B-49

STATE OF NEW JERSEY

In the Matter of David Vibbert, Department of Environmental Protection CSC Docket No. 2015-1139	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION** Request for Reconsideration Request for Counsel Fees

ISSUED: MAR - 6 2015 (SLK)

David Vibbert, a Park Maintenance Specialist 2 with the Department of Environmental Protection, represented by Francine W. Kaplan, Esq., requests reconsideration of the decision rendered on July 16, 2014 with respect to counsel fees regarding the modification of his ten working day suspension to a five working day suspension.

By way of background, the appellant was suspended for ten working days on charges of incompetency, inefficiency or failure to perform duties, insubordination, neglect of duty, conduct unbecoming a public employee, and other sufficient cause. Specifically, the appointing authority asserted that the appellant did not appropriately complete his duties as expected on September 18, 2011 and September 25, 2011. The appellant appealed his ten working day suspension to the Civil Service Commission which transferred the matter to the Office of Administrative Law (OAL) for a hearing as a contested case. The Administrative Law Judge recommended upholding the charge of insubordination for the appellant's conduct on September 18, 2011 and September 25, 2011, dismissing the remainder of the charges, and modifying the ten working day suspension to a five working day suspension. The Commission adopted the ALJ's recommendations and imposed a five working day suspension. *See In the Matter of David Vibbert* (CSC, decided July 16, 2014).

In his October 23, 2014 request for reconsideration, the appellant submitted a certification from Kaplan in support of his request for counsel fees. The appellant states that although he raised the issue of counsel fees at the OAL, the initial decision and the Commission's final decision did not address the issue of counsel

fees. With regard to his petition for counsel fees, Kaplan details her legal experience, indicates that she entered into a retainer agreement where the appellant agreed to pay her $190.00 per hour, and states that she spent 102.90 hours on the matter. Therefore, the appellant requests $19,607.95 in counsel fees. The appellant emphasizes that the appointing authority initially charged him with five separate charges but the Commission only upheld one of those charges, insubordination. Additionally, the appellant states that the ALJ found that the appointing authority incorrectly applied the concept of progressive discipline, which resulted in the Commission modifying the penalty to a five working day suspension, which is minor discipline. Therefore, the appellant maintains that under *N.J.A.C.* 4A:2-2.12, he should be awarded partial or full reasonable counsel fees as he prevailed on substantially all of the primary issues before the Commission.

Additionally, the appellant states that after the ALJ issued her initial decision, she did not rule on the matter of counsel fees. Therefore, his counsel contacted the OAL and he states that she was advised that she should apply directly to the Commission because the "fee issue was never transmitted to the [OAL]." Thereafter, the appellant filed a motion for counsel fees directly to the Commission and he requests that his petition be considered timely. In the alternative, if the ALJ should have addressed the issue of counsel fees in her initial decision, the appellant requests that the matter be referred to the OAL for consideration. The appellant reiterates that since only one charge was sustained and that his suspension was reduced to minor discipline, he prevailed on the primary issues before the Commission. He also emphasizes that this was an extremely fact sensitive case requiring five days of hearings and an enormous amount of attorney time. Therefore, the appellant requests that the Commission consider the number of issues that were involved in which he prevailed and award him reasonable counsel fees.

In response, the appointing authority, represented by Cheryl R. Clarke, Deputy Attorney General, states that the appellant does not provide the date when Kaplan contacted the OAL to inquire about counsel fees or the date when she contacted the Commission and was advised to file her petition in that forum. Therefore, it argues that the appellant's October 23, 2014 request for reconsideration, which is more than 90 days after the Commission's final decision, is untimely. Additionally, the appointing authority argues that the appellant did not prevail on substantially all of the primary issues as the primary issue in any disciplinary appeal is the merits of the charges, and not whether the penalty imposed was appropriate. In this regard, it maintains that insubordination was the primary issue regarding the incidents in this case and that the Commission imposed a five working day suspension. Although the appellant attempts to minimize the significance of the insubordination charges, the ALJ found that the appellant did not respect his supervisor's authority, which, in the context of the incidents in this matter, was the primary issue.

It is noted that the neither the ALJ's initial decision nor the Commission's decision discusses the issue of counsel fees.

CONCLUSION

N.J.A.C. 4A:2-1.6(a) provides that within 45 days of receipt of a decision, a party to the appeal may petition the Commission for reconsideration.

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

N.J.A.C. 4A:2-2.12(a) provides that the Commission shall award partial or full reasonable counsel fees incurred in proceedings before it and incurred in major disciplinary proceedings at the departmental level where an employee has prevailed on all or substantially all of the primary issues before the Commission.

In this matter, the Commission's final decision was issued on July 16, 2014. The appellant's request for counsel fees and costs was received by this agency on October 23, 2014. Therefore, the request for reconsideration is clearly untimely. Nevertheless, it cannot be ignored that neither the initial decision nor the Commission's final decision specify if counsel fees should be awarded. As such, notwithstanding the fact that the petition was filed more than 45 days after issuance of the final decision, the Commission will address the merits of the appellant's request for counsel fees.

The appellant contends that he is entitled to counsel fees because the Commission's dismissal of four of five charges against him demonstrates that he prevailed on all or substantially all of the primary issues before the Commission. However, the primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield*, 282 N.J. Super. 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this case, the Commission dismissed some of the charges against the appellant, but it sustained the insubordination charge and imposed a five day suspension. The ALJ specified in her findings when she dismissed the failure to perform duties charge of September 18, 2011 that the issue was not that the restroom had not been cleaned, rather, it was that the appellant failed to recognize a supervisor's authority. The neglect of duty charge was also dismissed on the same grounds, *i.e.*, the appellant's failure to recognize a

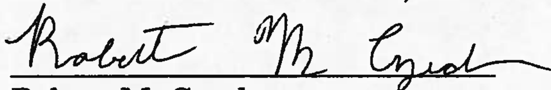
supervisor's authority. Accordingly, in the context of the situation, the appellant's insubordinate behavior on both occasions was clearly the primary issue in this appeal. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal and he is not entitled to counsel fees.

ORDER

Therefore, it is ordered that this request for reconsideration and request for counsel fees be denied.

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
THE 4th DAY OF MARCH, 2015



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals and
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P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

c: Francine W. Kaplan, Esq.
David Vibbert
Cheryl R. Clarke, DAG
Deni Gaskill
Joseph Gambino

A-1

STATE OF NEW JERSEY

In the Matter of David Vibbert, Department of Environmental Protection

CSC DKT. NO. 2012-2881
OAL DKT. NO. CSV 5764-12

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JULY 17, 2014 BW

The appeal of David Vibbert, Park Maintenance Specialist 2, Department of Environmental Protection, 10 working day suspension, on charges, was heard by Administrative Law Judge Lisa James-Beavers, who rendered her initial decision on May 21, 2014. Exceptions and cross exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on July 16, 2014, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision to modify the 10 working day suspension to a five working day suspension.

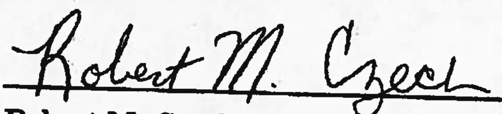
ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore affirms modifing the 10 working day suspension to a five working day suspension.

Re: David Vibbert

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
JULY 16, 2014



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attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 5764-12

AGENCY DKT. NO. 2012-2881

IN THE MATTER OF
DAVID W. VIBBERT,
NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION.

Francine Kaplan, Esq., for appellant

Cheryl Clarke, Deputy Attorney General, for respondent (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: February 26, 2014 Decided: May 21, 2014

BEFORE **LISA JAMES-BEAVERS**, ALJ:

STATEMENT OF THE CASE

Appellant David Vibbert (appellant) appeals from a ten-day suspension imposed by respondent New Jersey Department of Environmental Protection (DEP). Appellant seeks dismissal of the charges, back pay and counsel fees.

