



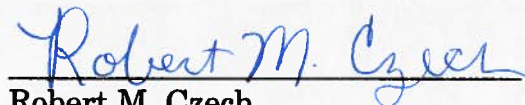
## ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Matthew Vilardo. The Commission further orders that appellant be granted back pay, benefits, and seniority for the period of separation to the actual date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C. 4A:2-2.12*. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2-2.10* and *N.J.A.C. 4A:2.12*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

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

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION  
FEBRUARY 4 2015



Robert M. Czech

Chairperson

Civil Service Commission

**Inquiries  
and  
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**attachment**



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

**INITIAL DECISION**

OAL DKT. NO. CSV 06561-14

AGENCY DKT. NO. 2014-2617

**IN THE MATTER OF MATTHEW VILARDO,  
JERSEY CITY PUBLIC SCHOOLS.**

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**Ronald M. Gutwirth, Esq.,** for appellant, Matthew Vilardo

**Jennifer Roselle, Esq.,** for respondent, Jersey City Public Schools<sup>1</sup> (Genova Burns  
Giantomasi Webster, attorneys)

Record Closed: October 14, 2014

Decided: December 3, 2014

BEFORE KELLY J. KIRK, ALJ:

**STATEMENT OF THE CASE**

Jersey City Public Schools terminated laborer Matthew Vilardo pursuant N.J.A.C. 4A:2-2.3(a)(6) for conduct unbecoming a public employee after video surveillance showed him lifting and carrying items while on workers' compensation.

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<sup>1</sup> Jersey City Board of Education.

## **PROCEDURAL HISTORY**

On or about January 9, 2013, and February 28, 2014, Jersey City Public Schools served Matthew Vilaro with a Preliminary Notice of Disciplinary Action.<sup>2</sup> (J-1.) A departmental hearing was held on March 19, 2014, and the charge of conduct unbecoming a public employee was sustained. (J-2.) On April 11, 2014, Jersey City Public Schools served Vilaro with a Final Notice of Disciplinary Action, removing him effective April 25, 2014. (J-2.) On April 24, 2014, Jersey City Public Schools served Vilaro with an amended Final Notice of Disciplinary Action, removing him effective June 20, 2014. (J-3.)

Vilaro appealed and the Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 to the Office of Administrative Law (OAL), where it was filed on May 29, 2014. Appellant filed a Motion for Summary Decision on July 28, 2014. Opposition was filed by respondent on August 18, 2014, and a reply was filed by appellant on August 27, 2014. Oral argument was heard on September 10, 2014. An Order denying summary decision was issued on September 24, 2014. The hearing was held on September 26, 2014, and September 30, 2014, and the record remained open for two weeks for post-hearing submissions. The record closed on October 14, 2014.

## **EVIDENCE AND FINDINGS OF FACT**

The parties stipulated to the Preliminary Notices of Disciplinary Action and Final Notices of Disciplinary Action, the DVD-R video surveillance of Vilaro, dated November 14, 2012, and the reports of Investigations Unltd., dated September 26, 2012, and November 14, 2012. (J-1 through J-6.) Respondent presented only the testimony of John Chester. Chester has been employed by Jersey City Public Schools for almost forty years, and his current job title is Executive Assistant, Business Division. The Business Administrator is the custodian of records, and Chester testified that the

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<sup>2</sup> The Preliminary Notices of Disciplinary Action are dated January 9, 2013, and February 28, 2014, though the Final Notice of Disciplinary Action reflects that he was served with a Preliminary Notice of Disciplinary Action on January 30, 2013. (J-1.)

records maintained by the Business Administrator include copies of the hearing officer's report in disciplinary matters.

Appellant presented the testimony of Roberto Guzman, Matthew Vilardo, David Severini, Alex Rodriguez, Joseph Cusimano, Carl Gargiulo, Vijaykumar Kulkarni, M.D., and Susan Schneider.

## **Background**

The following material facts are largely undisputed. Accordingly, I **FIND** them to be the **FACTS** of this case:

Matthew Vilardo has been employed by Jersey City Public Schools as a laborer since September 8, 1995. On September 5, 2012, Vilardo went to Concentra and reported that on September 4, 2012, he injured his right shoulder at work. Vilardo was treated by Dr. Parmar, who ordered an MRI and referred him for physical therapy. Vilardo remained out of work through September 17, 2012. Vilardo returned to work on September 18, 2012, but continued to complain about his right shoulder. Vilardo began physical therapy at Strulowitz & Gargiulo on September 19, 2012.

On the morning of September 28, 2012, Vilardo attended a Board seminar, at which Carl Gargiulo from Gargiulo & Strulowitz gave a lecture. Gargiulo is employed as a licensed physical therapist at Strulowitz & Gargiulo in Jersey City, New Jersey. Strulowitz & Gargiulo has treated injured employees for the Jersey City Board of Education (Board) for more than twenty-five years.

