

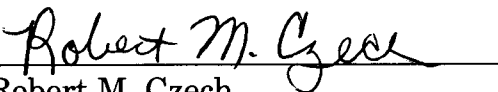
ORDER

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 James Kelk. 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
AUGUST 19, 2015


Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 12324-14

AGENCY DKT. NO. 2015-582

**IN THE MATTER OF JAMES KELK,
TOWNSHIP OF SCOTCH PLAINS –
DEPARTMENT OF PUBLIC PROPERTY.**

Steven I. Adler, Esq., for petitioner/appellant (Mandelbaum, Salsburg, Lazris & Discenza, attorneys)

Richard P. Flaum, Esq., for respondent (DiFrancesco Bateman, attorneys)

Record Closed: March 23, 2015

Decided: July 10, 2015

BEFORE **IMRE KARASZEGI, JR.**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Township of Scotch Plains Department of Public Property (Township) seeks to impose major discipline against appellant, James Kelk (Kelk), a tree maintenance worker, removing him effective July 14, 2014. The Township alleges that he violated N.J.A.C. 4A:2-2.3(a)(2), insubordination; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause; and harassment of co-workers as incorporated in the Township's personnel manual. Specifically, the

Township alleges that on July 7, 2014, Kelk exhibited "alarming, aggressive, and threatening verbal behavior" towards his supervisor.

On July 14, 2014, the Township prepared a Preliminary Notice of Disciplinary Action (PNDA) against appellant. After a departmental hearing, the Township prepared a Final Notice of Disciplinary Hearing (FNDA), on August 4, 2014, removing Kelk effective July 14, 2014. On August 20, 2014, Kelk requested a hearing. 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 September 24, 2014. Hearings were held on December 1, 2014, January 26, 2015, and March 24, 2015, on which date the record closed. Orders were entered extending the time for filing this decision.

FACTUAL DISCUSSION

After carefully considering the testimonial and documentary evidence presented, and having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, I **FIND** the following undisputed **FACTS**:

Kelk was hired by the Township as a laborer on November 21, 1994. Since December 31, 2011, he had been working as a tree maintenance worker.

On July 7, 2014, Kelk was assigned to remove a fifty-five-foot tree that had fallen on a house in the Township. Kelk, along with the tree removal crew, proceeded to remove the tree. Since the downed tree was located in the Township's right of way, past practice involved the Township removing the damaged tree from the property.

Several hours into the tree removal job, Kelk and the other members of the crew sat down on the property's front lawn to take a break from the hot and humid temperature of the day. Carlos Luaces, the Director of Public Properties, approached the crew as they sat in a circle on the front lawn. As he started to speak, Luaces remained near the street curb, approximately ten feet from where Kelk was sitting. Luaces commented about the Township's past practice of tree removal and questioned

whether the removal of a Township tree in the existing situation should instead be the responsibility of the homeowner and/or private insurance. Kelk responded that if it were his house and the Township did not do anything, he would voice his displeasure. Kelk remained seated throughout the conversation. Kelk's words were neither aggressive, nor threatening or inappropriate. At the same time, another conversation took place between Luaces and Kelk regarding the sale price of a house in the vicinity of the job site that Kelk had personally purchased and sold. When Luaces opined that a similar house "in his area" would sell for a lot less, Kelk responded, "Where do you live, Camden?" Both Luaces and Kelk laughed.

Gerald Giaimis, Township Manager, testified on behalf of the Township. Giaimis stated that Kelk's removal was based on the recommendation of Luaces. Giaimis noted that while there was nothing "about the wording" that Kelk said to Luaces that was alarming, the charges against Kelk were based on what "Luaces felt was alarming" and the "manner in which it was said." Giaimis also affirmed that he was not aware of any specific threats Kelk made to Luaces or "any direction" given to Kelk that he refused to follow.

Carlos Luaces, as Director of Public Properties, testified on behalf of the Township. Luaces started his employment with the Township on February 18, 2014. Luaces indicated that when he was at the job site involving the Township tree that had fallen on the roof of a house, he inquired as to the Township's past practice and why the Township automatically involved itself in the removal response. Luaces believed that it was for the homeowner's insurance and not the Township to be involved. Luaces acknowledged standing approximately ten feet from where Kelk and the other employees were sitting at the time he arrived. While noting that there was "nothing inappropriate" with Kelk's words, Luaces conceded that Kelk's words were neither aggressive nor threatening. During the discussion between Luaces and the other employees however, Luaces believed that Kelk's comment that Kelk would outlast Luaces in the job was "threatening." Luaces added, "I felt that he could sabotage the job site – social media, blogging, break the Township's equipment – all was going through my mind." When Kelk remarked to Luaces, "Where do you live, Camden?" and

everyone, including Luaces, laughed, Luaces stated that he believed Kelk was “baiting him” into an argument, he was “trying to make me lose my cool.”

