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STATE OF NEW JERSEY

In the Matter of Timothy London and Edmund Johnson, City of Trenton	DECISION OF THE CIVIL SERVICE COMMISSION
CSC Docket Nos. 2012-2183 and 2012-1462 OAL Docket Nos. CSV 1230-12 CSV 1233-12 (consolidated)	
	ISSUED: DEC 17 2014 (SLD)

The appeals of Timothy London and Edmund Johnson, Water Meter Readers, of their six month suspensions from the City of Trenton, on charges, were heard by Administrative Law Judge Edward J. Delanoy, Jr., (ALJ), who rendered his initial decision on September 26, 2014. Exceptions and cross exceptions were filed on behalf of the appellants and the appointing authority.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on December 3, 2014, did not accept the recommendation to modify the six month suspensions to three month suspensions. Rather, the Commission modified the six month suspensions to 30 working day suspensions.

DISCUSSION

The appointing authority presented the appellants with Final Notices of Disciplinary Action (FNDA) which indicated that they were removed, effective October 4, 2011,[1] on charges of insubordination, conduct unbecoming a public employee and neglect of duty. Specifically, the appointing authority asserted that they refused to perform assigned duties in the Construction and Maintenance Office

[1] The record indicates that the appellants were immediately suspended, effective September 29, 2011, and that subsequently, the appointing authority modified the removals to six month suspensions, effective September 29, 2011.

as Laborers from September 19 through September 23, 2011, and September 26 through September 28, 2011. Upon the appellants' appeals, the matters were transmitted to the Office of Administrative Law (OAL) for a hearing as contested cases where they were subsequently consolidated.

In the attached initial decision, the ALJ extensively recounted the testimony of the witnesses and his findings of fact. In pertinent part, the ALJ found the appointing authority's witness more credible than the appellants. In particular, the ALJ credited the testimony of Harold Hall, a former Manager, Public Works;[2] Tyrone Meyers, a General Supervisor, Water; and Ben Brown, a former Meter Worker Supervisor,[3] that the appellants had refused orders given to them to perform Laborer and Water Meter Reader duties. The thrust of the appellants' defense is that they were demoted and disciplined in retaliation for not collaborating with Mayor Tony Mack's plans and for contacting the Mercer County Prosecutor's Office.

In July 2010, Mayor Tony Mack took office. In September 2011, a conflict arose regarding who had oversight and direction for assigned overtime hours for construction and maintenance workers. As a result, Mack's brother, Stanley Davis, allegedly threatened Johnson by telling him that he would be unemployed shortly as Mack would disband the engineering division. Johnson spoke confidentially to a representative of the Mercer County Prosecutor's Office regarding Davis. London testified before the grand jury that indicted Davis. The ALJ noted that two other employees who had spoken with the Prosecutor's Office were not demoted as part of the 2011 layoff, which included three individuals from the Water Department, the appellants and John Patten, who were all demoted to the title of Water Meter Reader. However, Mack told Hall that the appellants and Patten were to be moved to construction and maintenance. Mack also told Hall that he wanted to save the positions of Charles Hall (Harold Hall's nephew), David Brigel and Henry Page. Based on the foregoing, Johnson believed his inclusion in the layoff plan was retaliatory based upon Davis' statements. As a result, Hall ordered London, Johnson and Patten to the construction and maintenance office as Laborers, and assigned Charles Hall, Brigel and Henry Page as Water Meter Readers. Hall and Dave Tallone, the Union President, testified that Tallone advised Hall that a move from Water Meter Reader to Laborer was not a demotion as there was no loss in salary, and because Tallone did not believe that either appellant could perform Charles Hall's duties in the parks division. Thereafter, on several occasions, the appellants refused to perform Laborer duties, performed duties that they were not assigned to perform instead of the Laborer duties, and did not tell their supervisor when they left the area. The ALJ noted that although Johnson was a Union

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[2] Agency records indicate that Hall's provisional appointment, pending open-competitive examination procedures to the title of Manager, Public Works, was terminated, effective February 28, 2014.

[3] Agency records indicate that Brown retired, effective May 1, 2014.

Representative during this time, neither he nor London filed any grievances regarding the change to their job duties. Rather, the appellants indicated that they believed that the complained of actions were not appropriate for an internal grievance, and instead should be filed with the Commission. With regard to the appellants' claims that the appointing authority's actions were retaliatory, the ALJ determined that the appointing authority had articulated legitimate, nondiscriminatory reasons for the adverse employment action of assigning the appellants Laborer duties.[4] Specifically, the ALJ found that the assignment of Laborer duties to the appellants was simply Hall's attempts to comply with Mack's directive to save the positions of Charles Hall, Brigel and Page. Moreover, as previously noted, Hall believed that the appellants' assignments as Laborers were not a demotion since there was no loss in salary.

The ALJ concluded that although both appellants' refusals to perform their duties on September 19, 2011, constituted conduct unbecoming a public employee and insubordination, it did not constitute negligence. With regard to September 26, 2011, the ALJ determined that Johnson's refusal to watch the parking lot and leaving to get a doctor's note constituted conduct unbecoming and insubordination. The ALJ also determined that London's conduct in advising his supervisor that digging holes was not the job of a Water Meter Reader and then after being told to go to the storehouse, London merely sat outside of the storehouse constituted conduct unbecoming. The ALJ concluded that London's actions on September 28, 2011, in forwarding an outline of the job specification for a Water Meter Reader to his supervisor, and advising his supervisor that he was physically able to perform only certain duties, constituted conduct unbecoming and insubordination. However, the ALJ found that the appellants' actions on September 20, 21, 22, 23, 27 did not constitute conduct unbecoming, insubordination or neglect of duty, and thus dismissed the charges related to those dates. The ALJ also determined that Johnson's leaving work on September 28, 2011 after being told he would not be paid did not constitute conduct unbecoming, insubordination or neglect of duty, and thus dismissed the charges related to that date for Johnson. Based on the foregoing, the fact that the appellants were not afforded an opportunity to make any adjustments to their behavior, and their lack of prior discipline, the ALJ modified the six month suspensions to three month suspensions.

In their exceptions and cross exceptions, the appellants assert that the ALJ erred in finding Hall credible, as his testimony was incompatible with the undisputed material evidence. The appellants also dispute that the appointing authority disciplined them for their actions on September 19, 2011, and thus the ALJ clearly erred in finding that their actions on that date were conduct unbecoming and insubordinate. The appellants also maintain that the record does

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[4] However, it is noted that the Commission does not adopt the ALJ's determination that the appellants' layoffs were made in good faith. In this regard, the appeal of the good faith of Johnson's layoff is still pending at the OAL.

not support the ALJ's findings that their actions on several occasions were either conduct unbecoming or insubordinate. Additionally, they argue that although the ALJ noted Mack's propensity for abusing his powers, which supports their claim of retaliation, the ALJ did not find that the actions taken against the appellants were retaliatory.

In its exceptions and cross exceptions, the appointing authority asserts that the ALJ erred in modifying the six month suspensions to three month suspensions. Specifically, the appointing authority notes that it had already modified the penalty from removals, and thus the appellants' six month suspensions should be upheld. Additionally, the appointing authority maintains that although the ALJ correctly found Hall's testimony credible, the appellants' testimony is sufficient to uphold the charges against them. Moreover, the appointing authority disputes the appellants' assertions that they had established that the actions taken against them were retaliatory.

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

However, the Commission does not agree that Hall had presented a "legitimate" business reason for the assignment of out-of-title Laborer duties to the appellants. In this regard, the Commission does not find that an attempt to "save" the jobs of Charles Hall, Brigel and Page, at the expense of other employees, constitutes a legitimate business reason. However, regardless of whether or not the

assignment of the out-of-title duties was "legitimate," many of the appellants' subsequent actions were still inappropriate or insubordinate, and as such, the ALJ correctly upheld the associated charges.

In determining the proper penalty, the Commission's review is *de novo*. The Commission, in addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock,* 38 *N.J.* 500 (1962). However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison,* 81 *N.J.* 571 (1980). It is settled that the principle 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). The record reveals that the appellants were both employed for more than 15 years with the appointing authority and neither had any disciplinary record. The ALJ determined that because he dismissed several of the incidents in question, and in light of the appellants clean disciplinary records and the fact that the appointing authority failed to provide them with an opportunity to modify their behavior by following the principles of progressive discipline, the six month suspensions imposed by the appointing authority were too severe a penalty, and modified them to three month suspensions.

Although the sustained charges of conduct unbecoming and insubordination were serious, the Commission agrees with the ALJ that the appellants' six-month suspensions should be modified based on the circumstances and their records. However, the Commission finds that a 30 working day suspension for each appellant is a more appropriate penalty. In this regard, as indicated above, neither employee had a disciplinary history in their many years of service. Further, the appointing authority's actions in how it handled the assignments given to the appellants were, at best, questionable. However, the appellants are reminded that a 30 working day suspension is a severe penalty and should place them on notice that any further incident may result in their removal from employment.

Since the appellants' six month suspensions have been modified to 30 working day suspensions, the appellants are entitled to mitigated back pay, benefits and seniority pursuant to *N.J.A.C.* 4A:2-2.10. However, the appellants are not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No.

A-1489-02T2 (App. Div. Mar. 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, the appellants were found guilty of several charges and the Commission only modified the penalty. Thus, the appellants have not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellants have failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

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

ORDER

The Civil Service Commission finds that the appointing authority's action in imposing six month suspensions on the appellants was not justified. Therefore, the Commission modifies the six month suspensions to 30 working day suspensions. The Commission further orders that the appellants be granted back pay, benefits and seniority for the period following the 30 working day suspensions. 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 appellants to the appointing authority within 30 days of the 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 3RD DAY OF DECEMBER, 2014

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
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
CONSOLIDATED

IN THE MATTER OF TIMOTHY LONDON, CITY OF TRENTON, DEPARTMENT OF PUBLIC WORKS.

OAL DKT. NO. CSV 1230-12
AGENCY DKT. NO. 2012-2183

IN THE MATTER OF EDMUND JOHNSON, CITY OF TRENTON, DEPARTMENT OF PUBLIC WORKS.

OAL DKT. NO. CSV 1233-12
AGENCY DKT. NO. 2012-1462

Jack A. Butler, Esq., and **George T. Dougherty**, Esq., for appellants Timothy London and Edmund Johnson (Katz & Dougherty, attorneys)

George R. Saponaro, Esq., for respondent City of Trenton (Law Offices of Saponaro & Sitzler, attorneys) (**Steven S. Glickman**, Esq., (Ruderman & Glickman, trial attorneys))[1]

Record Closed: June 30, 2014 Decided: September 26, 2014

BEFORE **EDWARD J. DELANOY, JR.**, ALJ:

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[1] Steven S. Glickman, Esq. withdrew as attorney for respondent and George R. Saponaro, Esq. substituted during the issuance of the Initial Decision.

STATEMENT OF THE CASE

Timothy London and Edmund Johnson ("appellants") appeal their six-month suspensions effective October 4, 2011, from their positions as water meter readers ("WMR") with the City of Trenton ("City"), Department of Public Works ("DPW" or "Public Works"). The charges sustained against appellants were insubordination, N.J.A.C. 4A:2-2.3(a)(2); conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); and neglect of duty, N.J.A.C. 4A:2-2.3(a)(7). Appellants contend that the charges were brought by the City as retaliation for the actions of appellants in assisting in the investigation of allegations of criminal charges of certain City employees.

PROCEDURAL HISTORY

Appellants were each served with a Preliminary Notice of Disciplinary Action ("PNDA") dated September 29, 2011, suspending them effective on the same date. (R-13; R-35.) Appellants requested a departmental hearing, which was held on October 3, 2011. Final Notices of Disciplinary Action ("FNDA") were issued on October 3, 2011, at which time appellants were removed from their positions effective October 4, 2011. (R-15; R-37.) Appellants each requested a fair hearing on November 4, 2011. The matters were transmitted to the Office of Administrative Law ("OAL") to be heard as contested cases pursuant to N.J.S.A. 52:14B-1 to -15 and 14F-1 to -13. They were filed at the OAL on January 30, 2012.

The matters were consolidated by Order of Administrative Law Judge Donald Stein dated June 11, 2012. On March 19, 2013, the FNDAs were amended for both appellants, reflecting an amendment of the discipline from removal to six-month suspension. (R-16; R-38.) Hearings were held on April 30, 2013, May 13, 2013, June 6, 2013, June 10, 2013, June 13, 2013, December 11, 2013, December 19, 2013, January 17, 2014, March 4, 2014, and March 27, 2014. The record was held open for the receipt of transcripts and the submission of written closing summations, which were due on May 30, 2014. The parties requested and were granted an additional thirty days to file their summations. The written summations were received on June 30, 2014, and

on that day the record closed. On August 13, 2014, an Order of Extension was entered, extending the time for filing the Initial Decision until September 26, 2014.