PROCEDURAL HISTORY

The DEP issued a Preliminary Notice of Disciplinary Action against appellant on October 18, 2011. Appellant requested a departmental hearing, which was held on February 7, 2012. The DEP issued a Final Notice of Disciplinary Action on March 9, 2012. The Final Notice set forth that the following charges had been sustained:

> Charge 1—incompetency, inefficiency or failure to perform duties, N.J.A.C. 4A:2-2.3(a)(1);
>
> Charge 2—insubordination, N.J.A.C. 4A:2-2.3(a)(2);
>
> Charge 3—conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6);
>
> Charge 4—neglect of duty, N.J.A.C. 4A:2-2.3(a)(7); and
>
> Charge 5—other sufficient cause, i.e., violation of departmental or agency rules, regulations, policies and procedures, N.J.A.C. 4A:2-2.3(a)(11).

For these offenses, the DEP imposed a ten-day suspension without pay. Appellant appealed to the Civil Service Commission on March 25, 2012. The Commission transmitted the contested case to the Office of Administrative Law pursuant to N.J.S.A. 52:14B-2(b). A hearing was scheduled for March 18 and 19, 2013, but adjourned at the request of Ms. Kaplan. A hearing was rescheduled for October 7 and 8, 2013, but October 7, 2013, was adjourned due to witness unavailability. The last hearing dates were held on November 13, and November 27, 2013. The record remained open for the submission of written summations. The record closed on February 26, 2014.

STIPULATIONS OF FACT

1. Appellant began his employment with the DEP on January 15, 2000, in the title of maintenance worker 2. He was thereafter promoted to maintenance worker 1.

2. Appellant was appointed to the title of parks maintenance specialist 2 on July 7, 2007, and is now a parks maintenance specialist 1 (2013).

3. From April 2009 to April 24, 2012, appellant was assigned to Washington Crossing State Park.

4. From April 2011 to October 24, 2011, Neal Ferrari was on temporary assignment to Washington Crossing State Park and Princeton Battlefield.

5. On September 18, 2011, and September 25, 2011, appellant was responsible for opening the park gates at 8:00 a.m.

6. On September 18, 2011, and September 25, 2011, appellant's lunch was thirty minutes and was scheduled for 12:00 to 12:30 p.m.

7. At all times relevant herein, appellant was entitled to two fifteen-minute breaks.

8. At all times relevant herein, appellant's work hours on Sundays were from 7:00 a.m. to 3:30 p.m.

9. While assigned to Washington Crossing State Park, Neal Ferrari worked directly with David Vibbert on three occasions only: Sunday, September 11, 2011, from 7:00 a.m. to 9:30 a.m.; Sunday, September 18, 2011, from 7:00 a.m. to 3:30 p.m.; and Sunday, September 25, 2011, from 7:00 a.m. to 3:30 p.m.

10. At approximately 9:00 a.m. on September 18, 2011, Ferrari observed appellant's maintenance truck parked near the River Lot restrooms and stopped to speak to appellant.

11. The septic pumps were not working at the River Lot restrooms, causing sewage to back up onto the restroom floors.

12. Later in the day on September 18, 2011, the urinals were not working at the River Lot restrooms.

13. At approximately 11:00 a.m. on September 18, 2011, Ferrari drove back to the River Lot restrooms and observed appellant working on the restrooms.

14. Ferrari and appellant had a conversation at the restrooms, the characterization and content of which is the subject matter of this disciplinary action.

15. On September 25, 2011, at approximately 9:30 a.m., Ferrari had a conversation with appellant at the Knox Grove picnic area and directed appellant to fill a washout in a dirt road by the group campsites after checking the River Lot restrooms to ensure that they were still operating correctly.

16. At 12:00 p.m., Ferrari checked appellant's progress on filling in the ruts from the washout.

17. At 12:30 p.m., Ferrari met appellant at the maintenance building and they had a conversation that is the subject of this disciplinary action.

18. The work order to fill in the washout was completed between 1:30 p.m. and 2:00 p.m.

19. On October 18, 2011, the DEP issued a Preliminary Notice of Disciplinary Action.

20. On March 9, 2012, the DEP issued a Final Notice of Disciplinary Action, charging appellant with incompetency, inefficiency, or failure to perform duties; 2) insubordination; 3) conduct unbecoming a public employee; 4) neglect of duty; and 5) other sufficient cause, and suspended him for ten days.

21. Appellant served a ten-day suspension on April 9, 10, 11, 12, 13, 16, 17, 18, 19 and 23, 2012.

TESTIMONY

Neal Ferrari testified that he has been employed by the DEP as the superintendent of Washington Crossing State Park since March 2012. Prior to that, he was an environmental specialist, and before that he was an area manager at Washington Crossing State Park. He has been an environmental specialist since 2005. When he became an area manager at Washington Crossing State Park in September 2011, he was not sure of his civil service title. He was assigned there because there was a vacancy at the park and the Department posted a lateral transfer. He identified the organizational charts showing that he was in the top position at Washington Crossing State Park effective September 2011. Appellant's direct supervisor was John Tuliszewski, who reported directly to him. (R-4.) Ferrari supervised thirteen full-time and four seasonal employees that summer, including appellant. When he started in late April 2011, employees were told that he was filling a six-month temporary position, with responsibilities identical to those of the superintendent. Appellant's supervisor introduced appellant and him during the last week of April 2011. Appellant no longer works at Washington Crossing State Park. He requested a transfer in March or April 2012. When they worked together, and John Tuliszewski was not there, Ferrari was appellant's supervisor. Appellant also reported directly to him on Sundays, when Tuliszewski did not work. Appellant made a request to work Sundays in August through

Tuliszewski, but Ferrari had to approve it. Ferrari told appellant that he would be reporting directly to him.

Ferrari testified that on Sunday, September 18, 2011, Ferrari was appellant's direct supervisor, as Tuliszewski was not working. On that day, Ferrari arrived at 8:00 a.m. and worked until 5:00 p.m. Ferrari had asked Tuliszewski to tell him what duties the employees under him should be working on. Ferrari would also assign duties and determine which took precedence on Sunday. At 9:00 a.m. that day, he stopped to talk to appellant, who had parked at the River Lot. Appellant was mopping the floors in the men's restroom. Appellant told him that there was a problem with the well or the septic pump that operated both the men's and women's restrooms. He said he was trying to fix it, but that the problem may be a fuse. Ferrari asked appellant if the women's restroom was open and appellant said it was. Appellant has the responsibility to open and make sure that the restrooms are clean for public use. Appellant was the only employee assigned that day. Ferrari then left to check the rest of the park. He came back around 11:00 a.m. Appellant was still at the River Lot restrooms working to correct the problem. The two had a conversation immediately outside the restroom door while appellant was inside the restroom. Appellant said the problem was not fixed yet. They discussed the possibility of shutting the restrooms down and putting out-of-order signs on the doors until the problem was fixed.

Ferrari said that he then found out that appellant had not yet cleaned the women's restroom. While they were having the conversation, a patron came around the building, and when that patron walked by, appellant became agitated. Ferrari asked him to step outside so they could talk. Appellant's demeanor changed and he told Ferrari he could not talk to him like that and walked out of the restroom, but away from Ferrari and toward his truck. Appellant became much more hostile and argumentative. Ferrari tried to continue the conversation and appellant said that Ferrari was not his boss. Ferrari told appellant he was being insubordinate. Appellant then drank his coffee, ignoring him. The exchange lasted only a minute. Appellant said he was not in charge of him. Ferrari informed appellant that he could resume working or he could use

his leave time and take the day off. Appellant returned to work. At that point, they ended the conversation.

