B-19

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Matthew Vilardo,
Jersey City Public Schools

CSC Docket No. 2015-2563

Request for Back Pay and
Counsel Fees

ISSUED: SEP 17 2015 (SLD)

Matthew Vilardo, a Laborer 1 with the Jersey City Public Schools, represented by Ronald M. Gutwirth, Esq., seeks enforcement of the attached Civil Service Commission (Commission) decision rendered on February 4, 2015, granting the appellant mitigated back pay and counsel fees.

By way of background, the appointing authority issued a Final Notice of Disciplinary Action (FNDA) removing the appellant on charges of conduct unbecoming. Upon his appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing. Following a hearing and the Commission's *de novo* review, the charges were dismissed and the Commission ordered that the appellant be reinstated and awarded mitigated back pay, benefits and seniority from July 1, 2014[1] to the date of his actual reinstatement. However, the parties were unable to agree on the amount of back pay or counsel fees due to the appellant, and the appellant requested Commission review.

In his request, the appellant initially argues that the appointing authority unreasonably delayed remitting payment of his back pay and counsel fees awards. In this regard, the appellant argues that he is entitled to $30,282.88 for his mitigated back pay, COBRA costs and fingerprinting costs. Specifically, he asserts that he was entitled to a per diem rate of $217.44, which he based on the gross wage listed on his pay stub for June 26, 2014 ($2,174.45) divided by 10 work days. The

[1] Although, the Commission's February 4, 2015 decision indicated that the appellant was removed, effective April 25, 2014, the parties agree that the appellant was paid through June 30, 2014.

appellant asserts that he received $9,601.02 in Workers' Compensation benefits for the time period from August 6, 2014 to January 7, 2015 (which he calculated to be 107 work days). The appellant asserts that prior to his removal, he had been receiving Workers' Compensation benefits of 100% of his wages, and therefore, he was entitled to the difference between the amount of Workers' Compensation benefits he received after his removal and his full wages. Additionally, the appellant asserts that he received $3,180 in unemployment benefits for the time period from January 7, 2015 to February 15, 2015 (which he calculated to be 28 work days). The appellant also calculated that there were 28 work days between his removal on June 26, 2014 to August 6, 2014. The appellant maintains that he is also entitled to the amount of $4,033.32 that he paid to maintain his health benefits with COBRA and $65.46 he paid to be fingerprinted to allow him to return to work.

Additionally, the appellant seeks counsel fees in the amount of $36,525. Specifically, Mr. Gutwirth maintains that he spent 146.1 hours from January 28, 2014 through December 22, 2014 on this matter. He argues that he is entitled to an hourly rate of $250, based on his 30 years of legal experience, 26 of which were spent as a solo practioner in a practice focused on litigation, "including premises liability, automobile liability, products liability, toxic torts, workers compensation and employment litigation." He also asserts that he has tried cases in the New Jersey Superior Court, the New Jersey Appellate Division, the New Jersey Supreme Court and several United States District Courts. Mr. Gutwirth notes that the $250 fee was agreed to by the appellant. Additionally, he notes that he has known members of the appellant's family for more than 20 years and has represented several members of the family. Mr. Gutwirth also argues that the complexity of the issues raised in this matter warrant his requested fee. In this regard, he argues that this matter raised many complex legal and factual issues including:

> (1) whether the New Jersey Division of Workers Compensation or the Civil Service Commission should exercise primary jurisdiction on disciplinary manners when the allegation of conduct unbecoming an employee involves interpretation of Workers' Compensation laws; (2) whether an employee can be removed from his position for conduct unbecoming an employee based on physical activity while he receives Workers' Compensation benefits when the employer fails to present medical testimony which establishes that the employee's physical efforts demonstrate the employee's ability to perform his full-time job; (3) whether an employer's failure to observe the time requirements for rendition of a hearing officer's report and termination of the employee should invalidate disciplinary action against a public employee; (4) whether a public employer's failure to notify its employees of a no activity requirement for injured workers on Workers' Compensation temporary disability bars disciplinary action on the undisclosed rule; (5) whether a public employer's failure to object to an employee's

> receipt of benefits in the New Jersey Division of Workforce Development estops a public employer's discipline of an employee based on conduct involving the receipt of unchallenged workers compensation benefits; (6) whether an employee's mandatory attendance at a lecture by an authorized treatment provider of a public employee where the lecturer encourages employees on Workers' Compensation to engage in physical activity estops the public employee from disciplining an employee on Workers' Compensation from engaging in physical activity; [and] (7) whether the removal of an employee for engaging in physical activity that did not violate his entitlement to temporary disability under Workers' Compensation law constituted wrongful retaliation for filing a workers compensation claim in violation of *N.J.S.A.* 34:15-39.1.[2]

Mr. Gutwirth argues that, although the Commission did not have to decide all of the issues he raised, he was required to raise them or be barred from raising them in subsequent proceedings under the theory of collateral estoppel. Additionally, he asserts that he prepared multiple briefs, totaling 112 pages. Moreover, he maintains that since this matter involved the removal of a longtime employee and a "lost wage claim easily exceeding a million dollars over [the appellant's] lifetime," he was obligated to extend all of the efforts he performed. Furthermore, Mr. Gutwirth asserts that the appointing authority's conduct in this matter also contributed to the time he expended. For example, he notes that the appointing authority failed to produce the hearing officer's report until 23 days after the departmental hearing and did not vote to terminate the appellant until 70 days after the departmental hearing, and as such he submitted a motion for summary judgment due to the alleged procedural violations. He also noted that he was forced to appear at the Jersey City Public School Board of Education (Board of Education) on three separate occasions, because the subject of the appellant's removal kept being postponed.

The appellant also maintains that he is entitled to costs in the amount of $3,385.96. Specifically he asserts that his costs were as follows: $27.11 (payment for copies of medical files); $79.05 (courier service); $101.36 (Fed Ex); $310.85 (subpoena service); $442.85 (transcript service); $118.74 (Express Mail); $20 (appeal fee); $2,250 (fees to Dr. Kulkarni); and $36 (subpoena fees).

In response, the appointing authority, represented by Jennifer Roselle, Esq., initially maintains that it did not unreasonably delay in responding to the

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[2] *N.J.S.A.* 34:15-39.1 provides, in pertinent part, that it shall be unlawful for any employer . . . to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim [Workers' Compensation] benefits from such employer . . . any violation of this act, the employer or agent shall be punished by a fine of not less than $100.00 nor more than $1,000.00 or imprisonment for not more than 60 days or both.

appellant's demands for back pay and counsel fees. It notes that upon receipt of the information from the appellant concerning his back pay request, it reviewed the numbers provided by the appellant and determined that the appellant had made several errors, and as such, he was only entitled to $15,648.17 for his mitigated back pay award. In this regard, the appointing authority notes that although the appellant's date of removal was June 20, 2014, he was paid through June 30, 2015, and therefore his gross salary from June 30, 2015 to February 16, 2015 was $32,813.77.[3] In calculating this amount, the appointing authority maintains that the appellant's per diem amount is actually $196.87, based on his salary of $51,187 plus his longevity pay in the amount of $1,000 per year, divided by 260 work days.[4] Additionally, the appointing authority noted that the appellant received $18,038.28 for Workers' Compensation benefits. In support, the appointing authority submitted the Workers' Compensation notes which also indicate that he was placed out of work on August 6, 2014 and was returned to work on full duty on January 7, 2015. It notes that he also received $3,180 for unemployment benefits, which should be deducted from the gross salary amount. It also maintains that $521.07 should also be deducted from his gross salary amount, for the portion of the costs of his health benefits that would have been deducted from his pay during this period of time if he had not been removed. The appointing authority maintains that although the appellant remitted payment for COBRA benefits in the amount of $4,705.54, he is only entitled to repayment in the amount of $4,508.26. In this regard, it notes that the appellant will receive a refund in the approximate amount of $197.28 as he was reinstated to its health benefits plan, effective February 17, 2015, and his COBRA benefits were for the period of August 2014 through February 2015. The appointing authority agrees to remit payment of $65.49 for the costs of the updated criminal background check.