FACTUAL DISCUSSION

Testimony

Edmund S. Johnson has been employed for seventeen years as a water systems distribution technician by the City. He is currently employed as a technician. On or about September 2011, Johnson was also the acting president of AFSCME Local 2286 ("Union"). The Union and City were governed by a collective bargaining agreement ("CBA") (R-6) and a Memorandum of Agreement ("MOA") extending the CBA until December 31, 2011 (R-7). At that time, Johnson represented all the employees covered under the CBA and MOA.

In July 2010, Mayor Tony Mack took office. During that following summer of 2010, Johnson investigated a situation where proper procedure was not followed in disconnecting a well. Sometime in late 2010 or early 2011, Johnson became aware of prohibited activity regarding City employees allegedly receiving money for illegal water hookups. Mayor Mack's brother, Stanley Davis, was involved with this activity. Davis wanted Johnson's assistance in covering up this action, but Johnson declined. Johnson also disagreed with Davis regarding overtime assignments. As a result, Davis threatened Johnson by telling Johnson he would be unemployed shortly. Johnson advised his attorney, who then drafted and forwarded a letter to the Mercer County Prosecutor's Office ("MCPO") on January 3, 2011. This letter assisted the MCPO in investigating the illegal activity. (A-56.) Johnson spoke to a representative of the MCPO via telephone regarding the matter. His communications with the Prosecutor's Office were "strictly confidential." Johnson testified that he had no conversation with anyone other than the Prosecutor's Office and his attorney regarding Davis's activities; he never communicated to anyone else his conversation with the Prosecutor's Office; and he never met with anyone from the Prosecutor's Office. Other City employees were involved with assisting in the investigation.

On Friday, September 16, 2011, Johnson was to be laid off as part of a layoff plan implemented by the City which affected approximately 120 employees. Based on what Davis had told him, Johnson was not surprised, and he believed his inclusion in the plan was based upon retaliation. This was because the budgets of the City and the DPW were separate entities. The City was subsequently determined to have failed to comply with layoff determinations of the Civil Service Commission ("CSC"). (R-21.) As a result of that determination, Johnson learned that as of September 19, 2011, he would be retained, but demoted to the title of WMR with specific job duties. (R-1; R-29.) This would include a pay decrease. John Patten and Timothy London were also included in the layoff, and all had bumping rights down to the title of WMR. Employee John Cardaciotto was not demoted in the layoff, while another, Cassarini, an adversary of Davis, was demoted after Mayor Mack took office.

On Monday, September 19, 2011, Johnson was on restricted duty, but he reported to work and punched in as a WMR in a new office location. Johnson had no conversations with Helen Fedor, supervisor of customer service for WMRs, and Johnson was not given instructions as to what his duties would be that day. He received a Personnel Action Form which reflected his new salary as a WMR. (R-2.) Johnson subsequently received information that rather than reporting as a WMR, he, Patten and London should report as laborers to the construction and maintenance division. This would include an additional pay decrease. Johnson went to supervisor Dilip Patel's office to report this issue. The new DPW acting director, Harold Hall, was meeting with Patel, and Patel advised that he would report back to Johnson. Johnson was asked by London for assistance, and after getting no response from Patel, Johnson called for an unscheduled meeting with Hall. The purpose of the meeting with Hall was to request information on why Johnson was being sent to construction and maintenance. Johnson was instructed by Hall that he, London and Patten should be sent to construction and maintenance. (R-3.) Manpower determinations are properly made by division heads. Hall advised Johnson that the change was being made at the request of Mayor Mack, and that Johnson's salary would not change. According to a memorandum written by Hall, after Johnson was given his new instructions, Johnson became loud and argumentative, and he refused to leave Hall's office until security

escorted him out. (R-5.) Johnson disagreed that Hall told him to "file a complaint through normal channels." (R-5.) Johnson also disagreed that he advised Hall that he would stay in Hall's office as long as he wanted, and that Hall instructed him to leave his office. (R-5.) Johnson testified that the entire second paragraph of Hall's memorandum was fabricated. (R-5.)

Rather than proceeding to construction and maintenance, Johnson went to City Hall. Johnson did not recall reporting to or ever seeing supervisor Tyrone Meyers in the construction and maintenance office on that day, and Johnson believed that Meyers's recitation of the events of the day was incorrect. (R-4.) Neither Johnson nor London refused any orders of Meyers on September 19, 2011. Johnson punched out at the end of the day.

Johnson agreed that job transfers were governed by the CBA, and that if an employer breached the CBA, the grievance process could be implemented. (R-6 at 0650.) Johnson did not file a grievance with regard to his job transfer to construction and maintenance. He believed that the procedure set forth in the CBA was for internal discipline only, and that the process implemented by the City called for a grievance to be filed at the State level.

Johnson reported to the construction and maintenance office each day. He subsequently met with Jesse King, a coordinator from the CSC. King advised Johnson that there had been no change in Johnson's job description, and that Johnson was still a WMR, and not a laborer. King never advised Johnson to disobey an order. King certified that he never instructed or ordered either appellant to report to one subdivision of the DPW or another following the layoff, as such orders are not issued by King or the CSC, and fall within the discretion of the appointing authority. (R-22.) Johnson agreed with the certification of King from December 12, 2012.

On Tuesday, September 20, 2011, Johnson and London reported to construction and maintenance. Johnson and London were given no duties, and neither did any work. Meyers was present for a part of the day, and he called Patel. Patel advised

Meyers to proceed as ordered by Harold Hall. Johnson incorrectly punched out twice, but he did not leave until 4:30 p.m. (A-61.)

On Wednesday, September 21, 2011, Johnson and London reported to construction and maintenance. Johnson and London were again given no duties, and neither did any work.

On Thursday, September 22, 2011, Johnson advised Meyers that he was becoming frustrated because he had union duties to fulfill. Johnson reported to Meyers that he was going to the billing office, and Meyers approved. Johnson believed he could be helpful in billing. Meyers advised Johnson that Hall was making Meyers take the actions he was taking. Once at billing, Johnson met with Harris, the acting head of billing. Johnson had not been instructed by any supervisor to report to billing. Johnson disagreed with Meyers's recitation that Johnson advised him he was going to the meter reader's office. (R-8.) Later that day, Johnson saw Meyers at billing. Meyers said he had come looking for Johnson.

On Friday, September 23, 2011, Johnson reported to construction and maintenance. He had no assignment, so he sat idle throughout the day. He was eventually told by Meyers to go to engineering and to clean out his desk and his vehicle. Johnson complied with that directive. Johnson left at 12:35 p.m., despite Meyers's warning that Johnson would be marked off payroll. Johnson did not disagree with the correspondence sent from Meyers to Patel on September 23, 2011. (R-12.)

On Monday, September 26, 2011, Johnson reported to construction and maintenance. At approximately 2:30 p.m. he was reassigned to the City dog pound by Meyers. Johnson felt this was an act of punishment. Johnson advised and showed proof to the supervisor of the dog pound, Elaine Reaves, that he had been ordered to perform sedentary duties only by his physician. (R-9; R-23; R-24.) Nevertheless, Reaves requested that he clean cages, and Johnson refused because of his light-duty limitation. Reaves then told him to sit outside and watch the parking lot. Johnson disagreed that he told Reaves that he was on "no duty." Reaves was embellishing facts in her correspondence to Joseph Rubino on September 26, 2011. (R-10.) Johnson

testified that he left to get a physician's note, and when he returned, he sat in a chair and monitored the parking lot. Johnson called the police after two other City employees started to harass and curse at him. Johnson had previously received workers' compensation Quick Notes and a patient order from his physician. (R-23; R-24; R-25; R-26.)

On Tuesday, September 27, 2011, Johnson reported to construction and maintenance. Meyers informed Johnson that Hall had advised him to mark Johnson off payroll, and that Johnson should leave. The police were summoned, and Johnson was allowed to stay. Instead, Meyers filed a trespassing complaint, which was later dismissed.

On Wednesday, September 28, 2011, Johnson reported to construction and maintenance. Meyers informed Johnson that he was marking Johnson off payroll. Johnson put in his slip and went home. Johnson was later called into City Hall, where he was served with Loudermill charges by Harold Hall. The hearing occurred on that day after disagreement over who would serve as the hearing officer. Harold Hall initially proposed that he oversee the hearing, but eventually agreed to acting business administrator Anthony Roberts as the hearing officer. The decision was to suspend Johnson pending a full hearing.

On Thursday, September 29, 2011, the Preliminary Notice of Disciplinary Action was written against Johnson (R-13), and he was suspended effective that same day. (R-14.) On October 3, 2011, Johnson was served with the Final Notice of Disciplinary Action and given his disciplinary hearing. The decision was for removal effective October 4, 2011. (R-15.) Johnson was subsequently reinstated to his position, and on March 19, 2013, an amended Final Notice of Disciplinary Action was served on Johnson, changing the disciplinary action to a 180-working-day suspension beginning September 29, 2011. (R-16.) Johnson had previously filed grievances. (R-17; R-18; R-19; R-20.)

Timothy L. London has been employed for twenty-two years as a water systems distribution technician by the City. He testified that an investigation was begun

of Stanley Davis after it was alleged that he was improperly undertaking private work for homeowners by running water lines from the curb to the home. London was approached by Patel to report on this issue. Davis advised London that when Mayor Mack came into office, the engineering division would be disbanded. London eventually testified before an MCPO grand jury, and his testimony was used to indict Davis. London testified that he did not tell anyone about what was discussed at the office of the MCPO. Subsequently, three technicians out of six were involved in the City layoff. London was present for an incident when Terrance Bailey, a laborer in the Water Works division, entered the City offices with a stuffed rat, and, banging it on the counter, said, "this is what happens to rats."

On Friday, September 16, 2011, London was part of the layoff plan implemented by the City. London was never given a reason for the layoff. The City was subsequently determined to have failed to comply with layoff determinations of the CSC. (R-21.) As part of the layoff plan, London was demoted to the title of WMR (R-30), with specific job duties (R-29). Patten and Johnson were also included in the layoff, and all had bumping rights down to the title of WMR. London was going to bump Charles Hall from his position as WMR.

On Monday, September 19, 2011, London reported to work as a WMR in a new office location. He checked in with supervisor "Ben." London's time card was ready and he punched in. Ben did not give London an assignment. London subsequently received information from Patel that rather than reporting as a WMR, he, Patten and Johnson should report to construction and maintenance to work as laborers. Patel advised that if there were any questions, London should talk to Harold Hall. London asked Johnson for assistance, and London proceeded to an unscheduled meeting at 10:00 a.m. that morning with Hall, to request the reasons why he was being sent to construction and maintenance. London was instructed by Hall that he, Johnson and Patten should be sent to construction and maintenance. (R-3.) Hall advised London that this was the wish of Mayor Mack, and that while the men would be laborers, they would be paid as technicians.

After the fifteen-minute meeting with Hall, rather than proceeding to construction and maintenance as ordered, London, without notifying a supervisor, went to the CSC. Upon his arrival at the CSC at approximately 1:00 p.m., London spoke to Jesse King. King advised London that London's title was WMR. London could not recall Patten attending the meeting with King, although King certified that Patten was present. (R-22 at 2.) London subsequently returned to the engineering office to retrieve personal items, and then went home for the day. London did not recall reporting to Tyrone Meyers in the construction and maintenance office on that day, and London believed that Meyers's recitation of the events of the day was incorrect. (R-4.) Meyers's letter was on a letterhead that London had never seen before. In addition, London had never seen supervisors addressing letters to the Public Works director. (R-4.) Such letters were written from supervisors to Patel, who would then correspond with the Public Works director. (R-8; R-12; R-32.) London never spoke to Meyers on this day. Neither Johnson nor London refused any orders of Meyers on September 19, 2011, because they received no directives from Meyers on that date.

On Tuesday, September 20, 2011, London went to construction and maintenance between 8:30 and 9:00 a.m., and reported to Meyers. Meyers told London he was going to go out on a crew and dig holes. London responded that digging holes was not the job of a WMR. Meyers then told London to go to the storehouse, and London complied with the directive. London reported to supervisor Ralph Conte. He thereafter took some parts out to a crew and came back. He did not receive any additional direction, so he sat outside the building on a bench. London never refused to go out on a crew, and Meyers did not assign him another job. London's time sheet showed he did work eight hours on September 20, 2011, and the time sheet was initialed and approved by Meyers. (A-64.) On September 21, 2011, London went to the storehouse, but on this day was not given an assignment. He sat outside all day. London was not told that he was committing misconduct or that he would be written up for either day.