On the afternoon of September 28, 2012, Vilardo began treating with Dr. Oppenheim. Dr. Oppenheim excused Vilardo from work, and advised him to continue physical therapy. Vilardo attended physical therapy at Strulowitz & Gargiulo and began receiving workers' compensation.

On November 14, 2012, Investigations Unltd conducted video surveillance of Vilardo. The video reflects that Vilardo arrived at physical therapy at approximately 9:50

a.m. and left physical therapy at approximately 11:22 a.m. (J-4.) The video also reflects that Vilardo later arrived at an office building and began lifting and carrying items at approximately 11:44 a.m. The video further reflects that three trips were made between an office building and storage unit, concluding at approximately 1:26 p.m.

Vilardo was out of work from September 5, 2012, through September 17, 2012, and from September 28, 2012, through November 18, 2012. On November 19, 2012, Vilardo returned to full-duty work without restrictions.

## **Testimony**

### Roberto Guzman

Roberto Guzman, a friend of Vilardo, asked Vilardo to help him move household and personal items from his office in Jersey City, where he works as IT support, to a storage unit in Jersey City. Guzman had packed the boxes and containers himself. Some were almost empty, while others weighed approximately five to twenty pounds. Guzman does not lift weights and is unable to carry heavy things, but he was able to lift two or three of the boxes at a time. Guzman had not packed any items that he was unable to lift himself. The contents included items such as empty CD cases, clothes hangers, plastic dishes, plastic cups, phones, clothes, office supplies, and a foam bed.

Sometime after November 14, 2012, Guzman returned to the storage unit with Vilardo to weigh approximately ten or twelve of the boxes, which were in the same condition as on November 14, 2012.

### Matthew Vilardo

Vilardo works an eight-hour day, six hours of which are manual labor. The other two hours consist of transporting supplies and materials from location to location as a truck driver. Vilardo's job as a laborer requires him to manually remove debris, break down walls, rip down ceilings, deliver and remove furniture, from desks and chairs to industrial stoves and refrigerators, and pick-up and deliver debris and equipment.

Vilardo handles sheet-rock deliveries and food commodity deliveries consisting of truckloads of food and canned goods. The boxes of canned goods reflect the weight, which is thirty to forty pounds per box. During the winter, Vilardo delivers rock salt to schools. One bag of rock salt weighs fifty pounds, and one bag of calcium chloride weighs 100 pounds. He can lift 100 pounds without assistance. However, approximately 60 pounds is the average he lifts before seeking assistance. Assistance is necessary for moving items like sheet rock, air conditioners, and industrial refrigerators, stoves, and mixers, as a stove may weigh 400-600 pounds and a mixer may weigh 180-200 pounds. Big material may require 2-4 men, with each man taking a corner, which is awkward and results in uneven weight distribution and lopsided carrying.

Laborers use hand trucks and flat dollies. The job requires that laborers go up and down stairs, and on and off trucks without tailgates, including climbing or jumping up and down the back of the truck. Jersey City Public Schools has forty locations, and probably fewer than twenty elevators, which sometimes do not function, and sometimes the materials do not fit in an elevator. Carrying boxes on a shoulder is actually easier than putting five boxes on a hand truck and going up a steep flight of steps, which may be broken or chipped.

On September 4, 2012, the laborers were under pressure to get their jobs done because schools get moved from location to location during the summer. They were moving a lot of furniture, which required loading and unloading the truck, getting on and off the truck, and going up and down stairs. Vilardo was at Infinity School going up and down stairs when he started feeling pain in his right shoulder and it finally gave out on him. He felt a stabbing burn under his armpit and his fingertips became tingly. Vilardo immediately complained of the pain, but he continued to work until 8:30 p.m., because they were short-staffed and his foreman advised that the job needed to be completed that day.

The following morning, Vilardo returned to work. He drove the truck to the Board building and loaded in excess of sixty boxes of calendars. His right arm hurt, and he believed it was injured because of the burning and pain in his fingertips. Vilardo went to



Concentra, where he was evaluated by Dr. Parmar. Dr. Parmar gave Vilardo paperwork to get an MRI and paperwork to provide to the Board to excuse him from work pending the MRI results. The MRI was done on September 10, 2012. Vilardo was out of work from September 5, 2012, through September 17, 2012. When he was first injured, the paperwork from Dr. Parmar said no pushing or pulling over 30 pounds. However, he was sent back to work on September 18, 2012, so he understood that restriction to have ended upon his return. When he returned to work, he did his job, but continued to complain about pain, burning, and numbness. He experienced symptoms he never had before, and believed something was wrong. He got an appointment with the Board's specialist, Dr. Oppenheim. His first visit with Dr. Oppenheim was scheduled for the afternoon of September 28, 2012. Dr. Oppenheim advised him to continue physical therapy. He saw no other doctors, and at no time was he advised that he was not permitted to do certain things.

