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STATE OF NEW JERSEY

DECISION OF THE CIVIL SERVICE COMMISSION

In the Matter of Jose Morales, Hudson County, Division of Roads and Public Property

CSC Docket No. 2015-3209 OAL Docket No. CSV 19280-15

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ISSUED: JUL 14 2017 (EG)

The appeal of Jose Morales, a Stationary Engineer with Hudson County, Division of Roads and Public Property, of his six-month suspension on charges, was heard by Administrative Law Judge Gail M. Cookson (ALJ), who rendered her initial decision on March 27, 2017. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the attached ALJ's initial decision, and having reviewed the testimony and evidence presented before the Office of Administrative Law (OAL), and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on June 21, 2017, did not adopt the ALJ's recommendation to reverse the suspension. Rather, the Commission imposed a five working day suspension.

DISCUSSION

The appellant was charged with conduct unbecoming a public employee, neglect of duty, insubordination and other sufficient cause. Specifically, the appointing authority asserted that the appellant falsified his timesheet and had been doing so for some time. Upon the appellant's appeal, the matter was transmitted to the OAL for a hearing as a contested case.

The ALJ set forth in her initial decision that the appellant worked the overnight shift at the Powerhouse. Kim Riscart-Cardella, an Executive Assistant, testified that the appointing authority had become suspicious that the appellant

and a co-worker were covering for each other's shifts and skipping out on some shifts. She indicated that when she reviewed a timesheet on March 4, 2015, before his shift had started, the appellant had already signed in and out for that day. She also identified log book entries wherein the appellant was improperly signing it on days he wasn't scheduled to work. However, Riscart-Cardella also testified that there was no evidence that the appellant actually worked fewer than five days per week. The ALJ noted that Thomas Manfredi, an Assistant Chief Stationary Engineer, the appellant's supervisor, testified that he had a discussion with the appellant about the differing interpretations of the overnight shift days in February 2014 and again in January 2015. Manfredi also denied that the appellant had ever advised him about his parental obligations or provided him with a court order regarding the same.

The appellant testified that he needed to work Saturday through Wednesday so he could take his son to school two days per week following his divorce. He indicated that he had Thursday and Friday off for many years without any problems until 2015. He acknowledged that Manfredi did discuss his revised schedule interpretation in January 2015 but he was advised by his union representative to wait until it was posted on formal letterhead before grieving the matter. Since no such posting occurred, the appellant never filed a formal grievance. Further, the appellant testified that in March 2015, Manfredi gave him an oral warning about following the schedule. The appellant asserted that at the same time, Manfredi agreed that if all the shifts were covered, it would not be a problem and that he could keep his schedule as it had been for many years until his son graduated in June.

Based on the foregoing, the ALJ found that the supervisors and the employees read the schedules differently. If the schedule indicated the overnight shift started Sunday at 11:00 p.m. and ended Monday at 7:00 a.m., the supervisors considered this a Sunday workday, while the employees considered it a Monday work day. The ALJ stated that this explained why it appeared that the appellant had signed in and out before his shift started. In this regard, the ALJ found that there was no evidence that the appellant signed in or out of his payroll sheet except contemporaneously or that he worked fewer than five shifts per week on a regular basis. Further, the ALJ concluded that while the supervisors had the authority to make changes to the long-standing practice of viewing the overnight schedule the way the employees viewed it, the appellant testified that he had asked Manfredi to keep his schedule the same until his son graduated in a few months. Although Manfredi denied this discussion, the ALJ found the appellant more credible in this regard. Accordingly, the ALJ found that the appointing authority had not met its burden of proof and dismissed the charges.

In its exceptions, the appointing authority argues that the ALJ's credibility determinations were not supported by the documentary evidence. It claims that the

schedules and sign-in sheets clearly show the appellant was not working his assigned shifts. Additionally, it contends that as of January 2015, the appellant acknowledged that he had been advised of the correct schedule to follow. Further, it argues that the ALJ improperly found the appellant more credible than Manfredi with regard to the appellant's schedule and the alleged request to keep the schedule the same until the appellant's son graduated.

In his reply to exceptions, the appellant argues that the ALJ's credibility determinations were amply supported by the record. In this regard, he states that the ALJ provided seven pages of summation of testimony. He also argues that Manfredi's testimony was inconsistent and not credible. He asserts that Manfredi testified that he had not heard of the appellant's court order until the May 2015 departmental hearing, yet he mentioned the court order in a letter he authored on March 6, 2015.