On Thursday, September 22, 2011, London went to the construction and maintenance office in the morning and was again told by Meyers that he was going on a crew to dig holes. London advised Meyers that this was not the job of a WMR, and

Meyers then told London that he was not going to deal with him, and that London should go to the storehouse. Meyers took London's response that this was not the job of a WMR to be a refusal to do an ordered job. London complied with the directive and went to the storehouse. London denied that he ever refused an assignment or said he would not do work outside of the duties of a WMR, although this contradicted the language London used in his civil complaint against the City (R-31), and his amended complaint (R-42). London did not dig any holes on that day, and he was never advised by Meyers that he would be marked off payroll. London disagreed with Meyers's contention that he did not see or hear from London until about 10:30 a.m. (R-8.) London saw Meyers between 8:00 and 8:30 a.m. London was subsequently advised by Lori Gallon, a secretary in the billing division, to proceed to the billing division to sign forms. London did not advise anyone that he was leaving the storehouse, because there were no supervisors present. Once he arrived in the billing division, London was told by Harris to proceed to the storage closet. At no time was London hiding in the closet, but London acknowledged that Harris did not have authority to assign him a job. London did not witness any encounter between Meyers and Johnson on that day. London then went back to the storehouse, but he did not see Meyers on this day.

On Friday, September 23, 2011, London went to the construction and maintenance office in the morning and was told by Meyers that he was going out on a crew to dig holes. London again advised Meyers that this was not the job of a WMR, and Meyers then told London to go to the storehouse. London disagreed that, as reported by Meyers, Meyers told him he would be marked off payroll if he went to the storehouse. (R-8.) London went to the storehouse, worked a full day but did nothing, and then went home.

On Monday, September 26, 2011, London went to the construction and maintenance office in the morning and was told by Meyers that he was going out on a crew to dig holes. London again advised Meyers that this was not the job of a WMR, and Meyers then told London to go to the storehouse. London complied with the directive, but sat outside of the storehouse. London denied that he told Meyers that he was going to be in his office. (R-33.) London learned that he would not be getting paid, so he went to Johnson, who advised him to prepare a memorandum to Patel. London

became aware of a new time sheet marking him off payroll from September 20 to September 23, 2011. (A-63.)

On Tuesday, September 27, 2011, London went to the construction and maintenance office in the morning and was told by Meyers that he was off payroll and that he should leave. London called Johnson, who advised London that he could not be sent home, and that he should wait there. At no time did Johnson advise London to refuse any of Meyers's orders. The police were subsequently called and arrived at the scene. Johnson met with Meyers and the police while London stayed outside the office. The police left the scene without taking any action, and London remained on the premises. (R-34.)

On Wednesday, September 28, 2011, London attempted to resolve the stalemate. He forwarded a memorandum to Meyers, outlining the job specifications for a WMR. (R-32.) London stated that in the memo he did not refuse to perform his duties. (R-32.) Meyers took the memo and left the area. When he returned a few minutes later, Meyers told London that Harold Hall said London could "wipe [London's] ass" with the memo. On the same day, London was given notice of a Loudermill hearing. (R-35 at 2; A-15.) The Loudermill hearing was held that day. The meeting was attended by London, his union representative, attorney Jack A. Butler, Harold Hall, and the City attorney. Harold Hall was going to be the hearing officer, but Butler objected. Hall then proposed that his secretary be the hearing officer, and Butler objected again. Finally, it was agreed that the City attorney would be the hearing officer. London was found guilty of all charges and suspended immediately, effective September 29, 2011. (R-36.)

On September 30, 2011, London received notice of an action seeking to remove him effective October 4, 2011. (A-58.) On October 3, 2011, London received a Final Notice of Disciplinary Action seeking to remove him effective October 4, 2011. (R-37.) The hearing was held and London was terminated. On March 19, 2013, an amended Final Notice of Disciplinary Action was issued amending the discipline to a 180-day suspension, beginning on September 29, 2011. (R-38.) London is currently working again as a technician.

London was aware of the CBA, and that the CBA stated that if an employer breached the CBA, the grievance process could be implemented. (R-6 at 0650.) London did not file a grievance with regard to his job transfer to construction and maintenance, or his orders to dig holes, because he did not believe the issues were contractual. London did not request a civil service desk audit, because he was attempting to resolve the issue with his union. Although he could not recall them, London had previously filed grievances. (R-39; R-40; R-41.)

Dilip V. Patel is employed by the City in the water division as a supervising engineer and has been acting superintendent since 2010. He reports to the director of the Department of Public Works. Patel was not involved in the layoff plan, but he was concerned about staffing. Prior to the layoffs, the water division had six meter readers. Patel spoke to the previous director of the DPW, Ralph Burzachiello, about the issue, but received no answers.

On September 19, 2011, Harold Hall came to Patel's office at approximately 8:35 a.m. Patel had not previously met Hall. Hall introduced himself to Patel as the acting director of the DPW. Hall advised Patel to direct London and Johnson to report to construction and maintenance. Hall's directive would leave Patel's division badly understaffed, with only three meter readers. One of the three meter readers was to be Charles Hall, the nephew of Harold Hall. Charles Hall did not previously work as a meter reader, but was staffed in the parks and recreation division at City Hall. Prior to this date, Harold Hall had never inquired about the needs of the water division, nor had the mayor of Trenton. Patel e-mailed the information to Helen Fedor. (R-3.) Johnson arrived while Harold Hall was in Patel's office.

The City storehouse was an area where two to three laborer employees were needed each day. Employees on light duty could also be sent to the storehouse. The employees would keep track of their hours worked by submitting time sheets. Meyers would verify the timesheets. An employee should only be taken off payroll after first having a hearing to determine the correctness of the action.

Harold Hall is currently the public property manager for the City. On September 16, 2011, after the City's first round of layoffs, Mayor Mack told Hall to take over the directorship of the DPW in a temporary appointment. Mack told Hall that he wanted to move London and Johnson, but he did not give a reason. Mack also wanted to save the positions of meter readers Charles Hall, David Brigel and Henry Page, but again he did not give a reason. Hall began his directorship position on September 19, 2011. Hall agreed that in hindsight it would have made sense to simply move Charles Hall, David Brigel and Henry Page to laborers, but that is not what Mack wanted. The water division fell under the Department of Public Works, and Patel was the supervisor. Hall had no previous experience with the water division, but he had heard rumors about its staffing. On or about September 9, 2011, Hall was told by Roberto Perez and Dave Tallone that additional laborers were needed in the water division and that overtime was being incurred. Neither Perez nor Tallone was part of the water division. (A-71.)

On the morning of September 19, 2011, Hall arrived at work at approximately 8:30 a.m. Hall introduced himself and met unannounced with Dilip Patel. Hall did not discuss demotions with Patel. Hall was attempting to comply with Mack's directive to save the positions of meter readers Charles Hall, David Brigel and Henry Page. Without previously having requested advice from Patel or Tyrone Meyers, Hall advised Patel to increase the number of laborers working in the water division. Hall had no knowledge of the number of laborers working in the water division. However, additional laborers were critical because water-division street construction was necessary, and overtime needed to be reduced. Hall was not aware that London, Johnson and Patten were included in the layoff, and he directed Patel to send London, Johnson and Patten to the construction and maintenance office, and to assign Charles Hall (Harold Hall's nephew), David Brigel and Henry Page as WMRs. (R-3.) Hall was attempting to preserve the jobs of Charles Hall, Brigel, and Page from the layoffs. Hall believed that a move from meter reader to laborer was not a demotion if there were no loss in salary. The compensation for meter readers and laborers was the same. Hall could not recall discussing displacement rights with Patel on this morning. Hall took this action because he had been advised by Tallone, the union president, that Johnson and London could work one step below their job title as long as the compensation was the same, and because he did not believe that either Johnson or London could perform Charles Hall's

functions in the parks division. Charles Hall was placed in the parks division by the business administrator. When the City's licensed landscape architect was laid off, Charles Hall was chosen to replace him. Patel was told to advise Johnson and London that if they had any questions, they were to see Harold Hall.

Charles Hall was close friends with Mayor Mack, but the mayor never advised Harold Hall to protect Charles Hall from displacement from his job. Harold Hall advised Charles Hall on several occasions not to frequent private establishments while he was on working hours. (A-75 at 3.) At no time did Harold Hall recommend discipline for Charles Hall, because he was never insubordinate. Charles Hall subsequently pled guilty to providing bribes to the mayor. (A-75.) Tallone was indicted in November 2011.

After speaking with Patel, Hall went back to his office. At approximately 10:00 a.m., Johnson arrived at Hall's office with a request to speak to Hall about Johnson's change in position. Johnson was not wearing a cervical collar. Hall advised Johnson why he was given the labor assignment, and Johnson told Hall that he would not go to the labor pool. Hall advised Johnson that there would be no change in pay, but that if he were still not happy, he should file a grievance. Johnson became loud and argumentative, and Hall advised him that if such behavior continued, he would have to leave. Johnson continued his behavior and told Hall that he would not leave. Hall requested that security intervene, and Johnson eventually left the office after approximately fifteen minutes. (R-5.) Hall never advised Johnson that the action was being taken because "that's the way the mayor wants it." Hall was unsure where Johnson went after leaving his office.

Before or during his lunch break, Hall received a phone call from Tyrone Meyers, the general supervisor in the water utility. Meyers advised that Patten was the only man who had reported to the construction office. Meyers stated that Johnson and London were not following orders. Hall advised Meyers to document the incident. Meyers did so; however, he did not explain in detail what assignments the men refused to undertake. (R-4.) The September 19, 2011, memo sent from Meyers to Hall was not written by Hall. The memo was sent to Hall, and Hall was unsure if the heading was

unusual. (R-4.) Hall believed that Meyers would be lying if he testified that Hall wrote this memo and gave it to Meyers for his signature.

On September 20, 2011, Meyers again called Hall and told him that Johnson and London showed up at the construction office but refused their assignment. Hall advised Meyers that if the men continued to refuse to work they should be taken off payroll. However, the daily time sheet prepared by Ralph Conte and approved by Tyrone Meyers revealed that London worked for eight hours on this day. (A-64.) A second time sheet showed that Meyers marked London off payroll on September 20, 2011. (A-63.) Hall did not advise Meyers to take this action, and it was to have been done prospectively only. Hall's order that Johnson and London report as laborers was never rescinded or modified.

Over the course of the next five days, Meyers called three more times and forwarded three additional memos to Hall regarding London and Johnson. On September 26, 2011, Johnson appeared with a doctor's note assigning him to light duty only. (R-9.) The following day, a cabinet meeting was held to discuss Johnson's issue, and Hall was advised that the animal shelter needed assistance. As a result, Johnson was told to proceed to the animal shelter. Hall was subsequently advised that after his arrival at the animal shelter, Johnson refused to follow the instructions of the supervisor. (R-10.)

On September 26, 2011, London also refused an order of Tyrone Meyers. (R-33.) At this time, Hall decided that discipline was required and he prepared the charges. (R-13; R-35.) Termination was recommended because of the multiple acts of insubordination over a period of two weeks. Hall did not advise Meyers that Johnson and London should first be given a due-process hearing because he was not aware of the requirement at that time. Hall had never previously witnessed similar behavior. Hall knew Terrance Bailey, who was hired by Mayor Mack, when Bailey was a young man. Hall spoke primarily to Meyers, and he did not speak to Bailey regarding London and Johnson.

At the time of the aforementioned interactions with London and Johnson, Hall was not aware that the two men had gone to the MCPO to provide information about illegal activities being undertaken by Mayor Mack's brother, Stanley Davis. Hall subsequently read about the incident in the newspaper. Hall remained in his capacity as acting director until February 2013. Hall is currently a defendant in a civil suit brought by Johnson and London.

Helen Fedor is employed in the Trenton water division as a supervisor of customer service and a supervisor of water meter readers. She reports to Patel. Ben Brown, as the direct supervisor, reports to Fedor. Johnson and London were under Fedor's supervision for a short time after their demotion.

On September 19, 2011, Fedor received instructions from Patel regarding London and Johnson. (R-3.) She saw Johnson and London off and on during the following week. They did not want to undertake the responsibilities of a WMR. The two men said there was confusion with regard to their status.

Eric Jackson was in charge of the billing division. Fedor was unsure if light-duty employees were needed in the billing division.

Ben Brown is employed in the Trenton water division as a supervisor of meter readers. Water meter reader is an entry-level position. Brown assigns responsibilities to the workers and reports to Fedor. The September 2011 layoff did not affect the meter readers' office, which was already understaffed. Johnson, London and Patten would have been welcome additions. After the layoffs, Brown was told to assign London and Johnson to another reader so they could go out with the other reader and learn how to work the respective routes. Johnson and London refused to go out on the routes with the other reader on September 19 and 20, 2011. Johnson advised Brown that he was injured and could not walk. Brown was subsequently told by Fedor to assign Johnson and London to the construction and maintenance division.