With regard to counsel fees, the appointing authority questions the reasonableness of the hours related to Mr. Gutwirth's direct appeal to the Board of Education, which included multiple appearances and written submissions. The appointing authority argues that Mr. Gutwirth's appearances in front of the Board of Education fell outside the scope of the due process entitlements under Civil Service regulations, which provide that the appellant was entitled to a departmental hearing before the appointing authority or its designated representative and the right to appeal the resulting discipline to the Civil Service Commission. *See N.J.A.C.* 4A:2-2.6. However, there is no mechanism for the appellant to appeal to the Board of Education after his departmental hearing, but before the Board of Education's vote to accept the hearing officer's determination. The appointing authority asserts that although the appellant and his attorney are permitted to appear before the Board of Education, the appearances were not part

[3] It is noted that it is unclear how many work days the appointing authority utilized in determining the appellant's gross pay for this time period.

[4] It is noted that the per diem amount of $196.87 does not include the appellant's longevity pay. If the appellant's longevity pay is included, his per diem amount is $200.72.

of the disciplinary process and thus, Mr. Gutwirth is not entitled to any counsel fees for those appearances. Although the appointing authority does not specify the amount of hours, Mr. Gutwirth's affidavit indicates that on April 15, 2014, he spent four hours on the preparation of a letter to the Board of Education objecting the appellant's removal. The affidavit also indicates that on April 22, 2014, May 20, 2014 and June 16, 2014, he spent four hours, three hours and two hours, respectively, for "attendance at meeting of the Board of Education to make public comment opposing the termination" of the appellant.

Additionally, the appointing authority asserts that Mr. Gutwirth is not entitled to an hourly fee of $250. In this regard, it asserts that *N.J.A.C.* 4A:2-2.12 provides in part that a partner or equivalent in a law firm with 15 or more years of experience in the practice of law is entitled to fees from $175 to $200 per hour. Moreover, it maintains that an attorney is only entitled to fees above the regulatory framework when the attorney's special skills or qualifications warrant such an award. However, there are no factors in this matter which would warrant additional fees. In this regard, it notes that Mr. Gutwirth indicated that he was not hired due to any special skills or knowledge, but that rather he had a relationship with other members of the appellant's family. Furthermore, the appointing authority disputes that this matter required any unique skills or knowledge, or that the issues raised in this matter were complex. In this regard, it maintains that the only issue in this matter was whether the appellant's performance of manual labor while he was on an approved Workers' Compensation leave of absence, was conduct unbecoming. However, it notes that it was the appellant who raised unnecessary arguments concerning the appellant's medical status and injury, when neither was at issue since it never disputed that the appellant was legitimately injured or that he was entitled to the Workers' Compensation leave. Therefore, since the injury was never in dispute, the appellant's presentation of medical testimony was irrelevant.

In response, the appellant agrees that his unearned salary from July 1, 2014 through February 16, 2015 was $32,831.77. He also agrees that upon review of his records he did receive $18,038.22 in Workers' Compensation benefits. With regard to reimbursement for his COBRA benefits, he rejects any deduction from the amount he paid since he was required to make the full payment or lose his health insurance, and thus, he should be compensated for the full amount of $4,705.54. However, he notes that he has no objection to the deduction of $521.07 for the payment of health insurance benefits he would have had to make if he had not been removed. Therefore, the appellant asserts that he is entitled to $15,845.45 for his mitigated back pay award.[5]

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[5] The appellant also raises questions concerning whether the benefits he received should be taxed. However, since the Commission does not have jurisdiction over this question, it will not be addressed in this matter.

Mr. Gutwirth argues that he was required to the file the instant request for counsel fees due to the appointing authority's failure to resolve the matter within the 60 days ordered by the Commission. Additionally, he reiterates that his motion to dismiss at the departmental level and his appearances before the Board of Education were both reasonable and necessary services that the appellant was entitled to. Moreover, Mr. Gutwirth maintains that he is entitled to counsel fees at the rate of $250. In this regard, he notes that *N.J.A.C.* 4A:2-2.12 incorporates the New Jersey Court Rules at RPC 1.5(a) which sets forth the conditions by which higher counsel fees may be awarded. He maintains that this matter warrants his requested rate of $250 as he previously noted that this was a complex matter which was not simply about whether the appellant's actions were conduct unbecoming a public employee, it required him to present co-workers as witnesses, and even an adverse witness. It also required him to conduct a detailed examination of the appellant's physical therapist and his expert witness, concerning the appellant's medical condition. The appellant also asserts that the Commission should consider the fees customarily charged in the area for similar legal services. For example, $275 was found to be a reasonable rate for matrimonial litigation in northern New Jersey in *Gruhin and Gruhin v. Brown*, 338 *N.J. Super.* 276 (App. Div. 2001); and $325 plus lodestar of 60% was found to be a reasonable rate for a sex discrimination matter in *Lockley v. Turner*, 344 *N.J. Super.* 177 (App. Div. 2002), *aff'd* as modified on other grounds 177 *N.J.* 413 (2003). Furthermore, Mr. Gutwirth argues that the Commission should consider that allowing for an increase in counsel fees would encourage attorneys to take meritorious cases of unjustly discharged employees who do not have the financial resources to pay an attorney. In this matter, he maintains that the appellant's union would not provide him with an attorney and he was unable to find another attorney who would take on the matter due to his inability to pay.

Additionally, Mr. Gutwirth requests an additional $2,600 in counsel fees (10.4 hours multiplied by $250). Specifically, in a supplemental affidavit Mr. Gutwirth indicates that he spent two hours on a notice of motion to assess counsel fees and supporting certification of service and an additional four hours on a reply memorandum to opposition of counsel fee application, for a total of six hours. The remaining 4.4 hours were spent on issues concerning the appellant's pursuit of his mitigated back pay award. Mr. Gutwirth argues that the amounts he is requesting are reasonable, especially when compared with the amount charged by opposing counsel in this matter. In this regard, he notes that opposing counsel charged the appointing authority $40,603.40 for fees and costs in order to pursue a meritless disciplinary proceeding.

CONCLUSION

Back Pay

Pursuant to *N.J.A.C.* 4A:2-2.10(d), an award of back pay shall include unpaid salary, including regular wages, overlap shift time, increments and across-the-board adjustments. Benefits shall include vacation and sick leave credits and additional amounts expended by the employee to maintain health insurance coverage during the period of improper suspension or removal. *N.J.A.C.* 4A:2-2.10(d)1 provides that back pay shall not include items such as overtime pay and holiday premium pay. Further, *N.J.A.C.* states, in pertinent part, that an award of back pay shall be reduced by the amount of money that was actually earned during the period of separation, including any unemployment insurance benefits received. *N.J.A.C.* 4A:2-2.10(d)4 states that where a removal or a suspension for more than 30 working days has been reversed or modified or an indefinite suspension pending the disposition of criminal charges has been reversed and the employee has been unemployed or underemployed for all or a part of the period of separation, and the employee has failed to make reasonable efforts to find suitable employment during the period of separation, the employee shall not be eligible for back pay for any period during which the employee failed to make such reasonable efforts. "Reasonable efforts" may include, but not be limited to, reviewing classified advertisements in newspapers or trade publications; reviewing Internet or on-line job listings or services; applying for suitable positions; attending job fairs; visiting employment agencies; networking with other people; and distributing resumes. The determination as to whether the employee has made reasonable efforts to find suitable employment shall be based upon the totality of the circumstances, including, but not limited to, the nature of the disciplinary action taken against the employee; the nature of the employee's public employment; the employee's skills, education, and experience; the job market; the existence of advertised, suitable employment opportunities; the manner in which the type of employment involved is commonly sought; and any other circumstances deemed relevant based upon the particular facts of the matter. The burden of proof shall be on the employer to establish that the employee has not made reasonable efforts to find suitable employment. *See N.J.A.C.* 4A:2-2.10(d)4, *et seq.* Furthermore, *N.J.A.C.* 4A:2-2.10(d)9 states that an award of back pay is subject to reduction for any period of time during which the employee was disabled from working.

Initially, the parties agree that the appellant's annual salary is $51,187 and he is entitled to $1,000 per year for longevity. They also agree that in determining his per diem rate, they will use 260 work days. The appointing authority argues that based on those numbers, his per diem rate is $196.87. However, that rate does not include the appellant's longevity pay. Therefore, his per diem rate should be $200.71 (annual salary of $51,187 plus $1,000 longevity divided by 260 work days).

