A-5

STATE OF NEW JERSEY

In the Matter of Laurene Harder
Hudson County,
Department of Building and Grounds

CSC DKT. NO. 2015-2689
OAL DKT. NO. CSV 04686-15

**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**

**ISSUED: OCTOBER 20, 2016 BW**

The appeal of Laurene Harder, Boiler Operator, Hudson County, Department of Building and Grounds, 30 working day suspension, on charges, was heard by Administrative Law Judge Gail M. Cookson, who rendered her initial decision on August 11, 2016. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on October 19, 2016, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Laurene Harder.

Re: Laurene Harder

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
OCTOBER 19, 2016

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

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

**INITIAL DECISION**

**IN THE MATTER OF LAURENE HARDER, COUNTY OF HUDSON, DIVISION OF ROADS & PUBLIC PROPERTY.**

OAL DKT. NO.CSV 04686-15
AGENCY REF. NO. 2015-2689

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**Vipin Varghese**, Esq., for appellant Laurene Harder (Pitta and Giblin, attorneys)

**John J. Collins**, Assistant County Counsel, for respondent County of Hudson (Donato Battista, Esq., County Counsel, attorneys)

Record Closed: August 3, 2016 Decided: August 11, 2016

BEFORE **GAIL M. COOKSON**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Laurene Harder (appellant) appeals from a disciplinary action taken by her employer the County of Hudson, Department of Building & Grounds, Division of Roads & Public Property (County) to suspend her from her position as a Boiler Operator for thirty days on charges of conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); insubordination in violation of N.J.A.C. 4A:2-2.3(a)(2); neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7); and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11).

The charges all relate to an incident on February 3, 2014, when there was an oil spill on the County property during a delivery overseen by appellant. Appellant denies the charges and claims that she did her job properly and that the oil spill was an

unfortunate accident and solely the result of the negligence of the fuel delivery person. Appellant also argues that her spotless civil service record of over sixteen years mitigates the excessive penalty given to her under the civil service progressive discipline policy.

The appeal was transmitted to the Office of Administrative Law (OAL), on April 2, 2015, for hearing as contested cases pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. After an interim settlement conference of this matter which was unsuccessful, it was assigned to me on June 23, 2015. Several hearing dates were scheduled and then adjourned for various good cause reasons. The plenary hearing was held on August 3, 2016, on which date the record closed.

## FACTUAL DISCUSSION

Based upon due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

Walter Crowley testified on behalf of the respondent. He has been a boiler operator for three years but it had only been two months at the time of this incident on February 3, 2014. He had held a housekeeping position with the County prior to this job, and prior thereto, he was a boiler operator for a charter school although it relied upon natural gas. Crowley described that there was a snowstorm on February 3, 2014, and during the morning he was detailed to shovel the snow on the outside of the Power House. Later in the morning, appellant told him that she would be receiving a fuel delivery of heating oil and Crowley asked if he could observe her as part of his training. When the fuel truck arrived, he helped with getting the hose off the truck. He was aware that appellant and the driver were talking on the other side of the truck but he could not hear the conversation over the noise of the engine.

Crowley then went inside with appellant into the area referred to as the vestibule of the Power House. Appellant said that the driver estimated the fueling would be done in about forty-five minutes. When they went back outside, Crowley saw oil spilling onto

the snow, turning it a reddish color. Appellant shouted at him to shovel the spoiled snow toward the retention area surrounding the underground tank[1]. Crowley shoveled and threw the contaminated snow over the short wall and into the boxed off area. He then testified that appellant was pushing some of the snow with a shovel in the opposite direction, which was toward a sewer drain.

The oil-covered snow was turning slushy and draining toward the sewer, sidewalk, and side street. By then, school children were walking through it as they had apparently been dismissed early due to the weather. Crowley was then directed by appellant to get a garden hose and use the water to push the snow faster but he objected stating that this was a "big problem" and that she had "better get Tommy [Thomas Manfredi] out here." Appellant then went inside the building to contact their supervisor. In the meantime, the fuel delivery truck left the scene. Manfredi arrived in about ten minutes while Crowley continued to throw the shoveled snow over the retaining wall. He and appellant then walked off the immediate site.

At some point a little while later, appellant went back into the office with Manfredi and Kim Cardella. Crowley went into the Power House office also. Appellant then claimed to Cardella and Manfredi that Crowley was supposed to have checked the level in the oil tank before the delivery with the dip stick. Crowley, who was new to the Power House position, had only asked to observe the delivery procedure and had not been asked to or been responsible for taking the fuel measurement. It was his testimony that appellant was lying when she said that to their bosses. Lastly, he stated at the hearing that he was not aware if any boiler operator was absent on the day in question who would have otherwise accepted the oil delivery. He also reconfirmed that he had not seen appellant use her cell phone while they were outside together but he was not always in a position to do so.