Brown had heard rumors about various water division employees being involved in the Stanley Davis prosecution. He did not know whether Johnson and London were among those who assisted in that prosecution.

Tyrone Meyers has been employed for twenty years by the City, the last ten as a general supervisor of construction and maintenance. He currently supervises eighteen individuals. Meyers was aware of the demotion of London, Johnson and Patten to the title of WMR as a result of the 2011 layoffs. Meyers did not tell Hall that his division was short-staffed. Meyers had never previously been a hearing officer or presented a case, but he had written disciplinary charges.

On the morning of September 19, 2011, Meyers received an e-mail from Patel directing that London, Johnson and Patten should be sent to construction and maintenance. (R-3.) Meyers believes he met with London and Johnson between 9:30 and 10:00 a.m. on that morning and advised them that, as per the instructions during an earlier phone conference with Harold Hall, they were to go out on a crew as laborers. However, London and Johnson advised that they were not going to do laborer work because the CSC said they each had the title of meter reader. London and Johnson then left before lunch and never went out and did laborer work. Meyers called Hall and advised him of what had occurred. Later in the day, or on the following day, Meyers hand-wrote a memo, which his secretary typed on Department of Public Works letterhead. Patel was not copied on the memo. Meyers initialed the memo and sent it to Hall. (R-4.) On cross-examination, Meyers admitted that it was possible that he did not physically write the September 19, 2011, correspondence to Harold Hall, but that he could not recall. Upon recall to the witness stand, Meyers stated that he received the September 19, 2011, memo by e-mail or fax from Harold Hall, and that he printed and forwarded the document. This was the first time in eight or nine years that Meyers received and handled a memo in such fashion, but the contents of the memo were accurate. (R-4.) Meyers had no previous interactions with Hall before that morning. Meyers was aware that a crew was sent to West End Avenue at 12:35 p.m. to shut down a water main. (A-76.) Meyers was unsure if he was out with the crew on that day. Meyers later changed his testimony and said that he did go to the job site and

stayed there from approximately 11:45 a.m. to 12:35 p.m. At 12:35 p.m., Meyers was called back to his office.

Neither Johnson nor London reported to the storehouse on September 21, 2011. (R-45.) However, on this day, Meyers had an incident with Terrance Bailey, an employee hired by Mayor Mack. Although Meyers requested that disciplinary action be taken against Bailey, Meyers believed that Bailey was not disciplined. (A-10.)

On September 22, 2011, Johnson came to Meyers's office and said he would work as a WMR as set forth by the CSC. Johnson produced a doctor's note setting forth that he was on light duty. (R-9.) Meyers did not hear from London that morning. Meyers reported the information to Patel, and Patel advised him to mark London off payroll. Later in the day, Meyers heard that both men were upstairs in the storage closet of the billing division. However, they had not been assigned there by Meyers or anyone else. Meyers went to look for the two men but could not find them. After speaking with Hall, Meyers was told to tell the two men to clean out their desks and turn over their keys to their vehicles. (R-8.) This memo was on letterhead commonly used in the water division. Neither Johnson nor London reported to the storehouse on September 22, 2011. (R-44.)

On September 23, 2011, London and Johnson both refused to go out on a crew. Johnson advised that he was waiting for his union representative and put in a request for a day off. (R-12.)

On September 26, 2011, London again refused to go out on a crew. Hall advised Meyers to tell London that he was off payroll and that he should leave the premises. (R-33.) Hall also wanted Johnson to go out on a crew, but Johnson was on light duty and instead was sent to the animal shelter.

On September 27, 2011, there was an encounter with the police department. (R-34 at 2.) The police department did not file charges.

This was the first time in Meyers's career that he had encountered any employee who had flatly refused to follow orders. London and Johnson refused on at least four or five occasions to follow orders. Patten did follow his orders and was not disciplined for that week.

On September 28, 2011, London forwarded a memo to Meyers regarding the job specifications for a WMR. (R-32 at 2.) In the memo, London advised that he was physically able to perform only certain meter-reader duties while assigned to construction and maintenance.

London and Johnson were marked off payroll from September 20 to September 23, 2011. Meyers did not know what London's or Johnson's assignment was for September 20, 2011. London was in the storehouse, but he had not been assigned there by Meyers. Meyers approved three men being at the storehouse on September 20, 2011. (A-64.) London went there voluntarily and was therefore marked off payroll. Meyers was told by Hall and Patel to amend the time sheet, and London and Johnson were subsequently marked off payroll by Meyers. (A-63.)

When Mayor Mack arrived in Trenton, he directed that employees Charles Hall, Page, Brigel and Bailey be hired. Meyers was aware that Stanley Davis was being prosecuted for actions as a water employee, but he was unaware that Johnson and London had provided information to assist in the Davis prosecution.

On December 7, 2010, overtime was being assigned by engineering, but on December 22, 2010, overtime was being assigned by construction and maintenance. (A-79.) This was overseen by Stanley Davis. From December 2010 until December 2011 there was a dispute between engineering and construction and maintenance as to who was in charge of overtime. Davis did not want to give up his determination of overtime. In September 2011, overtime was being assigned on a rotational basis, and Meyers was never in charge of assigning overtime.

Meyers testified before the grand jury of the MCPO. He was not disciplined as a result.

John Patten, Jr., has been employed as a technician with the City water division for sixteen years. He was part of the City's layoff plan in September 2011.

Patten was aware that illegal activities were occurring in the City, wherein employees of the Water Works division would take payments from homeowners when the division was not doing work for the homeowners. Mayor Mack's brother, construction and maintenance supervisor Stanley Davis, was involved with these activities. Patten worked with Davis. Subsequent to Mack taking office, Davis advised that he was the "new sheriff in town" and that he was in charge. After Davis required employee Terry Booker to give up his desk and office to Davis, Booker advised Davis that he would not do so, and said that Davis did not have such authority. Davis proceeded to call Mack, and, subsequently, Booker agreed to give up his office to Davis. Approximately one month after Mayor Mack took office, Davis took over the supervisory duties of assigning standby work for after-hours assignments. This work had previously been done by technicians. As a result, construction and maintenance required many additional hours of overtime to be paid to Davis and other construction and maintenance employees.

Patten was approached by London about going to the MCPO. Patten did not agree to do so because he was afraid of retaliation by the City administration, specifically, Davis and Mayor Mack. It was common knowledge at the City that technicians were going to the MCPO to report illegal activities occurring in construction and maintenance. Technicians John Cardaciotto and Al Scott went to the MCPO regarding the illegal activity. Neither man was demoted as part of the City layoff. The technicians were considered snitches, and Patten and others were asked on various occasions if they had gone to the MCPO. Terrance Bailey, an employee hired by Mayor Mack, came into Patten's office on one occasion with a stuffed rat. Bailey slammed the stuffed animal on the counter and said, "this is what happens to rats."

During the September 2011 layoffs, Davis advised Patten that he would not be affected because he did not go to the MCPO. Patten was surprised when he subsequently realized that he was included in the layoff. Patten went to speak to Harold

Hall. Hall advised that there was nothing he could do because it was what Mayor Mack wanted. Hall advised Patten that he would still get the same pay in his demoted title, but that did not occur. Patten's salary was reduced. Hall ordered Patten to report to construction and maintenance as a laborer. Patten did so, and during his first week as a laborer, Patten continued in his old duties as a leak detector. This included the use of a van, a computer, and a desk. Patten was not required to dig holes or go to the animal shelter. After the first week, Patten went out as a supervisor, and his duties were primarily to drive. Johnson and London were discussed in Patten's meeting with Hall regarding their contact with the MCPO. Patten had less seniority than Johnson and London. Davis interacted with Johnson, and the two had a tense relationship.

Eric Jackson had been the director of Public Works for the twelve-year period prior to the administration of Mayor Mack. Jackson ran for mayor in opposition to Mayor Mack, but lost the election. Terrance Bailey, a laborer in the Water Works division, participated in Mayor Mack's campaign. Bailey advised Jackson that he would be acceptable with the mayor. However, within the first week of the Mack administration, Jackson was demoted to the water billing office. Mayor Mack undertook nontraditional hiring practices, favoring individuals who supported his campaign, and bypassing the traditional manner of City employment.

In September 2011, a conflict arose between construction and maintenance and the Water Works technicians, concerning who had oversight and direction for assigned overtime hours for construction and maintenance workers. At that time, the overtime system was being abused, and Jackson thought it best for technicians to oversee the overtime system. After technicians were assigned to oversee the overtime system, necessary hours decreased dramatically.

After Jackson was reassigned, Ralph Burzachiello was appointed director of Public Works, and Stanley Davis was controlling the overtime. While Davis was under investigation by the MCPO for illegalities within the Water Works, it was common knowledge that individuals were cooperating with the investigation. Johnson and London were retaliated against by the Mack administration based on their cooperation with the MCPO investigation.

The City and the Water Works division are separate entities. The general operating budget of the City is separate from the budget of the Water Works division, and revenues are not intermingled. The Water Works division generally runs a surplus, and the City can draw from the surplus with restrictions. The manner in which the City can draw from the surplus is determined by a formula. The formula is based on a percentage of current payroll. Jackson did not believe that a cut in staffing for the Water Works division would have a positive impact on the City's tax bills. Losses in State funding to the City could not be overcome by savings generated by layoffs, and the Water Works division would not benefit from layoffs.

On two occasions in 2011, Mayor Mack's administration was contacted by the State of New Jersey, Department of Environmental Protection ("DEP"), regarding concerns that the DEP had over the layoff of Water Works personnel. (A-2; A-3.) The DEP made recommendations to the City regarding the negative impact of the proposed layoffs. Jackson would have complied with the opposition of the DEP had he been in an authorized position.

In September 2011, the Water Works division employed approximately four to five meter readers. Additional meter readers would have been helpful to allow for actual water-meter readings, as opposed to estimates only. This would ensure against overbilling, which must eventually be repaid to the owner.

While Jackson was the director of Public Works, he supervised Tyrone Meyers. Jackson did not believe the September 19, 2011, memorandum from Meyers to Harold Hall was drafted by Meyers. (R-4.) The letterhead on the memorandum was not something Jackson had ever seen before, and such a memorandum is generally drafted to the employee's supervisor and not to an acting director. In addition, the memorandum was grammatically correct, which was not generally the case with documents drafted by Meyers. Jackson believed that Meyers initialed the memorandum, which was drafted by someone else.

Johnson was on light duty prior to the layoffs, and Jackson supervised both Johnson and London. He found them both to be very good employees. After the layoff, Jackson could have used Johnson's assistance in the mail distribution division. Johnson remained on light duty, and Jackson advised Patel that he could use assistance.

William Guhl has a degree in accounting and has worked in government for thirty years. Guhl started his career as an accountant in the City's water division. He was eventually named as the City's director of finance and administrator. He later became an assistant State treasurer, and for fourteen years thereafter was the township manager of Lawrence Township. During that entire time, he provided advice regarding personnel practices, and he worked with the City Water Works division. He also became familiar with the interaction between the general operating City budget and the operating budget of the Water Works. For a short period of time after Mayor Mack's election, Guhl worked as an unpaid volunteer administrator to assist with Mayor Mack's transition. With his experience, Guhl became familiar with the Water Works budget, as well as with the general operating budget of the City. Guhl was offered and accepted as an expert in municipal finance, personnel practices, and the inter-working of the City Water Works budget with the City budget.

In April 2012, Guhl prepared a report concerning the Water Works budget. (A-28.) His conclusion at that time was that the Water Works division was awash in funds, and had surpluses from year to year. Because the Water Works division was owned by the City, the City could control its personnel. The City could gain from a Water Works surplus by transferring some or all of a surplus to the City's general operating fund. Such a transfer of surplus, however, would be limited to 5 percent of the prior year's Water Works expenses. As such, the layoff of Water Works employees would result in the reduction of Water Works division expenses, and, therefore, would reduce the amount the City could draw from a Water Works surplus. In fact, any Water Works division expense reduction would not make sense for the City. While Guhl would support reducing Water Works division expenses and ratepayers' rates, he would never support reducing the Water Works division staff in order to support the general-purpose budget of the City.

Guhl had issues with Mayor Mack regarding personnel during his short time as a volunteer administrator. In one instance, Mayor Mack wanted to appoint a political supporter to lead the parks and recreation division. In another instance, Mayor Mack wanted to appoint a supporter to be director of the division of community development. Guhl advised that neither action could be taken under the City's form of government, but the mayor made the appointments anyway.

