



STATE OF NEW JERSEY

In the Matter of John Rivera
Township of Belleville, Department of
Public Works

DECISION OF THE
CIVIL SERVICE COMMISSION

CSR DKT. NO. 2016-1368
OAL DKT. NO. CSV 00228-16

ISSUED: DECEMBER 7, 2018 BW

The appeal of John Rivera, Laborer 1, Township of Belleville, Department of Public Works, removal effective February 21, 2014, on charges, was heard by Administrative Law Judge Gail M. Cookson, who rendered her initial decision on November 2, 2018 reversing the removal. No 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 (Commission), at its meeting on December 5, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the removal has been reversed, the appellant is entitled to mitigated back pay, benefits and seniority from February 21, 2014 to the actual date of reinstatement. See *N.J.A.C. 4A:2-2.10*. Additionally, the appellant is entitled to reasonable counsel fees pursuant to *N.J.A.C. 4A:2-2.12*.

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

concerning back pay or counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

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 John Rivera. The Commission further orders that appellant be granted back pay, benefits, and seniority from February 21, 2014 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 and an affidavit of mitigation 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 ON
THE 5TH DAY OF DECEMBER, 2018



Dolores Gorczyca

Member

Civil Service Commission

**Inquiries
and
Correspondence**

attachment

**Christopher S. Myers
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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 00228-16

AGENCY REF. NO. 2016-1368

**IN THE MATTER OF JOHN RIVERA,
TOWNSHIP OF BELLEVILLE,
DEPARTMENT OF PUBLIC WORKS.**

Catherine M. Elston, Esq (C. Elston & Associates, for appellant John Rivera attorneys)

Michael A. Cifelli, Esq., (Florio Kenny Raval, attorneys) for respondent
Township of Belleville

Record Closed: September 28, 2018

Decided: November 2, 2018

BEFORE GAIL M. COOKSON, ALJ:

STATEMENT OF THE CASE

John Rivera (appellant¹) appeals from disciplinary action taken by respondent, Township of Belleville (Belleville) Department of Public Works (DPW), to remove him from his position as a Laborer on charges of conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11). The charges relate to allegations of creating a hostile work

¹ While the parties used the designation "Petitioner" for Rivera, the OAL protocol is to refer to the employee as the appellant.

environment for fellow employees in the DPW through bullying, verbal abuse, intimidation, and threats.

PROCEDURAL HISTORY

Appellant was suspended without pay effective February 21, 2014, by Preliminary Notice of Disciplinary Action handed to appellant the previous day. Therein, it stated that a departmental hearing would be held on March 18, 2014; however, that date was adjourned because discovery had not yet been received. As of April 11, 2014, appellant had still not received discovery or a hearing due to ongoing discovery and other prehearing issues. The departmental hearing did not commence until December 2, 2014, and continued on December 5, 29, 2014, and February 9 and 20, March 13, and April 9, 2015. The opinion of the Hearing Officer was issued on August 3, 2015, and adopted by the Interim Township Manager on September 11, 2015, in the Final Notice of Disciplinary Action. Appellant filed an appeal on September 29, 2015, which was granted by the Civil Service Commission on December 28, 2015.

The appeal was transmitted to the Office of Administrative Law (OAL), on December 30, 2015, for hearing as contested cases pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. It was assigned to the Honorable Imre Karaszegi, A.L.J., on or about January 8, 2016. A hearing notice was sent scheduling the matter for July 19 and 21, 2016. Prior to that date, the hearing dates were adjourned until September 27, 2016, at the request of Belleville. Upon Judge Karaszegi's nomination for the Superior Court, the September hearing had to be adjourned. The matter was re-assigned to me on or about October 14, 2016. Within days, my office was attempting to get hearing dates scheduled for 2016 but ultimately, we could not get consensus for a date until February 2, 2017.² The notice for that hearing had been sent on October 18, 2016. That date also had to be adjourned.

² By electronic mail sent from counsel for Belleville to my chambers on January 24, 2017, and following his request for an adjournment of the February 2, 2017, hearing date, it was acknowledged:

That is correct, back pay will continue if Mr. Rivera is reinstated without interruption. The Town of Belleville will not make any argument to the contrary and is prepared to pay Mr. Rivera for all time, including time in the adjournment period, IF he is reinstated.