Also on September 18, 2011, Ferrari asked appellant to clean the Stone Barn for an important meeting that was coming up. Appellant did not do that task, so Ferrari spoke to him. Appellant said that he was taking the water tester around and that was why he did not clean the Stone Barn. Ferrari had told appellant to communicate with him if he were unable to complete an assigned task. It was a problem that appellant would deviate from the task that he was assigned. Ferrari is reachable by phone or in the office. He has a State-issued cell phone on which he can be reached twenty-four hours a day. Ferrari was not looking for a disciplinary action to be taken against appellant, but he was looking for counseling. Ferrari sent an email to his supervisor, Joe Winnicki. (R-5.) The purpose of the email was to document appellant's insubordination.

Ferrari did not have a specific recollection of the September 11, 2011, incident, so he reviewed his email to remember. Ferrari had stopped by the maintenance shop to talk to appellant. He returned a while later. He saw appellant in the break room on an extended break of over fifteen minutes. Ferrari told appellant to meet him at the River Lot and told him that his break was too long. He was there in excess of a half hour, from 9:55 a.m. to 10:35 a.m. Appellant said he did not feel well and wanted to take the rest of the day off. Appellant went home. Ferrari felt that documentation was necessary because his efforts at talking to appellant were not having an effect, and he felt it was necessary to share the information. He did not want the situation to continue with appellant not completing job responsibilities.

On September 25, 2011, another Sunday, at 9:30 a.m., Ferrari saw appellant at the Knox Grove lot. They had a brief discussion about appellant's duties that morning and Ferrari told appellant that there was severe rutting in the campground and he asked him to fill it in with soil. Ferrari did not tell him how, but gave him discretion to do it as appropriate. The ruts were near the campground area, and were caused by rain and vehicles. Heavy storms had caused wash-outs. At the time, appellant was doing his

morning routine, checking restrooms. Ferrari told appellant to address the situation when he was done. Ferrari expected that his morning duties would take less than an hour and the filling would take about ninety minutes, as the ruts were deep. Ferrari went back two and a half hours later to check on appellant's progress. There were no signs that appellant had attempted to perform the assignment. Ferrari's understanding was that appellant would work on the ruts after doing his restroom loop.

Ferrari attempted to find appellant, and encountered him returning from lunch at the maintenance area at about 12:30 p.m. Ferrari asked why appellant did not attempt to fill the ruts, and appellant said that he had been mopping restrooms all morning. That did not make sense to Ferrari because there were no problems with the restrooms, and they should be mopped when they are opened first thing in the morning. Ferrari reiterated to appellant the need to notify him if he is not able to complete a task. Ferrari tried to get appellant to commit to a time frame when he would complete the rut-filling assignment, and appellant said, "It takes as long as it takes." Ferrari felt it was a simple task to establish a time frame and there was no reason that appellant should not be able to approximate a time. Appellant's demeanor was very agitated and argumentative. Ferrari told him it was not an acceptable answer, but appellant again said Ferrari could not tell him what to do and he was not his boss.

Ferrari testified that when appellant did the job, he was able to knock it out in less than ninety minutes and it looked fantastic. Appellant did an excellent job and Ferrari told him so. Ferrari prepared a memorandum to assistant director John Trontis (R-6) indicating that appellant does not take direction well and becomes argumentative. Ferrari had told him that if an issue came up, appellant needed to inform him why he could not complete an assignment. It is not appellant's job to say that the assignment is not going to be done. Ferrari also talked to appellant about the impact of his actions on his co-workers. Ferrari said he was requesting an official written reprimand, as it was the least punitive option available through this process. He also requested counseling for appellant. He was aware that appellant had some prior disciplinary issues, but did not know the specifics. He asked for counseling as the first step in the disciplinary process. Ferrari was not being successful with appellant, but thought

someone else might do better. On the same date, he wrote an email to Rosanne Rossi, as the supervisor had told him to do to formalize his request. Rossi wrote back on September 26, 2011.

On cross-examination, Ferrari testified that his specialty was watershed planning and land-use planning, regulation and instruction, as a senior environmental specialist. Before working for the DEP, he spent two years in South Carolina running an alternative school. He never worked as a maintenance man and has no certifications for the boiler or as a welder. Prior to April 2011, he had never worked in a State park and never supervised State maintenance workers. He was familiar with the roads of the park, as he had been a visitor to the park for years, but he was not familiar with the equipment, tools or septic pumps. Ferrari noted that he had on the uniform, but not the tie tack or name tag that the uniform required. He generally relies on the expertise of his staff and their communication with him. He did not prepare the organizational chart. (R-4.) His name was set forth on the chart as superintendent, although he was not superintendent. Ferrari indicated that he was assuming the role in June 2011 when the chart was created. He had been temporarily assigned from April 2011 to October 2011 as part of a program called the Lateral Mobility Opportunity. They needed the position during the summer. There was no guarantee of future employment. He had never worked as a superintendent before. He lived in Pennsylvania during the time of his assignment.

Ferrari agreed that the River Lot restrooms at which he found appellant on September 18, 2011, were the most used restrooms in the park. He also agreed that weekends are the busiest days. He disagreed that September 18, 2011, was his first full day working with appellant as a supervisor. Ferrari said he worked directly with appellant throughout the summer. Appellant did not communicate to him that he had an assignment from his direct supervisor. Ferrari had asked Tuliszewski to give him a list of set assignments. There was no plan ahead of time. On September 25, 2011, Ferrari did not issue appellant a written work order, but gave him a verbal order. Ferrari had received numerous complaints about the ruts prior to telling appellant to work on the ruts. Ferrari testified that it was appellant's responsibility to make sure potable

water was in the park. The lack of potable water is a major health and safety issue and a priority. He was not aware that the wells in the park had tested positive for coliform. Appellant said he had taken water tests from the wells, but Ferrari did not know the results. Ferrari first requested discipline from Winnicki, and then Winnicki referred him to Rossi. (R-7.) Ferrari noted that he had written an email to appellant's direct supervisor asking the supervisor to follow through on Monday with the assigned task to clean the Stone Barn unless the supervisor had something more important for appellant to do. The meeting at the Stone Barn was scheduled for Wednesday. Before September 2011, Ferrari had never repaired wash-out of roads in a park. He does not have a functioning park radio, nor does anyone else. The park police have a radio, but he does not have a handheld radio. Ferrari indicated, however, that he could have been reached on the cell phone at the Visitor Center or at the Nature Center. On September 18, 2011, he was aware that someone was on site to do the water testing, but he has no specific recollection of the first time the well water was determined not potable.

Ferrari noted that appellant was living in park housing and his classification was as an essential employee. He was living in the only existing employee housing. Ferrari now lives in the park housing that appellant used to live in. The house was vacant for six months after appellant left. On September 25, 2011, Ferrari was not aware that the septic pumps were failing. However, his email (R-7) indicated that appellant told him he was having an issue with the septic pumps. Appellant did not inform him that he was operating the septic pumps manually. Ferrari did not investigate that the pumps were not working. Ferrari was not clear whether he ordered appellant to finish the rut job before lunch or ordered him to fill the ruts after he was done with what he was doing.

Rina Heading testified that she has been employed as a management representative for eight years and has a total of twenty-one years with the State. Appellant's case was assigned to her. She determined the charges and represented the Department at the hearing. Appellant was charged with failure to perform his duties, because on September 18 and September 25, 2011, he was given an order or assignment from a supervisor that he failed to carry out. Appellant was charged with

insubordination because he stated that Ferrari was not his direct supervisor and he did not take orders from him; however, appellant was in Ferrari's direct chain of command. Appellant was charged with conduct unbecoming a public employee due to the manner in which he addressed his supervisor on September 25, 2011. She noted that the Final Notice of Disciplinary Action has the wrong date of September 27, 2011. It was actually on September 18, 2011, when the patron passed by the restroom and appellant walked away from Ferrari and refused to have a conversation with him. Appellant was charged with neglect of duty because he was given job assignments that he failed to complete. Specifically, he failed to clean the restroom on September 18, 2011, and to fill the ruts on September 25, 2011. Heading testified that the DEP included the violation of "other sufficient cause" to protect the charges, in case they needed it. Rossi was involved in creating the penalty with her. The basis for the ten-day suspension was progressive discipline. Appellant had been the subject of prior disciplinary actions.

