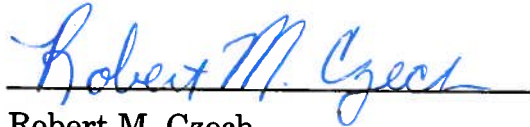


Re: Christopher Gros

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
AUGUST 13, 2014

A handwritten signature in blue ink, reading "Robert M. Czech", is written over a horizontal line.

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

OAL DKT. NO. CSV 13296-11

AGENCY DKT. NO. 2012-1223

**IN THE MATTER OF CHRISTOPHER GROS,
TOWNSHIP OF WEST MILFORD.**

John M. Barbarula, Esq., for petitioner Christopher Gros (Barbarula Law
Offices, attorneys)

Vincent J. Nuzzi, Esq., and **Lisa Chadwick Thompson, Esq.**, for respondent
(Nuzzi & Mason, attorneys)

Record Closed: June 30, 2014

Decided: July 15, 2014

BEFORE **BARRY E. MOSCOWITZ, ALJ**:

STATEMENT OF THE CASE

On September 6, 2011, Christopher Gros, a laborer with the West Milford Township Municipal Utilities Authority (MUA), yelled and screamed at his superior, physically intimidated her, and implied that he was having her followed. Should Gros be terminated? Yes. Under MUA policy, aggressive, hostile, or bullying behavior, which creates a reasonable fear of injury to another person, is prohibited and subjects that employee to discipline, including termination.

PROCEDURAL HISTORY

On September 13, 2011, the MUA terminated Gros from his employment as a laborer. In its Final Notice of Disciplinary Action, the MUA wrote that it terminated Gros for a number of reasons—including failure to report absence, harassment, and insubordination. On September 19, 2011, Gros appealed the determination.

On November 2, 2011, the Civil Service Commission transmitted the case to the Office of Administrative Law as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On November 14, 2013, November 20, 2013, and May 21, 2014, I held the hearing.

By June 30, 2014, the parties submitted their closing briefs and I closed the record upon their receipt.

FINDINGS OF FACT

Based upon the testimony the parties provided, and my assessment of its credibility, together with the documents the parties submitted, and my assessment of its sufficiency, I **FIND** the following as **FACT**:

I.

MUA

The MUA provides drinking water and sewer service for approximately 1,700 people in West Milford, New Jersey. The facilities include nine water-treatment plants, six sewer-treatment plants, six water tanks, and four lift stations. The mains span nine miles and each plant, tank, or station is free-standing. As a result, each worker must be

able to stay in contact with the main office and work independently without being micromanaged.

Love

Kelly Love is a full-time township administrator responsible for the administration of the MUA. She began working with the MUA in 2008 as an administrator and soon became responsible for the full-time administration of the MUA. In 2011, she oversaw a part-time billing clerk, Tiffany Lovell; a part-time laborer, Chris Thomas; and a full-time laborer, Gros.

Love testified that everyone in the office was friendly with one another when she first started at the MUA. Love explained that everyone lived in town and near each other and that some of their children also went to school together. According to Love, the work was fun and the experience was positive.

But Love testified that the working environment began to deteriorate in 2010. Love explained that some employees began taking advantage of her by coming to work late and leaving early. Similarly, Love explained that some employees began taking advantage of her by coming back from lunch late and not being where they were supposed to be. Finally, Love explained that some employees began taking advantage of her by taking personal calls that lasted too long. According to Love, this time period was part of her learning curve and she learned she had to be more of a boss than a friend to her colleagues.

Gros

Gros was hired as full-time laborer in 1993 and maintained that position until his termination in 2011. As the sole, full-time laborer, Gros was responsible for, among other things, maintaining the plant, keeping the grounds, and reading the meters. He was to report directly to Love. According to Love, no worker—including Gros—had ever been incommunicado during her tenure—at least not until this case.