Upon its *de novo* review of the record, the Commission does not agree with the ALJ's recommendation to dismiss the charges and reverse the six-month suspension. Regarding the charges, the Commission finds that the appellant did not follow the schedule as presented by his supervisors. A review of the testimony clearly indicates that the appellant knew what the proper schedule to follow was in January 2015 but chose not to follow the schedule due to his parental obligations. There was no evidence presented that the appellant approached his supervisor requesting to keep his prior schedule at any time between January 2015 and March 2015, when the appellant was confronted by Manfredi on March 6, 2015. Therefore, even if the appellant asked Manfredi to keep his schedule the same for a few more months, the appellant worked the wrong schedule without authorization on March 4, 5, and 6, 2015, as indicated in the Final Notice of Disciplinary Action.

In its exceptions, the appointing authority challenges the ALJ's determinations based on witness testimony. In instances such as this, the credibility of the witnesses plays a major role in determining the outcome of the case. In this regard, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 N.J. 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence or was

otherwise arbitrary. With regard to the standard for overturning an ALJ's credibility determination, *N.J.S.A. 52:14B-10(c)* provides, in part, that:

The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.

See also, N.J.A.C. 1:1-18.6(c); Cavalieri v. Public Employees Retirement System, 368 *N.J. Super.* 527 (App. Div. 2004).

In the instant matter, the appointing authority argues that the ALJ's credibility determinations were not proper and not supported by credible evidence. The Commission disagrees. The appellant's testimony regarding his request to keep his schedule for a few more months and his claim that he mentioned a court order to Manfredi were credible. Further, Manfredi's March 6, 2015, letter clearly mentions the appellant's court order. This same letter also contradicts Manfredi's assertion that he did not know about a court order until the May 2015 departmental hearing. Thus, finding the appellant more credible than Manfredi is supported in the record. Therefore, a review of testimony reveals that the ALJ's conclusions based on the witness testimony are reasonable and supported by the credible evidence in the record. However, the testimony also establishes that the appellant did not follow the schedule correctly, as noted previously.

In determining the proper penalty, the Commission's review is *de novo*. In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway State Prison*, 81 *N.J.* 571, 580 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 *N.J.* 474 (2007). In the instant matter, the appellant had no prior disciplinary actions since his employment began in 1998. Additionally, it is clear that the appellant had been working what he believed to be the correct schedule for years without issue. Further, the appellant had relied on his particular days off in order to meet his parental obligations. Given these particular circumstances, the Commission finds that a five working day suspension is the proper penalty.

Accordingly, the appellant is entitled to back pay, benefits and seniority after the imposition of the five working day suspension. With regard to counsel fees, since the appellant has not prevailed on the primary issues on appeal he is not entitled to an award of counsel fees. See *N.J.A.C. 4A:2-2.12*. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. See *Johnny Walcott v. City of Plainfield*, 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, while the penalty was modified, charges were upheld and discipline imposed. Consequently, as the appellant has failed to meet the standard set forth in *N.J.A.C. 4A:2-2.12*, counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved.

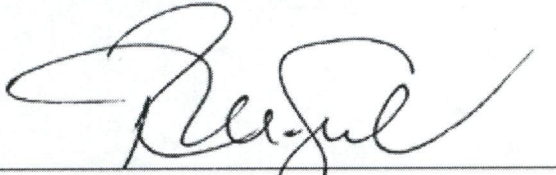
ORDER

The Civil Service Commission finds that the appointing authority's action in imposing a six-month suspension was not justified. Therefore, the Commission modifies the six-month suspension to a five working day suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority for the period after the imposition of the five working day suspension. 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 and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2-2.10*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay.

Counsel fees are denied pursuant to *N.J.A.C. 4A:2-2.12*.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 21ST DAY OF JUNE, 2017



Robert M. Czedz, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

**IN THE MATTER OF JOSE MORALES,
COUNTY OF HUDSON, DIVISION
OF ROADS & PUBLIC PROPERTY.**

OAL DKT. NO.CSV 19280-15
AGENCY REF. NO. 2015-3209

Robin Bernstein, Esq., for appellant Jose Morales (Bernstein Law Firm, attorneys)

John A. Smith, III, Assistant County Counsel, for respondent County of Hudson
(Donato Battista, Esq., County Counsel, attorneys)

Record Closed: February 7, 2017

Decided: March 27, 2017

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Jose Morales (appellant) appeals from a disciplinary action taken by his employer the County of Hudson, Department of Building & Grounds, Division of Roads & Public Property (County) to suspend him from his position as a Boiler Operator for six months 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 time sheet irregularities. Appellant denied the charges and claims and filed an appeal on June 2, 2015.