Guhl was aware of and discussed the issue of Davis's illegal activity with the mayor. The mayor was indifferent, and later put Davis in charge of overtime. Guhl left the City when he realized his agenda was different from that of Mayor Mack. If Guhl had received letters of concern from the DEP (A-2; A-3), he would have reconsidered the layoffs of Water Works employees. The efficiency and economy of the City would not be improved by laying off Water Works division employees.

Roberto Perez has been employed at the Water Works division as a meter repairman since February 2012. As a result, in September 2011 he did not speak to Harold Hall about this matter, and if Harold Hall had spoken to Perez, Perez would not have been able to assist Hall.

Maria Richardson was employed by the City as a youth opportunities coordinator during the Mack administration. During that time she spoke to Mayor Mack about administering the layoff list. She advised Mack that the layoff of Michael Morris was done incorrectly and that the CSC had ordered that Morris be reinstated. Richardson said Mack responded that he "would lay off every mother-fucking park ranger before he brought that nigger [Morris] back." Richardson currently has a suit pending against the City and Mack for retaliation.

Dave Tallone was called as a rebuttal witness by the City. Tallone has been employed at the City for thirty-seven years, and for twenty-one of those years he was the president of the union. Tallone's understanding of the civil service regulations is and was that it would be acceptable to place an employee in a job title lower than his standard title as long as there were no change in pay. Tallone met with Harold Hall

prior to Hall's reassigning London and Johnson to positions as laborers, and advised Hall of his aforementioned understanding of the civil service regulations. Tallone agreed that he did not speak to Hall regarding the civil service regulations prior to Hall commencing his duties as temporary director of the Department of Public Works.

FINDINGS OF FACT

Given the apparent contradiction of the versions of events set forth by appellants and the witnesses for respondent, it is my obligation and responsibility to weigh the credibility of the witnesses in this matter in order to make a determination. Credibility is the value that a fact finder gives to a witness's testimony. The word contemplates an overall assessment of a witness's story in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Credible testimony has been defined as testimony that must proceed from the mouth of a credible witness and must be such as the common experience and observation of mankind can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955) (quoting In re Perrone's Estate, 5 N.J. 514, 522 (1950)). In assessing credibility, the interests, motives or bias of a witness are relevant, and a fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973). Credibility does not depend on the number of witnesses and the finder of fact is not bound to believe the testimony of any witness. In re Perrone's Estate, supra, 5 N.J. 514.

The appellants presented their version of the events that occurred in September 2011. This testimony was in direct contrast to accounts presented by several employees of the City. First, Johnson disagreed that Hall told him to "file a complaint through normal channels." Johnson also disagreed that he advised Hall that he would stay in Hall's office as long as he wanted, and that Hall instructed him to leave his office. In fact, Johnson testified that the entire second paragraph of Hall's memorandum of September 20, 2011, was fabricated. Next, Johnson believed that Meyers's recitation of the events of September 19, 2011, in Meyers's memorandum of the same date, was incorrect. Johnson insisted that neither he nor London refused any orders of Meyers on

September 19, 2011. Johnson also disagreed with Meyers's statement that on September 22, 2011, Johnson told Meyers he was going to the meter readers' office. Rather, Johnson insisted he told Meyers that he was going to billing. Nevertheless, Johnson agreed that no supervisor advised him to report to billing. Further, Johnson disagreed that he told Reaves that he was on "no duty," and said that she was embellishing facts in her correspondence to Joseph Rubino on September 26, 2011.

London did not recall reporting to Tyrone Meyers in the construction and maintenance office on September 19, 2011, and London also believed that Meyers's recitation of the events of the day in his memorandum of September 19, 2011, was incorrect. London stated that he never spoke to Meyers on September 19, 2011. London's position was that neither Johnson nor London refused any orders of Meyers on September 19, 2011, because they received no directives from Meyers on that date. London stated that he did not see Meyers on September 22, 2011, but then changed his testimony and said that he saw Meyers between 8:00 and 8:30 a.m.

The City points out that while London denied that he ever refused or said he would not do work outside of the duties of a WMR, this contradicted the language London used in his civil complaint against the City and his amended complaint. In the amended complaint, London pled, "After both plaintiffs properly refused to perform job duties which were outside their Civil Service titles . . . ." (R-42.) In addition, Ben Brown testified that he was told to assign London and Johnson to another meter reader so they could go out with the other meter reader and learn how to work the respective routes. According to Brown, Johnson and London refused to go out on the routes with the other meter reader on September 19 and 20, 2011.

Accordingly, London and Johnson disagree with City employees Hall, Meyers, Reaves and Brown. Hall, Meyers, and Brown all testified, while Reaves did not. I **FIND** that Hall was a credible witness, and that Hall told Johnson to "file a complaint through normal channels." I also **FIND** that Johnson advised Hall that he would stay in Hall's office as long as he wanted, and that Hall instructed Johnson to leave his office. I **FIND** that Meyers and Brown were credible witnesses, and that while appellants did not perceive their actions as refusing orders, appellants did, as was admitted in the civil

complaint, refuse to perform job duties that were outside their civil service titles. Brown and Meyers both characterized appellants as having refused to perform job duties, and there are no facts established as to why Brown and Meyers would have lied about that characterization. Finally, although animal-control supervisor Reaves did not testify, there are no facts established as to why Reaves would lie about Johnson having told her that he was on "no duty," and/or why she would embellish facts in her correspondence to Joseph Rubino on September 26, 2011. It is not feasible to believe Reaves was part of a City conspiracy to retaliate against appellants.

Conversely, appellants do have reason to remember events as they occurred in a light most favorable to them. They stand to lose six months' pay, and they seek to prove that all of the events of September 2011 resulted in charges that were brought by the City as retaliation for the actions of appellants in assisting in the investigation of allegations of criminal charges of certain City employees. For the aforementioned reasons, I give limited credibility to the testimony of appellants.

The record in this matter includes documentary evidence and the testimony of the individuals who witnessed or had knowledge of the incidents they described. After carefully considering the testimonial and documentary evidence presented, and having had the opportunity to listen to testimony and observe the demeanor of the witnesses, I **FIND** the following to be the relevant and credible **FACTS** in this matter:

In July 2010, Mayor Tony Mack took office. During the following summer, Johnson investigated a situation where proper procedure was not followed in disconnecting a well. Sometime in late 2010 or early 2011, Johnson became aware of prohibited activity regarding employees allegedly receiving money for illegal water hookups. Mayor Mack's brother, Stanley Davis, was allegedly involved with this activity. It was alleged that Davis was improperly undertaking private work for homeowners by running lines from the curb to the home. Davis wanted Johnson's assistance in covering up this action, but Johnson declined. Johnson also disagreed with Davis regarding overtime assignments.

In September 2011, a conflict arose between construction and maintenance and the Water Works technicians concerning who had oversight and direction for assigned overtime hours for construction and maintenance workers. At that time, the overtime system was being abused. After technicians were assigned to oversee the overtime system, necessary hours decreased dramatically. As a result, Davis threatened Johnson by telling Johnson he would be unemployed shortly. Davis advised London that when Mayor Mack came to office, the engineering division would be disbanded. Johnson advised his attorney, who then drafted a letter which assisted the MCPO in investigating this illegal activity. Johnson spoke to a representative of the MCPO via telephone regarding the matter. His communications with the prosecutor's office were "strictly confidential." Johnson had no conversations with anyone other than the prosecutor's office and his attorney regarding Davis's activities, and he never communicated to anyone else his conversation with the prosecutor's office. Johnson never met with anyone from the prosecutor's office. London eventually testified before an MCPO grand jury, and his testimony was used to indict Davis. London did not tell anyone about what was discussed at the office of the MCPO. City-employee technicians John Cardaciotto and Al Scott also went to the MCPO regarding the illegal activity. Neither man was demoted as part of the City layoff. All told, three technicians out of six were involved in the City layoff.

In or around September 2011, Johnson was also the acting president of the Union. The Union and City were governed by a CBA, and an MOA extending the CBA until December 31, 2011. At that time, Johnson represented all the employees covered by the CBA and MOA.

London, Johnson and Patten were included in a layoff plan implemented by the City that affected approximately 120 employees. The City was subsequently determined to have failed to comply with layoff determinations of the CSC. On September 7, 2011, Johnson was informed by the CSC of his layoff from the title of City engineering division technician as of the close of business on September 16, 2011, and of his bumping right to move to the title of WMR, a title held by Henry Page. Johnson would receive a pay decrease in the lower position of meter reader. Johnson was advised of his right to appeal this layoff. Patten and London also had bumping rights

down to the title of WMR. London was going to bump Charles Hall from his position as WMR.

On Friday, September 16, 2011, after the City's first round of layoffs, Mayor Mack told Harold Hall to take over the directorship of the DPW in a temporary appointment. Mack told Hall that he wanted to move London and Johnson to construction and maintenance, but he did not give a reason. Mack also wanted to save the positions of meter readers Charles Hall, David Brigel and Henry Page. Based on what Davis had told him, Johnson was not surprised, and he believed his inclusion in the layoff plan was based upon retaliation. This was because the budgets of the City and DPW were separate entities. London was never given a reason for the layoff.

On the morning of September 19, 2011, Hall arrived at work at approximately 8:30 a.m., and he began his directorship position. Prior to this date, Harold Hall had never inquired about the needs of the water division, nor had Mayor Mack. Hall met unannounced with Dilip Patel at Patel's office at approximately 8:35 a.m. The water division fell under the DPW, and Patel was the supervisor. Patel had not previously met Hall. Hall introduced himself to Patel as the acting DPW director. Without previously having requested advice from Patel or Tyrone Meyers, Hall advised Patel to increase the number of laborers working in the water division. Hall had no knowledge of the number of laborers working in the water division. However, additional laborers were critical because water-division street construction was necessary, and overtime needed to be reduced. Hall directed Patel to send London, Johnson and Patten to the construction and maintenance office as laborers, and to assign Charles Hall (Harold Hall's nephew), David Brigel and Henry Page as WMRs. Charles Hall did not previously work as a meter reader, but was staffed in the recreation division at City Hall. Hall's directive would leave Patel's division understaffed with only three meter readers, but Hall was attempting to preserve the jobs of Charles Hall, Brigel, and Page from the layoffs. Hall believed that a move from meter reader to laborer was not a demotion if there were no loss in salary. The compensation for meter readers and laborers was the same. Hall took this action because he had been advised by Tallone, the union president, that Johnson and London could work one step below their job title as long as the compensation was the same, and because he did not believe that either Johnson or

London could perform Charles Hall's functions in the parks division. Patel was told to advise Johnson and London that if they had any questions, they were to see Harold Hall. After speaking with Patel, Hall went back to his office.

On the same day, September 19, 2011, Johnson was on restricted duty, but both he and London reported to work and punched in as WMRs in a new office location. Johnson did not speak with Helen Fedor, supervisor of customer service for WMRs, and Johnson was not given instructions as to what his duties would be that day. He received a Personnel Action Form which reflected his new salary as a WMR. London checked in with supervisor Ben Brown. London's time card was ready and he punched in. Brown had been told to assign London and Johnson to another WMR so they could go out with the other reader and learn to work the respective routes. Johnson and London refused to go out on the routes with the other reader on September 19 and 20, 2011. Johnson advised Brown that he was injured and could not walk. Both Johnson and London subsequently received information that rather than reporting as WMRs, they should report, along with Patten, as laborers to the construction and maintenance division. This would include an additional pay decrease. London asked Johnson for assistance, and London proceeded to an unscheduled meeting at 10:00 a.m. that morning with Harold Hall to request the reasons why he was being sent to construction and maintenance. Patten did not ask Johnson for assistance, and he did not attend the meeting with Hall.

At that morning meeting, London was instructed by Hall that he, Johnson and Patten should be sent to construction and maintenance. Hall advised that this was the wish of Mayor Mack, and that while the men would be laborers, they would be paid as technicians. Hall advised Johnson why he was given the labor assignment, and Johnson told Hall that he would not go to the labor pool. Hall advised Johnson that there would be no change in pay, but that if he were still not happy, he should file a grievance, or file a complaint through normal channels. Johnson became loud and argumentative, and Hall advised him that if such behavior continued, he would have to leave. Johnson continued his behavior and Hall instructed Johnson to leave his office. Johnson told Hall that he would not leave and that he would stay in Hall's office as long

as he wanted. Hall requested that security intervene, and Johnson eventually left the office after approximately fifteen minutes.

After leaving, rather than proceeding to construction and maintenance, Johnson went to City Hall. He did not report to construction and maintenance. Johnson punched out at the end of the day.