On cross-examination, Heading testified that she wrote the specifications with the assistance of Rossi, but the information came from the investigation and the supervisor's report. She noted that the supervisor's report indicated that on September 18, 2011, the patron passed by the restroom, but was not in the restroom. She also noted that the issue of the Stone Barn was not given to her in the investigative report. The neglect-of-duty charge pertained to the cleaning of the restroom and the filling in of the ruts. It also had to do with appellant's failure to communicate with and acknowledge Ferrari as his supervisor. She was clear that she relied on the supervisory/investigatory report to write the specifications. (R-6.) She is aware that Ferrari did not request major disciplinary action for appellant and did not recommend a ten-day suspension. She took the position that a more punitive response would be the appropriate penalty. When she issued the recommendation, she did not note that appellant was an essential employee. She was aware that he was living in employee housing. She was not aware that appellant had to provide services to the park on call because he was an essential employee, even when he was on suspension. She was not aware that she could offer a fine to an essential employee in lieu of suspension. She also was not aware of commendations or letters that appellant had received from

the public. She was not aware prior to preparing the disciplinary notice that appellant had filed a grievance against his supervisor.

Heading continued that she was not aware of the email exchange between Ferrari and Rossi until she received the disciplinary case. It did not have any impact on the charges selected. (P-3.) She did not interview appellant before issuing discipline.

Heading testified that the regulations allow for the issuance of fines in lieu of suspension, but that provision was usually used for such matters as restitution for theft or damage to vehicles, which did not seem to apply here. In conversations with appellant in order to make sure that his appeal had been received, appellant never said he was being harassed by Ferrari.

Appellant, David Vibbert, testified that he has worked for the Park Service since January 15, 2000. His father, William Vibbert, was a park superintendent at the end of his career. When appellant began in 2000, he worked at Liberty State Park as a maintenance worker 2. He was working that park on September 11, 2001, when planes crashed into the World Trade Center towers, and he was actively involved in the rescue effort as people evacuated New York City and came to Liberty State Park. He asked for reassignment thereafter and was placed in Bass River State Forest, where he was in charge of seasonal employees. From there, he went to Washington Crossing State Park, where he was also in charge of seasonal employees, and then he asked to be reassigned to Wharton State Forest. There, he was a maintenance specialist.

Growing up, appellant lived with his parents in Cheesequake Park for seventeen years. His parents' residence was adjacent to the maintenance building and the main entrance to the park. He was around the park every day, and eventually did volunteer work cleaning the park, helping the maintenance staff, helping with events and emergencies, and often plowing snow. In 1987 his father was assigned to Island Beach State Park. There he learned to maintain and repair tractors and trucks. Before 2000 he was a wildlife worker for six months in the Division of Fish and Wildlife. As a maintenance specialist 1 in Wharton, he is now at the top of the series, which means

more responsibilities and more money. He has the lead role over his subordinates in the areas of carpentry, masonry and electrical work. His number-one order is to provide for the safety of the public and the workers. The work can be dangerous.

Appellant testified that he began working at Washington Crossing State Park in April 2009. It is a 3,000-acre class 1 park, which is the highest rating. His direct supervisor was Johnny Tuliszewski, who was a parks maintenance supervisor 2. His supervisor wrote all of his performance reviews. Appellant testified to and identified several commendations he received for his work, particularly for his work on 9/11 at Liberty State Park. After 9/11, he also helped set up an event honoring the survivors of 9/11, and he received a plaque from the commissioner for that. (P-6.)

Appellant continued that, on September 18, 2011, the chain of command at the park was that his immediate supervisor, Tuliszewski, reported to the acting regional superintendent, who reported to the assistant director. The same situation existed on September 25, 2011. In general, his supervisor would tell him what he wanted done that day and also have a maintenance plan for things that had to be done over a period of time. In the summer of 2011 he was advised that Neal Ferrari had been temporarily assigned. The regional superintendent announced Ferrari's lateral-mobility transfer, which would last for six months. He worked directly with Ferrari only on September 18 and September 25, 2011, which were both Sundays. On those days, he was the only maintenance man working.

Appellant also testified that on September 18, 2011, his day began at his usual start time, 7:00 a.m. He checked the answering machine in the maintenance building, got the keys to the truck, and headed to the Delaware River to start cleaning the River Lot restrooms. Appellant marked the park entrance and the River Lot restroom on a map. (P-7.) When he arrived at the men's restroom, it was a mess. The floor was flooded with sewage that had backed up. Instead of going to the septic system, it came out of the floor drains. It was shocking. He had to mop up the mess a couple of times. He then had to clean the restroom with bleach and rinse the bleach with another mop.

The River Lot restroom is the busiest restroom in the park and it is open twenty-four hours a day, seven days a week.

Appellant testified that he then tried to figure out why it was broken. Just prior to cleaning, he did hit the control panel that forced the water down manually by holding the button. He was able to get the sewage to drain off the floor and down the pipe. He still had to open the park gates at 8:00 a.m., and there were people standing outside waiting to come into the park. That day, there were several groups scheduled. Two park permits had been issued for the Greene Grove area of the park, one for 125 people from 9:00 a.m. to 4:00 p.m. (P-8) and the other for twenty-plus people for a family picnic. Before 8:00 a.m. he still had to check the rest of the park to ensure that there were no downed dead trees, as well as check the other restrooms. He made the rounds and checked the River Lot restrooms again around 8:30 a.m. or 9:00 a.m. and found them to be a mess again. A urinal was stuck and flooding the floor with water. He had to clean that up as well. He explained how the septic tanks work, and if there is too much volume of water, then it overflows. There have to be two pumps running at all times. The pumps that he had to go to were located about 200 feet across the road in the middle of a field and covered with manhole covers. The pumps weren't working at all on September 18, 2011, which he told his supervisor. Hurricane Irene had caused the water level to be too high and overwhelmed the system with rain water, which overheated the circuit board and blew the fuses. Ferrari probably did not know about the pumps because he and Tuliszewski never communicated.

Appellant testified that on the morning of September 18, 2011, he told Ferrari about the raw sewage on the floor in the men's room and said he was having a bad day. Appellant said he needed to go back to the shop to get the volt meter. With it, he was able to diagnosis three blown fuses. He replaced the fuses and the system started to work. After he replaced the fuses, he checked the River Lot restroom against around 10:00 a.m. Between leaving the River Lot restroom and coming back around 10:00 a.m., he went to check the Knox Grove restroom. Ten o'clock is usually his break time, but he did not take his break. Appellant testified that he met Ferrari in the interior of the River Lot restroom. Ferrari was in a doorway and he was at the concrete wall by the

hand dryer. Appellant said he had a mop in his hand and was drying the floor. Ferrari already was upset that he was still mopping. Ferrari thought appellant had been there the whole time, but he had not been. Ferrari ordered him to do inventory on old parts in an attic in the maintenance shed. Appellant told Ferrari he was not done cleaning the restrooms. Ferrari said he should not open restrooms if they are not ready, but the restrooms do not lock. They stay open, so they had to be cleaned.