The hearing was re-scheduled for April 24, 2017. On April 18, 2017, Belleville filed a Motion to Quash Subpoenas on two higher ranking officials of the town, which had been served two weeks prior on March 30, 2017. Telephonically on April 20, 2017, I reviewed the motion with the parties and memorialized on the record on the first day of the hearing my decision that I was deferring the motion to quash the subpoenas to demand in person testimony of the Mayor and the Township Attorney, without prejudice to appellant's right to renew the request for their testimony if it proved essential. Any subpoenas for documents would be responded to by Belleville.

The hearings were commenced on April 24, 2017, but additional dates were needed on September 6, 2017, February 6 and 23, and April 17, 2018.³ Post-hearing summations were permitted to be filed, after receipt of the transcripts and another adjournment request, on September 28, 2018, on which date the record closed.

FACTUAL DISCUSSION

Robert Welter testified for Belleville. He has been the Assistant Road Supervisor for approximately five years and has been with the DPW for a total of twenty years. Welter was also the Shop Steward for the approximately forty-four DPW workers at the time of these alleged incidents.

Welter testified that he had heard rumors of Rivera bossing around other workers, but he never spoke to appellant about any of them. Welter stated at the hearing that he had purchased a fundraiser ticket for Mayor Kimble's fundraiser in the winter of 2014 but did not provide any other support.⁴ He did not recall which laborers

³ Transcripts of the plenary hearings at the OAL shall be identified as follows:
Transcript of hearing April 24, 2017: "1T page number: line number"
Transcript of hearing September 6, 2017: "2T page number: line number"
Transcript of hearing February 6, 2018: "3T page number: line number"
Transcript of hearing February 23, 2018: "4T page number: line number"
Transcript of hearing April 17, 2018: "5T page number: line number"

⁴ Central to this contested matter was the fact that May 2014 was a municipal election during which a mayor and council would be chosen.

attended the fundraiser, but he did see Esposito, Gilbert, and Balsamo at that particular fundraiser.

On cross-examination, Welter testified that at no time did he receive any complaints about appellant from any of his members; nor did Balsamo or Gilbert ever complain to him about appellant. In fact, Welter testified that he had heard only rumors or gossip that appellant was bossing people around on the job site and did not believe in acting on gossip. He personally never heard appellant talk politics on the job.

Vincent Sousa was hired by Belleville DPW on or about November 4, 2013, as a laborer. He initially worked in the mechanic shop performing brake jobs, oil changes, changing tires, and taking out motors of the Township's vehicles. During snowstorms, he would prepare the salters and snowplows. Sousa also worked with the Water Department. In this job, laborers have to dig to locate water mains. The water mains are about five to six feet deep. It is important that when a laborer is in the hole digging around the main that the other laborer at street level ensure safety. Sousa was also required to assist with shoveling and salting during snowstorms.

During one snowstorm in the winter of 2014, Sousa was told by appellant that he was "going to work today." This occurred at the Senior Center. Sousa understood that comment to mean that he did not work particularly hard on other days. He felt that appellant was bossing him around. There was another incident at the Recreation Center where Sousa was going to help Fiscella take down a snow blower from the back of a truck when Rivera snapped at him saying, "you're going to help me, jerk-off?"

During that same storm, Sousa testified that appellant and Fiscella spoke of newer DPW employees getting fired after the election. Sousa did not discuss politics with appellant directly, but he claimed to have overheard him discussing politics with others by the punch clock. Sousa claimed that appellant did once tell him that both he and his mother would lose their jobs after the election.

On cross-examination, Sousa acknowledged that he had supported Mayor Kimble and his ticket in the upcoming 2014 election. He attended at least five of the

Mayor's fundraisers. Sousa stated that he made various complaints about appellant to supervisor Rocco Balsamo and Shop Steward Welter but could point to no evidence or specifics to support that statement. Sousa admitted that he had been one of the workers who had taken a break from shoveling snow to engage in a snowball fight when appellant reacted by yelling at them all to get back to work. As testified to also at the departmental hearing regarding the snowball fight, Sousa reported that appellant told him: "Stop horsing around and get to work." He recalled other comments to the effect that they should grab the shovel and get back to work, and to stop being a "jerk off." These comments were conceded to have taken place just once and at the Recreation Center. In total, Sousa and appellant worked together only three times during the storms that winter. Sousa was never in a truck with appellant.