In fact, Love had commented in her performance report for Gros in January 2011 that Gros takes great pride in his work, that he is eager to help with any task that needs to be done, and that he is extremely cost conscious. Indeed, Love noted that Gros exhibited strengths in six of the eight categories of performance: team player; meets deadlines; organizational skills and knowledge of position; leadership ability; interaction with co-workers; and quality of work. Unfortunately, Love also noted that Gros exhibited weakness in the remaining two categories of performance: communication skills and attendance.

Regarding his communication skills, Love commented that Gros had no problem voicing his opinion but was headstrong and frequently frustrated. Regarding his attendance, Love commented that Gros was absent only when he was truly unable to work but needed to report to her when he was in fact unable to do so. Ironically, Love commented in the "Employer's Comments" section that Gros rarely took time off and needed to be encouraged to do so.

II.

A.

In August 2011, Gros went on vacation to Las Vegas, Nevada for a pool tournament. Love approved vacation time for Monday, August 22, 2011, through Monday, August 29, 2011, and expected Gros to return to work on Tuesday, August 30, 2011. Gros, however, did not return to work on that date. Meanwhile, from Saturday, August 27, 2011, through Sunday, August 28, 2011, Hurricane Irene hit New Jersey, and Gros could not get a return flight home from Las Vegas.

B.

From Tuesday, August 23, 2011, through August 24, 2011, the MUA prepared for the storm. Sump pumps, sludge pumps, and sewage pumps had to be readied for anticipated flooding, and hay bales had to be amassed for anticipated overflow. In addition, all of the facilities had to be secured, especially the doors and roofs.

Moreover, all of the plants had to be pumped to their lowest levels. Finally, the generators had to be checked to make sure that they were in working order and extra parts and chemicals had to be obtained to make sure they were available for likely breakdowns and emergencies.

C.

Love testified that this storm preparation was a twenty-four-seven operation; that she had no help from the Township, the County, or the State; and that she had to do all of this without the services of Gros—her sole, full-time laborer.¹

D.

West Milford incurred damage from Hurricane Irene. Trees were downed, power was out, and roads were closed. According to Love, it took one to two weeks for things to get back to normal in West Milford and at the MUA.

III.

A.

Love testified that on Tuesday, August 30, 2011, when Gros was scheduled to return to work from vacation, she had not received a message from him indicating he would be unable to do so. Love explained that she checked her cell phone, her home phone, and her work phone for messages but had received none. To be clear, Love asserted that she had received neither a voicemail message nor a text message from Gros indicating that he would be unable to return to work. In addition, Love testified that she spoke to all of her employees at the MUA to ask whether any of them had spoken to Gros or had received a message from him and that none of them reported they had spoken to Gros or had received a message from him. Indeed, Love testified that she

¹ Love testified that she had to team up with her part-time clerk to lay down bales of hay (among other things) while her part-time laborer assumed other duties.

even reviewed the phone records from her cell phone, home phone, and work phone to be sure Gros had not left a message indicating he would be unable to return to work.

B.

On Thursday, September 1, 2011, Thomas showed Love a series of text messages he had received in an exchange with Gros earlier that morning. In that exchange, Gros told Thomas that he had left a message with Love on Monday, August 30, 2011, which informed her that he could not get a return flight home from Las Vegas, and that Love had not gotten back to him. Moreover, Gros told Thomas that Love had to get back to him:

Sep 1, 2011 10:55 AM

Thomas: Hey man hope everything is ok we r all worried

Gros: She aint worried she hasn't cald me back or text me back left message on Monday we cant get the fuck out of vegas our flights keep changing

Thomas: O shit man that what I figured Kelly said she hasn't gotten any messages or anything

Gros: Left a call n text Monday she got both its on record

Thomas: U need to call the office when u get a chance she never got anything

Gros: She can kiss my ass as supervisor she needs to contact me she has no idea what her job is

[R-13.]

C.

Gros testified that he did in fact send these text messages but that he used the language he did because he was frustrated and angered about not being able to get a return flight home from Las Vegas until Friday, September 2, 2011.

In addition, Gros testified that the following message is the text he had left with Love on August 30, 2011:

Oh hi how are things by u, we cant get back to jersey until fri morning.