In the instant matter, the record evidences that the appellant was placed out of work by the Workers' Compensation doctors on August 6, 2014 to undergo surgery and that he was released to full duty on January 7, 2015 as he had reached medical maximum improvement (MMI). Consequently, since the appellant was disabled from work, he is not entitled to any back pay from August 6, 2014 to January 7, 2015. However, the appellant would be entitled to back pay from July 1, 2014 to August 6, 2014 and January 8, 2015 to February 16, 2015, as agreed to by the parties. From July 1, 2014 through August 5, 2014, the appellant missed 25 work days at a per diem rate of $200.71, for a total of $5,017.75. From January 8, 2015 through February 15, 2015, the appellant missed 27 work days at a per diem rate of $200.71, for a total of $5,419.17. During the appellant's separation from employment, he received $3,180 in unemployment benefits. Therefore, the calculation of the appellant's mitigated back pay award is as follows:

Time Period	**Gross Amount Owed**
July 1, 2014 through August 5, 2014	$5,017.75 (*i.e.,* $51,187 salary plus $1,000 longevity divided by 260 workdays equals $200.71 per diem rate multiplied by 25 workdays)
August 6, 2014 through January 7, 2015	$0
January 8, 2015 through February 15, 2015	$5,419.17 (*i.e.,* 51,187 salary plus $1,000 longevity divided by 260 workdays equals $200.71 per diem rate multiplied by 27 workdays)
Total Gross Back Pay Amount	$10,436.92
Less Mitigation Amounts	$3,180 (unemployment benefits)
Total Mitigated Back Pay Award	**$7,256.92**

With regard to the appellant's request for reimbursement of $4,705.54 for the continuation of his health benefits through COBRA, *N.J.A.C.* 4A:2-2.10(d) provides for reimbursement of payments made to maintain the employee's health insurance coverage. Therefore, the appellant would be entitled to any monies he spent on COBRA to maintain his own health insurance. The appointing authority argues that $197.28 should be deducted from this amount since the appellant would be reimbursed for that amount for the time period after February 15, 2015, when his health benefits began again. However, the appointing authority has not presented any evidence that the appellant in fact received this amount. Therefore, the appellant would be entitled to the full amount of $4,705.54 for his COBRA benefits. However, if the appointing authority can present to the appellant documentation prior to remitting payment that the appellant has been reimbursed in the amount of $197.28, then the appellant would only be entitled to $4,508.26. Finally, with regard to fingerprinting, although the rules are silent on this item, the parties have expressed their agreement on repayment. Thus, the appellant is also entitled to repayment of $65.49 for the payment of his fingerprinting. Accordingly, the

appellant is entitled to the gross amount of **$12,027.95** for his mitigated back pay, and reimbursement for his COBRA payments and fingerprinting.

Finally, with regard to the $521.07 that the parties agree is to be withheld for his health benefit contributions during the period of his removal, *N.J.A.C.* 4A:2-2.10(d)2 provides that the award of back pay shall be reduced by the amount of taxes, social security payments, dues, pension payments, and any other sums normally withheld. Thus, the appointing authority, by rule, should reduce the appellant's back pay award consistent with this provision and provide the appellant with a full accounting of its deductions which would include taxes, health benefit and pension contributions when it makes its payment to the appellant. *See In the Matter of Ronald Dorn* (MSB, decided December 21, 2005). Therefore, for purposes of determining the appellant's total mitigated back pay award, this amount is not deducted in the calculations noted above. However, the appointing authority should deduct this amount, and any other required deductions prior to remittance to the appellant.

Counsel Fees

N.J.S.A. 11A:2-22 provides that the Commission may award reasonable counsel fees to an employee as provided by rule. *N.J.A.C.* 4A:2-2.12(a) provides that the Commission shall award partial or full reasonable counsel fees incurred in proceedings before it and incurred in major disciplinary proceedings at the departmental level where an employee has prevailed on all or substantially all of the primary issues in an appeal of major disciplinary action before the Commission. *N.J.A.C.* 4A:2-2.12(c) provides as follows: an associate in a law firm is to be awarded an hourly rate between $100 and $150; a partner in a law firm with fewer than 15 years of experience in the practice of law is to be awarded an hourly rate between $150 and $175; and a partner in a law firm with 15 or more years of experience practicing law, or notwithstanding the number of years of experience, with a practice concentrated in employment or labor law, is to be awarded an hourly rate between $175 and $200. *N.J.A.C.* 4A:2-2.12(d) provides that if an attorney has signed a specific fee agreement with the employee or the employee's negotiations representative, the attorney shall disclose the agreement to the appointing authority and that the attorney shall not be entitled to a greater rate than that set forth in the fee agreement. *N.J.A.C.* 4A:2-2.12(e) provides that the fee amount or fee ranges may be adjusted based on the circumstances of the particular matter, and in consideration of the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly, the customary fee in the locality for similar services, the nature and length of the relationship between the attorney and client and the experience, reputation and ability of the attorney.

It is clear that appellant is entitled to counsel fees pursuant to the Commission's February 4, 2015 decision. As to the amount of counsel fees, the Commission finds that Mr. Gutwirth has provided insufficient information to justify awarding his counsel fees at the requested hourly rate of $250. While he attempts to justify the requested rate by noting that he is admitted to practice in multiple states and federal courts, he provides no details regarding the subject matter of the matters he normally works on, nor has he indicated any particular expertise in labor or employment law. In this regard, he merely states that his practice focuses on litigation which includes "premises liability, automobile liability, products liability, toxic torts, workers compensation and employment litigation." As to the complexity of the case, the matter involved approximately two days of hearing with nine witnesses. Despite Mr. Gutwirth's assertions to the contrary, this type of appeal inherently lacks the legal complexity necessary to justify the hourly rate requested by him. The case was adjudicated based upon factual testimony rendered during the hearing. No unique legal experience was required by counsel in order to establish that the charges against appellant were not warranted. In this regard, although Mr. Gutwirth argues that Workers' Compensation laws were also at issue, the Commission does not agree. Rather, the ultimate question was whether the appellant's actions, when he had been authorized off duty due to medical restrictions, was conduct unbecoming. Moreover, Mr. Gutwirth's reliance on court decisions approving counsel fees in excess of $250 are irrelevant to the instant matter, since neither of the cases cited by him concern the determination of fees in similar employment matters under Civil Service regulations. Therefore, based on the information provided by Mr. Gutwirth regarding his years of experience in the practice of law, he should be reimbursed at the rate of $200 per hour. *See N.J.A.C.* 4A:2-2.12(c),(d), and (e).

With regard to the appointing authority's concerns regarding Mr. Gutwirth's appearances at Board of Education public meetings, a review of Mr. Gutwirth's affidavit indicates that on April 22, 2014, May 20, 2014 and June 16, 2014, he spent four hours, three hours and two hours, respectively, for "attendance at meeting of the Board of Education to make public comment opposing the termination" of the appellant. The Commission agrees that Mr. Gutwirth's mere appearance at the Board of Education open public meetings is insufficient to warrant the payment of counsel fees for those nine hours. However, the Commission notes that if Mr. Gutwirth had specified the actual amount of time he spoke at the Board of Education regarding his client's removal, he would be entitled to the reimbursement for that time as he would have been actively advocating for his client. Moreover, the Commission does not agree that Mr. Gutwirth is not entitled to reimbursement for his preparation of an April 15, 2014 letter to the Board of Education objecting to the appellant's removal. As noted above, even though appealing to the Board of Education is not required under Civil Service regulations or law, Mr. Gutwirth was presenting arguments to the appointing authority regarding the appellant's removal, and thus would be entitled to that amount.