On the morning of September 28, 2012, he attended a Board seminar, at which Carl Gargiulo from Gargiulo & Strulowitz gave a lecture. He had been attending physical therapy at Strulowitz & Gargiulo for approximately one week prior to the seminar. Gargiulo advised that when injured on the job, you should not go home and feel sorry for yourself, or stay in bed on medication. Gargiulo recommended going to the gym and staying active, which is a form of therapy for the mind, body, and spirit. Home-care instructions were to always stretch, use ice and heat, go for walks, or go to the gym.

While at physical therapy, Vilardo received electrical stimulation, ice, heat, and ultrasound on his shoulder. His routine involved activities like stretching; a digital machine that simulates swinging a hammer, with tension; pulling machine; hand-bike machine; carrying; lifting; and up and down stairs. When in physical therapy, the therapist would set him up, tell him what to do, show him what to do initially, then he would start to do what was instructed and the therapist would move on to the next person. Vilardo did not receive assistance, and once the five minutes started, he was basically alone. The therapist monitored the beginning to ensure it was done correct, and the therapist would return for the next set up, tell him what to do, probably watch him do it once and again move on to the next person.

The work-hardening therapy was more difficult than regular physical therapy. He began work-hardening on September 19, 2012, three days per week at first and then five days per week in the last two or three weeks, beginning approximately November 5, 2012. Work-hardening involved lifting a crate weighing 10-15-20 pounds from waist high to overhead onto a shelf using his tiptoes in five minute intervals, during which time it was probably 20 or more times waist-over-head non-stop; carrying 20-25 pounds while walking around for five-minute intervals non-stop; carrying a 10-15 pounds "big foam thing" while walking up and down stairs from the first floor to the second floor, which was 20-30 steps in five-minute intervals non-stop. The various activities were in 5-minute intervals for at least a half hour non-stop. Vilardo knew how much weight he was lifting, and he was advised of his progress.

Initially, Vilardo was unable to extend his arm without more severe pain, but he was able to start lifting it and moving it by himself after week of physical therapy. Vilardo characterized physical therapy as intense exercise. His sessions were 1.5 to 2 hours. He was doing very well in physical therapy and complied with all requirements. However, he never stopped complaining about his shoulder/underarm and bicep. His target date to return to work was November 19, 2012. His last appointment with Dr. Oppenheim was on November 16, 2012, and he was cleared to return to work on November 19, 2012. The burning sensation and tingling in fingertips was not going away, but he was feeling better and had more movement, extension, and rotation in his arm.

On November 14, 2012, Guzman asked Vilardo to help him move items from his office to a storage unit. Vilardo received no compensation from Guzman. Vilardo was leaving physical therapy, not far away, and he already knew that he was returning to work on Monday because his maximum medical improvement was up on Friday, November 16, 2012. Despite the pain, he was feeling good after physical therapy, because he had gotten ice, heat, and electrical stimulation, and was on medication.

Vilardo characterized what he was lifting and carrying for Guzman as "junk." He did not look in the boxes, but some items he saw were paper cups, clothes hangers,

and a coffee pot. He felt the weight of the boxes and they were easy enough for him or Guzman to lift and carry. His estimate was that the boxes weighed no more than 20 pounds. Muscle has memory and he is aware of what weight his body is able to handle because he has been a laborer all his life. Physical therapy was much more intense than the moving.

After receiving a Preliminary Notice of Disciplinary Action, Vilardo returned to the storage unit with Guzman to weigh the boxes. The air conditioner box did not contain an air conditioner. The items appeared in the same condition as on November 14, 2012. Vilardo purchased a household scale because he wanted to prove that the boxes were not heavy. He weighed what looked heaviest and took photographs. He tried to position the boxes on the scale so that the photographs would reflect the weight. He wrote down some of the weights (17.4, 14.8, 11.9, 15.9) on the photographs in P-7, but was unable to weigh everything in storage. He also measured the loading dock, which was 42 inches high.

Vilardo found out about the video months after it was taken. He initially testified that it was one to three months later, but then testified that his union had trouble obtaining the video and he did not see the video until he retained an attorney, so it may have been six months later.

Vilardo has had no prior discipline. When he returned to work on November 19, 2012, it was one hundred percent full, active duty. There is no such thing as light duty, and he would not be allowed to do anything less than eight hours of work or less than his normal daily job duties. The week he returned he had to move an industrial two-door refrigerator and approximately 142 boxes of commodities. From November 19, 2012 until the end of April 2014, when he took disability leave for an intestinal problem, he never refused any assignment and did not take days off because of his shoulder. He did whatever was required despite the pain. He has a good absentee record, and does not take days off unless they are "use or lose" days. He had in excess of 200 sick days accumulated, maybe 240.