[P-2.]

Although the text is dated stamped August 29, 2011—and even though a screen shot of his phone indicates that Gros sent that text on August 29, 2011²—neither the date stamp nor the screen shot proves that Gros sent the text or that Love received his message.

The vagaries of electronic messaging aside, Love testified that she never received the text message from Gros, and I believe her.³

IV.

Gros testified that he could not get a return flight home from Las Vegas until Friday, September 2, 2011, and that he contacted Love to inform her of this. To repeat, the only evidence that Gros contacted Love to inform her that he would be unable to return to work on Tuesday, August 30, 2011, other than his testimony, is the text from Monday, August 29, 2011, including the date stamp and the screen shot. But as can be seen from the text (“Oh hi how are things by u, we cant get back to jersey until fri morning”) his message is not nearly as informative as he thinks. What also undermines his testimony is his later testimony that he could have gotten a return flight home sooner but considered it too expensive to do so.

Meanwhile, Gros also testified that he learned on Saturday, August 27, 2011—two days earlier than the date he contends he contacted Love—that his fight was cancelled for Monday, August 29, 2011—which raises the specter why he did not attempt to contact Love sooner.

² The screen shot of the text message is R-21.

³ The fact that Gros neither disclosed nor produced the screen shot until the date of the hearing also raises suspicion about its authenticity.

In his defense, Gros testified that he did not know when his original flight would be rescheduled so he did not contact Love until Monday, August 29, 2011, when the evidence suggests that he at least tried to text Love.

But what was more troubling was his insistence that it was not his job to ensure or confirm that Love had received his text. More specifically, Gros testified that it was her job to confirm that she received his text and that he had already done his job by sending her the text he claims he sent on Monday, August 29, 2011. Yet this testimony was pure conjecture because Gros also testified that he never even thought to confirm that Love received his text. As such, Gros admitted that he never called Love to inform her that he was not returning to work on Tuesday, August 2011.

Gros also admitted quite candidly that when he finally did return home from Las Vegas on Friday, September 2, 2011, it was so early in the morning (four o'clock to be exact) that he was too tired to go to work, and that he did not call Love to tell her so.

In fact, Gros testified that he did not return to work until Tuesday, September 6, 2011, and that he did not help with the aftermath of the storm that holiday weekend, because he ordinarily does not work on weekends or holidays.

Surprisingly, Gros further testified that the aftermath of the storm looked no worse than the aftermath of any other storm with downed trees and power outages.

V.

A.

On September 6, 2011, Love handed Gros a letter notifying him that the MUA was going to reprimand him and suspend him for four days without pay upon his receipt of the letter because he had failed to return to work on August 30, 2011, as scheduled, in violation of MUA policy and procedure.

Gros, however, refused to acknowledge receipt of the letter.

Love certified that Gros was irate, threatening, aggressive, and intimidating. She also certified that she came to believe that Gros had been stalking her or having someone follow her. As a result, Love certified that she asked Gros to leave the building but reminded him to return to work on September 12, 2011.⁴

Love further certified that she went to the municipal police department to file a restraining order but was told she could not do so because Gros was not a family member.

At the hearing, Love recapitulated what she had written in her certification but added that Gros flicked the memo at her and pointed a finger at her. Indeed, Love emphasized that Gros was physically intimidating. "For me it was scary. He was really angry," she said.

Love also repeated that Gros had insisted that he had called her to inform her that he would not be returning to work on August 30, 2011, as scheduled. In addition, Love recounted that Gros exhorted, "This is crap!" Moreover, Love explained that Gros—who is much bigger than she—stood the whole time in her small office—including when he pointed his finger at her. "He was in my face," she said.

B.

In anticipation of a confrontation with Gros, Love had asked a former MUA commissioner to be in the room when she handed Gros the memo. At the hearing, the former commissioner, James Burns, corroborated that Gros refused to sign the memo, that he started yelling and screaming at Love, and that he pointed a finger in her face. Burns, however, did not remember Gros flicking the memo at her. More significantly, Burns stated that Gros told Love that he would not listen to her because he did not believe she knew what she was doing.