Further, it was clarified that Sousa had assumed he could be one of the DPW workers to lose his job if the election upset the Kimble ticket because he felt that he was one of the last ones hired. Yet, he knew that there were other DPW members hired after him, as he had worked there for two years by then. With respect to his testimony concerning his mother's job, Sousa confirmed on cross-examination that his job and that of his mother were not, in fact, connected. She was a crossing guard. Lastly, Sousa acknowledged that he never turned down overtime during snowstorms even if it meant he might have to work with appellant. Further, he did not recall complaining about appellant at the February 19th meeting in the town manager's office.

James DiModica was hired as a laborer in the DPW on January 5, 2014. DiModica was called into shovel snow during the snowstorms in January and February of 2014. DiModica testified that he worked with appellant only during the first snowstorm in 2014. DiModica thought appellant was a supervisor based upon his attitude because he was bossing around other workers. For example, DiModica was waiting in the truck with other workers to salt behind those that were shoveling ahead. Rivera came by the truck and yelled at them to "get the fuck out of the truck."

DiModica recalled that there was pizza for the workers the next day. DiModica texted Mauriello to inform him about the pizza, but Mauriello advised that he was with appellant eating Chinese food. DiModica was on the salting crew spreading salt after

the shoveling crew cleared the snow when appellant screamed at the employees to get to work.

On cross-examination, DiModica admitted that he and others were sitting in a truck staying warm when appellant yelled at them to get out and help. While there were two other DPW members, John Romano and Pete Velardi, who were in the truck with DiModica at this time, neither of them complained. DiModica acknowledged that appellant was not yelling and cursing at him but just generally used a curse word, which really did not bother him.

DiModica testified that he never observed or heard appellant talk about anybody losing their jobs because of the election. DiModica did not report appellant to anyone verbally, or informally, and he did not write a written complaint. DiModica further testified that he did not want to "make a big thing" out of what happened with appellant and that the only person he spoke to was Balsamo. At the February 19th meeting with the town manager and town attorney, he just told them about the small "bossy" incident with the shoveling and the salting.

On further cross-examination, DiModica confirmed that Balsamo would tell everyone in the breakroom that there were fundraisers being held for the Mayor and that he would make tickets available so they could attend. DiModica ultimately confirmed that Balsamo told the DPW members that going to the fundraisers would get you further on the job, that you want to "show your face" at the fundraisers.

Michael Mauriello been employed for four years as a laborer, but his employment for Belleville began on January 6, 2014. His duties consist of picking up bags, taking care of the grass, patchwork on the roads, and other miscellaneous tasks. Within the first two weeks there was a snowstorm. During one snow storm, Mauriello was traveling in a municipal pick-up truck with appellant and Fiscella. The truck had a bench seat with Fiscella driving, appellant at the window, and Mauriello in between them. Mauriello stated at this hearing that the two men were discussing politics. Appellant told him that if Mayor Kimble's opposition won, they would take over and make changes. Mauriello also testified that when DiModica texted him about pizza at town hall, appellant said that

Esposito could “choke on his pizza.” Mauriello recalled later during that snowstorm, appellant and Sousa cursing at each other from a distance. Mauriello complained to Balsamo because he felt uncomfortable.

On cross-examination, Mauriello admitting attending Mayor Kimble’s fundraisers out of loyalty to the person to whom he felt he owed his job even though he did not like getting involved in politics. Mauriello clarified that appellant only remarked that a new administration might lead to some changes for the better. There was no threat to jobs. It made him uncomfortable, however, because he could tell that Fiscella and appellant were not loyal to Kimble. Nevertheless, they were both good workers. Mauriello merely asked Balsamo to put him on a different crew for snowstorms because he did not want to get involved in talking politics. Accordingly, he only worked with appellant for that one heavy, overnight storm. He did not hear appellant state that DPW workers would lose their jobs if Kimble lost the election; only that changes would be made.