The appeal was transmitted to the Office of Administrative Law (OAL), on November 25, 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. It was assigned to the Honorable Irene Jones, A.L.J. on December 7, 2015. A hearing notice was sent scheduling the matter for April 18, 2016. On that date, the County failed to appear and asserted that it had never received any pre-hearing or hearing notice. It was re-assigned to me on July 8, 2016, following the retirement of Judge Jones. With the consultation of counsel, the hearing was scheduled for December 1, 2016. When it did not conclude on that date, another plenary hearing was convened on February 7, 2017, 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**:

Kim Riscart-Cardella was the first witness to be presented by the respondent on this matter. Cardella has been the Unit Chief with the Department of Buildings and Grounds since January 2006. She oversees the buildings and parking lots including the facilities themselves and the personnel within. Chief Engineer Thomas Manfredi reports to her and there are various other intermediate supervisors between Manfredi and appellant. Appellant works in the Powerhouse as a Boiler Operator.

Cardella testified that she sought removal of appellant on disciplinary charges because he had allegedly stolen county services through manipulation of his time sheets. The final disciplinary action was reduced to six months because of certain mitigating factors, including, but not limited to, his apology, an admission, and some family custody issues. Cardella then provided more background to this disciplinary action.

Cardella stated that appellant and Gary Dooley worked the overnight shift at the Powerhouse. Because they each received two different days off, they only both worked that shift three days of the week. In March of 2015, she became suspicious that the operators were covering for each other's shifts and skipping out on some of those shifts. On March 4, 2015, Cardella reviewed the payroll sign-in/sign-out sheet and found that

appellant had already signed out for that day. She then instructed Manfredi to drop in on the night shift to see who was working. He did so on April 9, 2015, and found Dooley working notwithstanding that he should have been out serving a suspension on that date. He also found that appellant was not there even though he was the operator who should have been on duty. On several other dates, she, Manfredi, or day-shift operators reported that Dooley and appellant were switching shifts or not following the schedule. Cardella identified log book entries wherein appellant was improperly signing it on certain days when he was not scheduled to work, and same with Dooley.

On cross-examination, Cardella admitted that the log book entries were consistent with the appellant's interpretation of what day of the week to denominate the overnight shift. She also admitted that there was no evidence that appellant actually worked fewer than five days per week, although she seemed convinced that Dooley somehow worked four days and had three days off or was serving a suspension one day per week during this period. There was also no evidence that the county needed to cover extra shifts because of appellant skipping shifts without authorization, or that the Powerhouse was unattended for any overnight shifts. Cardella was sure that appellant had not provided any court order on his parental rights prior to the departmental disciplinary hearing.

Orestes Acosta is a supervisor for the Powerhouse for the second shift (3:00 pm. to 11:00 p.m.). He has been with the County for four years. There is no supervisor on duty for the overnight shift. Acosta's office is in the Administration Building. On March 5, 2015, he advised Cardella that Dooley was working the shift that had been assigned to appellant.

Julio Cartegena has been a day shift boiler operator for the County for approximately eight years. He takes over from the shifts covered by Dooley and appellant. He admitted that the daily boiler read-out sheets were started at 11:00 p.m. by the overnight operators and then continued for that particular day by the first and second shift operators. Cartegena recalled that on March 4, 2015, he saw both Dooley and appellant in their vehicles when his shift started.

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 Powerhouse and the Courthouses. He issues the schedule for the Powerhouse operators but he is seldom there on site. Timesheets are on the honor system and there is no reliance on an electronic punch clock. Manfredi testified that he had had a discussion with Dooley and appellant about the differing interpretations of the overnight shift "days" in February 2014 (R-17) and again in January 2015 (R-10b). He had done this because he also had heard rumors that these two employees were covering different shifts than they were assigned.

On cross-examination and then in rebuttal, Manfredi denied that appellant had ever advised him about his parental obligations or shown him a court order regarding such. Nevertheless, Manfredi mentioned such a family court order in his own memorandum to Cardella when describing appellant's refusal to follow the schedule as dictated by himself.

Rodolfo Quintanilla testified on behalf of the appellant. He is now retired but he had been a boiler operator for several years with total county employment spanning fourteen years. Quintanilla mostly was assigned to the second shift but sometimes covered for the overnight shift. He testified as to where the schedules were posted and that the boiler read-out sheets always started a new day at 11:00 p.m. of the prior evening. Quintanilla did not recognize the hand-written annotated schedule used by Manfredi to explain his overnight shift interpretation. On cross-examination, he explained that he worked the overnight shift a few times per month when he would be assigned to cover the shift for someone who was out. He always worked that shift alone.