⁴ The certification referenced here is the certification Love submitted in support of the MUA's opposition to Gros's motion to dismiss this disciplinary action against him.

Burns also corroborated that Gros told Love that he was having someone follow her. Burns recounted that Gros exclaimed, "I know exactly what you're up to and what you're doing because I'm having someone follow you!" Moreover, Burns explained that Love was shaken and very upset and offered his opinion that Gros should be terminated.

On cross-examination, Burns clarified that Gros asserted, "I know exactly what you're doing," and not, "I know exactly what you're up to and what you're doing because I'm having someone follow you."

Either way, the implication was the same: Gros was having Love followed.

C.

Gros corroborated that he told Love that he would not listen to her because he did not believe she knew what she was doing—but explained that he did not think he had to listen to her because he thought he was being railroaded and had to accept the suspension. Gros also corroborated that he would not sign the memo—but explained that he would not sign the document until he spoke to a lawyer. Moreover, Gros testified that he did not confront Love in her office on September 6, 2011—although he did admit that he put his finger in her face—and that he had no problem with Love. I specifically reject the testimony that Gros had no problem with Love because Gros wrote to Thomas, "She can kiss my ass as supervisor[;] she needs to contact me[;] she has no idea what her job is," and then testified at the hearing that he did not think Love knew what she was doing.

D.

Even Thomas testified that he was shocked by the text. Thomas also testified that he too heard Gros yelling at Love in her office on September 6, 2011. Regardless, the fact remains that Thomas, in texting Gros on September 1, 2011, put Gros on notice that Love had not received his text message that he could not get a return flight home from Las Vegas until Friday, September 2, 2011, and that it behooved Gros to confirm

with Love that she knew he would be unable to return to work on Tuesday, August 30, 2011, as scheduled.

Indeed, Thomas testified that as an employee, he knew it was his responsibility to confirm that Love received such a message.

By the same token, Gros knew or should have known that he bore the same responsibility.

VI.

A.

On September 9, 2011, Love wrote a memo to the Board memorializing her confrontation with Gros on September 6, 2011, including his refusal to take direction from her generally, and his refusal to take responsibility for contacting her about not coming to work on August 30, 2011, specifically.

Love also quoted Gros as saying, "I have a guy who is following you and knows every move you make and where you are! I know you were at Bald Eagle doing hay bales and Highview, etc. I know everything!"

Gros testified that he did not have anyone following Love and that he knew where she was before the storm because he had spoken to a co-worker.

Once again, the implication was the same: Gros was having Love followed.

On September 12, 2011, the MUA handed-delivered Gros a Rice Notice notifying him that its commissioners would be raising the issue of his employment at their meeting scheduled for September 13, 2012.

B.

On September 13, 2011, Gros sent Love a letter advising Love that he would be attending the meeting.

On September 14, 2011, Love sent Gros a letter notifying him that the Board terminated him from his position with the MUA for the following reasons:

- Failure to Report Absence
- Harassment
- Insubordination
- Refusal to Follow Directions
- Failure to Perform
- Inefficiency
- Violations of Rules and Regulations
- Other Sufficient Cause

On October 14, 2011, the MUA served Gros with the Final Notice of Disciplinary Action.

Love testified that she thought Gros had been insubordinate because he had failed to advise her that he would not be able to return to work on August 30, 2011. Love also testified that she thought Gros had harassed her by his threatening manner in her office on September 6, 2011. Above all, Love testified that she thought Gros should be terminated because he would not take direction from her, because she feared him, and because she could not be alone with him.

C.

Presciently, Love had written in her performance report for Gros in January 2011 that when he did take time off, Gros needed to contact the office. She had also written in her performance report for Gros that he would sometimes let his personal problems

interfere with his work. As such, Love wrote in her performance report for Gros that he needed to take greater responsibility for the work assigned, that he needed to listen to authority more, and that he need to stop trying to fix every problem on his own. Finally, Love wrote in her performance report for Gros that he needed to accept change and not take things so personally.