Generally, an appellant is entitled to counsel fees regarding his enforcement request *for his counsel fee award* since New Jersey courts have recognized that attorneys should be reimbursed for the work performed in support of any fee application. *See H.I.P. (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc.*, 291 *N.J. Super.* 144, 163 (Law Div. 1996) [quoting *Robb v. Ridgewood Board of Education*, 269 *N.J. Super.* 394, 411 (Ch. Div. 1993)]. However, the appellant is not entitled to counsel fess for his enforcement request for his back pay award where the appointing authority did not unreasonably delay implementing the Commission's order and there was no evidence of any improper motivation on the part of the appointing authority. *See In the Matter of William Carroll* (MSB, decided November 8, 2001). There is no evidence in the record that the appointing authority unreasonably delayed implementing the Commission's order, nor has the appellant presented any evidence of any improper motivation of the part of the appointing authority. In this regard, although the appellant argues that the appointing authority had sufficient time to remit payment, the Commission notes that there were legitimate disputes as to the amount of the back pay and counsel fees awards. In the supplemental affidavit, Mr. Gutwirth indicates that he spent two hours on a notice of motion to assess counsel fees and supporting certification of service and an additional four hours on a reply memorandum to opposition of counsel fee application, for a total of six hours. The remaining 4.4 hours were spent on issues concerning the appellant's pursuit of his mitigated back pay award and are not recoverable in this matter. Therefore, Mr. Gutwirth is entitled to 143.1 hours (*i.e.*, 146.1 hours minus nine hours for his appearances at the Board of Education plus six hours in pursuit of his counsel fees) at the hourly rate of $200 for a total of **$28,620**.

Costs

With regard to costs associated with the representation of the appellant, it is noted that the costs associated with printing/copying, postage and delivery charges, are classified as normal office overhead, and are, therefore, non-reimbursable. *See N.J.A.C.* 4A:2-2.12(g). *See also, In the Matter of William Brennan* (MSB, decided January 29, 2002); and *In the Matter of Monica Malone* (MSB, decided August 21, 2003). Although normally costs for copying are not included as they are considered normal office overhead, the fee listed for copying the appellant's medical documents ($27.11) would be reimbursable as it was remitted to the physician's office. The appeal processing fee of $20 is also non-reimbursable. *See N.J.A.C.* 4A:2-1.8(f). However, the remaining expenses for transcripts ($442.85), subpoena service ($310.85), subpoena fees ($36) and fees to Dr. Kulkarni ($2,250) are reimbursable pursuant to *N.J.A.C.* 4A:2-2.12(g). *See In the Matter of Tracey Andino* (MSB, decided August 21, 2003); *In the Matter of Gail Murray* (MSB, decided June 25, 2003). Thus Mr. Gutwirth is entitled to costs in the amount of **$3,030.81**.

ORDER

Therefore, it is ordered that the appointing authority pay Matthew Vilardo the gross amount of $12,027.95 for back pay, health benefits and fingerprinting within 30 days of receipt of this decision. It is further ordered that the appointing authority pay counsel fees in the amount of $28,620 and costs in the amount of $3,030.81 within 30 days of receipt of this decision.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 16TH DAY OF SEPTEMBER, 2015

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

c: Matthew Vilardi
Ronald Gutwirth, Esq.
Rita R. Salley
Jennifer Roselle, Esq.
Kenneth Connolly
Joseph Gambino

STATE OF NEW JERSEY

In the Matter of Matthew Vilardo
Jersey City Public School District

CSC DKT. NO. 2014-2617
OAL DKT. NO. CSV 06561-14

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 6, 2015 BW

The appeal of Matthew Vilardo, Laborer 1, Jersey City Public School District, removal effective April 25, 2014, on charges, was heard by Administrative Law Judge Kelly J. Kirk, who rendered his initial decision on December 3, 2014 reversing the removal. Exceptions and cross exceptions were sent.

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 February 4, 2015, 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*, 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 Matthew Vilardo. 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
FEBRUARY 4 2015

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 06561-14
AGENCY DKT. NO. 2014-2617

IN THE MATTER OF MATTHEW VILARDO,
JERSEY CITY PUBLIC SCHOOLS.

Ronald M. Gutwirth, Esq., for appellant, Matthew Vilardo

Jennifer Roselle, Esq., for respondent, Jersey City Public Schools[1] (Genova Burns Giantomasi Webster, attorneys)

Record Closed: October 14, 2014 Decided: December 3, 2014

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE

Jersey City Public Schools terminated laborer Matthew Vilardo pursuant N.J.A.C. 4A:2-2.3(a)(6) for conduct unbecoming a public employee after video surveillance showed him lifting and carrying items while on workers' compensation.

[1] Jersey City Board of Education.

PROCEDURAL HISTORY

On or about January 9, 2013, and February 28, 2014, Jersey City Public Schools served Matthew Vilardo with a Preliminary Notice of Disciplinary Action.[2] (J-1.) A departmental hearing was held on March 19, 2014, and the charge of conduct unbecoming a public employee was sustained. (J-2.) On April 11, 2014, Jersey City Public Schools served Vilardo with a Final Notice of Disciplinary Action, removing him effective April 25, 2014. (J-2.) On April 24, 2014, Jersey City Public Schools served Vilardo with an amended Final Notice of Disciplinary Action, removing him effective June 20, 2014. (J-3.)

Vilardo appealed and the Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 to the Office of Administrative Law (OAL), where it was filed on May 29, 2014. Appellant filed a Motion for Summary Decision on July 28, 2014. Opposition was filed by respondent on August 18, 2014, and a reply was filed by appellant on August 27, 2014. Oral argument was heard on September 10, 2014. An Order denying summary decision was issued on September 24, 2014. The hearing was held on September 26, 2014, and September 30, 2014, and the record remained open for two weeks for post-hearing submissions. The record closed on October 14, 2014.

EVIDENCE AND FINDINGS OF FACT

The parties stipulated to the Preliminary Notices of Disciplinary Action and Final Notices of Disciplinary Action, the DVD-R video surveillance of Vilardo, dated November 14, 2012, and the reports of Investigations Unltd., dated September 26, 2012, and November 14, 2012. (J-1 through J-6.) Respondent presented only the testimony of John Chester. Chester has been employed by Jersey City Public Schools for almost forty years, and his current job title is Executive Assistant, Business Division. The Business Administrator is the custodian of records, and Chester testified that the

[2] The Preliminary Notices of Disciplinary Action are dated January 9, 2013, and February 28, 2014, though the Final Notice of Disciplinary Action reflects that he was served with a Preliminary Notice of Disciplinary Action on January 30, 2013. (J-1.)

records maintained by the Business Administrator include copies of the hearing officer's report in disciplinary matters.

Appellant presented the testimony of Roberto Guzman, Matthew Vilardo, David Severini, Alex Rodriguez, Joseph Cusimano, Carl Gargiulo, Vijaykumar Kulkarni, M.D., and Susan Schneider.

Background

The following material facts are largely undisputed. Accordingly, I **FIND** them to be the **FACTS** of this case:

Matthew Vilardo has been employed by Jersey City Public Schools as a laborer since September 8, 1995. On September 5, 2012, Vilardo went to Concentra and reported that on September 4, 2012, he injured his right shoulder at work. Vilardo was treated by Dr. Parmar, who ordered an MRI and referred him for physical therapy. Vilardo remained out of work through September 17, 2012. Vilardo returned to work on September 18, 2012, but continued to complain about his right shoulder. Vilardo began physical therapy at Strulowitz & Gargiulo on September 19, 2012.

On the morning of September 28, 2012, Vilardo attended a Board seminar, at which Carl Gargiulo from Gargiulo & Strulowitz gave a lecture. Gargiulo is employed as a licensed physical therapist at Strulowitz & Gargiulo in Jersey City, New Jersey. Strulowitz & Gargiulo has treated injured employees for the Jersey City Board of Education (Board) for more than twenty-five years.

On the afternoon of September 28, 2012, Vilardo began treating with Dr. Oppenheim. Dr. Oppenheim excused Vilardo from work, and advised him to continue physical therapy. Vilardo attended physical therapy at Strulowitz & Gargiulo and began receiving workers' compensation.

On November 14, 2012, Investigations Unltd conducted video surveillance of Vilardo. The video reflects that Vilardo arrived at physical therapy at approximately 9:50

a.m. and left physical therapy at approximately 11:22 a.m. (J-4.) The video also reflects that Vilardo later arrived at an office building and began lifting and carrying items at approximately 11:44 a.m. The video further reflects that three trips were made between an office building and storage unit, concluding at approximately 1:26 p.m.

Vilardo was out of work from September 5, 2012, through September 17, 2012, and from September 28, 2012, through November 18, 2012. On November 19, 2012, Vilardo returned to full-duty work without restrictions.