Vilardo continually pressed for additional treatment from the first day he was injured. He started to question himself, because he had burning in his arm and tingling in his fingers, but had been advised that the MRI showed nothing and his request to see another doctor was denied. He went to a back specialist to see if his back was the cause of the pain. After the back specialist, he went to a shoulder specialist. The shoulder specialist sent him for an MRI arthrogram, and he underwent shoulder surgery on August 6, 2014. (The surgery was delayed as a result of his intestinal issue.) The shoulder surgery was paid for and he remained on temporary disability. At the time of the hearing, he was in physical therapy three days per week, paid for by workers' compensation, and he was receiving workers' compensation benefits. After surgery, his surgeon instructed him not to do anything while the shoulder sling was on. That was the first time he was ever told by workers' compensation not to do anything. No one from Jersey City Public Schools told him what he was or was not allowed to do.

Vilardo had issues with his shoulder and back in 2011, but his last medical treatment had been probably more than a year prior to September 4, 2012, and he had been back to work every day.

David Severini

David Severini has been employed as a laborer by Jersey City Public Schools for approximately twenty-one years. Severini was Vilardo's co-worker, and is now his supervisor. Severini attended the seminar on September 28, 2012. During the seminar, Gargiulo advised that while attending physical therapy, they do not want you sitting around like a couch potato.

Severini had a workers' compensation case several years ago. He was out of work for approximately ten months, and never received any written instruction from the Board regarding level of activity or regarding what he was allowed to do while on disability.

Alex Rodriguez

Alex Rodriguez has been employed as a laborer by Jersey City Public Schools for thirteen years. He attended the seminar on September 28, 2012. Although Gargiulo did not say anything specific about level of activity, he encouraged all workers to be as physical and active as possible while off the job, including going to the gym. Gargiulo mentioned that workers should not stay home and not do anything.

Rodriguez has had two workers' compensation cases since 2010, for which he was out of work. He never received any oral instruction from the Board about no activity, and no one from the Board showed him any written rule about no activity. Gargiulo encouraged the workers to go to the gym if able, and to do physical things if able, in order to get back to work sooner, but to be careful. Workers should be as physical and active as possible without causing injury.

Joseph Cusimano, Jr.

Joseph Cusimano has been employed as a plasterer by Jersey City Public Schools for approximately eleven years. Cusimano attended the seminar on September 28, 2012. Gargiulo said that if you are going for physical therapy, on your own time you should keep moving and really should not just be hanging around, or it would counteract physical therapy. No one from the Board showed him any rule that workers cannot engage in physical activity if injured.

Carl Gargiulo

Carl Gargiulo gave a lecture at the Board's seminar on September 28, 2012. His recollection, without having reviewed the lecture, was that it was based upon preventative concepts, not treatment. It was a general purpose lecture with no specific instruction, the gist of which was low-back-related, not extremities-related, such as safe lifting for low back, remaining active with low-back injury, maintaining muscle strength, and preventing low-back injuries.

Gargiulo did not recall exactly what he said at the lecture regarding physical activity. Physical activity is desirable following injury if medically appropriate. The general gist was that guided physical activity is desirable. He made no recommendations during the lecture, and he did not recall addressing going to the gym. Gargiulo did not think he addressed injured workers at the seminar. However, as a physical therapist, he testified that a patient's activity level is essential to recovery if within the guidelines of a medical professional.

Gargiulo did not issue a statement that people with pending workers' compensation claims should not engage in activity. Activity that is safe can be beneficial when returning from injury. Guided means it is done with some guidance and supervision so as not to reinjure the area being rehabilitated. He provides guided advice because patients sometimes need direction as to how to resume activities and stay active.

#### Susan Schneider

Susan Schneider has a doctorate in physical therapy and is a licensed physical therapist. She is employed as a senior physical therapist by Strulowitz & Gargiulo, where she has worked for twenty-seven years.

Vilardo was Schneider's patient approximately two years ago for a shoulder injury. Schneider evaluated his shoulder and began treatment, which consisted of a series of modalities, including moist heat, electrical stimulation, ultrasound, manual techniques for range of motion, and an exercise program initially for range of motion. Vilardo treated for two months, a total of approximately 24-25 treatments. The last week and a half of Vilardo's treatment was work-hardening, which is the last phase of treatment used in a rehabilitation program to progress a patient from strengthening range of motion to more work-simulation activities to try to prepare for work duties. It consists of taking baseline data and discussing job duties with the patient and what the patient feels his or her limitations are in returning to work. Work-hardening attempts to simulate activities that would allow the patient to succeed and to tell the doctor if it looks like the patient has the capability of returning to work.

Vilardo began work-hardening in the beginning of November 2012. The major limitation with Vilardo's shoulder was lifting things overhead and lifting and carrying heavy objects. After his baseline was established, Schneider set up a lifting and carrying program and then some overhead tool manipulation on a special computer machine. Vilardo started with a ten-pound weight in a crate, and he would walk 200-250 feet carrying the crate with a ten-pound weight in it. Additionally, because Vilardo had to go up and down stairs and ladders at work, Schneider had Vilardo carry on his shoulder a bolster that weighed approximately ten pounds up and down some stairs. She also put a weight in a crate and had Vilardo lift it from approximately waist-level to a shelf above his head. Over the week and a half, he progressed from 10 pounds to a carry of 25 pounds and a lift of 20 pounds. In the beginning, Vilardo did the program with difficulty, but improved as time went on.