VII.

On August 14, 2008, Gros received the MUA Employee Handbook, which contained, among other things, the MUA policy on workplace violence, anti-harassment, and employee discipline.

The MUA policy on workplace violence states, among other things, that aggressive, hostile, or bullying behavior, which creates a reasonable fear of injury to another person, or subjects another individual to emotional distress, is prohibited:

Workplace Violence Policy:

The Authority will not tolerate workplace violence. Violent acts or threats made by an employee against another person or property are cause for immediate dismissal and will be fully prosecuted. This includes any violence or threats made on Authority property, at Authority events or under other circumstances that may negatively affect the Authority's ability to conduct business.

Prohibited conduct includes:

- Causing physical injury to another person;
- Making threatening remarks;
- Aggressive, hostile, or bullying behavior that creates a reasonable fear of injury to another person or subjects another individual to emotional distress;
- Intentionally damaging employer property or property of another employee;
- Possession of a weapon while on Authority property or while on Authority business except with the authority of the Police Chief; and
- Committing acts motivated by, or related to, sexual harassment or domestic violence.

Any potentially dangerous situations must be immediately reported. The Authority will actively intervene in any potentially hostile or violent situation.

[R-1, page 11.]

The MUA policy on anti-harassment states, among other things, that harassment of an employee by another employee—including threats, derogatory comments, and other similar physical conduct—is prohibited:

General Anti-Harassment Policy:

It is the Authority's policy to prohibit harassment of an employee by another employee, management representative, supplier, volunteer, or business invitee on the basis of actual or perceived sex, race, creed, color, religion, national origin, ancestry, age, martial or political status, affectional or sexual orientation, domestic partnership status, civil union status, atypical heredity, cellular or blood trait, genetic information, disability (including AIDS or HIV infection), liability for service in the United States armed forces, and/or any other characteristic protected by law. While it is not easy to define precisely what harassment is, it includes slurs, epithets, threats, derogatory comments, unwelcome jokes, teasing, and other similar verbal or physical conduct.

If an employee is witness to or believes to have experienced harassment, immediate notification of the supervisor or other appropriate person should take place. See the Employee Complaint Policy.

Harassment of any employees, in connection with their work, by non-employees may also be a violation of this policy. Any employee who experiences harassment by a non-employee, or who observes harassment of an employee by a non-employee should report such harassment to the supervisor. Appropriate action will be taken against any non-employee.

Notification of appropriate personnel of any harassment problem is essential to the success of this policy and the Authority generally. The Authority cannot resolve a harassment problem unless it knows about it. Therefore, it is the responsibility of all employees to bring those kinds of problems to attention of the appropriate officials so that steps are taken to correct them.

Violation of this harassment policy will subject employees to disciplinary action, up to and including immediate discharge.

[R-1, page 11.]

The MUA policy on employee discipline states, among other things, that an employee may be subject to discipline for a variety of reason—including failure to report an absence, harassment of co-workers, and failure to report to work following a vacation:

Employee Discipline Policy:

An employee may be subject to discipline for any of the following reasons:

- Falsification of public records, including attendance and other personnel records.
- Failure to report absence.
- Harassment of co-workers and/or volunteers and/or visitors.
- Theft or attempted theft of property belonging to the Authority, fellow employees, volunteers or visitors.
- Failure to report to work day or days prior to or following a vacation, holiday and/or leave, and/or any other unauthorized day of absence.
- Fighting on Authority property at any time.
- Being under the influence of intoxicants (e.g., liquor) or illegal drugs (e.g., cocaine or marijuana) on Authority property and at any time during work hours.
- Possession, sale, transfer or use of intoxicants or illegal drugs on Authority property and at any time during work hours.
- Insubordination.
- Entering the building with permission during non-scheduled work hours.
- Soliciting on Authority premises during work time. This includes but is not limited to distribution of literature or products or soliciting membership fraternal, religious, social or political organization, and/or sales of products, such as those from Avon, Amway, etc.
- Careless waste of materials or abuse of tools, equipment or supplies.
- Deliberate destruction or damage to Authority or suppliers' property.