Thomas Manfredi also testified for respondent. He has been employed by the County for twenty-six (26) years and presently serves as the Chief Engineer. His office is in the Administration Building but he also has oversight over the Annex, the Power

[1] As described by several witnesses, the underground storage tank had a four-sided brick wall around it, approximately one foot high and ten feet by forty feet square.

House and the Courthouses. On February 3, 2014, Manfredi and appellant had a communication about the fact that an oil delivery was coming later that morning. Sometime later, Manfredi received a call from appellant stating that about thirty gallons had spilled. He walked over to the Power House to review the situation.

Upon arriving at the oil tank area outside, Manfredi could tell that a lot more than thirty gallons had been spilled. At that point, he directed Crowley to go inside and watch the boilers and he directed appellant to shovel the snow into the retention area. Manfredi called Cardella and advised her of the spill. As she approached the area, Manfredi and appellant walked toward her and back to Cardella's office. During that meeting, Cardella asked appellant if she had measured the tank with the dip stick, to which appellant replied in the affirmative. All three of them then walked to the Power House so Cardella could check the stick. She found it dry as a bone and reiterated her query to appellant, who then said that Crowley had been directed to dip the stick in the tank.

Manfredi recalled that Cardella contacted directly or indirectly an environmental services company. There were some questions raised as to whether the New Jersey Department of Environmental Protection had to be notified. The clean-up of the spill took hours beyond the regular work day with the contaminated snow, slush and oil product being disposed of in barrels and then taken off-site. Luckily, the area affected outside was all paved so that it was impervious to the oil contamination. Manfredi also explained the written oil delivery procedures that have been in place and posted in the Power House since before he joined the County.

On cross-examination, Manfredi described in a little more detail his responsibilities as Chief Engineer. He also asserted that he had personally accepted oil deliveries in the past, which included compliance with the earlier-described protocols. Whether the weather is bad or not, Manfredi remained outside during deliveries. On the date of the incident, Manfredi believed that one to two hours had elapsed between the phone calls with appellant. When she reported the spill, he did not advise her as to what to do because he was walking over there in just a matter of minutes. At the time of her second call, he had been doing paperwork in the pump room of the Administration

Building. When he arrived, Manfredi observed the slushy oil-laden snow flowing down the sidewalk toward the side street. The retaining pit was also overflowing. He recalled that in total, inclusive of the snow or slush, the environmental company removed approximately 1500 gallons from the spill.

Manfredi had been the person who placed the oil delivery order. He always orders 5,000 gallons because the company will otherwise not delivery it if the amount is too small. Nevertheless, once there the delivery truck will only pump and bill for the amount needed. The County tank has a 10,000 gallon capacity. The County uses oil as a heating source when PSE&G interrupts their utility service as an interruptible customer.

Kim Riscart-Cardella was the last witness to be presented by the respondent on this matter. Cardella is the Unit Chief with the Department of Buildings and Grounds. She oversees the buildings and parking lots including the facilities themselves and the personnel within. On February 3, 2014, at approximately 1:00 p.m., she recalled Manfredi telling her of the oil spill at the underground storage tank of the Power House. Cardella had just come in from riding a plow due to the snow storm so she was already dressed to go back out. Even before she got all the way to the tank pad, Cardella could see the spill and also observed Crowley and appellant shoveling the red slush into the retention area. Crowley was directed to go get more personnel to help him with shovels and to also bring up the cat litter used to help absorb spills.

Cardella went back to her office where she, Manfredi and appellant then met. Cardella specifically questioned appellant on whether the tank had been measured with the dip stick before the driver started filling the tank. Appellant replied that she had and that it measured 69 inches. Cardella told Manfredi to check the log book entries while she reported the spill to the Department Director. She also contacted Ken's Marina as the vendor for this urgent spill remediation. It might have taken that firm two hours to get on the site and begin the cleanup. Cardella testified that they used absorbent pads and barrels in order to complete the cleanup. She estimated that the company might have been on site until about 9:00 p.m.

Meanwhile, it was confirmed that the log book had a hand-written entry by appellant of the tank reading at 69 inches. That level would mean that only approximately 2,000 gallons would be needed before the tank would be full. Cardella and the others returned to the Power House where she personally grabbed the dip stick from its storage spot in the PVC pipe on the catwalk. She ran the stick through her hand and found it and the pipe to be totally dry with no oil residue on it, which would not have been the case if it had been used on the tank just an hour or two earlier. At that point, appellant changed her story and pointed to Crowley and advised Cardella that he was the one who dipped the tank rather than her. After further consultation with the Director, Cardella immediately suspended appellant from the job.