Testimony

Roberto Guzman

Roberto Guzman, a friend of Vilardo, asked Vilardo to help him move household and personal items from his office in Jersey City, where he works as IT support, to a storage unit in Jersey City. Guzman had packed the boxes and containers himself. Some were almost empty, while others weighed approximately five to twenty pounds. Guzman does not lift weights and is unable to carry heavy things, but he was able to lift two or three of the boxes at a time. Guzman had not packed any items that he was unable to lift himself. The contents included items such as empty CD cases, clothes hangers, plastic dishes, plastic cups, phones, clothes, office supplies, and a foam bed.

Sometime after November 14, 2012, Guzman returned to the storage unit with Vilardo to weigh approximately ten or twelve of the boxes, which were in the same condition as on November 14, 2012.

Matthew Vilardo

Vilardo works an eight-hour day, six hours of which are manual labor. The other two hours consist of transporting supplies and materials from location to location as a truck driver. Vilardo's job as a laborer requires him to manually remove debris, break down walls, rip down ceilings, deliver and remove furniture, from desks and chairs to industrial stoves and refrigerators, and pick-up and deliver debris and equipment.

Vilardo handles sheet-rock deliveries and food commodity deliveries consisting of truckloads of food and canned goods. The boxes of canned goods reflect the weight, which is thirty to forty pounds per box. During the winter, Vilardo delivers rock salt to schools. One bag of rock salt weighs fifty pounds, and one bag of calcium chloride weighs 100 pounds. He can lift 100 pounds without assistance. However, approximately 60 pounds is the average he lifts before seeking assistance. Assistance is necessary for moving items like sheet rock, air conditioners, and industrial refrigerators, stoves, and mixers, as a stove may weigh 400-600 pounds and a mixer may weigh 180-200 pounds. Big material may require 2-4 men, with each man taking a corner, which is awkward and results in uneven weight distribution and lopsided carrying.

Laborers use hand trucks and flat dollies. The job requires that laborers go up and down stairs, and on and off trucks without tailgates, including climbing or jumping up and down the back of the truck. Jersey City Public Schools has forty locations, and probably fewer than twenty elevators, which sometimes do not function, and sometimes the materials do not fit in an elevator. Carrying boxes on a shoulder is actually easier than putting five boxes on a hand truck and going up a steep flight of steps, which may be broken or chipped.

On September 4, 2012, the laborers were under pressure to get their jobs done because schools get moved from location to location during the summer. They were moving a lot of furniture, which required loading and unloading the truck, getting on and off the truck, and going up and down stairs. Vilardo was at Infinity School going up and down stairs when he started feeling pain in his right shoulder and it finally gave out on him. He felt a stabbing burn under his armpit and his fingertips became tingly. Vilardo immediately complained of the pain, but he continued to work until 8:30 p.m., because they were short-staffed and his foreman advised that the job needed to be completed that day.

The following morning, Vilardo returned to work. He drove the truck to the Board building and loaded in excess of sixty boxes of calendars. His right arm hurt, and he believed it was injured because of the burning and pain in his fingertips. Vilardo went to

Concentra, where he was evaluated by Dr. Parmar. Dr. Parmar gave Vilardo paperwork to get an MRI and paperwork to provide to the Board to excuse him from work pending the MRI results. The MRI was done on September 10, 2012. Vilardo was out of work from September 5, 2012, through September 17, 2012. When he was first injured, the paperwork from Dr. Parmar said no pushing or pulling over 30 pounds. However, he was sent back to work on September 18, 2012, so he understood that restriction to have ended upon his return. When he returned to work, he did his job, but continued to complain about pain, burning, and numbness. He experienced symptoms he never had before, and believed something was wrong. He got an appointment with the Board's specialist, Dr. Oppenheim. His first visit with Dr. Oppenheim was scheduled for the afternoon of September 28, 2012. Dr. Oppenheim advised him to continue physical therapy. He saw no other doctors, and at no time was he advised that he was not permitted to do certain things.

On the morning of September 28, 2012, he attended a Board seminar, at which Carl Gargiulo from Gargiulo & Strulowitz gave a lecture. He had been attending physical therapy at Strulowitz & Gargiulo for approximately one week prior to the seminar. Gargiulo advised that when injured on the job, you should not go home and feel sorry for yourself, or stay in bed on medication. Gargiulo recommended going to the gym and staying active, which is a form of therapy for the mind, body, and spirit. Home-care instructions were to always stretch, use ice and heat, go for walks, or go to the gym.

While at physical therapy, Vilardo received electrical stimulation, ice, heat, and ultrasound on his shoulder. His routine involved activities like stretching; a digital machine that simulates swinging a hammer, with tension; pulling machine; hand-bike machine; carrying; lifting; and up and down stairs. When in physical therapy, the therapist would set him up, tell him what to do, show him what to do initially, then he would start to do what was instructed and the therapist would move on to the next person. Vilardo did not receive assistance, and once the five minutes started, he was basically alone. The therapist monitored the beginning to ensure it was done correct, and the therapist would return for the next set up, tell him what to do, probably watch him do it once and again move on to the next person.

The work-hardening therapy was more difficult than regular physical therapy. He began work-hardening on September 19, 2012, three days per week at first and then five days per week in the last two or three weeks, beginning approximately November 5, 2012. Work-hardening involved lifting a crate weighing 10-15-20 pounds from waist high to overhead onto a shelf using his tiptoes in five minute intervals, during which time it was probably 20 or more times waist-over-head non-stop; carrying 20-25 pounds while walking around for five-minute intervals non-stop; carrying a 10-15 pounds "big foam thing" while walking up and down stairs from the first floor to the second floor, which was 20-30 steps in five-minute intervals non-stop. The various activities were in 5-minute intervals for at least a half hour non-stop. Vilardo knew how much weight he was lifting, and he was advised of his progress.

Initially, Vilardo was unable to extend his arm without more severe pain, but he was able to start lifting it and moving it by himself after week of physical therapy. Vilardo characterized physical therapy as intense exercise. His sessions were 1.5 to 2 hours. He was doing very well in physical therapy and complied with all requirements. However, he never stopped complaining about his shoulder/underarm and bicep. His target date to return to work was November 19, 2012. His last appointment with Dr. Oppenheim was on November 16, 2012, and he was cleared to return to work on November 19, 2012. The burning sensation and tingling in fingertips was not going away, but he was feeling better and had more movement, extension, and rotation in his arm.

On November 14, 2012, Guzman asked Vilardo to help him move items from his office to a storage unit. Vilardo received no compensation from Guzman. Vilardo was leaving physical therapy, not far away, and he already knew that he was returning to work on Monday because his maximum medical improvement was up on Friday, November 16, 2012. Despite the pain, he was feeling good after physical therapy, because he had gotten ice, heat, and electrical stimulation, and was on medication.

Vilardo characterized what he was lifting and carrying for Guzman as "junk." He did not look in the boxes, but some items he saw were paper cups, clothes hangers,

and a coffee pot. He felt the weight of the boxes and they were easy enough for him or Guzman to lift and carry. His estimate was that the boxes weighed no more than 20 pounds. Muscle has memory and he is aware of what weight his body is able to handle because he has been a laborer all his life. Physical therapy was much more intense than the moving.

After receiving a Preliminary Notice of Disciplinary Action, Vilardo returned to the storage unit with Guzman to weigh the boxes. The air conditioner box did not contain an air conditioner. The items appeared in the same condition as on November 14, 2012. Vilardo purchased a household scale because he wanted to prove that the boxes were not heavy. He weighed what looked heaviest and took photographs. He tried to position the boxes on the scale so that the photographs would reflect the weight. He wrote down some of the weights (17.4, 14.8, 11.9, 15.9) on the photographs in P-7, but was unable to weigh everything in storage. He also measured the loading dock, which was 42 inches high.

Vilardo found out about the video months after it was taken. He initially testified that it was one to three months later, but then testified that his union had trouble obtaining the video and he did not see the video until he retained an attorney, so it may have been six months later.

Vilardo has had no prior discipline. When he returned to work on November 19, 2012, it was one hundred percent full, active duty. There is no such thing as light duty, and he would not be allowed to do anything less than eight hours of work or less than his normal daily job duties. The week he returned he had to move an industrial two-door refrigerator and approximately 142 boxes of commodities. From November 19, 2012 until the end of April 2014, when he took disability leave for an intestinal problem, he never refused any assignment and did not take days off because of his shoulder. He did whatever was required despite the pain. He has a good absentee record, and does not take days off unless they are "use or lose" days. He had in excess of 200 sick days accumulated, maybe 240.