- Sleeping on the job.
- Carrying weapons of any kind on Authority premises and/or during work hours, unless carrying a weapon is a function of your job duties.
- Violation of established safety and fire regulations.
- Unscheduled absence and chronic or excessive absence.
- Chronic tardiness.
- Unauthorized absence from work area, and/or roaming or loitering on the premises, during scheduled work hours.
- Defacing walls, bulletin boards or any other Authority or supplier property.
- Failure to perform duties, inefficiency or substandard performance.
- Unauthorized disclosure of confidential Authority information.
- Gambling on Authority premises.
- Horseplay, disorderly conduct and use of abusive and/or obscene language on Authority premises.
- Deliberate delay or restriction of your work effort, and/or incitement of others to delay or restrict their work effort.
- Conviction of a crime or disorderly persons offense.
- Violating any Authority rules or policies.
- Conduct unbecoming a public employee.
- Violations of Authority policies, procedures and regulations.
- Violation of Federal, State or West Milford Municipal utilities Authority laws, rules or regulations concerning drug and alcohol use and possession.
- Misuse of public property, including motor vehicles.
- Unauthorized use of computers, Internet, and email
- Other sufficient cause.

Major disciplinary action includes termination, disciplinary demotion or suspension or fine exceeding five working days. Minor discipline includes a formal, written reprimand or suspension or fine of five working days or less. Employees who object to the terms or conditions of the discipline are entitled to a hearing under the applicable grievance procedure and Civil Service procedure. In every case involving employee discipline employees will be provided with an opportunity to respond to charges either verbally or in writing.

In cases of employee misconduct, the Authority believes in corrective action for the purpose of correcting undesirable behavior and preventing a recurrence of that behavior. The corrective action taken will be related to the gravity of the situation, the number and kind of previous infractions and other circumstances. In every case, employees will be given an opportunity to state the situation from their point of view.

In order to correct undesirable behavior, supervisors and managers may utilize the following corrective tools: verbal reprimand; Executive Director or Supervisor review; written reprimand; suspension; fines; and, dismissal. At the discretion of Authority, action may begin at any step, and/or certain steps may be repeated or by-passed, depending on the severity and nature of the infraction and the employee's work/disciplinary record.

Neither this manual nor any other Authority guidelines, policies or practices create an employment contract. The employee or Authority may terminate employment with Authority at any time with or without cause or reason.

[R-1, page 17.]

VIII.

The MUA usually gives an employee three verbal or written warnings before imposing any discipline on that employee such as a suspension. As this section reveals, Gros received five warnings before a suspension was imposed in October 2000 and then three more warnings before he was terminated in September 2011. Significantly, most of the previous misconduct (failure to report) is the same misconduct as some of the current misconduct. Moreover, Gros never appealed or grieved any of this prior discipline.

Warning—April 1995

On April 17, 1995, Diane Paretti, the former administrator of the MUA, wrote a memo to Gros informing him that the time he took away from his job on Wednesday,

April 12, 1995, had been charged to his personal time and that any unauthorized absence in the future would result in his suspension or dismissal.⁵

Warning—January 1998

On January 16, 1998, Paretti wrote a memo to Gros, memorializing their conversation on January 12, 1998, during which time she explained that if he was unable to complete an assigned task, then he was to advise the office of the reasons why he was unable to do so and when he was unable to do so, with particular emphasis on advising her when. The memo also memorialized that Gros still did not complete his assigned run and still did not notify the office even after their discussion. The memo then ends with a warning that if this misconduct were to happen again, Paretti would be forced to take further action. The memo also ends with a handwritten note that Paretti discussed this misconduct with the Board on January 20, 1998.

Warning—August 1998

On August 26, 1998, Paretti wrote a memo to Gros informing him that when she is out of the office, Dawn Farrell always has a number where she can be reached, and that Farrell is not authorized to approve sick days.