On cross-examination, Cardella specified that she has been the Unit Chief for ten (10) years with a total tenure of thirteen (13) years with the County. In addition, she responded with very detailed description of the posting location of the Oil Delivery Procedures. Crowley, as a new trainee, would not and should not have been in charge of dipping the tank unless appellant was right there with him. His role was to shadow her. When asked if the dip stick could have been used but then wiped down, Cardella remarked that the stick which was wooden would have still had some residue on it as would the PVC pipe.

Appellant testified in her own defense. She has been employed for sixteen (16) years as a Boiler Operator for the County, with eight (8) of those years in the Power House. On February 3, 2014, appellant was working the day shift of 7:00 a.m. to 3:00 p.m. First, she received a call from Manfredi advising her that there would be an oil delivery later that morning. She next received a call from the driver that he was on his way with his expected arrival time. While in the boiler room office, appellant told Crowley to shovel the snow and to also dip the oil tank for her as he was out there anyway. Appellant explained to Crowley that it was just like checking the oil in your car but with a longer stick.

When the oil delivery arrived, appellant told Crowley to tell the driver what the dip stick reading was and then to help with the delivery hose as the snow was making the area slippery. Meanwhile, appellant was having a conversation with the driver. He was

stating that the delivery was for 5,000 gallons and she was trying to get him to understand that the tank would not accept that much. She testified that she begged him not to put that much in. She also begged him to take a dip stick himself in accordance with the "specs." She recalled this particular driver from an incident a few years ago when she actually had to call the cops on him because he was so belligerent. Appellant tried to call Manfredi and then 9-1-1 but she could not get a signal on her cell phone, perhaps because of the weather. Appellant and Crowley then went back inside. Crowley was to watch the boilers which cannot go unmanned for too long. It seems that she was on the catwalk but also in the vestibule area inside the Power House during the filling process. The vestibule did not give her a clear line of sight on the delivery process.

All of a sudden appellant noticed the driver rushing and slipping in the snow to hit the emergency stop button on the delivery truck. When appellant went outside, she could see how much had spilled from his over-filling the tank. She asked the driver what she should do and he said to shovel it down the sewer. Appellant expected him to stay and help but as soon as she signed the bill, he drove off. Manfredi was notified that there was an emergency and then she helped Crowley shovel the contaminated slush. Appellant stated that she never pushed the slush toward the sewer drain. She was then told by Manfredi to come to Cardella's office.

In the office, appellant said that Cardella was screaming and panicking which in turn got her all nervous. Appellant volunteered during her testimony that heating oil was not used much for several years due to equipment problems. It had just been cranked back up in late January of that year. When they all went back to the Power House, appellant saw Cardella grab the stick and announce that it was not wet. Appellant then said she had asked Crowley to take the dip and he must not have. She exclaimed that it was definitely 69 inches because it had been logged at that height for several prior entries in the log book. The oil had not been used so it was not going to have gone down and it cannot evaporate. With respect to the size of the spill, appellant stated that her entry in the log book of about "34 gallons" was the driver's estimate and not her own; she would have guessed it to be a couple of hundred gallons. She also denied that she ever told Crowley to get a garden hose and water down the spill.

On cross-examination, appellant appeared to concede that she relied upon the prior log book entries when telling the driver and Cardella that the tank level was at 69 inches. She denied that there was a written oil delivery protocol ever provided to her or posted. Appellant knows the routine but insisted it was never reduced to a memo. It had been several years since the County received an oil delivery before that winter. Yet some of the log book entries shown to her at the hearing seemed to indicate rising and lowering tank levels up until a few days prior to the incident.

Even though the Sheriff's Office was nearby, appellant stated that she would not have called them to assist with the belligerent driver because they were short-handed and had plenty of problems "dealing with terrorism" such that she would not feel right pulling them away. While she testified that she went inside during the filling process because the driver scared her, she also admitted that she does not always stay out if the weather is bad. During the course of her somewhat rambling testimony, appellant admitted that she knew before the driver ever arrived that Crowley had not measured the tank's level. She felt that her inconsistent statements or lies were Cardella's fault because the latter was screaming and panicking and getting appellant flustered.

In response to my questioning, appellant estimated that she had accepted four to five oil deliveries for the County over her years as a Boiler Operator. Other delivery drivers will only fill the tank up to what it can hold even though the bills of lading always specify 5,000 or 3,000. This was the only driver who gave her a hard time.

For evidence to be credible it must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). I **FIND** that appellant was not a very credible witness. She easily and quickly blamed others for instances in which she was caught in misstatements. It was clear from her testimony that she knew the procedures required for accepting an oil delivery, including measuring the tank before the delivery, having the driver measure it again, staying out to watch the

delivery, and signing the invoice for delivery to the County administration. Nevertheless, she failed to take a measure of the tank, failed to insist that the driver take a measure, and most importantly, failed to stay outside. This was undoubtedly because of the weather. She could have asked Crowley to help her communicate with the driver or to watch the filling process. She could have asked the Sheriff's Office to assist her. Instead she chose to go inside, get warm, and wait forty-five minutes before returning outside. Appellant clearly knew the tank would accept no more than 2,000 gallons and should have known that the filling time would thus be a lot less than the driver's estimate.