Vilardo's physical therapy sessions were approximately 1.5 to 2 hours. Work-hardening was just a portion of the sessions, as he would also do strengthening exercises. Work-hardening was done repetitively over 10-15 minutes for each activity: overhead, carry, lifting, and bolster up and down approximately 15 wide, standard steps. Vilardo would climb the steps probably 10-12 times in a half hour period. Vilardo was cooperative with physical therapy.

Every treatment worked on active range of motion. At the time Vilardo was discharged, his shoulder flexion over-the-shoulder and overhead was good, at probably 90 percent of normal. His flexion out to the side and overhead was more difficult, at probably 70 percent of normal. Based on his progress, Schneider thought Vilardo would benefit from additional physical therapy. She thought that work-hardening should continue, and that Vilardo did not have the capability of doing his job as he had described it to her. She requested additional physical therapy, but the request was denied.

Vijaykumar Kulkarni, M.D.

Dr. Vijaykumar Kulkarni, a board certified general surgeon, examined Vilardo on September 10, 2014. He has been licensed in New Jersey since 1976. Kulkarni has been employed by Sall Myers since 2002. In 2004, he was certified as an independent medical examiner in orthopedics. He performs an average of fifty independent medical examinations per week for work-related injuries and slip and falls. His practice is limited to orthopedics. Kulkarni's examination of Vilardo's shoulder was limited, because Vilardo had a right shoulder arthroscopy in August 2014, and he was still in physical therapy and under the care of his physician, and his right shoulder was in a sling. Dr. Kulkarni reviewed Vilardo's medical records, including records from Concentra, Dr. Oppenheim, and Strulowitz & Gargiulo. Dr. Kulkarni also reviewed both MRIs.

Vilardo was injured on September 4, 2012. On September 5, 2012, he was treated at Concentra on September 5, 2012, for right shoulder pain. He was treated with an x-ray, pain medication, and physical therapy. He was also sent for an MRI of his right shoulder. The MRI showed a partial tear. He was later treated by Dr. Oppenheim, who treated him with a cortisone injection and physical therapy. Dr. Kulkarni reviewed the physical therapy notes from Strulowitz & Gargiulo. The notes reflect that Vilardo received physical therapy, including moist heat and exercise, increasing his range of motion, and carrying more weight. He initially worked with 15-20 pounds then went to 20-25, though his goal was to reach up to 50-60 pounds because he had to lift and move heavy objects at work. The final note from Strulowitz & Gargiulo reflects that at his last physical therapy session, Vilardo was able to raise his right shoulder almost up to 165 degrees. Kulkarni explained that normal is 180 degrees, so there was still a limitation of 15 degrees, but once there is damage to the joint it is not expected to be normal or without some limitation. Vilardo was also able to lift 15-20 pounds above his head. A malingerer would try to restrict movement, but the records show that Vilardo was improving with physical therapy.

Ultimately, Vilardo had an MRI arthrogram of his right shoulder, which showed a labral tear and a rotator cuff partial tear, for which he underwent surgery. The medical records also reflected that Vilardo advised the doctor that he had injured his right



shoulder, neck, and back in February 2011, and that he went to Concentra and had physical therapy and conservative treatment. One of the notes from Dr. Parmar, the treating doctor, was that he had a right shoulder sprain and no MRI was done.

Dr. Kulkarni reviewed the November 14, 2012, video. He did not review Vilardo's job description, but Vilardo explained his job duties. Kulkarni noticed that Vilardo was carrying small packages with both hands. There were a few places where he was carrying orange bags and green bags, another where he was putting something on top of the car. At the time the video was taken, his physical therapy records reflect that he could raise his hand up to 165 degrees, which was "pretty good," and Kulkarni saw him only once raising his right upper extremity about 90 degrees. His impression from the video was that the items were not big or heavy, unlike the items he encounters at work. Vilardo advised Kulkarni that they weighed anywhere from 7-12-15 pounds, and that his job required him to lift objects 60-100 pounds and with the help of co-workers, move items like a piano from place to place.

Kulkarni did not think Vilardo misrepresented his injuries to the Board. During the two-month period he was out, he was not lifting anything heavy like he would lift at work. Further, the video does not show whether he was in pain or not, or whether he took pain medication before or after. Vilardo returned to work only days later, and once back to work, he continued to do the same work that he had done prior, although he continued to complain of pain and later had an MRI arthrogram, and ultimately surgery.