Suspension—October 2000

On October 23, 2000, Paretti wrote a memo to Gros memorializing that he had been advised on three different occasions to notify the office when he cannot complete the task assigned in the morning, and that if he is not making two trips to Newark, he cannot change instructions without authorization. More specifically, on Friday, October 10, 2000, Gros was instructed to truck two loads to PVSA but made only one trip. For these reasons, Paretti followed the Board directive and suspended Gros for three days, from October 24, 2000, through Friday, October 27, 2000.

⁵ The administrator of the MUA was then known as the executive director of the MUA.

Warning—November 2010

On November 22, 2010, Love wrote a memo to Gros memorializing their conversation on November 19, 2010, during which time she informed him that it was brought to her attention that he had used company time to work on a mechanical complication with his personal vehicle on November 15, 2010—without reporting to her that he was having such a problem, that he needed time to take a look at the vehicle, and that he would take his lunch hour to do so. In addition, the memo noted that extra hours were taken from his vacation time to compensate for this work. Finally, the memo warned that should this happen again further action would be taken.

Warning—December 2010

On December 2, 2010, Love wrote a memo to Gros memorializing that he was late on December 2, 2010, without notifying management. The memo also reminded him that all employees need to notify management of any tardiness, sick time, or personal time. As a result, the memo noted that one and a half hours of sick time would be used for the payroll period.

CONCLUSIONS OF LAW

I.

In appeals concerning major disciplinary action, the appointing authority bears the burden of proof. N.J.A.C. 4A:2-1.4(a). The burden of proof is by a preponderance of the evidence, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), and the hearing is de novo, Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980). On such appeals, the Civil Service Commission may increase or decrease the penalty, N.J.S.A. 11A:2-19, and the concept of progressive discipline guides that determination, In re Carter, 191 N.J. 474, 483-86 (2007).

In this case, Gros failed to report to Love that he would not be returning to work on Tuesday, August 30, 2011, as scheduled, because he could not get a return flight

home from Las Vegas, and that he would be returning to work on Friday, September 3, 2011, instead. More specifically, Gros failed to ensure or confirm that Love received the text message he claims he sent on August 29, 2011, and then, on September 1, 2011, when he learned that Love had not in-fact received his text message, he failed to report to Love again that he had been unable to return to work on Tuesday, August 30, 2011, and that he would be returning to work on Friday, September 3, 2011. To make matters worse, on September 3, 2011, when Gros finally did return home from Las Vegas, he failed to report to Love that he would not be returning to work on that date. Given these facts, I **CONCLUDE** that Gros failed to report his absences from Tuesday, August 30, 2011, through Friday, September 3, 2011, in violation of MUA policy, as well as N.J.A.C. 4A:2-2.3(a)(1), (2), (3), and (12), and is subject to discipline.

In this case, Gros also refused to sign a letter notifying him that the MUA was going to reprimand him and suspend him for four days without pay for his failure to report to work on Tuesday, August 30, 2011, through Friday, September 1, 2011. More significantly, Gros flicked the letter at Love and pointed a finger at her close to her face. Indeed, Gros, who is much bigger than Love, stood the whole time in her small office, yelled and screamed at Love, and implied that he was having her followed. Finally, Gros told Love that he did not have to listen to her. Given these facts, I **CONCLUDE** that Gros harassed Love and was insubordinate to her in violation of MUA policy, as well as N.J.A.C. 4A:2-2.3(a)(2) and (12), and is subject to discipline.

II.

The concept of progressive discipline hinges on the totality of the disciplinary record and the remoteness of the individual instances of misconduct. In re Stallworth, 208 N.J. 182, 199 (2011). To paraphrase the New Jersey Supreme Court in that case, the number of offenses, the remoteness of the offenses, and the seriousness of the offenses, together with an analysis of the present conduct, informs the evaluation of the appropriate penalty. Ibid. For example, where the present misconduct alone would not warrant a termination, a history of discipline in the reasonably recent past may very well justify a greater penalty. Ibid. Once again, it would be the number, the timing, or the

seriousness of the previous offenses that could make termination the appropriate penalty in that instance. Ibid.