After the meeting with Hall, rather than proceeding to construction and maintenance, London went to the CSC. London did not advise a supervisor. Upon his arrival at the CSC at approximately 1:00 p.m., London spoke to Jesse King, a coordinator from the CSC. King advised that London's title was WMR. King never instructed or ordered either appellant to report to one division of the DPW or another following the layoff, as such orders are not issued by King or the CSC, and fall within the discretion of the appointing authority. London subsequently returned to the water-division engineering office to retrieve personal items, and then went home for the day. He did not report to construction and maintenance. Patten was the only man of the three who reported to the construction office on September 19, 2011.

Johnson subsequently also met with Jesse King. King advised Johnson that there had been no change in Johnson's job description, and that Johnson was still a WMR, and not a laborer. King never advised Johnson to disobey an order.

Job transfers at the City are governed by the CBA, and if an employer breaches the CBA, the grievance process can be implemented. Although Johnson had previously filed grievances, he did not file a grievance with regard to his job transfer to construction and maintenance because he believed that the procedure set forth in the CBA was for internal discipline only, and that the process implemented by the City called for a grievance to be filed at the State level. London also did not file a grievance.

On Tuesday, September 20, 2011, and Wednesday, September 21, 2011, London and Johnson went to construction and maintenance between 8:30 and 9:00 a.m. and reported to Meyers. Johnson was given no duties on either day. Johnson incorrectly punched out twice, but he did not leave until 4:30 p.m. Meyers told London

he was going to go out on a crew and dig holes, and London responded that digging holes was not the job of a WMR. London did not flatly refuse to go out on a crew. Meyers then told London to go to the storehouse and London complied with the directive. The City storehouse was an area where two to three laborer employees were needed each day. Employees on light duty could also be sent to the storehouse. The employees would keep track of their hours worked by submitting time sheets. Meyers would verify the timesheets. London reported to supervisor Conte. On September 20, 2011, London took some parts out to a crew and came back. He did not receive any additional direction, so he sat outside the building on a bench. London worked eight hours on September 20, 2011, and the time sheet was initialed and approved by Meyers. On September 21, 2011, London went to the storehouse, but on this day he was not given an assignment. He sat outside all day. London was not told that he was committing misconduct or that he would be written up for either day.

On Thursday, September 22, 2011, Johnson advised Meyers that he was becoming frustrated because he had union duties to fulfill. Johnson reported to Meyers that he was going to the meter reader's office and Meyers approved. However, Johnson believed he could be helpful in billing, and he proceeded to billing. Once at billing, Johnson met with Harris, the acting head of billing. Johnson had not been instructed by any supervisor to report to billing. Later that day, Johnson saw Meyers at billing. Meyers said he had come looking for Johnson. On that day, London went to the construction and maintenance office at approximately 10:30 a.m. and was again told by Meyers that he was going on a crew to dig holes. London again advised Meyers that this was not the job of a WMR, and Meyers told London that he was not going to deal with him, and that London should go to the storehouse. London was advised by Meyers that he would be marked off payroll. London complied with the directive. London did not dig any holes on that day, and London was subsequently advised by Lori Gallon, a secretary in the billing division, to proceed to the billing division to sign forms. London did not advise anyone that he was leaving the storehouse because there were no supervisors present. Once he arrived in the billing division, London was told by Harris to proceed to the storage closet. London acknowledged that Harris did not have authority to assign him a job. London did not witness any encounter between Meyers and Johnson on that day. London then went back to the storehouse.

On Friday, September 23, 2011, Johnson and London reported to construction and maintenance. Johnson had no assignment, so he sat idle throughout the day. He was eventually told by Meyers to go to engineering and to clean out his desk and his vehicle. Johnson complied with that directive. Johnson left at 12:35 p.m., despite Meyers's warning that Johnson would be marked off payroll. London was told by Meyers that he was going to a crew to dig holes. London again advised Meyers that this was not the job of a WMR, and Meyers then told London to go to the storehouse, and that London would be marked off payroll. London went to the storehouse, worked a full day but did nothing, and then went home.

On Monday, September 26, 2011, Johnson and London reported to construction and maintenance. At approximately 2:30 p.m., Johnson was reassigned to the dog pound by Meyers. Johnson felt this was an act of punishment, but there is no corroborating proof. Johnson advised and showed proof to the supervisor of the dog pound, Elaine Reaves, that he had been ordered to perform sedentary duties only by his physician. Johnson told Reaves that he was on "no duty." Nevertheless, the supervisor requested that he clean cages, and Johnson refused because of his light-duty limitation. The supervisor then told him to sit outside and watch the parking lot. Johnson left to get a physician's note, and when he returned he sat in a chair and monitored the parking lot. Johnson called the police after two other City employees started to harass and curse at him. London was told by Meyers that he was going to a crew to dig holes. London again advised Meyers that this was not the job of a WMR, and Meyers then told London to go to the storehouse. London complied with the directive, but sat outside of the storehouse. London learned that he would not be getting paid, so he went to Johnson, who advised him to prepare a memorandum to Patel. London learned of a new time sheet marking him off payroll from September 20 to September 23, 2011.

On Tuesday, September 27, 2011, Johnson and London reported to construction and maintenance. Meyers informed Johnson that Hall had advised him to mark Johnson off payroll, and that Johnson should leave. The police were summoned, and met with Meyers and Johnson while London stayed outside the office. The police left

the scene without taking any action, and Johnson was allowed to stay. Instead, Meyers filed a trespassing complaint, which was later dismissed. London was also told by Meyers that he was off payroll and that he should leave. London called Johnson, who advised London that he could not be sent home. At no time did Johnson advise London to refuse any of Meyers's orders. London remained on the premises.

On Wednesday, September 28, 2011, Johnson and London reported to construction and maintenance. Meyers informed Johnson that he was marking Johnson off payroll. Johnson put in his slip and went home. Johnson was later called into City Hall, where he was served with Loudermill charges by Harold Hall. The hearing occurred on that day after disagreement over who would serve as the hearing officer. Harold Hall initially proposed that he oversee the hearing, but eventually agreed to acting business administrator Anthony Roberts as the hearing officer. The decision was to suspend Johnson pending a full hearing. On that same day, London forwarded a memorandum to Meyers, outlining the job specifications for a WMR. In the memo, London advised that he did not refuse to perform his duties, but that he was physically able to perform only certain meter-reader duties while assigned to construction and maintenance.

Meyers took the memo and left the area. When he returned a few minutes later, Meyers told London that Harold Hall said London could "wipe [London's] ass" with the memo. London was then also given notice of a Loudermill hearing. London's Loudermill hearing was also held that day. London was found guilty of all charges and suspended immediately effective September 29, 2011.

LEGAL ANALYSIS

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil service law, a public entity should not be burdened

with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A. 11A:1-2(a). Such a civil service employee may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a).

The appointing authority shoulders the burden of establishing the truth of the allegations by a preponderance of the credible evidence, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), and a civil service employee may not be removed from his or her position unless the appointing authority establishes just cause by a preponderance of the credible evidence. In re Polk, 90 N.J. 550 (1982). Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Lowe v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

The preponderance may also be described as the greater weight of credible evidence in a case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Testimony, to be believed, must not only proceed from the mouth of a credible witness, but it must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 554–55 (1954). 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).

Retaliation Against Appellants

In the process of considering and making findings and conclusions regarding each of the charges noted hereinafter and the specifications attendant to each, I have considered the arguments by the appellants and the respondent in light of the Supreme Court decision of Winters v. North Hudson Regional Fire and Rescue, 212 N.J. 67, 71 (2012). In that matter, the Court held that, under the facts, a firefighter "who was removed from public employment after positing a claim of employer retaliation in a civil

service disciplinary proceeding . . . [was] barred from seeking to circumvent that discipline through a subsequent Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14, action also alleging retaliation." In addition, the Court held that all employees must affirmatively raise a retaliation claim under CEPA in an administrative disciplinary proceeding (if they are to raise it at all), and if the principle of collateral estoppel so warrants, an employee will be barred from raising the issue in a subsequent State judicial proceeding. The Court's holding applies equally to retaliation claims under 42 U.S.C.A. § 1983 ("section 1983" or "§ 1983").

CEPA is designed "to protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct." Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405, 431 (1994); N.J.S.A. 34:19-3.[2] As such, "CEPA must be considered 'remedial' legislation and therefore should be construed liberally to effectuate its important social

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[2] Specifically, CEPA prohibits an employer from taking retaliatory action against an employee who:

> a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer . . . that the employee reasonably believes:
>
> (1) is in violation of a law, or a rule or regulation promulgated pursuant to law . . . ; or
>
> (2) is fraudulent or criminal . . . ;
>
> b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer . . . ; or
>
> c. Objects to or refuses to participate in any activity, policy or practice which the employee reasonably believes:
>
> (1) is in violation of a law, or a rule or regulation promulgated pursuant to law . . . ;
>
> (2) is fraudulent or criminal . . . ; or
>
> (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.
>
> [N.J.S.A. 34:19-3.]

goal." Abbamont, supra, 138 N.J. at 431 (citations omitted). To establish a prima facie case under CEPA, an employee must show that

> 1) he or she reasonably believed that his or her employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy; (2) he or she performed a "whistle-blowing" activity described in [N.J.S.A. 34:19-3]; (3) an adverse employment action was taken against him or her; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action.
>
> [Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003) (citations omitted).]

As the New Jersey Supreme Court noted in Winters, the test set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), applies to CEPA claims. Winters, supra, 212 N.J. at 90. Thus, according to the Court,

> [t]he employee carries the initial burden of establishing a prim[a] facie case of retaliation. The burden of production then shifts "to the employer to articulate some legitimate, nondiscriminatory reason" for the adverse employment action. Once the employer does so, "the presumption of retaliatory discharge created by the prima facie case disappears and the burden shifts back to the [employee]." At that point, the employee must convince the fact finder that the employer's reason was false "and that [retaliation] was the real reason." The ultimate burden of proof remains with the employee.
>
> [Ibid. (citations omitted).]

The Court further stated:

> To prove the Section 1983 claim for retaliation under the First Amendment, a plaintiff must prove that: (1) "the activity in question was protected"; (2) that "his interest in the speech outweighs the state's countervailing interest as an employer in promoting the efficiency of the public services it provides through its employees"; and (3) that "the protected

> activity was a substantial or motivating factor in the alleged retaliatory action."
>
> [Id. at 89, n.5 (citation omitted).]

In light of the Supreme Court's decision in Winters, an employee must now raise at the OAL, CEPA and Section 1983 claims as part of his or her disciplinary appeal, and both employee and employer must live with the potential preclusive effect an administrative finding on the issue of retaliation may have on subsequent judicial proceedings. In Winters, the Court held that, under the facts, a firefighter who raised, but did not present a defense on, the issue of retaliation in a civil service disciplinary matter before the OAL was collaterally estopped from raising a CEPA claim in a subsequent judicial proceeding. However, the Court issued a more expansive holding with regard to the defense of retaliation in disciplinary matters. According to the Court,

> [i]f retaliatory animus is involved in the actions of a public employer, that information is important for the [Civil Service] Commission to know as part of its overall responsibility for supervision of the public employee employment and discipline system.
>
> We therefore put users of the public employment system of employee discipline on notice that integration of employer-retaliation claims should be anticipated and addressed where raised as part of the discipline review process. It is unseemly to have juries second-guessing major public employee discipline imposed after litigation is completed before the Commission to which the Legislature has entrusted review of such judgments. Findings made as part of the discipline process will have preclusive impact in later employment-discrimination litigation raising allegations of employer retaliation based on the same transactional set of facts.
>
> [Id. at 73–74 (citation omitted; emphasis added).]

In Winters, the majority specifically stated that "[i]t is because Winters raised the issue that we differentiate his case from past disciplinary actions that preceded the notice provided in this matter, where an employee might have relied on the fact that retaliation was not an essential part of the employer's case." Id. at 90, n.6 (citing

Scouler v. City of Camden, 332 N.J. Super. 69, 74–75 (App. Div. 2000)). Thus, the Court put future litigants on notice that employees must raise a defense of retaliation in administrative disciplinary matters, and that an administrative decision on that issue may have a preclusive effect on the ability to later raise the issue in a State judicial proceeding.

Here, appellants assert that the City targeted and retaliated against them. They urge that mayor Tony Mack and Harold Hall targeted appellants because they refused to be collaborators in Mack's attempts to use the Trenton Water Works as his personal slush fund to dole out favors and repay debts. What led Mack to disregard the warnings of the DEP and explicitly disobey the order of the CSC was his desire for revenge against appellants for the assistance they provided to the MCPO in indicting and convicting Mack's brother, Stanley Davis. Appellants had been forced into a corner by the City, and they could not win the game the City had structured. This was by design, but when appellants refused to simply resign in frustration, the City ejected appellants from their positions and sought termination for violations which even if sustained would not justify such a penalty. Appellants maintain that the City's bad faith began when it identified appellants in the layoff plan, when their layoffs could not have improved economy or efficiency in any way whatsoever. It continued when the City refused to follow the orders of the CSC and attempted to place appellants in the most demeaning positions available. Finally, appellants allege that the City went so far as to fabricate documents to support appellants' discipline and instruct a supervisor to go to the Trenton Police Department to personally swear out a civilian's complaint against appellant Johnson.