Vilardo complied with and followed his physical therapy program. The physical therapy notes reflect that he was asked to lift 20-25 pounds, which is much heavier than the items in the video, which Vilardo said weighed about 7-15 pounds. The lifting on November 14, 2012, did not put him at risk of harm. Most of the time, except the one time he lifted his right shoulder 90 degrees, Vilardo was using both hands to carry the items, and they were at the front of his body and below shoulder level. Carrying in that manner typically uses hand and forearm muscles. His shoulder was getting rest except for physical therapy, so he was able to carry those items. He was not carrying above his head. Vilardo said that he has to lift 60-100 pounds at work, which is much heavier, and that he has to raise his arm above his head, which is different from what is on the

video. There is a difference in carrying at waist level and carrying overhead. The video is not proof that Vilardo could do his job. It was only 1.5 hours, which is different from 5-6 hours. Additionally, there is a difference in strength for carrying 7-22 pounds versus 60 pounds, especially if it must be lifted above shoulder level. Carrying with both hands a weight of 7-22 pounds is approximately 5-10 pounds per hand, which is nothing. Once there is damage and one starts carrying and lifting, it progressively starts causing pain.

### **Factual Discussion**

Review of the November 14, 2012, video surveillance reveals that Vilardo helped Guzman move items from Guzman's office to storage, beginning at approximately 11:44 a.m. and ending at approximately 1:26 p.m. During this period of approximately 1.75 hours, three trips were made between the office and the storage unit.

Specifically, Vilardo arrived at the office at approximately 11:38 a.m., and was first observed lifting and carrying items and loading the vehicle from approximately 11:44 a.m. until approximately 11:46 a.m. From approximately 11:56 a.m. until 12:07 a.m. the items were unloaded from the vehicle at the storage unit. From approximately 12:14 p.m. until approximately 12:19 p.m., items were loaded into the vehicle at the office. From approximately 12:28 p.m. until approximately 12:36 p.m. the items were unloaded from the vehicle at the storage unit. From approximately 12:45 p.m. until approximately 1:01 p.m., items were loaded into the vehicle at the office. Finally, from approximately 1:13 p.m. until 1:26 p.m. the items were unloaded from the vehicle at the storage unit. From the video, it appeared that included in the items moved were typical file-sized moving boxes, green bags, black duffel or laptop-type bags that appeared to have nothing in them, reusable shopping bags, canvas bags, a foam mattress, several plastic storage totes, some of which were clear, large sacks, plastic storage containers with two or three drawers, and miscellaneous boxes. Short of the final trip, where a storage container and some large poster board was tied to the roof, the items appeared to easily fit in the Jeep. And a drawer slid open on the storage container on the roof, revealing that it was empty. Guzman and Vilardo lifted and carried various items, and none appeared particularly cumbersome or heavy, given the way they were slid into or

onto the Jeep and then the loading dock. There were two instances where Vilardo carried items on his right shoulder, and then transferred the items to the roof of the Jeep.

Dr. Kulkarni reviewed the video and Vilardo's medical records and opined that Vilardo neither exaggerated his injuries nor misrepresented his abilities, and respondent presented no witnesses or evidence to suggest otherwise. Kulkarni noted that Vilardo had used both his hands and carried the items in front of him, below shoulder level, which typically uses hands and forearms. The video showed him carrying on his shoulder or overhead twice, and both times the item did not appear particularly heavy or cumbersome. Further, Vilardo testified extensively as to the demanding physical requirements of his job, testified that he was never advised of any restrictions on his activities by the Board or his doctor, and testified that the items he was lifting and carrying for Guzman were in no way similar to the items he was required to lift and carry at work. Again, respondent presented no witnesses or evidence to refute Vilardo's testimony. Additionally, Vilardo and Schneider both testified that Vilardo improved with physical therapy, and Kulkarni also testified that based upon his review of Vilardo's medical records, Vilardo improved with physical therapy.

With regard to employees on workers' compensation being encouraged to remain physically active, including going to the gym if they are able, I credit the testimony of Vilardo, Severini, Rodriguez, and Cusimano, rather than that of Gargiulo. When Gargiulo was asked if he had recommended that people who were injured should stay physically active, he hesitated and stated that his answer would be that he did not recall exactly what he said that day. Gargiulo also testified that he did not think he addressed injured workers at the seminar. Gargiulo's testimony at times appeared calculated to include phrases like "medically appropriate" and "guided physical activity" and "within guidelines of a medical professional." Conversely, the testimony of respondent's employees was consistent and appeared forthcoming and not contrived.

Vilardo testified that he was unaware of the video surveillance at the time he returned to work on November 19, 2012. Respondent presented no witnesses or evidence to refute Vilardo's testimony, and it is noted that the Investigations Unltd. letter

with respect to the November 14, 2012, surveillance is dated November 18, 2012, the day prior to Vilardo's return. Accordingly, it appears unlikely that he could have been aware of the video surveillance. Vilardo also testified that November 19, 2012, had been his anticipated date of return, and respondent presented no witnesses or evidence to refute Vilardo's testimony.

Having had an opportunity to consider the evidence and to observe the witnesses and make credibility determinations based on the witnesses' testimony, I **FIND** the following additional **FACTS** in this case:

Vilardo injured his shoulder at work on September 4, 2012, and was on approved workers' compensation leave on November 14, 2012. He was not advised of any restrictions or no-activity requirements by his employer or his physician.