Louis Sacchiero was also a new DPW laborer in January 2014. He similarly thought that appellant was a supervisor based upon the way he screamed at others to get to work. Sacchiero only worked with Rivera once during a snowstorm. Sacchiero testified that the incident where appellant cursed at the other DPW workers who were having a snow ball fight took place from 70-100 yards away down the hill. Sacchiero testified that he never had any meetings with Balsamo or Gilbert regarding appellant. Sacchiero also agreed that it is not uncommon to hear DPW workers curse while working.

Giuseppe D. Cofone has been a Belleville DPW laborer for eleven years. He worked with appellant only a few times. He described appellant’s demeanor as being harsh. Cofone testified that he heard Rivera discussing politics regarding a “new regime.” On cross-examination, Cofone denied that he made any complaints about appellant to either Balsamo, Esposito or Murphy, or at the February 19th meeting in the town manager’s office. Cofone admitted that when workers are not shoveling fast enough or throwing salt fast enough, someone has to step up and take charge. Appellant did yell at others to get back to work or to work harder. Cofone confirmed that

he never felt that his job had been threatened by appellant and he never heard appellant tell anyone else that they might lose their jobs if Mayor Kimble lost.

William Gilbert is the Supervisor of the DPW, overseeing approximately forty-six employees. He described the structure of the DPW and his responsibilities. He has been a Belleville employee since 1985, starting as a laborer and thereafter getting promoted to mechanic and then management. Gilbert then explained the steps he took after Balsamo brought the DPW worker complaints to him. He testified that he condensed the worker's written complaints down to a two-page letter (Exhibit R-1), on February 20, 2014, and then shredded the underlying documents. He stated: "I shredded them for security. I didn't want other people to know what was going on." [T3:18:24-25.]

On cross-examination, Gilbert testified that it was Sousa, Mauriello and DiModica who had written complaints, the same three individuals who had been in Balsamo's office earlier. While Belleville had a harassment complaint procedure and policy in place, and a complaint form, neither Balsamo nor Gilbert advised these three employees to use the form or procedure set forth in the policy. Gilbert discussed the complaints from the DPW workers with Balsamo and then, alone, with Esposito.

Kevin Esposito is currently the Township Tax assessor. He was the Interim Township Manager between 2012 and 2016. As interim Township Manager, Esposito would oversee the day-to-day operations of the municipality. Esposito hired appellant in 2013 after he met with him seeking full-time employment. Esposito recalled that Rivera was experiencing financial hardship, but also had good recommendations and qualifications. Esposito described appellant's history of positions with the Township, starting with code inspector. He also set forth the documents that each new employee was provided and which each had to acknowledge. Esposito testified that appellant was transferred from code enforcement because there was a declining need for inspectors.

Esposito described a meeting held on February 19, 2014, with himself, the town attorney Murphy, Gilbert, and Balsamo. The union shop steward Welter was also

present. The laborers who were present were Marra, Cofone, Mauriello, Sousa, DiModica, and Sacchiero. Mauriello reported appellant's comment "he can choke on his pizza." Esposito stated that he was told by several workers during that meeting that appellant threatened that they should not be supporting certain political groups and that everyone would be fired in the future. Appellant was reportedly aligned with a political power broker in town – Richard Yanuzzi.

Esposito decided that appellant was causing a distraction on the jobs undertaken by the Water Department and that such behavior put himself and his co-workers in harm's way. The complaints were summarized by Gilbert and Balsamo as follows: 1) he is saying what did you do to get thrown out of the garage; 2) they are going to lose their jobs when the election happens in May; 3) he is yelling and giving orders, and talking about when his organization takes over how everything is going to change; 4) he is constantly threatening workers about what will happen after the election during work hours; 5) when the manager bought the DPW workers pizza during a snow storm, he would not take an employee to get a slice of pizza at the manager's office and told the employee that the manager should choke on his pizza, and 6) that he cannot wait until May to walk in his office and fire the town manager. [Exhibit R-1.]