Appellant testified that Ferrari was animated and yelling at him and pointing a finger. There was a park visitor using the restroom at the time, but Ferrari could not see him from the doorway. Ferrari berated him in front of a member of the public. Appellant asked Ferrari to go outside near Ferrari's office. Ferrari agreed, and they walked toward appellant's truck. He opened the truck's door and retrieved his coffee, which he had not had a chance to drink. Ferrari came to the truck and continued yelling at him, while he tried to explain to Ferrari that the restroom was never locked. Appellant also tried to explain that inventory was not important when there were groups coming in and the restrooms needed to be cleaned. He explained that he was operating the way the park had operated every Sunday for thirty-five years, and that is what Tuliszewski told him to do, but Ferrari tried to override his supervisor. Appellant finally agreed to do what Ferrari wanted him to do. Also in the park that day was a group of Boy Scouts, who had come the night before and were staying until noon on September 18, 2011. He wanted to clean the restrooms by the campsite after they left, as well as check for falling branches. They sometimes use the fireplace as a garbage can, and that has to be cleaned out as well. Cleaning after the Boy Scouts left took him until lunchtime, and he took his lunch break from 12:00 p.m. to 12:30 p.m.

Appellant testified that when he returned from lunch there was a lab water-test van sitting in the parking lot, which he thought was strange because it was Sunday. The technician informed him of water-sample failures, as multiple sources in the park had tested positive for coliform. (P-10.) Park patrons were at risk of being exposed to potentially contaminated water, and those patrons included young students visiting the Nature Center, which has two open water fountains. Appellant went to the Visitor Center Museum, where the customer-service representative told him to shut off the

fountains. He explained that the customer-service representative, Gale Kennedy, was the secretary to the superintendent and was stationed at the Visitor Center to handle such problems. He had to post signs not to drink the water. Only the toilets stayed on. He found out that a water report had been issued on Friday and that the water should have been shut down at that time. For two days people had been drinking water that was potentially contaminated. He immediately had to close the water valves and put the signs up in the Nature Center. He also had to assist the technician in doing water testing on the sinks and water fountains. As the only maintenance person on duty, appellant had all of the keys to the wells, and he accompanied the tester to three locations. This took all afternoon. It took ten minutes to get from one sampling location to another, plus another fifteen minutes to take the water samples and put them on ice. He stopped at 3:30 p.m. and called Ferrari. Ferrari agreed it was a serious situation and that appellant needed to continue helping the technician. After work, he ran into Ferrari, and Ferrari was upset that he had not done the cleaning of the Stone Barn, where there was going to be a meeting that Wednesday.

Appellant explained that at 7:00 a.m. on September 25, 2011, he went to maintenance, got the keys, and headed to the River Lot restrooms. He then saw that the men's-room floor again was covered with sewage. He tried to mop it up and override the pumps manually. He bleached everything, made sure it was clean, and then got the restroom opened. The gates to the park open at 8:00 a.m. regardless of what problems are occurring in the park. He noted that both the Boy Scouts and the Girl Scouts were scheduled to leave on that day. After cleaning the restroom, he went to the Stone Barn restroom and cleaned it. He then went to the Greene Grove restroom and cleaned it. He met with Ferrari at about 10:00 a.m. at the Knox Grove picnic-area playground. He was there to clean and check the restroom. Ferrari suggested filling in the wash-outs, and appellant did not know what Ferrari was talking about. Appellant said to Ferrari that he still had to clean the Knox Grove restroom and a couple of others, and he would try to fill in the wash-outs that day. He checked the River Lot restrooms, but had a problem with another urinal that was flooding. He mopped the floor again, which took longer than expected. He checked the rest of the restrooms and figured that he could get to the wash-out after lunch. Ferrari had given

him no written order or list of materials to perform the job, so he went to look at what the job was before lunch. It was a big hole, so he went back to the shop. He needed a front-end loader. He went over to the machine and saw that it had a flat tire. He put air in the tire and checked the pressure. He got the machine ready to go after lunch. Ferrari gave him no idea how to do the job. He did not tell him how much fill was needed or how deep the rut was. He estimated that the materials needed would be eight cubic yards. After lunch, he went back to the shop to get the machine to go. He saw Ferrari, who was mad that he had not gotten the job done. Appellant explained that he eats lunch at twelve. Ferrari told him to shovel the stone by hand, but appellant believed he needed a tractor. He needed seven to ten yards of stone to fill the wash-out.

Appellant explained why Ferrari's suggestions for shoveling stone would not work, and how he ultimately came to the conclusion that he could run the front-end loader backwards to move the existing stone that had washed out and fill the ruts. He was able to do it quickly, easily and safely. Ferrari finally agreed with him. Ferrari did not come back until the job was completed. Appellant was done by approximately 1:30 p.m. or 2:00 p.m. Ferrari was surprised at how well he had done the job. Ferrari had not told him that the job had to be done by a specific time that day; he had just told him to fix the wash-outs. Appellant showed pictures of the front-end loader that he used (P-13) and the road where the wash-out was (P-14). Ferrari did not give him anything else to do that day.

Appellant next discussed how the Department of Environmental Protection designated him as an essential employee, with the designation "WB." It means that he has to be available to go to work during weather emergencies such as snow and rain. (P-15; P-16.) There was no gap in his designation as an essential employee. Also, as a resident of mandatory employee housing, he was required to respond to public requests for emergency assistance and provide other "in-kind services." (P-17.) Additionally, police would come to the house if a park visitor were missing. Probably once a week there was an alarm failure. He was the only employee living in the park in September 2011. He was never told to stand down from providing in-kind services. He

was not in paid status during the ten-day suspension, so he lost the mandatory-employee-housing status during that time. He would sometimes see Ferrari standing behind his house. Ferrari would go past his house at lunchtime. Maintenance workers get priority for residential housing at parks. Others can apply for it. (P-18.) Appellant showed a posting for the residential house at Washington Crossing State Park. The house was posted as available on August 29, 2012. (P-19.) Appellant vacated it at the end of June 2012. Appellant submitted a grievance asserting that the notices of disciplinary action he received for September 18 and September 25, 2011, were submitted late. His grievance did not go to a grievance hearing, but he did fill out the form. He told the union about it and submitted it to the assistant director. The grievance went nowhere. Since there was no evidence of its actual submission, it was not admitted into evidence.

On cross-examination, appellant testified that he did not really know what an area supervisor was, but knew Ferrari's civil service title was environmental specialist 2. He disagreed that the organizational chart submitted by Ferrari was in effect in September 2011. Ferrari was not a superintendent and he was not getting paid by the Parks Service as the chart sets forth. Also, Robert Piccone was not a parks maintenance specialist 1. According to the chart, Ferrari was Tuliszewski's supervisor. Appellant testified that he was never made aware of the chart at the time he was working there. He believed Tuliszewski was supervised by Joe Winnicki, the regional superintendent. Winnicki was not on the chart. Gale Kennedy is on the chart as a customer-service representative reporting to Neal Ferrari. Appellant testified that it was vague whether Ferrari was in his chain of command. He did not concede that Ferrari was a supervisor. All of his work assignments came from Tuliszewski. In four months of working there, Ferrari never even said hello to him. Appellant testified that Ferrari sat in his office and read books from April to July. Appellant said that after the four months, he met with Ferrari when the superintendent came down to handle a complaint. After that, they had almost no interaction. When appellant asked in September 2011 for his schedule to be changed, he made the request to Tuliszewski, and he granted it. Before September 2011, appellant did not work with Ferrari on any occasion.

Appellant testified that on September 18, 2011, he had no supervisor. On September 25, 2011, Ferrari was working, but he was an environmental specialist 2. His title never changed. Appellant knows what Ferrari's title was because the regional superintendent announced his temporary assignment in March 2011. He did not recall any mention of Ferrari being area supervisor. When appellant was asked in interrogatories whether he acknowledged that Ferrari was his supervisor on September 18, 2011, appellant answered that Ferrari was not, by Department rules and regulations, his supervisor. The rules say that a supervisor is someone who works for the Park Service, but the Park Service was not paying Ferrari's salary. Ferrari was just working at the park. Appellant said Ferrari never gave anyone work assignments. Appellant was told that Ferrari's job was to handle leases, concessions and permits, not to run daily operations. The title of "area supervisor" was not a civil service title. That title became a "conundrum," in that he did not know what to do with it. A maintenance supervisor or superintendent is his supervisor. Ferrari worked in water management.