In this case, Gros had received two recent warnings that he needed to be mindful of company time and report to management when he was using company time for personal use. On November 22, 2010, Gros received a warning for failing to inform Love that he had used company time to work on a mechanical complication with his personal vehicle. Then, on December 2, 2010, less than two weeks later, Gros received a warning for failing to inform Love that he would be late to work that day.

But these were not isolated incidents: On April 12, 1995, Gros failed to report to the previous administrator that he would be absent; on January 12, 1988, Gros failed to report to the previous administrator that he could not complete an assigned task on time; on August 26, 1998, Gros again failed to report to the previous administrator that he would be absent; and on October 10, 2000, Gros again failed to report to the previous administrator that he could not complete an assigned task on time.

Given the totality of this disciplinary record, together with his failure to report his absences on Tuesday, August 30, 2011, through Friday, September 3, 2011, I **CONCLUDE** that Gros should have been suspended for at least ninety days, instead of just four, as originally noticed.

That Gros should have been suspended for more than four days, however, is of no moment because Gros should be terminated for his aggressive, hostile, and bullying behavior on Tuesday, September 6, 2011, when he refused to sign the letter suspending him for the days he was absent. Likewise, Gros should be terminated for his threatening and derogatory comments toward Love. Indeed, Gros has demonstrated that he has no respect for Love, her authority, or her direction. As a practical matter, Gros had demonstrated that he can no longer work for her, and by extension, the MUA. As such, I **CONCLUDE** that Gros should and must be terminated from his position as a laborer with the MUA. His actions on September 6, 2011, were insubordinate, undermine public confidence in the MUA, and have no place in the workplace.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that Gros is hereby terminated as a laborer for the MUA and his appeal is consequently **DISMISSED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

7/15/14
DATE



BARRY E. MOSCOWITZ, ALJ

Date Received at Agency:

7-15-14

Date Mailed to Parties:
dr

JUL 16 2014


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Witnesses

For Petitioner:

Kelly Love
Christopher Thomas
James Burns

For Respondent:

Christopher Gros
Kathy Rogosich

Documents

Petitioner:

- P-1 Performance Report for Gros by Love dated January 10, 2011
- P-2 Printout of texts messages from Verizon Wireless dated August 1, 2011, through August 29, 2011

Respondent:

- R-1 Employee Handbook for MUA adopted February 27, 2007, revised March 25, 2008, revised February 1, 2011
- R-2 Receipt for Personnel Policies and Procedures Manual signed by Gros on August 14, 2008
- R-3 Memo from Diane Paretto to Gros dated April 17, 1995
- R-4 Memo from Paretto to Gros dated January 16, 1998
- R-5 Memo from Paretto to Gros dated August 26, 1998
- R-6 Memo from Paretto to Gros dated October 23, 2000
- R-7 Memo from Love to Gros dated November 22, 2010
- R-8 Memo from Board to Gros dated December 2, 2010
- R-9 Memo from Management to All Employees dated June 21, 2011

- R-10 Telephone records from Optimum Voice from August 18, 2011, to September 1, 2011
- R-11(a) Telephone records from Optimum Voice from August 19, 2011, to August 19, 2011
- R-11(b) Telephone records from Optimum Voice from August 19, 2011, to September 1, 2011
- R-12 Telephone records from Verizon Wireless from August 23, 2011, to September 18, 2011
- R-13 Screen shot of text messages from September 1, 2011
- R-14 Memo from Management to All Employees dated June 21, 2011
- R-15 Letter from Love to Gros re: reprimand dated September 6, 2011
- R-16 Memo from Love to Board dated September 9, 2011
- R-17 Rice Notice dated September 12, 2011
- R-18 Letter from Gros to Love dated September 13, 2011
- R-19 Minutes of MUA meeting on September 13, 2011
- R-20 Letter from Love to Gros re: termination dated September 14, 2011
- R-21 Screen shots of text messages from August 2, 2011, to August 29, 2011