I **FIND** that respondent's witnesses were all more credible than appellant. Crowley was new with the County. He knew better and seemed to have more common sense than appellant about what he could and could not do at that point in his training. With respect to Cardella and Manfredi, both had served a long time with the County and were very knowledgeable and professional in their testimony. Cardella in particular was very specific in her testimony regarding the dip stick, its location, and attributes, as well as the location of the published procedures.

## ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 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 County Park Comm'n, 46 N.J. 138, 147 (1965). Governmental employers also have delineated rights and obligations. The Act sets forth that it is State policy to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A

civil service employee who commits a wrongful act related to her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against her and, if so, the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In this matter, the County bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Credibility, or, more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954).

Based upon the facts set forth above, I **CONCLUDE** that the respondents' witnesses were more credible and their testimony was entitled to more weight than the denials of appellant, at least with respect to her job duties, her understanding of those duties, and her conduct on February 3, 2014. Both the Chief Engineer and the Unit Chief, with a combined experience with the County of almost forty (40) years, testified to the existence of the Oil Delivery Procedure and the practice of accepting those deliveries. Cardella in particular was very precise in her description of the Power House layout, the catwalk, and the location of the posted notices.

Appellant's protestations that she either did not have formal procedures with which to comply when supervising an oil delivery or that she complied with them were not credible. Appellant was well aware that there were required procedures as evidenced by her statement that the delivery driver is required to stick the tank and confirm the level. She also knew that she could not visually confirm what was taking

place during the delivery because she was inside the vestibule of the Power House. Her failure to oversee the actual delivery of the oil cannot be blamed on a shortage of other boiler operators or Sheriff's officers. Without admitting such, it was clear that appellant wanted to be inside during the delivery because of the snow storm taking place. Rather than asserting herself with the driver, seeking the aid of Crowley to buttress her point, or enlisting the Sheriff's Office, appellant figuratively threw up her hands, went inside to get warm, and let a bad situation unfold. In addition, appellant all but admitted that she did not measure the tank herself, that she knew Crowley had not measured it, and that she just assumed the level was 69 inches based on the Daily Log. Accordingly, I **CONCLUDE** that appellant was not credible with her excuses.

While all parties agreed that a tank level of 69 inches would necessarily mean that 5,000 gallons of oil would not be accepted in the tank, and in that sense only was a "mere" technical violation of the protocols, appellant not only failed in her administrative responsibilities to take the measurement and record it but also failed in her obligations of overseeing the oil delivery to ensure that the tank was not overfilled. Even with a recalcitrant driver, appellant could have avoided this incident if she had just stood outside during the delivery. I did not find her statement that she found the driver's presence unsettling or uncomfortable to be credible. Even if the driver and/or oil delivery company could also be jointly liable for the costs of this spill, those issues are not before me and are irrelevant to the issue of whether appellant was negligent in her own job responsibilities. For the reasons set forth above, I **CONCLUDE** that she was negligent.

Having concluded that violations of the Oil Delivery Procedure occurred, I must determine the proper penalty or discipline to be assessed. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty. See Bock, supra, 38 N.J. at 523-24. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of the concept of progressive discipline is the nature, number and proximity of prior disciplinary infractions

should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of an employee's potential.

In addition to considering an employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, or a suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

In this case, I **CONCLUDE** that this disciplinary action supports the respondent's argument that appellant was appropriately suspended for thirty days. While a lesser number of days of suspension is available to an appointing agency, especially for a first offense in appellant's long civil service career, I **CONCLUDE** that this single incident was egregious enough and impacted the public interest seriously enough to warrant that period of time without being excessive or contrary to a sense of fairness. On balance of all the factors, I **CONCLUDE** that a longer suspension as requested orally by the County at the hearing is also not warranted.

## ORDER

Accordingly, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action of the County of Hudson, Department of Roads and Property against appellant Laurene Harder is hereby **AFFIRMED**.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision

within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 11, 2016

DATE

**GAIL M. COOKSON**, ALJ

Date Received at Agency:

Date Mailed to Parties: AUG 15 2016

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

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## APPENDIX

## LIST OF WITNESSES

For Appellant:

Laurene Harder

For Respondent:

Walter Crowley

Thomas Manfredi

Kim Riscart-Cardella

## LIST OF EXHIBITS IN EVIDENCE

Joint

J-1 Final Notice of Disciplinary Action, dated March 17, 2015

For Appellant:

None.

For Respondent:

R-1 Oil Delivery Procedure, Hudson County, Division of Roads & Public Property

R-2 Excerpts from Daily Log of Boiler Operation