Luaces also noted that although Kelk was sitting on the lawn with the other employees at the job site when Luaces spoke to them, he believed that Kelk’s “body language was telling me, I don’t care who you are, similar to Clockwork Orange.” Luaces further opined how Kelk, who was sitting on the ground, “shoulders upright,” “leaned back with his legs out, knees straight” appeared to be “taunting” Luaces by the way in which Kelk sat. Luaces indicated as an “afterthought” that the way Kelk was “wiggling his feet and sitting” was enough for Luaces to think that Kelk “may sabotage the job site.” Luaces stated, “He was being very smug, he was being a smart ass.” Luaces opined, “when my five-year-old does this, he’s taunting.” Luaces believed that Kelk’s whole “manner of being” was rude and disrespectful and therefore, he wanted Kelk fired.

LEGAL ANALYSIS AND CONCLUSIONS

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). 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). Both guilt and penalty are redetermined on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

The Township has charged Kelk with violating N.J.A.C. 4A:2-2.3(a)(2), insubordination; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee;

N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause; and harassment of co-workers as incorporated in the Township's personnel manual. On August 4, 2014, a Final Notice of Disciplinary Action (FNDA) incorporated the following, as previously detailed in a July 14, 2014, Preliminary Notice of Disciplinary Action (PNDA), as giving rise to the various disciplinary charges against Kelk;

On July 7, 2014, at the Parkwood Dr. job-site during a group discussion between you myself and your co-workers, you exhibited alarming, aggressive, and threatening verbal behavior toward your supervisor Carlos Luaces, Director of Public Property. This behavior was unprovoked and is unwarranted in any workplace environment. This form of communication is unacceptable and creates an unnecessary hostile work environment. Your behavior is degrading to the workplace and is not consistent with the values that we expect from a public employee. This behavior is consistent with a pattern that you have exhibited during the course of your employment over the last several years that resulted in multiple major disciplinary actions and numerous days suspensions.

Based on the foregoing facts and applicable law, I **CONCLUDE** that respondent has not proven, by a preponderance of the competent, credible evidence, that Kelk exhibited "alarming, aggressive, and threatening verbal behavior" toward Luaces. In fact, Luaces conceded that Kelk's words were neither aggressive nor threatening. In addition, Township Manager Giaimis testified that there was nothing "about the wording" that Kelk said to Luaces that was alarming. The charges against Kelk were based, as Giaimis stated, on what "Luaces felt was alarming" and the "manner in which it was said." Luaces testified at length about "body language" and how he perceived Kelk's body language on July 7, 2014. I **CONCLUDE** that the record is devoid of any documentary or testimonial evidence of "alarming, aggressive, and threatening behavior" on the part of Kelk that could substantiate any of the charges in this matter. I also **CONCLUDE** that neither the documentary nor testimonial evidence presented substantiate, much less indicate, any alleged hostile work environment or harassing conduct by Kelk towards his co-workers.

ORDER

It is **ORDERED** that the charges against appellant, James Kelk, be **DISMISSED**. It is also **ORDERED** that the penalty of removal, be **REVERSED**.

It is further **ORDERED** that the appellant be reinstated to his position as a tree maintenance worker 3.

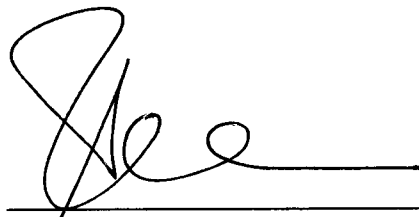
Accordingly, it is **ORDERED** that the appointing authority pay back pay and benefits from the initial removal date of July 14, 2014. Consistent with the appellant's duty to mitigate his damages, I **ORDER** the appellant to submit to the appointing authority a certified statement detailing any employment and income for the period of his suspension, with copies of relevant tax and other records and names and addresses of employers. N.J.A.C. 4A:2-2.10; see also Phillips v. Dep't of Corr., A-5581-01T2F (App. Div. Feb. 26, 2003). Since the appellant has prevailed, I **ORDER** the appointing authority to pay reasonable attorney's fees to appellant's attorney. The appellant's attorney will submit to the appointing authority a certified bill itemizing his services. N.J.A.C. 4A:2-2.21.

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

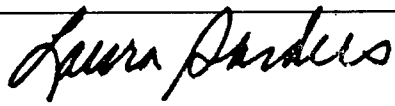
This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise 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.

July 10, 2015
DATE


IMRE KARASZEGI, JR., ALJ

Date Received at Agency:


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: **JUL 13 2015**

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APPENDIX

LIST OF WITNESSES

For Petitioner/Appellant:

Todd Sharpe
Charles Tripet
James Kelk

For Respondent:

Gerald Giaimis
Carlos B. Luaces

LIST OF EXHIBITS IN EVIDENCE

For Petitioner/Appellant:

P-1 SPPWRA letter dated July 17, 2014
P-2 Interim Director of Public Works job advertisement

For Respondent:

R-1 Preliminary Notice of Disciplinary Action dated July 14, 2014
R-2 Giaimis letter to Kelk dated July 14, 2014
R-3 Giaimis letter to Kelk dated August 4, 2014 (with hearing officer decision)
R-4 Disciplinary Form dated January 5, 2008
R-5 Disciplinary Form dated January 22, 2008
R-6 Lori Majeski email dated June 10, 2009
R-7 Confidential memorandum dated August 20, 2009
R-8 Christopher R. Marion letter dated December 3, 2010
R-9 Christopher R. Marion letter dated January 14, 2011
R-10 Preliminary Notice of Disciplinary Action dated February 26, 2013