Esposito then convened a meeting with Gilbert, Murphy and appellant to address the complaints. The Preliminary Notice of Disciplinary Action (PNDA) was prepared prior to the meeting. Esposito stated that he had intended to give appellant an opportunity to respond to the allegations, but appellant became too angry, shouting "this is bullshit" and flailing his arms. Esposito determined to give him the PNDA right then and advised appellant that he was suspended without pay. Appellant was charged with conduct unbecoming of a public employee and other sufficient causes. Esposito testified that he based that upon the hostile work environment due to bullying, verbal abuse, intimidation, and threats to fellow employees.⁵ Esposito insisted that appellant

⁵ Esposito testified that he received complaints from a member of the public and another Belleville employee about appellant prior to his re-assignment to the DPW. However, in both instances the individuals refused to reduce their complaints to writing. The member of the public allegedly advised Esposito that appellant, in his duty as a code inspector, was aggressive and hostile towards a property owner. As this is inadmissible hearsay without a residuum of competent evidence supporting it, it shall be disregarded. Further, appellant was never advised of these complaints or given the opportunity to tell his side of the story.

was not disciplined due to his political affiliations; rather, he was disciplined due to concerns of the other employees' safety and work place environment.

On cross-examination, Esposito admitted that he was the person who conducted the investigation and made the determination to fire appellant. Neither Esposito nor Balsamo asked any questions of appellant, and the PNDA was already prepared for his immediate suspension without pay prior to appellant entering the meeting. There was also no attempt by Esposito to interview other laborers or Fiscella, even though he was a witness and/or participant in several of the alleged incidents. Esposito seemed confused and uncertain when questioned as to the exact timeline of his investigation. The verbal complaints of the three workers might have been received on February 19 or 20; the timing of the complaints of Cofone and Maura were even less certain; although all these complaints were allegedly summarized in the Gilbert and Balsamo memorandum dated February 20.

Esposito also confirmed that it was against public policy for anyone to solicit monies for political fundraisers or to sell tickets to such events during the workday and on town property.

Rocco Balsamo has been employed by the Belleville DPW for 14 years. He was the Assistant Superintendent of DPW at the time of these incidents. His duties included meeting with each Department supervisor to review the assignments of the employees and pass along any orders from the Superintendent. Balsamo first met appellant in 2014 in Esposito's office when he was being transferred into the DPW. Rivera was assigned as a laborer in the Water Department.

Balsamo stated that he received complaints against appellant regarding one or two snowstorms from a group of newer employees over the course of a couple of days. He then asked that group of workers to come to his office. Balsamo was advised by Mauriello that he felt threatened and that appellant bossed him around. Mauriello told Balsamo that he was not allowed to get pizza, that he could not go for a break, and that appellant remarked that he did not do his job properly. Sousa complained about Rivera yelling, cursing, and demeaning him about working hard. Cofone complained about him

taking the lead and acting like a supervisor. DiModica and Sacchiero complained about the same issues. According to Balsamo's testimony, the employees felt threatened because they were told there would be changes after the upcoming election and they were new hires. Also, Balsamo testified that he was told by the employees that they felt threatened and were not focusing on their jobs because of the upcoming election. Balsamo explained that he was concerned for their safety.

Balsamo testified that he took notes on exactly what he was told by the laborers and then presented them to Gilbert. After presenting the complaints to the DPW Superintendent Gilbert, Balsamo testified that Gilbert summarized them in writing and presented it to the Township Manager Esposito. Balsamo testified that he was called into the meeting with the Township Manager and Gilbert as to the complaints. He also attended another meeting with Esposito and the Township Attorney Murphy to review the complaints.

On cross-examination, Balsamo testified that even though he claimed that appellant's fellow laborers felt threatened, he was unable to identify any of the language or wording used that made them feel that way. Balsamo could also not recall anyone specifically saying that appellant used the term "regime change."

Joseph Marra was not called to testify but his departmental testimony of February 20, 2015, was admitted into the record. Therein, Marra could not recall working with appellant, or ever hearing him talk politics. Marra also denied hearing any other workers complain about appellant.