Vilardo continually pressed for additional treatment from the first day he was injured. He started to question himself, because he had burning in his arm and tingling in his fingers, but had been advised that the MRI showed nothing and his request to see another doctor was denied. He went to a back specialist to see if his back was the cause of the pain. After the back specialist, he went to a shoulder specialist. The shoulder specialist sent him for an MRI arthrogram, and he underwent shoulder surgery on August 6, 2014. (The surgery was delayed as a result of his intestinal issue.) The shoulder surgery was paid for and he remained on temporary disability. At the time of the hearing, he was in physical therapy three days per week, paid for by workers' compensation, and he was receiving workers' compensation benefits. After surgery, his surgeon instructed him not to do anything while the shoulder sling was on. That was the first time he was ever told by workers' compensation not to do anything. No one from Jersey City Public Schools told him what he was or was not allowed to do.

Vilardo had issues with his shoulder and back in 2011, but his last medical treatment had been probably more than a year prior to September 4, 2012, and he had been back to work every day.

David Severini

David Severini has been employed as a laborer by Jersey City Public Schools for approximately twenty-one years. Severini was Vilardo's co-worker, and is now his supervisor. Severini attended the seminar on September 28, 2012. During the seminar, Gargiulo advised that while attending physical therapy, they do not want you sitting around like a couch potato.

Severini had a workers' compensation case several years ago. He was out of work for approximately ten months, and never received any written instruction from the Board regarding level of activity or regarding what he was allowed to do while on disability.

Alex Rodriguez

Alex Rodriguez has been employed as a laborer by Jersey City Public Schools for thirteen years. He attended the seminar on September 28, 2012. Although Gargiulo did not say anything specific about level of activity, he encouraged all workers to be as physical and active as possible while off the job, including going to the gym. Gargiulo mentioned that workers should not stay home and not do anything.

Rodriguez has had two workers' compensation cases since 2010, for which he was out of work. He never received any oral instruction from the Board about no activity, and no one from the Board showed him any written rule about no activity. Gargiulo encouraged the workers to go to the gym if able, and to do physical things if able, in order to get back to work sooner, but to be careful. Workers should be as physical and active as possible without causing injury.

Joseph Cusimano, Jr.

Joseph Cusimano has been employed as a plasterer by Jersey City Public Schools for approximately eleven years. Cusimano attended the seminar on September 28, 2012. Gargiulo said that if you are going for physical therapy, on your own time you should keep moving and really should not just be hanging around, or it would counteract physical therapy. No one from the Board showed him any rule that workers cannot engage in physical activity if injured.

Carl Gargiulo

Carl Gargiulo gave a lecture at the Board's seminar on September 28, 2012. His recollection, without having reviewed the lecture, was that it was based upon preventative concepts, not treatment. It was a general purpose lecture with no specific instruction, the gist of which was low-back-related, not extremities-related, such as safe lifting for low back, remaining active with low-back injury, maintaining muscle strength, and preventing low-back injuries.

Gargiulo did not recall exactly what he said at the lecture regarding physical activity. Physical activity is desirable following injury if medically appropriate. The general gist was that guided physical activity is desirable. He made no recommendations during the lecture, and he did not recall addressing going to the gym. Gargiulo did not think he addressed injured workers at the seminar. However, as a physical therapist, he testified that a patient's activity level is essential to recovery if within the guidelines of a medical professional.

Gargiulo did not issue a statement that people with pending workers' compensation claims should not engage in activity. Activity that is safe can be beneficial when returning from injury. Guided means it is done with some guidance and supervision so as not to reinjure the area being rehabilitated. He provides guided advice because patients sometimes need direction as to how to resume activities and stay active.

Susan Schneider

Susan Schneider has a doctorate in physical therapy and is a licensed physical therapist. She is employed as a senior physical therapist by Strulowitz & Gargiulo, where she has worked for twenty-seven years.

Vilardo was Schneider's patient approximately two years ago for a shoulder injury. Schneider evaluated his shoulder and began treatment, which consisted of a series of modalities, including moist heat, electrical stimulation, ultrasound, manual techniques for range of motion, and an exercise program initially for range of motion. Vilardo treated for two months, a total of approximately 24-25 treatments. The last week and a half of Vilardo's treatment was work-hardening, which is the last phase of treatment used in a rehabilitation program to progress a patient from strengthening range of motion to more work-simulation activities to try to prepare for work duties. It consists of taking baseline data and discussing job duties with the patient and what the patient feels his or her limitations are in returning to work. Work-hardening attempts to simulate activities that would allow the patient to succeed and to tell the doctor if it looks like the patient has the capability of returning to work.

Vilardo began work-hardening in the beginning of November 2012. The major limitation with Vilardo's shoulder was lifting things overhead and lifting and carrying heavy objects. After his baseline was established, Schneider set up a lifting and carrying program and then some overhead tool manipulation on a special computer machine. Vilardo started with a ten-pound weight in a crate, and he would walk 200-250 feet carrying the crate with a ten-pound weight in it. Additionally, because Vilardo had to go up and down stairs and ladders at work, Schneider had Vilardo carry on his shoulder a bolster that weighed approximately ten pounds up and down some stairs. She also put a weight in a crate and had Vilardo lift it from approximately waist-level to a shelf above his head. Over the week and a half, he progressed from 10 pounds to a carry of 25 pounds and a lift of 20 pounds. In the beginning, Vilardo did the program with difficulty, but improved as time went on.

Vilardo's physical therapy sessions were approximately 1.5 to 2 hours. Work-hardening was just a portion of the sessions, as he would also do strengthening exercises. Work-hardening was done repetitively over 10-15 minutes for each activity: overhead, carry, lifting, and bolster up and down approximately 15 wide, standard steps. Vilardo would climb the steps probably 10-12 times in a half hour period. Vilardo was cooperative with physical therapy.

Every treatment worked on active range of motion. At the time Vilardo was discharged, his shoulder flexion over-the-shoulder and overhead was good, at probably 90 percent of normal. His flexion out to the side and overhead was more difficult, at probably 70 percent of normal. Based on his progress, Schneider thought Vilardo would benefit from additional physical therapy. She thought that work-hardening should continue, and that Vilardo did not have the capability of doing his job as he had described it to her. She requested additional physical therapy, but the request was denied.

Vijaykumar Kulkarni, M.D.

Dr. Vijaykumar Kulkarni, a board certified general surgeon, examined Vilardo on September 10, 2014. He has been licensed in New Jersey since 1976. Kulkarni has been employed by Sall Myers since 2002. In 2004, he was certified as an independent medical examiner in orthopedics. He performs an average of fifty independent medical examinations per week for work-related injuries and slip and falls. His practice is limited to orthopedics. Kulkarni's examination of Vilardo's shoulder was limited, because Vilardo had a right shoulder arthroscopy in August 2014, and he was still in physical therapy and under the care of his physician, and his right shoulder was in a sling. Dr. Kulkarni reviewed Vilardo's medical records, including records from Concentra, Dr. Oppenheim, and Strulowitz & Gargiulo. Dr. Kulkarni also reviewed both MRIs.

Vilardo was injured on September 4, 2012. On September 5, 2012, he was treated at Concentra on September 5, 2012, for right shoulder pain. He was treated with an x-ray, pain medication, and physical therapy. He was also sent for an MRI of his right shoulder. The MRI showed a partial tear. He was later treated by Dr. Oppenheim, who treated him with a cortisone injection and physical therapy. Dr. Kulkarni reviewed the physical therapy notes from Strulowitz & Gargiulo. The notes reflect that Vilardo received physical therapy, including moist heat and exercise, increasing his range of motion, and carrying more weight. He initially worked with 15-20 pounds then went to 20-25, though his goal was to reach up to 50-60 pounds because he had to lift and move heavy objects at work. The final note from Strulowitz & Gargiulo reflects that at his last physical therapy session, Vilardo was able to raise his right shoulder almost up to 165 degrees. Kulkarni explained that normal is 180 degrees, so there was still a limitation of 15 degrees, but once there is damage to the joint it is not expected to be normal or without some limitation. Vilardo was also able to lift 15-20 pounds above his head. A malingerer would try to restrict movement, but the records show that Vilardo was improving with physical therapy.