Appellant testified in his own defense. He has been employed with the county since approximately 1998 when he started at the correctional facility. He was a Boiler Operator and then a Stationary Engineer at the Administrative Building. By 2004, appellant was working the third or overnight shift, which was selected by seniority rank. He needed to work Saturday through Wednesday so he could take his son to school

two days per week following his divorce. He stated that he had Thursday and Friday off for many years without any problem or even any discussion from Manfredi until 2015. Appellant denied ever seeing the 2014 marked-up schedule sheet prepared by Manfredi. While Manfredi did discuss his revised schedule interpretation in January 2015, appellant's union representative advised him to wait until it was posted on formal letterhead and to then grieve the management action. Appellant stated that it was never posted on letterhead, which is why he never filed a formal grievance.

In March 2015, Manfredi gave appellant an oral warning about following his schedule. According to appellant, Manfredi then agreed at that same time that if all the shifts were covered, it would not be a problem. Nevertheless, this disciplinary action was then initiated by his supervisors. Appellant remarked that he had a clear disciplinary record throughout his career and that he never signed in or out until that appropriate time. In other words, he never signed in and out at the same time. He also never signed in for a shift he did not actually work. Appellant utilized various examples from the log books to demonstrate his consistency in his recording of the days of his shifts.

On cross-examination, appellant maintained that he would never be able to get his son to school in Millburn on a Thursday morning if he worked until 7:00 a.m. on Thursday as his "Wednesday" shift. Appellant lives in Newark. Appellant also maintained that he had left a copy of his court order in an envelope with the time sheets at the time that it was issued in 2007. He had no knowledge of where it went once payroll picked up the sheets but after the passage of so much time, he assumed Manfredi understood. To the extent he had additional weekend days with his son, he had family members over at his house to babysit while he worked.

When questioned as to why he had produced a court order at the departmental hearing for the first time, appellant disagreed and stated that he showed a later court order from March 2015 at the departmental hearing only because it was new and the most current. Appellant insisted that Manfredi had orally acknowledged that the schedule could stay as it had been for many years until his son graduated from high school that June. Appellant is the most senior boiler operator assigned to the

Powerhouse.

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). Credibility, or, more specifically, credible testimony 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). I **FIND** that respondent's witnesses were less credible than appellant. Credibility means the testimony as a whole holds or hangs together, and makes sense. After listening carefully to every witness, it was clear to me that this entire case turned on a difference in interpretation as to what to call the day the person on the overnight shift is working.

Appellant and Quintanilla both explained that the practice for many years of the overnight shift was to mark themselves down at the beginning of the shift (11:00 p.m.) as working on the "next" day. Hypothetically, or by way of example, if one was assigned to work 11:00 p.m. to 7:00 a.m. on Monday, appellant and his fellow overnight boiler operators would report on Sunday at 11:00 p.m. and work through until Monday at 7:00 a.m. They would mark the payroll sheets accordingly as Monday. The supervisors considered that to be Sunday's shift. The log book entries by both appellant and Dooley were consistent with their interpretation of the day of the week worked.

The supervisors, who did not themselves ever work that shift, expected the boiler operators assigned on Monday in the hypothetical example to report to work at 11:00 p.m. on Monday and work through until Tuesday at 7:00 a.m. Appellant and his co-workers considered that to be Tuesday's shift. Thus, when the supervisors saw a payroll sheet already signed in for Tuesday at a time when they were of the view that such shift did not commence until 11:00 p.m. on Tuesday, they considered appellant as having signed out ahead of time and therefore, maybe not even working until the end of the shift.

The fact is that every shift was covered and every operator including appellant worked five shifts a week. It is just that Cardella and Manfredi expected to see Dooley sometimes when they saw appellant or vice versa. However, appellant and Dooley

were consistent with each other as were the substitutes from other shifts who occasionally covered. Thus, when appellant stated that he had to have Thursday and Friday off so he could have time to get his son to school for approximately eight years, he stopped work at 7:00 a.m. on Wednesday and returned to the Powerhouse at 11:00 p.m. on Friday. In that way, he had the daytime hours of Thursday and Friday off and was available to drive his son. When Manfredi testified that he believed appellant should have worked through 7:00 a.m. on Thursday and report back at 11:00 p.m. on Saturday, appellant tried to explain that those hours interfered with his parenting time.

There has been no evidence that appellant worked fewer than five shifts per week on a regular basis, unless using authorized leave time. There is no evidence that appellant signed in and out on his payroll sheet except contemporaneously. It only looked that way to Manfredi and Cardella because they were operating with a different "day" in mind. Other factual bases for my finding that appellant and the overnight boiler operators were consistent, and at least historically correct, are the boiler reading charts that "start" at 11:00 p.m. (A-2), and the boiler logs. The payroll sheets were also picked up at the end of the week by 3:00 p.m. so the Friday overnight to Saturday shift started fresh with the next sign-in sheet.