In consideration of the aforementioned requirements of Winters, the presentation of the facts that appellants testified before the MCPO grand jury, and subsequently were asked to work at construction and maintenance, raises at least an initial question regarding and, as such, the basis for a prima facie case of retaliation relative to, the initial removal action initiated by the City against appellants. However, the City has articulated some legitimate, nondiscriminatory reasons for the adverse employment action.

1. Targeted For Layoff

It has not been shown that appellants were a part of the City layoff because of their cooperation with the MCPO regarding Davis. The City layoff was broad and it encompassed 120 employees, and the layoff occurred approximately nine months after appellants' attorney had discussions with the MCPO regarding illegal activities at the water division. Two other water division employees, John Cardaciotto and Al Scott, also cooperated with the MCPO, and were not part of the layoff. There is also no evidence in the record that these two men were disciplined by the City. As such, it is illogical that appellants were the only two singled out for retaliation. Meyers and Hall testified that they had no knowledge of appellants' involvement in assisting with the prosecution of Davis at the MCPO. Johnson was clear that his communications with the Prosecutor's Office were "strictly confidential," and that he had no conversation with anyone other than the Prosecutor's Office and his attorney regarding Davis's activities. Johnson never communicated to anyone else his conversation with the Prosecutor's Office, and he never met with anyone from the Prosecutor's Office. London testified that he did not tell anyone about what was discussed at the MCPO. In addition, although the instant case did not involve the propriety of the City layoff, appellants attempted to show, through the testimony of Guhl, that because the budgets of the City and the water division were independent, the layoff of appellants was unnecessary to solve the City's budget issues, and is proof that the layoff was done only for retaliatory purposes. Even if accepted as true, this does not explain why technician John Patten, who did not go to the MCPO, was part of the layoff. There was no retaliatory purpose for making Patten part of the layoff. While Guhl's testimony might have exposed some budgetary mismanagement, it does little to show acts of retaliation by the City.

2. Unauthorized Unilateral Demotion Following Layoff

Appellants argue that the City's refusal to follow the orders of the CSC and the placement of the two appellants in "demeaning" positions was further proof of the City's retaliatory behavior. Appellants fail to explain why a position as laborer is demeaning, and, in any event, it has not been proven that the City refused to follow the orders of the CSC. King certified that he never instructed or ordered either appellant to report to one

subdivision of the DPW or another following the layoff, as such orders are not issued by King or the CSC, and fall within the discretion of the appointing authority.

3. Fabrication of the Record

Appellants believe that the City fabricated documents to support appellants' discipline, and that a supervisor was instructed to go to the Trenton police to swear out a civilian's complaint against Johnson. While the authorship of the September 19, 2011, memo allegedly written by Meyers to Hall is admittedly in question given Meyers's changing testimony regarding the memo's origination, the memo is not necessarily evidence of retaliatory behavior by the City. Rather, the more plausible explanation is that Hall wrote the memo for Meyers to sign as an attempt to document the events of September 19, 2011. In addition, Meyers was clear that no matter the author of the memo, the statements set forth therein were true. As such, the authorship of the memo is really of no moment, given the memo's accuracy.

4. Meyers's Civilian Complaint

The incident regarding the filing of a civilian complaint by Meyers against Johnson at the instruction of Hall occurred on September 27, 2011, eight days after the labor dispute between appellants and the City commenced. Once again, this incident, while troubling, is not proof of retaliation by the City, but more likely reflects an escalation of tempers resulting from frustration with eight days of interaction between appellants and the City.

5. Inferior Treatment as Laborers

Hall's reasoning in placing appellants in positions as laborers was explained. Hall was attempting to comply with Mack's directive to save the positions of meter readers Charles Hall, David Brigel and Henry Page. Without previously having requested advice from Patel or Tyrone Meyers, Hall advised Patel to increase the number of laborers working in the water division. Hall had no knowledge of the number of laborers working at the water division. However, additional laborers were critical

because water-division street construction was necessary, and overtime needed to be reduced. Hall directed Patel to send London, Johnson and Patten to the construction and maintenance office, and to assign Charles Hall (Harold Hall's nephew), David Brigel and Henry Page as WMRs. Hall was attempting to preserve the jobs of Hall, Brigel, and Page from the layoffs. Hall believed that a move from meter reader to laborer was not a demotion if there were no loss in salary. The compensation for meter readers and laborers was the same. Hall took this action because he had been advised by Tallone, the union president, that appellants could work one step below their job title as long as the compensation was the same, and because he did not believe that either appellant could perform Charles Hall's functions in the parks division.

The City has therefore shown a legitimate, nondiscriminatory reason for the adverse employment action. I am not convinced that the City's reason was false "and that [retaliation] was the real reason." While some of the actions of Hall were questionable at best, those actions do not rise to the level of retaliation by the City. There is insufficient evidence in the record of an effort on behalf of the City to retaliate against appellants. The speculation and allegations set forth by appellants of a retaliatory scheme hatched by Mack and carried out by Hall are proven by the record to be only speculation and allegations. As the ultimate burden of proof remains with the employee, there are not sufficient facts in the record to sustain the allegations of the appellants.

Thus, after considering all of the relevant evidence in that regard, and although appellants contend that their initial termination by the City for their actual involvement in assisting the MCPO with its investigation of Mayor Mack's half-brother, Stanley Davis, was a pretext and retaliation for their whistle-blowing efforts relative to the construction and maintenance scam regarding the receipt of money for illegal water hook-ups, I find the relevant proofs to be lacking to support their position in that regard. It is accordingly **REJECTED**, pursuant to the requirements of Winters.

Specific Allegations of Appellants' Misconduct

Based on the specifications, appellants were charged with violations of insubordination, N.J.A.C. 4A:2-2.3(a)(2); conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); and neglect of duty, N.J.A.C. 4A:2-2.3(a)(7). Each appellant was charged with one count each of insubordination, conduct unbecoming a public employee, and neglect of duty, for each of the eight days between September 19 and September 28, 2011,

Appellants have been charged with violating N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee. Conduct unbecoming a public employee has been described as an elastic phrase that includes any conduct that adversely affects the morale of governmental employees or the efficiency of a public entity or conduct that has a tendency to destroy public respect for governmental employees and confidence in public entities. Karins v. City of Atl. City, 152 N.J. 532, 554–57 (1998); In re Emmons, 63 N.J. Super. 136 (App. Div. 1960). A finding or conclusion that a public employee engaged in unbecoming conduct need not be based upon the violation of a particular rule or regulation and may be based upon the implicit standard of good behavior governing public employees consistent with public policy. City of Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955); Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992).

Appellants have also been charged with violating N.J.A.C. 4A:2-2.3(a)(2), insubordination. Insubordination can be defined as intentional disobedience or refusal to accept reasonable orders, assaulting or resisting authority, disrespect or use of insulting or abusive language to a supervisor.

Finally, appellants have been charged with violating N.J.A.C. 4A:2-2.3(a)(7), neglect of duty. This section prohibits negligence in performing one's duty.

The charges brought against appellants begin with an analysis of the initial incident on September 19, 2011. On that day, both Johnson and London reported to work and punched in as WMRs. Both Johnson and London subsequently received

information that rather than reporting as WMRs, they should report, along with Patten, as laborers to the construction and maintenance division. London asked Johnson for assistance, and London proceeded to an unscheduled meeting at 10:00 a.m. that morning with Harold Hall, to request the reasons why he was being sent to construction and maintenance.

At that morning meeting, London was instructed by Hall that he, Johnson and Patten should be sent to construction and maintenance. Hall advised that this was the wish of Mayor Mack, and that while the men would be laborers, they would be paid as technicians. Hall advised Johnson why he was given the labor assignment, and Johnson told Hall that he would not go to the labor pool. Hall advised Johnson that there would be no change in pay, but that if he were still not happy, he should file a grievance, or file a complaint through normal channels. Johnson became loud and argumentative, and Hall advised him that if such behavior continued, he would have to leave. Johnson continued his behavior and Hall instructed Johnson to leave his office. Johnson told Hall that he would not leave and that he would stay in Hall's office as long as he wanted. Hall requested that security intervene, and Johnson eventually left the office after approximately fifteen minutes.

After leaving, rather than proceeding to construction and maintenance, Johnson went to City Hall. He did not report to construction and maintenance. Johnson punched out at the end of the day.

After the meeting with Hall, rather than proceeding to construction and maintenance, London went to the CSC. London did not advise a supervisor. Upon his arrival at the CSC at approximately 1:00 p.m., London spoke to Jesse King, a coordinator from the CSC. London subsequently returned to the water division engineering office to retrieve personal items, and then went home for the day. He did not report to construction and maintenance.

I **CONCLUDE** that the actions of appellants on September 19, 2011, constitute conduct that adversely affects the morale of governmental employees or the efficiency of a public entity or conduct that has a tendency to destroy public respect for

governmental employees and confidence in public entities. Appellants' actions also constitute intentional disobedience or refusal to accept reasonable orders. Thus, the charges of conduct unbecoming a public employee and insubordination have been proven by the City, and shall be sustained. However, appellants' conduct did not constitute negligence, and, therefore, the charges of neglect of duty against both appellants are dismissed.

On Tuesday, September 20, 2011, and Wednesday, September 21, 2011, London and Johnson went to construction and maintenance between 8:30 and 9:00 a.m., and reported to Meyers. Johnson was given no duties on either day. Therefore, I **CONCLUDE** that on these dates, Johnson did not commit conduct unbecoming a public employee, insubordination or neglect of duty. London was told by Meyers to go out on a crew and dig holes, and although London did not flatly refuse to go out on a crew, London responded that digging holes was not the job of a WMR. Meyers then told London to go to the storehouse, and London complied with the directive. On September 20, 2011, London took some parts out to a crew and came back. He did not receive any additional direction, so he sat outside the building on a bench. London worked eight hours on September 20, 2011, and the time sheet was initialed and approved by Meyers. London's conduct on that day did not rise to a level of insubordination or neglect of duty, but it did constitute conduct unbecoming, and I so **CONCLUDE**. On September 21, 2011, London went to the storehouse, but on this day was not given an assignment. He sat outside all day. London's conduct on that day did not rise to a level of insubordination, neglect of duty, or conduct unbecoming, and I so **CONCLUDE**.

On Thursday, September 22, 2011, Johnson advised Meyers that he was becoming frustrated because he had union duties to fulfill. Johnson reported to Meyers that he was going to the meter readers' office and Meyers approved. London went to the construction and maintenance office at approximately 10:30 a.m. and was again told by Meyers that he was going out on a crew to dig holes. London again advised Meyers that this was not the job of a WMR, and Meyers told London that he was not going to deal with him, and that London should go to the storehouse. London complied with the directive. I **CONCLUDE** that on this date, Johnson did not commit conduct unbecoming

a public employee, insubordination or neglect of duty. London's conduct on that day did not rise to a level of insubordination or neglect of duty, but it did constitute conduct unbecoming, and I so **CONCLUDE**.

On Friday, September 23, 2011, Johnson and London reported to construction and maintenance. Johnson had no assignment so he sat idle throughout the day. He was eventually told by Meyers to go to engineering and to clean out his desk and his vehicle. Johnson complied with that directive. London was told by Meyers that he was going out on a crew to dig holes. London again advised Meyers that this was not the job of a WMR, and Meyers then told London to go to the storehouse, and that London would be marked off payroll. London went to the storehouse, worked a full day but did nothing, and then went home. I **CONCLUDE** that on this date, Johnson did not commit conduct unbecoming a county employee, insubordination or neglect of duty. London's conduct on that day did not rise to a level of insubordination or neglect of duty, but it did constitute conduct unbecoming, and I so **CONCLUDE**.

On Monday, September 26, 2011, Johnson and London reported to construction and maintenance. At approximately 2:30 p.m., Johnson was reassigned to the dog pound by Meyers. Johnson advised and showed proof to the supervisor of the dog pound, Elaine Reaves, that he had been ordered to perform sedentary duties only by his physician. Johnson told Reaves that he was on "no duty." Nevertheless, the supervisor requested that he clean cages, and Johnson refused because of his light-duty limitation. The supervisor then told him to sit outside and watch the parking lot. Johnson left to get a physician's note, and when he returned, he sat in a chair and monitored the parking lot. Johnson called the police after two other City employees started to harass and curse at him. London was told by Meyers that he was going out on a crew to dig holes. London again advised Meyers that this was not the job of a WMR, and Meyers then told London to go to the storehouse. London complied with the directive, but sat outside of the storehouse. I **CONCLUDE** that the actions of Johnson on September 26, 2011, of refusing to watch the parking lot and leaving to get a doctor's note constitute conduct that adversely affects the morale of governmental employees or the efficiency of a public entity or conduct that has a tendency to destroy public respect for governmental employees and confidence in public entities. Johnson's

actions also constitute intentional disobedience of or refusal to accept reasonable orders. Thus, the charges of conduct unbecoming a public employee and insubordination have been proven by the City, and shall be sustained. However, Johnson's conduct did not constitute negligence, and, therefore, the charge of neglect of duty is dismissed. London's conduct on that day did not rise to a level of insubordination or neglect of duty, but it did constitute conduct unbecoming, and I so **CONCLUDE**.