Ultimately, Vilardo had an MRI arthrogram of his right shoulder, which showed a labral tear and a rotator cuff partial tear, for which he underwent surgery. The medical records also reflected that Vilardo advised the doctor that he had injured his right

shoulder, neck, and back in February 2011, and that he went to Concentra and had physical therapy and conservative treatment. One of the notes from Dr. Parmar, the treating doctor, was that he had a right shoulder sprain and no MRI was done.

Dr. Kulkarni reviewed the November 14, 2012, video. He did not review Vilardo's job description, but Vilardo explained his job duties. Kulkarni noticed that Vilardo was carrying small packages with both hands. There were a few places where he was carrying orange bags and green bags, another where he was putting something on top of the car. At the time the video was taken, his physical therapy records reflect that he could raise his hand up to 165 degrees, which was "pretty good," and Kulkarni saw him only once raising his right upper extremity about 90 degrees. His impression from the video was that the items were not big or heavy, unlike the items he encounters at work. Vilardo advised Kulkarni that they weighed anywhere from 7-12-15 pounds, and that his job required him to lift objects 60-100 pounds and with the help of co-workers, move items like a piano from place to place.

Kulkarni did not think Vilardo misrepresented his injuries to the Board. During the two-month period he was out, he was not lifting anything heavy like he would lift at work. Further, the video does not show whether he was in pain or not, or whether he took pain medication before or after. Vilardo returned to work only days later, and once back to work, he continued to do the same work that he had done prior, although he continued to complain of pain and later had an MRI arthrogram, and ultimately surgery.

Vilardo complied with and followed his physical therapy program. The physical therapy notes reflect that he was asked to lift 20-25 pounds, which is much heavier than the items in the video, which Vilardo said weighed about 7-15 pounds. The lifting on November 14, 2012, did not put him at risk of harm. Most of the time, except the one time he lifted his right shoulder 90 degrees, Vilardo was using both hands to carry the items, and they were at the front of his body and below shoulder level. Carrying in that manner typically uses hand and forearm muscles. His shoulder was getting rest except for physical therapy, so he was able to carry those items. He was not carrying above his head. Vilardo said that he has to lift 60-100 pounds at work, which is much heavier, and that he has to raise his arm above his head, which is different from what is on the

video. There is a difference in carrying at waist level and carrying overhead. The video is not proof that Vilardo could do his job. It was only 1.5 hours, which is different from 5-6 hours. Additionally, there is a difference in strength for carrying 7-22 pounds versus 60 pounds, especially if it must be lifted above shoulder level. Carrying with both hands a weight of 7-22 pounds is approximately 5-10 pounds per hand, which is nothing. Once there is damage and one starts carrying and lifting, it progressively starts causing pain.

Factual Discussion

Review of the November 14, 2012, video surveillance reveals that Vilardo helped Guzman move items from Guzman's office to storage, beginning at approximately 11:44 a.m. and ending at approximately 1:26 p.m. During this period of approximately 1.75 hours, three trips were made between the office and the storage unit.

Specifically, Vilardo arrived at the office at approximately 11:38 a.m., and was first observed lifting and carrying items and loading the vehicle from approximately 11:44 a.m. until approximately 11:46 a.m. From approximately 11:56 a.m. until 12:07 a.m. the items were unloaded from the vehicle at the storage unit. From approximately 12:14 p.m. until approximately 12:19 p.m., items were loaded into the vehicle at the office. From approximately 12:28 p.m. until approximately 12:36 p.m. the items were unloaded from the vehicle at the storage unit. From approximately 12:45 p.m. until approximately 1:01 p.m., items were loaded into the vehicle at the office. Finally, from approximately 1:13 p.m. until 1:26 p.m. the items were unloaded from the vehicle at the storage unit. From the video, it appeared that included in the items moved were typical file-sized moving boxes, green bags, black duffel or laptop-type bags that appeared to have nothing in them, reusable shopping bags, canvas bags, a foam mattress, several plastic storage totes, some of which were clear, large sacks, plastic storage containers with two or three drawers, and miscellaneous boxes. Short of the final trip, where a storage container and some large poster board was tied to the roof, the items appeared to easily fit in the Jeep. And a drawer slid open on the storage container on the roof, revealing that it was empty. Guzman and Vilardo lifted and carried various items, and none appeared particularly cumbersome or heavy, given the way they were slid into or

onto the Jeep and then the loading dock. There were two instances where Vilardo carried items on his right shoulder, and then transferred the items to the roof of the Jeep.

Dr. Kulkarni reviewed the video and Vilardo's medical records and opined that Vilardo neither exaggerated his injuries nor misrepresented his abilities, and respondent presented no witnesses or evidence to suggest otherwise. Kulkarni noted that Vilardo had used both his hands and carried the items in front of him, below shoulder level, which typically uses hands and forearms. The video showed him carrying on his shoulder or overhead twice, and both times the item did not appear particularly heavy or cumbersome. Further, Vilardo testified extensively as to the demanding physical requirements of his job, testified that he was never advised of any restrictions on his activities by the Board or his doctor, and testified that the items he was lifting and carrying for Guzman were in no way similar to the items he was required to lift and carry at work. Again, respondent presented no witnesses or evidence to refute Vilardo's testimony. Additionally, Vilardo and Schneider both testified that Vilardo improved with physical therapy, and Kulkarni also testified that based upon his review of Vilardo's medical records, Vilardo improved with physical therapy.

With regard to employees on workers' compensation being encouraged to remain physically active, including going to the gym if they are able, I credit the testimony of Vilardo, Severini, Rodruiguez, and Cusimano, rather than that of Gargiulo. When Gargiulo was asked if he had recommended that people who were injured should stay physically active, he hesitated and stated that his answer would be that he did not recall exactly what he said that day. Gargiulo also testified that he did not think he addressed injured workers at the seminar. Gargiulo's testimony at times appeared calculated to include phrases like "medically appropriate" and "guided physical activity" and "within guidelines of a medical professional." Conversely, the testimony of respondent's employees was consistent and appeared forthcoming and not contrived.

Vilardo testified that he was unaware of the video surveillance at the time he returned to work on November 19, 2012. Respondent presented no witnesses or evidence to refute Vilardo's testimony, and it is noted that the Investigations Unltd. letter

with respect to the November 14, 2012, surveillance is dated November 18, 2012, the day prior to Vilardo's return. Accordingly, it appears unlikely that he could have been aware of the video surveillance. Vilardo also testified that November 19, 2012, had been his anticipated date of return, and respondent presented no witnesses or evidence to refute Vilardo's testimony.

Having had an opportunity to consider the evidence and to observe the witnesses and make credibility determinations based on the witnesses' testimony, I **FIND** the following additional **FACTS** in this case:

Vilardo injured his shoulder at work on September 4, 2012, and was on approved workers' compensation leave on November 14, 2012. He was not advised of any restrictions or no-activity requirements by his employer or his physician.

During the September 28, 2012 seminar, attended by Vilardo, Severini, Rodriguez, and Cusimano, employees were encouraged to remain active while on workers' compensation. Vilardo's final physical therapy session was on November 14, 2012. On November 14, 2014, Vilardo lifted and carried items from an office to a storage unit over a period of approximately 1.75 hours, which includes driving time to and from the storage unit three times.

Vilardo attended physical therapy for approximately two months, during which time his shoulder improved. His physical therapy included work-hardening, and at the time he was discharged from physical therapy he had improved from a carry of 10 pounds to a carry of 25 pounds, and from a lift of 10 pounds to a lift of 20 pounds. His shoulder flexion over-the-shoulder and overhead was at approximately 90 percent of normal and his flexion out to the side and overhead was at approximately 70 percent of normal. He was able to raise his right shoulder approximately 165 degrees. 180 degrees is normal and some limitation is expected after an injury.

Vilardo's final appointment with Dr. Oppenheim was on November 16, 2012, two days after the video surveillance was conducted, and Vilardo returned to work on November 19, 2012, five days after the video surveillance was conducted, which had

been his anticipated date of return. Vilardo was unaware of the November 14, 2012, video surveillance at the time he returned to work on November 19, 2012.