Appellant continued that on September 18, 2011, the problem with Ferrari giving him assignments was that it caused confusion. Tuliszewski gave him a plan of what to do on weekends, and then Ferrari overrode those assignments, so he was not sure what to do. Ferrari's assignments did not make much sense. Appellant did not understand the need to do inventory. Appellant testified that on September 25, 2011, Ferrari first said that he wanted him to cut grass, and then said, "never mind." The weekend before that he wanted him to cut trees all by himself, and appellant had to call labor relations. Winnicki said not to do the job. Ferrari did not have the work experience or training to be the supervisor. Appellant said he did not do the inventory. Ferrari canceled that request in light of the problem with the water samples testing positive for bacteria. The tree cutting was also canceled. Regarding September 18, 2011, when Ferrari asked if the restroom was open, appellant responded "yes," because the restroom is open all the time. He had cleaned it. When they had a discussion about the men's room, Ferrari never asked him to move outside. Appellant said he asked Ferrari to go outside. He felt embarrassed and asked Ferrari to step outside if he were going to talk to him that way. Ferrari followed him to the maintenance truck. Appellant denied ignoring him or snapping at him. He was

embarrassed that someone in the park heard this argument. He denied saying that Ferrari was not his supervisor, but he did say that "Johnny" was his boss. If he had done what Ferrari wanted him to do, he would have neglected a public-safety issue.

Regarding filling the ruts on September 25, 2011, Ferrari told him to do a quick check of the restrooms and then work on the wash-out. He completed the wash-out filling in the afternoon that day. He did not call Ferrari after Ferrari left him. It took time, because there was not enough stone on hand to fill the ruts, and he had to go back home and get noise earmuffs because the machinery is so loud. He told Ferrari that he had inspected the area and he had been cleaning restrooms all morning. The sewage backup in the restrooms required more than normal, routine cleaning. He had to manually override the pumps. He did not recall Ferrari asking how long it would take him to complete the wash-out filling. He denied saying, "It takes as long as it takes." The job had been started by another crew. It took him an hour to an hour and a half to complete the job. Tuliszewski and Winnicki were his supervisors; however, neither was working that day.

William Vibbert, appellant's father, testified that he is a retired employee from the Division of Parks and Forestry, State Park Service, after thirty-three years. He concluded his career as a superintendent 1 at Island Beach State Park after having served as a superintendent since 1969. (P-21.) He testified that a State park is like a small city. It has its own water and sewer systems and infrastructure. He was responsible for the training of new superintendents. He trained with the philosophy to serve the public and protect the resource. He stays current with parks by visiting them and following news regarding them. He was qualified as an expert in parks and natural-resource management.

Vibbert testified that at the park, weekdays are totally different from weekends. On weekends, the park operates for the use of the public. On weekdays, the superintendent handles administrative details, budget and scheduling. For inter-park communications, the radio is the preferred method because communication is instantaneous and the superintendent can reach several people at once. The radio is

necessary for disseminating information about lost children, medical emergencies and communications with other agencies. The superintendent is the only staff person with line authority. The importance of line authority is that only the superintendent can close a State park, and only the superintendent can get on the radio and give orders to the whole staff. A maintenance worker receives orders from a maintenance supervisor. It is rare for a superintendent to give an order to a maintenance worker. Similarly, a superintendent who wants a road fixed should implement the order through the maintenance supervisor. It is impossible to know how long a job repairing roads will take because every road job is different. Repairing roads is an inappropriate job for the weekends because too much equipment is involved and there are children around. Vibbert also gave the opinion that doing inventory on a weekend is inappropriate due to the large number of people in the park on the weekends that may need help.

Vibbert testified that contaminated water is a high priority. The first duty is to prevent the public from having access to the water supply by either fixing the problem or cutting off the supply. It is the superintendent's responsibility to ensure that potable water is in the park. He identified well samples taken from five locations in the park where fecal coliform was noted. (P-11.) A superintendent getting such results has a duty to respond immediately. The first duty is to protect the public health and safety. The standard is zero for bacteria in the water. On September 15, 2011, the colony count was 9223B (bacteria). The inspector returned and retested and the results were the same. The reason all the results are the same is because there is no ability to count colonies after 9223. A water-quality problem must be reported to the superintendent. The report of coliform (P-10) should not have gone to the secretary or customer-service representative. That duty cannot be delegated.

Regarding appellant, Vibbert testified that by the time appellant was an adult, he was able to do any job in a State park. Vibbert had lived in parks his entire career. He knows the uniform policy for superintendents, and he said that Ferrari was not in his dress uniform. He had on the wrong pants, no name tag, and the wrong shoes. He is supposed to wear his full uniform. Looking at the organizational chart, Vibbert noted

that the title of area supervisor was not in the chain of command. The interim title filled a short-term need. It was not a civil service or professional title.

Neal Ferrari testified on rebuttal that he worked with appellant on three weekdays and two weekends in the six-month period between April and October 2011. As area supervisor he had the same responsibility as the superintendent. Assignments were given to him by assistant director John Trontis and regional superintendent Joe Winnicki. He absolutely denied yelling and screaming at appellant on September 18, 2011. He did not recall appellant saying anything to him. He did not recall being advised of the water quality on September 18, 2011. He did not discuss how long it would take for appellant to fill in the ruts on September 25. He recalled appellant saying he did not have any idea how long it would take.

John Tuliszewski testified that he is a parks maintenance supervisor 1 and worked at Washington Crossing State Park for thirty-two years. He is still employed in that position. In September 2011, Neal Ferrari was his supervisor. Regional superintendent Winnicki advised him that Ferrari was going to be his supervisor. When appellant requested a change to his schedule to work Sundays, ultimately Neal Ferrari approved the requested change. Tuliszewski gave appellant assignments to do when he was not there. He had a routine to follow that began with opening the restrooms, picking up trash, and other things. If Ferrari gave appellant tasks to do, it was because Ferrari was in charge when Tuliszewski was not there.

FINDINGS OF FACT

September 18, 2011

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I **FIND** the following with regard to the September 18, 2011, incident Ferrari had no experience or training to perform the duties of superintendent and, therefore, of appellant's supervisor in September 2011. Nevertheless, the regional superintendent explained to Tuliszewski that, as area

supervisor, Ferrari was going to be acting in the capacity of supervisor to appellant on days when Tuliszewski was not working. Appellant never accepted Ferrari as his supervisor because Ferrari was not paid by the Division of Parks and Forestry and did not hold a title that is in the chain of command. Nonetheless, on September 18, 2011, Ferrari was appellant's supervisor. As such, he gave appellant an order to clean the restrooms. Appellant, upon arriving at the men's River Lot restroom, found the floor covered in sewage. He cleaned the sewage and bleached the floor. He made his rounds and checked the River Lot restrooms again around 8:30 a.m. or 9:00 a.m. and found them to be a mess again. Appellant found that a urinal was flooding the floor with water. He cleaned that up and went 200 feet across the road to work the pumps manually because they had been overwhelmed with rain water that overheated the circuit board and blew the fuses. Appellant was able to replace the blown fuses and returned to the River Lot restrooms. When he met Ferrari on the morning of September 18, 2011, he told him about the raw sewage on the floor in the men's room and said he was having a bad day. When Ferrari returned at approximately 11:00 a.m., he presumed appellant had been in the restroom the entire time, but he had not.