Vincent Fiscella, Jr. presented testimony on behalf of appellant. Fiscella was a laborer with Belleville between approximately October 3, 2011 through May 13, 2014.⁶ Fiscella stated that during the snowstorms, the crews were given over twenty properties to clear of snow and lay down salt. Those properties included around town hall, which

⁶ Fiscella was terminated by respondent due to allegations unrelated to those herein. In Vincent Fiscella, Jr., Twp. of Belleville Dept. of Public Works, OAL Dkt. CSV 2891-15, both the Initial Decision (October 22, 2015) and the Final Decision (December 16, 2015) reversed his termination, finding one charge unsupported and one charge worthy of only a written reprimand. Fiscella was also reinstated to municipal employment and awarded mitigated back pay and some counsel fees.

is a full block around, police parking lots, library, a recreation center, which is up a hill, and the senior citizen building. In the winter of 2014, there were a few significant snowstorms with very heavy snow. Fiscella recalled for one snowstorm, he was partnered with appellant and Mauriello. He testified that the town had snow blowers but that they were inoperable, which clearly made the job more arduous and time consuming. The laborers had worked throughout the night on that occasion. Fiscella said it was bitterly cold and all he and appellant wanted to do was get done and get warm.

Fiscella observed that throughout the night, the other DPW workers made excuses, such as having to get salt or shovels, in order to find some relief from the cold, leaving appellant, Mauriello, and himself to shovel. At some point, appellant recommended calling Fiscella's father, the Superintendent of Grounds at the Belleville Board of Education, to ask to borrow a snow blower. Fiscella's father agreed to provide the snow blower so their crew of three picked up the blower along with ramps to get it on the truck. Needless to say, it was a miserable storm and everyone was tired and cold. Fiscella observed appellant wearing a backbrace – of a Home Depot type -- when appellant took off his jacket at lunch. Fiscella further testified that appellant complained of his back hurting him, that it was sore and aching, and that he had surgery on his back.

Fiscella testified that the only discussion he recalled them having while they were in the vehicle concerned a comparison between how the Board of Education was well-operated as compared to the town, especially regarding broken trucks and equipment, and the general organization of the management. Fiscella testified that his father's trucks were older, but in tip-top shape, clean and functioning. So, he stated that the discussion was more about how the town could be run better if a new administration was voted in.

Fiscella further stated that after working through the night, he had called the Road Supervisor, Bob Welter, to ask if they could stop to get something to eat, which was granted. The only place open was a Chinese buffet on Main Street, so the three of them went there to eat. Appellant paid for Mauriello's lunch. After eating, Fiscella

testified that he got a call from Welter telling them to return to City Hall because they needed the snow blower there to clean. Fiscella recalled that upon arriving, as they were taking the snow blower off the truck, Gilbert pulled up and said, "There's pizza inside if you guys want." At that point, Fiscella was indifferent to that news as they had just eaten. Fiscella confirmed that appellant was seen yelling at the workers who were throwing snowballs down the hill from the Recreation Center and not working. He recalled that appellant had also cursed while yelling at the men who were sitting in a truck earlier in the storm.

On cross-examination, Fiscella stated that he did not know appellant very well prior to and during their mutual employment with Belleville. His father knew appellant from the Board of Education, and Fiscella and appellant would see each other at the local cigar store where they hung out. Cigars were the subject of conversation in the break room on occasion. Because Fiscella had had a prior career in a more political agency, he knew better than to talk politics on the job; about which he could not say the same for Balsamo.

John Rivera testified on his own behalf. Appellant was initially hired to be an inspector for code enforcement. He remained in that position for approximately one year. Appellant was then transferred to be a clerk in the Municipal Court, but there was a conflict because of the fact that he was a Board of Education Trustee. He was then transferred to the DPW effective December 11, 2013. Appellant believed that the transfer was politically motivated. He was also not happy about having to work in the DPW because of his age and a bad back.

Appellant was assigned to the Water Department where that he received no complaints about his performance from Balsamo or Gilbert. Appellant testified that he worked two or three snowstorms the winter of 2014, where he and other laborers had to work fourteen to eighteen hours at a time. As others have stated, appellant testified that the snowstorms that year were comprised of one to two feet of very wet and heavy snow.