During the September 28, 2012 seminar, attended by Vilardo, Severini, Rodriguez, and Cusimano, employees were encouraged to remain active while on workers' compensation. Vilardo's final physical therapy session was on November 14, 2012. On November 14, 2014, Vilardo lifted and carried items from an office to a storage unit over a period of approximately 1.75 hours, which includes driving time to and from the storage unit three times.

Vilardo attended physical therapy for approximately two months, during which time his shoulder improved. His physical therapy included work-hardening, and at the time he was discharged from physical therapy he had improved from a carry of 10 pounds to a carry of 25 pounds, and from a lift of 10 pounds to a lift of 20 pounds. His shoulder flexion over-the-shoulder and overhead was at approximately 90 percent of normal and his flexion out to the side and overhead was at approximately 70 percent of normal. He was able to raise his right shoulder approximately 165 degrees. 180 degrees is normal and some limitation is expected after an injury.

Vilardo's final appointment with Dr. Oppenheim was on November 16, 2012, two days after the video surveillance was conducted, and Vilardo returned to work on November 19, 2012, five days after the video surveillance was conducted, which had

been his anticipated date of return. Vilardo was unaware of the November 14, 2012, video surveillance at the time he returned to work on November 19, 2012.

Vilardo's job requires 5-6 hours of manual labor daily, which includes, but is not limited to loading and unloading truckloads of materials and commodities; lifting and carrying up to 100 pounds without assistance; and lifting and carrying hundreds of pounds with assistance. He is also required to lift and carry up and down stairs and on and off trucks.

Jersey City Public Schools does not have light duty available for laborers. Vilardo returned to work on November 19, 2012, without restrictions. Vilardo has no prior disciplinary history.

### **LEGAL ANALYSIS AND CONCLUSIONS**

N.J.S.A. 11A:1-1 through 12-6, the "Civil Service Act," established the Civil Service Commission in the Department of Labor and Workforce Development in the Executive Branch of the New Jersey State government. N.J.S.A. 11A:2-1. The Commission establishes the general causes that constitute grounds for disciplinary action, and the kinds of disciplinary action that may be taken by appointing authorities against permanent career service employees. N.J.S.A. 11A:2-20. N.J.S.A. 11A:2-6 vests the Commission with the power, after a hearing, to render the final administrative decision on appeals concerning removal, suspension or fine, disciplinary demotion, and termination at the end of the working test period, of permanent career service employees.

N.J.A.C. 4A:2-2.2(a) provides that major discipline includes removal, disciplinary demotion, and suspension or fine for more than five working days at any one time. An employee may be subject to discipline for reasons enumerated in N.J.A.C. 4A:2-2.3(a), including "conduct unbecoming a public employee." N.J.A.C. 4A:2-2.3(a)(6). In appeals concerning such major disciplinary actions, the burden of proof is on the appointing authority to establish the truth of the charges by a preponderance of the believable

evidence. N.J.A.C. 4A:2-1.4; N.J.S.A. 11A:2-21; Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

Vilardo is charged with conduct unbecoming a public employee pursuant to N.J.A.C. 4A:2-2.3(a)(6), and the burden of proof is on Jersey City Public Schools to prove, by a preponderance of the credible evidence, that Vilardo's conduct was unbecoming a public employee. N.J.A.C. 4A:2-2.3(a)(6) does not define conduct unbecoming. However, the Appellate Division has held that conduct unbecoming a public employee is "any conduct . . . which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). In Emmons, which involved a police officer charged with conduct unbecoming, the Appellate Division also held that conduct unbecoming is "any conduct which adversely affects the morale or efficiency of the bureau." Ibid. What constitutes conduct unbecoming a public employee is primarily a question of law. Karins v. Atl. City, 152 N.J. 532, 553 (1998).

Respondent concedes that the issue presented is limited to whether Vilardo engaged in conduct unbecoming a public employee while on approved workers' compensation leave, not whether he was legitimately injured or whether he was entitled to the leave, as there is no claim that Vilardo defrauded the Board. Respondent concedes that petitioner was on approved workers' compensation leave because he was physically unable to perform his job duties. Respondent argued that Vilardo's job duties include lifting and hauling material, and that he engaged in conduct nearly identical to that which he was excused from while on leave for purposes of recovery. Respondent further argued that Vilardo's conduct can only be classified as conduct unbecoming, and that the determination does not rest on the quantity or weight of the items, but rather simply on whether or not his conduct tends to destroy respect for government employees and the confidence in public services.

Conversely, Vilardo argued that the Board cannot disregard the workers' compensation statutes, which define when a person is entitled to temporary disability. Vilardo argued that a person is only entitled to temporary disability if he is unable to perform his full-time job on a full-time basis, and that the mere ability to perform the job

even two or three times per week is insufficient to disqualify a person from workers' compensation benefits. Vilardo further argued that his job involves enormous amounts of heavy lifting, which is in no way comparable the lifting and carrying on the video. Likewise, he argued that physical therapy was far more strenuous than the activity on the video. Vilardo also argued that he was never advised of any no-activity restriction by respondent and was provided with no written record, rule, or regulation stating that a person is not permitted to engage in physical activity while on workers' compensation. To the contrary, Vilardo argued that per the Board's seminar, employees on workers' compensation are encouraged to remain active.