I **FIND** that the women's restroom was to be cleaned and ready for the public before 8:00 a.m. When Ferrari asked if the women's restroom was open, appellant accurately answered that it was, because the door does not lock. Appellant had not cleaned the women's restroom because he was dealing with an emergency in the men's restroom and manually operating the pump and replacing fuses to keep the men's restroom functioning. Nevertheless, since he testified that he was still able to make his rounds as he was dealing with the emergency, then he should have been able to clean the women's restroom. I further **FIND** that while appellant and Ferrari were talking about the women's restroom a patron was present, and appellant became agitated that Ferrari was accusing him of not having been working, when he had actually been working very hard. Ferrari's testimony was credible that he asked appellant to step outside so they could talk. Ferrari testified that appellant said he could not talk to him like that, indicating that Ferrari's voice was indeed raised. Appellant then walked out of the restroom, but away from Ferrari and toward his truck. It is very credible in light of appellant's refusal to recognize Ferrari as his "supervisor" that

appellant became argumentative and said that Ferrari was not his boss. Ferrari told appellant he was being insubordinate. Appellant then drank his coffee, because he had missed his 10:00 break. The exchange lasted only a minute. Ferrari informed appellant that he could resume working or he could take the day off. Appellant returned to work.

September 25, 2011

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I **FIND** the following with regard to the September 25, 2011, incident: As of September 2011, Ferrari had never performed any maintenance work or previously worked in a State park. At approximately 9:30 a.m., Ferrari gave appellant an assignment to fill the ruts in the roadway caused by wash-out from heavy rains. Ferrari told appellant to address the situation when he was done with his duties in the restrooms, where he found him. Although Ferrari testified that he expected that appellant's morning duties would take less than an hour and the filling would take about ninety minutes, he did not communicate this to appellant. When Ferrari went back two and a half hours later, there were no signs that appellant had attempted to perform the rut-filling assignment. When Ferrari found appellant returning from lunch at the maintenance area about 12:30 p.m., Ferrari asked why appellant had not attempted to fill the ruts, and appellant said that he had been mopping restrooms all morning. The heavy use of the septic system on Saturday coupled with the heavy rains led to the system overflowing on Sunday. Ferrari reiterated the need to notify him if appellant is not able to complete a task, as he had said the prior week. Ferrari tried to get appellant to commit to a time frame when he would complete the assignment, and appellant said words to the effect of, "It takes as long as it takes," because he did not know. Appellant, in an argumentative tone, said that Ferrari could not tell him what to do and he was not his boss. Again, Ferrari's testimony was credible because appellant expressed many times that he did not recognize Ferrari as his supervisor.

I further **FIND** that appellant did the rut-filling job in ninety minutes in an expert and professional manner, and that Ferrari told him that he did an excellent job. Ferrari

thereafter prepared a memorandum to assistant director John Trontis seeking an official reprimand and counseling of appellant.

Appellant urged this judge to find Ferrari not credible because Ferrari wanted to move into and in fact later did move into the house that appellant lived in at the time of the incidents in questions. I did not find that Ferrari lacked credibility on this basis, because when appellant did a good job, Ferrari told him so, and memorialized that appellant did excellent work. Also, Ferrari sought only counseling or some minimal discipline against appellant. Such action was not going to result in appellant's removal from housing. Appellant made the choice to leave Washington Crossing State Park on his own.

CONCLUSIONS OF LAW

Alleged Procedural Violation

Appellant first argues that the charges against him must be dismissed for failure to hold a hearing within thirty days of the notice of disciplinary action in accordance with N.J.S.A. 11A:2-13. The DEP argues that the time to argue this point was at the departmental hearing. On this point, I agree with the DEP. The case before me is a hearing de novo. N.J.A.C. 1:1-8.2(d). Appeals before the Civil Service Commission are conducted as hearings de novo. East Patterson v. Dep't of Civil Serv., 47 N.J. Super. 55 (App. Div. 1957); Newark v. Civil Serv. Comm'n, 114 N.J.L. 406, 413 (1935). De novo means it is as if there had been no prior hearing and as if no decision had been previously rendered. Housing Auth. of Newark v. Norfolk Realty Co., 71 N.J. 314, 326 (1976). The issue of a violation of N.J.S.A. 11A:2-13 should have been addressed at the departmental level. Although appellant testified that he filed a grievance seeking to dismiss the case on the basis that the hearing was not held within thirty days, the grievance was never addressed, and it was not addressed at the departmental hearing. Any procedural defect below has been cured by the present hearing, in which the case was heard de novo in the Office of Administrative Law.

Burden of Proof

The DEP has the burden of proving the charges by a preponderance of the competent, relevant and credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). Precisely what is needed to satisfy this standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 275 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily depending on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47, 49 (1975).

When the testimony of witnesses is in disagreement, as it is in this case, it is the responsibility of the fact-finder to weigh the credibility of the witnesses in order to make factual findings. Credibility, or, more specifically, credible testimony, must not only proceed from the mouth of a credible witness, but it must credible in itself as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554–55 (1954).

September 18, 2011

The first charge against appellant for September 18, 2011, is N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency or failure to perform duties. According to Heading, appellant was charged with failure to perform his duties because he was given an order or assignment from a supervisor that he failed to carry out. On that date, appellant had an emergency in the men's bathroom. That emergency necessitated actions on appellant's part that took him away from his regular duties, which included cleaning the women's restroom. To charge him with failure to perform his duties would be to ignore the work appellant did that morning to make the men's restroom useable. In addition, Ferrari testified that he clarified with appellant that "in the future," when he asked whether the restrooms were open, he meant "cleaned," but that was not necessarily clear when he asked appellant if the women's restroom was open. Also, if it were not for the subsequent dialogue following Ferrari's discovery that the restroom had not

been cleaned, appellant would not have been charged. It was appellant's failure to recognize Ferrari's authority that was the issue. Therefore, I **CONCLUDE** that the DEP did not prove by a preponderance of the evidence that appellant failed to perform his duties on September 18, 2011, and therefore I **DISMISS** that charge.

Appellant was next charged with insubordination. Black's Law Dictionary 802 (7th ed. 1999) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Such dictionary definitions have been utilized by courts to define the term where it is not specifically defined in contract or regulation.[1]

> "Insubordination" is not defined in the agreement. Consequently, assuming for purposes of argument that its presence is implicit, we are obliged to accept its ordinary definition since it is not a technical term or word of art and there are no circumstances indicating that a different meaning was intended.
>
> [Ricci v. Corporate Express of the East, Inc., 344 N.J. Super. 39, 45 (App. Div. 2001) (citation omitted).]

Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person. The Webster's definition accurately describes appellant's conduct. Even if he arguably had good reason for not cleaning the women's restroom, given the multitude of problems that morning, he did not accept Ferrari's authority over him and did not respect his orders. It is completely consistent that appellant would tell Ferrari that he was not his boss because appellant testified that he believed exactly that, despite having been told otherwise. I therefore **CONCLUDE** that the DEP proved by a preponderance of the credible evidence that appellant was insubordinate, in violation of N.J.A.C. 4A:2-2.3(a)(2), on September 18, 2011.

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[1] Appellant cites a definition in the NJ DEP Division of Human Resources, Office of Labor Relations Disciplinary Guidelines, at page 10, but neither appellant nor respondent offered that document into evidence, so it is not part of the record in this case.

Neglect of duty, N.J.A.C. 4A:2-2.3(a)(7), was also charged as a result of the incident on September 18, 2011. Neglect of duty is the same as failure to perform duties. Therefore, for the same reason as set forth under "failure to perform duties," I **CONCLUDE** that the DEP did not meet its burden of proving by a preponderance of the credible evidence that appellant neglected his duty, and I **DISMISS** this charge. Heading did not base charges on the failure to clean the Stone Barn.

Heading testified that the DEP included the violation of "other sufficient cause" to protect the charges, in case they needed it. She did not set forth that it was needed or set forth facts to support it. I therefore **CONCLUDE** that there was no basis for the "other sufficient cause" charge, and I **DISMISS** that charge with regard to both the September 18, 2011, and the September 25, 2011, events.