On Tuesday, September 27, 2011, Johnson and London reported to construction and maintenance. Meyers informed Johnson that Hall had advised him to mark Johnson off payroll, and that Johnson should leave. The police were summoned, and met with Meyers and Johnson while London stayed outside the office. The police left the scene without taking any action, and Johnson was allowed to stay. Instead, Meyers filed a trespassing complaint, which was later dismissed. London was also told by Meyers that he was off payroll and that he should leave. London called Johnson, who advised London that he could not be sent home. At no time did Johnson advise London to refuse any of Meyers's orders. London remained on the premises. I **CONCLUDE** that on this date, appellants did not commit conduct unbecoming a public employee, insubordination or neglect of duty.

On Wednesday, September 28, 2011, Johnson and London reported to construction and maintenance. Meyers informed Johnson that he was marking Johnson off payroll. Johnson put in his slip and went home. Johnson was later called into City Hall, where he was served with Loudermill charges by Harold Hall. On that same day, London forwarded a memorandum to Meyers, outlining the job specifications for a WMR. London stated that in the memo he did not refuse to perform his duties. In the memo, London advised that he was physically able to perform only certain meter-reader duties while assigned to construction and maintenance. London was then also given notice of a Loudermill hearing. I **CONCLUDE** that on this date Johnson did not commit conduct unbecoming a public employee, insubordination or neglect of duty. I **CONCLUDE** that the actions of London on September 28, 2011, constitute conduct that adversely affects the morale of governmental employees or the efficiency of a public entity or conduct that has a tendency to destroy public respect for governmental

employees and confidence in public entities. London's actions also constitute intentional disobedience or refusal to accept reasonable orders. Thus, the charges of conduct unbecoming a public employee and insubordination have been proven by the City, and shall be sustained. However, London's conduct did not constitute negligence, and, therefore, the charge of neglect of duty against him is dismissed.

In summary, all charges for neglect of duty are dismissed as to both London and Johnson. Charges of insubordination are sustained against London for his actions on September 19 and September 28, 2011, while insubordination charges are sustained against Johnson for his actions on September 19 and September 26, 2011. All other insubordination charges against London and Johnson are dismissed. Charges of conduct unbecoming are sustained against London for his actions on September 19, 20, 22, 23, 26 and September 28, 2011, while conduct unbecoming charges are sustained against Johnson for his actions on September 19 and September 26, 2011.

PENALTY

In West New York v. Bock, 38 N.J. 500, 523 (1962), the New Jersey Supreme Court stated that a public employee's prior disciplinary record may be referred to in assessing the reasonableness of a penalty for a current offense.

> [N]o rigid disciplinary guidelines for assessing penalties exist. A system of progressive discipline has evolved . . . to serve the goals of providing public employees job security and protecting them from arbitrary employment decisions. Nevertheless, at times immediate removal may be appropriate and need not be preceded by less severe penalties. See, Golaine v. Cardinale, 142 N.J. Super. 385, 395–6 (Law Div. 1976). Of course, an employee's conduct must be egregious before the policy of progressive discipline is circumvented.
>
> [Reinhardt v. E. Jersey State Prison, 97 N.J.A.R.2d (CSV) 166, 169.]

Appellants' disciplinary histories consist of the following:

As to Edmund Johnson, the parties have agreed and stipulated to his disciplinary record. (J-1.) The disciplinary history is unremarkable, and any discipline noted thereon has been removed, apparently in response to the age of the discipline.

As to Timothy London, the parties have agreed and stipulated to his disciplinary record. (J-2.) The disciplinary history is unremarkable, and there is only a one-day suspension from 2002 noted thereon.

As to the penalty of six-month suspensions, the issue is whether this is too harsh under the circumstances. I must consider whether the spirit of progressive discipline has been upheld by appellants' suspensions. Progressive discipline is intended to give the employee notice and an opportunity to correct the improper behavior.

Here, appellant's actions took place over an eight work–day period beginning on September 19, 2011, and ending on September 28, 2011. The disciplinary charges brought by the City were based on the actions taken by appellants during that time frame. All charges brought against appellants were made after the conclusion of the aforementioned eight day time frame. As such, appellants had not previously been afforded the opportunity to make adjustments in their behaviors. Therefore, the respondent City's discipline does undermine the spirit of progressive discipline. While I consider that the City has already amended its discipline from removal to six months suspension, and that appellants' conduct justifies major discipline, a six-month suspension is excessive given appellants' lack of prior discipline. However, based upon both appellant's multiple sustained disciplinary charges, more than a minimal major disciplinary action is required. Consequently, the penalty of a six-month suspension is **MODIFIED** to a three-month suspension as to both appellants.

ORDER

For the reasons discussed above, charges of insubordination are **SUSTAINED** against London for his actions on September 19 and September 28, 2011, while insubordination charges are **SUSTAINED** against Johnson for his actions on September

19 and September 26, 2011. All other insubordination charges against London and Johnson are **DISMISSED**. Charges of conduct unbecoming are **SUSTAINED** against London for his actions on September 19, 20, 22, 23, 26 and September 28, 2011, while conduct unbecoming charges are **SUSTAINED** against Johnson for his actions on September 19 and September 26, 2011. All other conduct unbecoming charges against London and Johnson are **DISMISSED**. All neglect of duty charges against London and Johnson are **DISMISSED**. The penalties therein are **MODIFIED** to a three-month suspension as to each appellant.

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, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 26, 2014
DATE

EDWARD J. DELANOY, JR., ALJ

Date Received at Agency: September 26, 2014

Date Mailed to Parties: September 26, 2014

EJD/cb

APPENDIX

WITNESSES

For appellants:

Timothy London
Edmund Johnson
Dilip Patel
Harold Hall
Helen Fedor
Ben Brown
Tyrone Meyers

For respondent:

John Patten, Jr.
Eric Jackson
Edmund Johnson
Timothy London
William J. Guhl
Harold Hall
Maria Richardson
Dave Tallone
Tyrone Meyers
Roberto Perez

EXHIBITS

Jointly submitted:

J-1	Employee Record of Edmund Johnson
J-2	Employee Record of Timothy London

For appellants:

A-1	Not in evidence
A-2	Furlough plan for City of Trenton employees, dated February 15, 2011
A-3	Department of Environmental Protection letter, dated August 5, 2011 re: concerns regarding layoff plans
A-4 thru 9	Not in evidence
A-10	Memorandum from Tyrone Meyers to Dilip Patel, dated September 22, 2011
A-11 thru 14	Not in evidence
A-15	Notice of Loudermill hearing for Timothy London, dated September 28, 2011
A-16 thru 27	Not in evidence
A-28	Statement of William J. Guhl, dated April 11, 2012
A-29	Not in evidence
A-30	City of Trenton FY 2012 Final Budget
A-31	City of Trenton Water Utility Fund, Statements of Assets, Liabilities, Reserves, and Fund Balance
A-32 thru 55	Not in evidence
A-56	Letter addressed to Mercer County Prosecutor, dated January 3, 2011, re: reprisal
A-57	Not in evidence
A-58	Preliminary Notice of Disciplinary Action for Timothy London, dated September 30, 2011
A-59 thru 60	Not in evidence
A-61	Time Card for Timothy London, pay period ending September 24, 2011
A-62	Not in evidence
A-63	Daily Time Sheet, dated September 20–23, 2011 (amended)
A-64	Daily Time Sheet, dated September 20, 2011
A-65	Trenton Police and Fire Event Report, dated September 27, 2011
A-66 thru 70	Not in evidence

A-71	Trenton Water Works, Construction and Maintenance Office C&M Daily Schedule, dated September 21, 2011
A-72 thru 74	Not in evidence
A-75	NJ.com article, dated February 27, 2013, re: "Cooperating Conspirator in Trenton Mayor Tony Mack corruption case pleads guilty to extortion charge"
A-76	Trenton Water Works, Construction and Maintenance Office Daily Log Sheet, dated September 19, 2011
A-77 thru 78	Not in evidence
A-79	Email from Dilip Patel, dated December 22, 2010

For respondent:

R-1	Layoff letter addressed to Edmund Johnson, dated September 7, 2011
R-2	Civil Service Commission Personnel Action Form, effective September 16, 2011
R-3	Email from Dilip Patel, dated September 19, 2011
R-4	Memorandum from Tyrone Meyers to Harold Hall, dated September 19, 2011
R-5	Memorandum from Harold Hall to Eric Berry, dated September 20, 2011
R-6	City of Trenton and Local #2286 agreement
R-7	Memorandum of Agreement
R-8	Memorandum from Tyrone Meyers to Dilip Patel, dated September 23, 2011
R-9	Doctor's note for Edmund Johnson, dated September 22, 2011, re: sedentary work only
R-10	Email from Elaine Reaves, dated September 26, 2011
R-11	Memorandum from Harold Hall to Anthony Roberts, dated September 27, 2011
R-12	Memorandum from Tyrone Meyers to Dilip Patel, dated September 23, 2011

R-13	Preliminary Notice of Disciplinary Action for Edmund Johnson, dated September 29, 2011
R-14	Notice of Loudermill hearing results for Edmund Johnson, dated September 28, 2011
R-15	Final Notice of Disciplinary Action for Edmund Johnson, dated October 3, 2011
R-16	Final Notice of Disciplinary Action for Edmund Johnson, dated March 19, 2013 (Amended)
R-17	AFSCME Official Grievance Form of Edmund Johnson, dated December 29, 1995
R-18	Grievance Initiation Form of Edmund Johnson, dated January 12, 2009
R-19	Grievance Appeal Form of Edmund Johnson, dated January 20, 2009
R-20	Grievance Appeal Form of Edmund Johnson, dated January 23, 2009
R-21	Final Administrative Action of the Civil Service Commission, Request for Enforcement, issued September 5, 2012
R-22	Certification of Jesse King, dated December 12, 2012
R-23	New Jersey Neck & Back Institute, P.C., Worker's Compensation / Quick Note for Edmund Johnson, dated July 18, 2011
R-24	New Jersey Neck & Back Institute, P.C., Worker's Compensation / Quick Note for Edmund Johnson, dated September 28, 2011
R-25	New Jersey Neck & Back Institute, P.C., Patient Order Requisition for Edmund Johnson, dated October 10, 2011
R-26	New Jersey Neck & Back Institute, P.C., Worker's Compensation / Quick Note for Edmund Johnson, dated October 19, 2011
R-27	City of Trenton Direct Deposit Voucher, dated April 25, 2013
R-28	Civil Service Commission Leaves, Separations and Transfers Form for Edmund Johnson, dated October 7, 2011
R-29	Civil Service Commission Job Specification 02500, Meter Reader
R-30	Civil Service Commission Personnel Action Form for Timothy London, dated September 16, 2011

R-31	Excerpts from Appellants' *Own* Civil Complaint against the City of Trenton
R-32	Memorandum from Dilip Patel to Harold Hall, dated September 29, 2011
R-33	Memorandum from Tyrone Meyers to Dilip Patel, dated September 26, 2011
R-34	Letter from Jack Butler, Esq., dated December 7, 2012, re: Trenton Police and Fire Event Report
R-35	Preliminary Notice of Disciplinary Action for Timothy London, dated September 29, 2011
R-36	Notice of Loudermill Hearing Results for Timothy London, dated September 28, 2011
R-37	Final Notice of Disciplinary Action for Timothy London, dated October 3, 2011
R-38	Final Notice of Disciplinary Action for Timothy London, dated March 19, 2013 (Amended)
R-39	Memorandum from Brandino Cacallori to Timothy London, dated November 29, 1993
R-40	Grievance Initiation Form of Timothy London, dated May 2, 1994
R-41	AFSCME Official Grievance Form of Timothy London, dated October 18, 1999
R-42	Excerpts from Appellants' *Own* Civil Complaint against the City of Trenton
R-43	Trenton Water Works Organizational Chart
R-44	Trenton Water Works Daily Time Sheet, dated September 22, 2011
R-45	Trenton Water Works Daily Time Sheet, dated September 21, 2011