Unfortunately, appellant found that the DPW snowblowers were all broken and even some shovels were less than ideal in functionality. He also testified that there were no radios in the truck and the lift gates on the trucks were also broken, requiring the DPW members to do everything manually. Appellant confirmed that there were over 20 properties that had to be shoveled. Although they would be split into separate groups, one group would follow up on another group to finish clearing and salting a property. Appellant stated that there would be three laborers to a truck, and that he was always put with Fiscella during the snowstorms. Fiscella was always driving. Because the trucks had no radios, the supervisors would call Fiscella by phone. Appellant recalled that Sacchiero was with them in a truck for one storm but only for approximately two hours, and Mauriello for another occasion.⁷

Appellant testified that there was no conversation about politics with Sacchiero. The conversation he had with Fiscella about politics with Mauriello in the truck concerned how none of the town's equipment was working during a big snowstorm. After they contacted Fiscella's father, who was head of buildings and grounds for the Belleville Board of Education, to borrow a snow blower from the Belleville Board of Education, the conversation turned to how things would change for the better if the other candidates won. This was strictly in the sense of the town equipment and how the town seemed to be deteriorating with the upkeep and planning that seemed missing at that point. Appellant denied making any comment that anyone would lose their jobs after the election, nor did he ask Mauriello who he was planning on voting for.

With respect to the "pizza incident," appellant testified that they had been working since late evening and they had worked all through the night for twelve hours without food or a break other than grabbing coffee. Fiscella got a call from Gilbert telling them to go to lunch. Because of the storm, just about everything was closed but they found a Chinese restaurant on Main Street and went to eat there. Appellant paid for everyone's lunch. At that point, they had the snowblower in the truck, but they were tired, wet and cold. His back was killing him. When these three were done with lunch, they were told

⁷ Appellant testified that Cofone was on the truck with him for about twenty minutes. On that occasion, appellant was driving and Cofone was on the back of the truck spreading salt, but he was never inside the truck with him.

to go to town hall to clear the property. It was then that they found out that Esposito bought pizza for everyone. Appellant admitted that he made the statement that "Well, he can choke on his pizza," but it was because he was upset that he just paid \$35.00 for Chinese food when they could have had free pizza. All he wanted to do was just finish clearing the properties and be done with this snow duty.

At one point, when appellant and Fiscella were clearing snow at the Senior Center, which runs around 200 yards, he was working to get the sidewalk clear. When appellant was approximately 100 yards towards the train trestle, he turned around, stopped the machine, and looked back. He observed several guys were down there having a snowball fight, including Sousa, DiModica and two or three others. Fiscella was right next to him. At that point, he yelled to them, "Pick up a fucking shovel, we got work to do." They picked up shovels and started working. On another occasion, DiModica and other members were sitting in a truck, with the windows closed staying warm, while he and the others were outside shoveling. Appellant did yell to them: "Get out of the truck. Let's go."

Appellant stated that at no time during the snowstorms did he ever witness Gilbert or Balsamo on the road. It was rare to see any supervisors out in these snowstorm events. He also reiterated that at no time when he met up with other groups of DPW workers did they hang out outside and talk politics. He never had a one-on-one conversation with Sousa about politics and he never commented that his mother was going to lose her job. There was only one verbal run-in when appellant felt that Sousa was standing around while Fiscella obviously needed help getting the snowblower off the back of the truck.

Appellant denied that he had any conversations with Cofone, DiModica, Sacchiero, or anyone other than Fiscella about Belleville politics, especially in light of his belief that the reason he was transferred to the DPW was as punishment for his political views. Appellant rarely stopped in the breakroom but walked through it to get to his truck. In the Water Department, laborers did not have to go to the breakroom to get assignments. With respect to his work with the Water Department, appellant stated that

he only worked two water main jobs with each of Cofone and Sousa when they were shoveling dirt into a hole during which they had no conversation.

Appellant testified that on the day he was served with the PNDA, he was told to respond to town hall to see Esposito. He was not told what it was about and he had no idea of what was coming. Balsamo, Gilbert, Murphy and Esposito were there, as well as union representative Welter. He was immediately told that he was being suspended without pay because he had been "abusive" and "harassed" toward some of the other laborers. He was handed the PNDA within the first minutes of being there. Appellant said to Welter, "This is bullshit, help me here, what's going on?" Appellant testified that nobody spoke to him and nobody asked him his version of any of the alleged incidents. They told him he could get a hearing. Appellant insisted that his tone at the meeting was level because he was trying to save his job and his only income. He emphatically denied that he was yelling loudly and flailing his arms. At the hearing, he explained that he has a metal plate in his arm from an accident and "flailing" is not something he does with his arms.

On cross-examination, appellant admitted to the yelling he did during the snowstorms but stated that such was only in response to other employees shirking their jobs and in the absence of any supervisors.