September 25, 2011

In connection with the September 25, 2011, incident, appellant was charged with failure to perform his duties, because he was given an order or assignment from a supervisor that he failed to carry out. Because the substantial credible evidence in the record established that appellant did the job that was asked of him and he did an excellent job, I **CONCLUDE** that the DEP did not prove the charge of failure to perform duties by a preponderance of the credible evidence. Ferrari's inexperience led him to believe that the restrooms were fine, but they were not. No time frame within which to complete the assignment given to appellant by Ferrari was communicated to appellant other than when he finished the restrooms. Therefore, the charge of failure to perform duties is **DISMISSED**. Again, because appellant was charged with neglect of duty on the same basis, for failing to complete an assignment, I **CONCLUDE** that the DEP did not prove this charge by a preponderance of the credible evidence either, and that charge is also **DISMISSED**.

Appellant was charged with insubordination because he stated that Ferrari was not his direct supervisor and he did not take orders from him, although appellant was in Ferrari's direct chain of command. The substantial credible evidence established that,

although appellant was "confused" about Ferrari's status and felt it created a "conundrum," Ferrari was his boss for the two Sundays in question in this case. Appellant was not happy about being supervised by someone who knew so little about the State park and one who knew so much less than he did. Therefore, it is completely credible and I **FIND** that appellant said to Ferrari, "It takes as long as it takes," and words to the effect of, "You're not my boss." Nonetheless, appellant took his job seriously and did what he had to do to make the park operational for the public. Appellant performed his duties, but did not like being given orders by Ferrari. The Webster's definition of insubordination does not require that appellant disregard a direct order, only that appellant is not submissive to authority, which incorporates acts of non-compliance and non-cooperation. In the present case, it is not so much appellant's acts, but his words and his attitude in refusing to recognize the authority that Ferrari had been given. I therefore **CONCLUDE** that the DEP proved by a preponderance of the credible evidence that appellant was insubordinate on September 25, 2011.

According to Heading, appellant was charged with conduct unbecoming a public employee due to the manner in which he addressed his supervisor on September 25, 2011. N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect for government employees and confidence in the operation of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). The case law establishes that a charge of conduct unbecoming should be based on more than just how an employee addresses his supervisor, especially where, as here, no one was present to hear the conversation except appellant and Ferrari. The words and tone were insubordinate, as found above, but they did not offend publicly accepted standards of decency nor affect the morale of the governmental unit. Ferrari testified to an effect appellant would have on co-workers, but appellant was the only maintenance employee working on those two Sundays and, as I have found, appellant performed his

duties. I therefore **CONCLUDE** that the DEP has not proved by a preponderance of the credible evidence that appellant's words to his supervisor rise to the level of conduct unbecoming a public employee, and I **DISMISS** that charge.

PENALTY

When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal, based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. N.Y. v. Bock, 38 N.J. 500 (1962). Where appropriate, concepts of progressive discipline involving penalties of increasing severity are used in imposing a penalty and in determining the reasonableness of a penalty. W. N.Y. v. Bock, supra, 38 N.J. at 523–24. Factors determining the degree of discipline include the employee's work history, his prior disciplinary record and the gravity of the misconduct. Bock, 38 N.J. at 524. The New Jersey Supreme Court also stated, "The number and remoteness or timing of the offenses and their comparative seriousness, together with an analysis of the present conduct, must inform the evaluation of the appropriate penalty." In re Stallworth, Camden Cnty. Mun. Utilities Auth., 208 N.J. 182, 199 (2011).

Unfortunately, the parties did not stipulate to appellant's disciplinary history. However, they seem to agree that he had the following prior disciplinary actions: 1) a five-day suspension for insubordination, conduct unbecoming and neglect of duty from an incident that occurred in March 2007; 2) two written warnings for being out of uniform in January 2007; 3) a written warning for operating a lawn mower without a safety pin in September 2004; and 4) a warning for loafing in 2003.

Ferrari testified consistent with his supervisor's report that he wanted direction on how to go about counseling appellant. His memorandum sought only an official reprimand. However, Rina Heading looked at the same supervisor's report and concluded that it, along with appellant's prior disciplinary history, merited a major disciplinary action of ten days' suspension. She testified that the "Department does not go backward; we go forward." Thus, she did not consider how remote in time the prior

discipline was to the present case, as long as it was in the appellant's history. Appellant considers 2003 too remote in time, yet wants this judge to consider his commendations from 2001. The commendations cannot be considered without the disciplinary actions from the same time. I **CONCLUDE** that in determining the penalty, they should all be considered.

I **CONCLUDE** that it is significant that appellant had gone four and a half years without any disciplinary problems at all and had received promotions and commendations for his job performance in 2001, 2003 and 2004, as well as glowing statements in his performance assessment reviews. The DEP also did not give any consideration to the fact that the supervisor to whom the insubordination was directed wanted to counsel appellant and give him the lowest formal penalty, and stated his reasons. Ferrari did not think the conduct warranted a major suspension and thought it would be counterproductive. The aggravating factor, however, is that the charges in 2007 were the same charges that were brought in the present case. After considering all of the above aggravating factors and mitigating factors, one of which is that I did not sustain all of the charges, only the insubordination; the length of time that appellant went without an infraction; and the fact that the supervisor who experienced the insubordination sought only counseling for appellant, I **CONCLUDE** that the appropriate penalty is a five-day suspension.

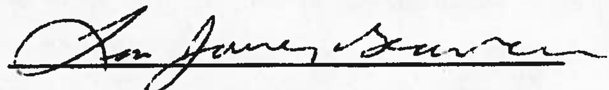
ORDER

For the foregoing reasons, I **ORDER** that the ten-day suspension is **MODIFIED** to a five-day suspension on the charge of violating N.J.A.C. 4A:2-2.3(a)(2), insubordination. The charges of failure to perform duties, conduct unbecoming a public employee, neglect of duty and other sufficient cause are **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, 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.



May 21, 2014
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: May 21, 2014

Date Mailed to Parties: May 21, 2014

cmo

APPENDIX

WITNESSES

For Appellant:

David Vibbert
William Vibbert

For Respondent:

Neal Ferrari
Rina Heading
John Tuliszewski

EXHIBITS

Joint:

J-1 Final Notice of Disciplinary Action
J-2 Preliminary Notice of Disciplinary Action
J-3 Stipulation of Facts

For Appellant:

P-1 Résumé of Neal Ferrari
P-2 Email from Neal Ferrari to John Tuliszewski, dated 9/18/11
P-3 Email from Rosanne Rossi to Neal Ferrari, dated 10/4/11
P-4 Job Specifications for Parks Maintenance Supervisor 1
P-5 Performance Evaluation Report
P-6 Commendations
P-7 Map of Washington Crossing State Park
P-8 State Park Service Permit

P-9 Pictures (3 pages)

P-10 Handwritten note

P-11 Individual Positive Total Coliform Results (Distribution and Raw Water)

P-12 State Park Service Permit

P-13 Pictures

P-14 Pictures

P-15 Letter to David Vibbert (cover page only)

P-16 Letter from Debra Ewalt, Director, Human Resources, to David Vibbert, dated 10/25/12

P-17 Mandatory Employee Housing "In-Kind Services"

P-18 Division of Parks and Forestry Employee Housing Posting, dated 6/17/08

P-19 Division of Parks and Forestry Employee Housing Posting, dated 8/29/12

P-21 Résumé of William C. Vibbert

For Respondent:

R-1 Letter with attachments from Rosanne Rossi, Administrator, ER, to David Vibbert, dated 6/22/01

R-2 Letter from Debra A. Ewalt, Director, Division of Human Resources, to Ferrari, dated 4/19/11

R-3 Letter from Debra A. Ewalt, Director, Division of Human Resources, to Ferrari, dated 10/28/11

R-4 Washington Crossing State Park Organizational Chart

R-5 Email from Neal Ferrari to Joe Winnicki, dated 9/18/11

R-6 Memo and attachment from Neal Ferrari to John G. Trontis, Assistant Director, dated 9/27/11

R-7 Email from Rosanne Rossi to Neal Ferrari, dated 9/26/11