The appointing authority presented no witnesses to rebut the testimony of any of the appellant's witnesses, and relied upon the video recording. Having had opportunity to review the video, I concur with Dr. Kulkarni that none of the items lifted and carried by Vilardo appears particularly heavy or cumbersome. Vilardo is a laborer whose job requires strenuous physical activity and exertion. He is expected to carry up to 100 pounds, by himself, up and down flights of stairs, and to assist in moving commercial items weighing hundreds of pounds, for most of every day. There was no dispute that the respondent does not have light duty available for a laborer. Accordingly, unless and until Vilardo was sufficiently rehabilitated that he could return to his job with no restrictions, he would not be able to perform his job duties.

If respondent had wanted Vilardo to avoid physical activity in public, it failed to convey that to Vilardo. There was no testimony or evidence in the record that Vilardo was advised by respondent, a doctor, or a physical therapist, that he should avoid activity other than physical therapy while on workers' compensation, and in fact, several witnesses credibly testified that employees on disability were encouraged to be as active as possible in order to facilitate rehabilitation. Certainly, the argument can be made that Vilardo knew or should have known that he should not be utilizing his shoulder as he would have at work. However, his conduct in the video reflects that he was lifting and carrying items that in no way resembled the size or weight that was required at work, and for less than 1.5 hours, rather than the 5-6 required at work. Further, there was unrefuted testimony that Vilardo returned to work, without restrictions, five days after the video was taken; unrefuted testimony that November 19,

2012, had been his anticipated return date; and unrefuted testimony that Vilardo was unaware of the November 14, 2012, video or still photographs when he returned to work. Accordingly, there was no evidence to suggest that he had himself returned to work as a result of the video surveillance.

Collecting workers' compensation disability benefits while able to perform one's job duties would undoubtedly destroy the public's respect for and confidence in public employees, and adversely affect the morale and efficiency of one's department. However, the appointing authority has not established that Vilardo engaged in such conduct. The video shows Vilardo lifting and carrying miscellaneous personal items and transporting them in a typical automobile. He was not lifting and carrying commodities, commercial appliances, or the like. Even if the weights on the scale were inaccurate, or if Vilardo had not weighed the heaviest items because he was unable to view the screen on the scale, review of the video leaves no doubt that those items were not even remotely similar to those he is required to lift and carry at work. Further, even if the items had been heavier or larger, like furniture, the fact is that Vilardo returned to work without any restrictions just five days later, after two months of physical therapy.

Certainly, while the public may look askance at an employee on workers' compensation who appears able-bodied, there are situations where an employee may suffer a disability other than a physical or orthopedic disability that renders the employee unable to perform his or her job duties. Accordingly, that an employee on workers' compensation is seen in public appearing able-bodied does not of itself constitute conduct unbecoming. Respondent did not direct Vilardo not to engage in any physical activity in public, and having considered the facts of this case, there is no basis for respondent to have disciplined Vilardo. He neither violated any directive from respondent, nor engaged in conduct that mirrored his job duties.

In view of the testimony and documentary evidence, I **CONCLUDE** that Jersey City Public Schools has not met its burden of proving by a preponderance of the credible evidence that Vilardo's conduct was unbecoming a public employee, and no cause existed for any discipline, much less his termination, after nineteen years with no prior disciplinary history.



**ORDER**

I **ORDER** that the charges against Vilardo are **DISMISSED** and that the termination is hereby **REVERSED**, and that Vilardo be awarded back pay in accordance with the guidelines set forth in N.J.A.C. 4A:2-2.10.

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.

12/3/14  
\_\_\_\_\_  
DATE

Kelly J. Kirk  
\_\_\_\_\_  
KELLY J. KIRK, ALJ

Date Received at Agency:

December 3, 2014 / db

Date Mailed to Parties:

December 3, 2014 / db

db

**APPENDIX**

**WITNESSES**

**For Appellant:**

John T.M. Chester

**For Respondent:**

Roberto Guzman

Matthew Vilaro

David Severini

Alex Rodriguez

Joseph Cusimano

Carl Gargiulo

Vijaykumar Kulkarni, M.D.

Susan Schneider

**EXHIBITS IN EVIDENCE**

**Joint:**

- J-1 Preliminary Notices of Disciplinary Action
- J-2 Final Notice of Disciplinary Action, dated April 11, 2014
- J-3 Final Notice of Disciplinary Action, dated April 24, 2014
- J-4 Surveillance Video
- J-5 Investigations Unltd Report, dated September 26, 2012
- J-6 Investigations Unltd Report, dated November 18, 2012

**For Appellant:**

P-7 Photographs

**For Respondent:**

None