The totality of the evidence in the record does demonstrate that the supervisors had an expectation that the shifts were working different from the reality; and as supervisors, they had the authority to make a change to the long-standing and historic practice. On that point, there was conflicting testimony as to when the difference of interpretations was first discussed. Appellant asked Manfredi for a couple of months before implementing the announced change for two reasons: (1) his parenting time and school drop offs for his son would go away by the end of June and cease to be an impediment or issue because he was then a senior in high school; and (2) appellant was the most senior operator such that no matter what day you called it, he just needed and expected to be off Thursdays and Fridays before 7:00 a.m. While Manfredi presented rebuttal testimony to the effect that appellant never mentioned these personal circumstances, I **FIND** appellant more credible on the likelihood that these conversations and concerns were expressed because appellant was very sensitive to the issue of his parenting time.

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). 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). This dispute does not turn on a legal interpretation but a factual one.

Based upon the facts set forth above, I **CONCLUDE** that the respondent has not proven by a preponderance of the credible evidence that appellant falsified any records or "stole" time from the County. Furthermore, the evidence supports that there was a well-established pattern and practice of calling the overnight shift by the day of the week during which most of the hours occurred and the shift ended, and not the day it began at one hour until midnight. While it is apparent that respondent required the third shift boiler operators to stop using the time sheets and clock in that manner, it was also shown by the preponderance of the credible evidence that appellant had oral permission to continue as they always had been for just a couple of more months until his son graduated high school. Thereafter, appellant's visitation rights would no longer be impacted by the supervisor's differing view of the third shift "days."

Accordingly, I **CONCLUDE** that respondent has not met its burden of proof on these disciplinary charges and that they must be dismissed.

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 Jose Morales is hereby **REVERSED**. It is further **ORDERED** that appellant Jose Morales is entitled to back pay and any other benefits that would have otherwise accrue had he not served this six-month suspension.

It is further **ORDERED** that reasonable counsel fees should be awarded to the appellant as the prevailing party, subject to submittal of an affidavit of services and supporting documentation to the appointing agency, if settlement of fees is not successful, in accordance with N.J.A.C. 4A:2-2.12.

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.

March 27, 2017

DATE



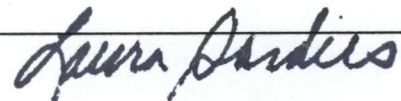
GAIL M. COOKSON, ALJ

Date Received at Agency:

Date Mailed to Parties:

id

MAR 27 2017



DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

LIST OF WITNESSES

For Appellant:

Rudolfo Quintanilla
Jose Morales

For Respondent:

Kim Riscart-Cardella
Orestes Acosta
Julio Cartogena
Thomas Manfredi

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

- A-1 [not in evidence]
- A-2 Hudson County Blank Reading and Temperature Log
- A-3 Hudson County and IUOE Local 68 Memorandum of Agreement, dated November 14, 2013
- A-4 Superior Court, Family Part, Consent Order, dated September 24, 2007
- A-5 Boiler Room Log Book (excerpts), dated February 6, 2015 etc.

For Respondent:

- R-1 Final Notice of Disciplinary Action, dated November 18, 2015
- R-2 [not in evidence]
- R-3 Preliminary Notice of Disciplinary Action, dated April 29, 2015
- R-4 E-Mail Memorandum from Kim Riscart to Denise Dalessandro, dated April 9, 2015
- R-5 Statement of Orestes Acosta, dated April 16, 2015
- R-6 Statement of Julio Cartegena, dated April 10, 2015
- R-7 Statement of Tom Manfredi, dated March 6, 2015

- R-8 County of Hudson, Employee Handbook (excerpt), dated July 1, 1998
- R-9 Receipt of Handbook by Jose Morales, dated July 15, 1998
- R-10 Powerhouse Monthly Schedule
- R-11 Payroll Form, Jose Morales, Pay Period dated February 21, 2015
- R-12 Boiler Room Log Book (excerpts), dated March 4, 2015
- R-13 Boiler Room Log Book (excerpts), dated March 6, 2015
- R-14 Boiler Room Log Book (excerpts), dated April 7, 2015
- R-15 [not in evidence]
- R-16 Payroll Form, Jose Morales, Pay Period dated April 4, 2015
- R-17 Powerhouse Monthly Schedule with Hand-Written Annotations, dated February 24, 2014
- R-18 Superior Court, Family Part, Order on Visitation, dated May 28, 2010
- R-19 Superior Court, Family Part, Order, dated March 6, 2015