated May 14, 2014

R-8 Memorandum of Interview (Michael Hoyer), dated August 12, 2014

**For appellant:**

P-1 Letter, dated January 16, 2015

P-2 List of DOT Assault of Battery Charges and disposition of penalty