Vilardo's job requires 5-6 hours of manual labor daily, which includes, but is not limited to loading and unloading truckloads of materials and commodities; lifting and carrying up to 100 pounds without assistance; and lifting and carrying hundreds of pounds with assistance. He is also required to lift and carry up and down stairs and on and off trucks.

Jersey City Public Schools does not have light duty available for laborers. Vilardo returned to work on November 19, 2012, without restrictions. Vilardo has no prior disciplinary history.

LEGAL ANALYSIS AND CONCLUSIONS

N.J.S.A. 11A:1-1 through 12-6, the "Civil Service Act," established the Civil Service Commission in the Department of Labor and Workforce Development in the Executive Branch of the New Jersey State government. N.J.S.A. 11A:2-1. The Commission establishes the general causes that constitute grounds for disciplinary action, and the kinds of disciplinary action that may be taken by appointing authorities against permanent career service employees. N.J.S.A. 11A:2-20. N.J.S.A. 11A:2-6 vests the Commission with the power, after a hearing, to render the final administrative decision on appeals concerning removal, suspension or fine, disciplinary demotion, and termination at the end of the working test period, of permanent career service employees.

N.J.A.C. 4A:2-2.2(a) provides that major discipline includes removal, disciplinary demotion, and suspension or fine for more than five working days at any one time. An employee may be subject to discipline for reasons enumerated in N.J.A.C. 4A:2-2.3(a), including "conduct unbecoming a public employee." N.J.A.C. 4A:2-2.3(a)(6). In appeals concerning such major disciplinary actions, the burden of proof is on the appointing authority to establish the truth of the charges by a preponderance of the believable

evidence. N.J.A.C. 4A:2-1.4; N.J.S.A. 11A:2-21; Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

Vilardo is charged with conduct unbecoming a public employee pursuant to N.J.A.C. 4A:2-2.3(a)(6), and the burden of proof is on Jersey City Public Schools to prove, by a preponderance of the credible evidence, that Vilardo's conduct was unbecoming a public employee. N.J.A.C. 4A:2-2.3(a)(6) does not define conduct unbecoming. However, the Appellate Division has held that conduct unbecoming a public employee is "any conduct . . . which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). In Emmons, which involved a police officer charged with conduct unbecoming, the Apellate Division also held that conduct unbecoming is "any conduct which adversely affects the morale or efficiency of the bureau." Ibid. What constitutes conduct unbecoming a public employee is primarily a question of law. Karins v. Atl. City, 152 N.J. 532, 553 (1998).

Respondent concedes that the issue presented is limited to whether Vilardo engaged in conduct unbecoming a public employee while on approved workers' compensation leave, not whether he was legitimately injured or whether he was entitled to the leave, as there is no claim that Vilardo defrauded the Board. Respondent concedes that petitioner was on approved workers' compensation leave because he was physically unable to perform his job duties. Respondent argued that Vilardo's job duties include lifting and hauling material, and that he engaged in conduct nearly identical to that which he was excused from while on leave for purposes of recovery. Respondent further argued that Vilardo's conduct can only be classified as conduct unbecoming, and that the determination does not rest on the quantity or weight of the items, but rather simply on whether or not his conduct tends to destroy respect for government employees and the confidence in public services.

Conversely, Vilardo argued that the Board cannot disregard the workers' compensation statutes, which define when a person is entitled to temporary disability. Vilardo argued that a person is only entitled to temporary disability if he is unable to perform his full-time job on a full-time basis, and that the mere ability to perform the job

even two or three times per week is insufficient to disqualify a person from workers' compensation benefits. Vilardo further argued that his job involves enormous amounts of heavy lifting, which is in no way comparable the lifting and carrying on the video. Likewise, he argued that physical therapy was far more strenuous than the activity on the video. Vilardo also argued that he was never advised of any no-activity restriction by respondent and was provided with no written record, rule, or regulation stating that a person is not permitted to engage in physical activity while on workers' compensation. To the contrary, Vilardo argued that per the Board's seminar, employees on workers' compensation are encouraged to remain active.

The appointing authority presented no witnesses to rebut the testimony of any of the appellant's witnesses, and relied upon the video recording. Having had opportunity to review the video, I concur with Dr. Kulkarni that none of the items lifted and carried by Vilardo appears particularly heavy or cumbersome. Vilardo is a laborer whose job requires strenuous physical activity and exertion. He is expected to carry up to 100 pounds, by himself, up and down flights of stairs, and to assist in moving commercial items weighing hundreds of pounds, for most of every day. There was no dispute that the respondent does not have light duty available for a laborer. Accordingly, unless and until Vilardo was sufficiently rehabilitated that he could return to his job with no restrictions, he would not be able to perform his job duties.

If respondent had wanted Vilardo to avoid physical activity in public, it failed to convey that to Vilardo. There was no testimony or evidence in the record that Vilardo was advised by respondent, a doctor, or a physical therapist, that he should avoid activity other than physical therapy while on workers' compensation, and in fact, several witnesses credibly testified that employees on disability were encouraged to be as active as possible in order to facilitate rehabilitation. Certainly, the argument can be made that Vilardo knew or should have known that he should not be utilizing his shoulder as he would have at work. However, his conduct in the video reflects that he was lifting and carrying items that in no way resembled the size or weight that was required at work, and for less than 1.5 hours, rather than the 5-6 required at work. Further, there was unrefuted testimony that Vilardo returned to work, without restrictions, five days after the video was taken; unrefuted testimony that November 19,

2012, had been his anticipated return date; and unrefuted testimony that Vilardo was unaware of the November 14, 2012, video or still photographs when he returned to work. Accordingly, there was no evidence to suggest that he had himself returned to work as a result of the video surveillance.

Collecting workers' compensation disability benefits while able to perform one's job duties would undoubtedly destroy the public's respect for and confidence in public employees, and adversely affect the morale and efficiency of one's department. However, the appointing authority has not established that Vilardo engaged in such conduct. The video shows Vilardo lifting and carrying miscellaneous personal items and transporting them in a typical automobile. He was not lifting and carrying commodities, commercial appliances, or the like. Even if the weights on the scale were inaccurate, or if Vilardo had not weighed the heaviest items because he was unable to view the screen on the scale, review of the video leaves no doubt that those items were not even remotely similar to those he is required to lift and carry at work. Further, even if the items had been heavier or larger, like furniture, the fact is that Vilardo returned to work without any restrictions just five days later, after two months of physical therapy.

Certainly, while the public may look askance at an employee on workers' compensation who appears able-bodied, there are situations where an employee may suffer a disability other than a physical or orthopedic disability that renders the employee unable to perform his or her job duties. Accordingly, that an employee on workers' compensation is seen in public appearing able-bodied does not of itself constitute conduct unbecoming. Respondent did not direct Vilardo not to engage in any physical activity in public, and having considered the facts of this case, there is no basis for respondent to have disciplined Vilardo. He neither violated any directive from respondent, nor engaged in conduct that mirrored his job duties.

In view of the testimony and documentary evidence, I **CONCLUDE** that Jersey City Public Schools has not met its burden of proving by a preponderance of the credible evidence that Vilardo's conduct was unbecoming a public employee, and no cause existed for any discipline, much less his termination, after nineteen years with no prior disciplinary history.

ORDER

I **ORDER** that the charges against Vilardo are **DISMISSED** and that the termination is hereby **REVERSED**, and that Vilardo be 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, DIVISION OF APPEALS AND REGULATORY AFFAIRS, 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.

12/3/14
DATE

KELLY J. KIRK, ALJ

Date Received at Agency: December 3, 2014

Date Mailed to Parties: December 3, 2014

db

APPENDIX

WITNESSES

For Appellant:

John T.M. Chester

For Respondent:

Roberto Guzman
Matthew Vilardo
David Severini
Alex Rodriguez
Joseph Cusimano
Carl Gargiulo
Vijaykumar Kulkarni, M.D.
Susan Schneider

EXHIBITS IN EVIDENCE

Joint:

J-1 Preliminary Notices of Disciplinary Action
J-2 Final Notice of Disciplinary Action, dated April 11, 2014
J-3 Final Notice of Disciplinary Action, dated April 24, 2014
J-4 Surveillance Video
J-5 Investigations Unltd Report, dated September 26, 2012
J-6 Investigations Unltd Report, dated November 18, 2012

For Appellant:

P-7 Photographs

For Respondent:

None