It was clear both at the hearing and through reading the post-hearing submissions of both parties that this relatively short employment relationship was contentious and the employment action herein challenged was infused with at least some politics. Belleville's perspective was hyperbolic and fairly far afield of the actual evidence in the record.⁸ Rivera's argument emphasized political connections and perceived conflicts.⁹ My task is to see the truth through the weeds.

⁸ For example --

[Appellant]'s suspension stems from a vitriolic campaign of harassment, intimidation, and hostile conduct against virtually all his fellow laborers during which he subjected them to regular threats that he would gain political power and eliminate their livelihoods.

[Respondent's Brief at 4.]

And --

For evidence to be credible it must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Credibility, or, more specifically, credible testimony must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954). I **FIND** that respondent's witnesses were less credible than appellant. Credibility means the testimony as a whole holds or hangs together and makes sense. After listening carefully to every witness, it was clear to me that this entire case turned on the exaggerations and over-reactions, whether intentional or unintentional, of Balsamo and Esposito. At the hearing, they were placed in a position to defend a decision to immediately suspend without pay and then terminate a low-level DPW laborer on "safety concerns" that stemmed almost entirely from two big snowstorms in 2014 during which no one was hurt, threatened or confronted by hostile elements other than Mother Nature. Conversely, appellant's testimony was consistent, forthright, and believable, even when he admitted to raising his voice during those long hours of shoveling.

FINDINGS OF FACT

Accordingly, and based upon due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to

The laborers of Belleville's Department of Public Works deserved the ability, particularly during the historically brutal winter of 2013 – 2014, to attend to their critical job responsibilities without the distraction of a never-ending barrage of threats to their employment as well as crude personal insults.

[Respondent's Brief at 6.]

⁹ Appellant, who used the label "cousin" to describe the familial relationship between Gilbert and the Mayor seventeen (17) times, also had a decided bent to his post-hearing presentation –

There is no dispute that all those involved in the decision to investigate, charge, suspend without pay, and terminate [appellant] supported the Mayor in the upcoming election by raising money, by selling tickets to the Mayor's fundraisers and/or purchasing tickets to the Mayor's fundraisers and/or participating in the fundraisers and/or actively campaigning for the Mayor[.]

[Appellant's Brief at 2.]

observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

1. Appellant is in his mid-fifties, having graduated high school in 1980. He took some college courses but did not matriculate. After some typical odd jobs, appellant was employed in security, then the banking and bond industry, and for a longer period in hospital financial services.

2. Appellant began employment with Belleville in early 2013 as a property maintenance inspector within the code enforcement department.

3. Appellant was also the President of the Board of Education for the Township of Belleville during all relevant times herein, specifically, two three-year terms from 2010 to 2016.

4. Appellant was transferred initially to the municipal court in or about November 2013, but it was then confirmed that his position with the school board prohibited that job assignment.

5. Appellant was thereafter transferred to the Department of Public Works as a laborer in the Water Department on or about December 11, 2013.

6. The reasons for that transfer cannot be determined on this record.

7. There were two snowstorms discussed in detail at the hearings.

8. Appellant yelled at some fellow laborers who were throwing snowballs while he and some others were still shoveling snow.

9. Appellant and Fiscella discussed the hope that a new municipal administration would operate the DPW better and provide functional equipment.

10. Mauriello was assigned to the same truck as appellant and Fiscella for only a few hours during one of the storms. He was uncomfortable with their viewpoints on the town government but never felt threatened in any manner.

11. The conversation between appellant and Fiscella while Mauriello was in the truck with them, which was only on and off for a few hours during one snowstorm, centered on frustrations with the DPW equipment and the invidious comparison to the BOE equipment.

12. Mauriello was never asked for whom he was planning on voting for Mayor and council.

13. All of the laborers had worked long, cold, and hard hours during these snowstorms. It is fair to surmise that everyone was tired, hungry, cold, and cranky. Each person reacts individually to those types of stressors.

14. Appellant got permission to take a meal break and treated Mauriello and Fiscella to a Chinese buffet before any of them knew about the free pizza back at the municipal building.

15. Appellant's comment that Esposito could "choke on his pizza" was not a threatening comment, but one expressed out of fatigue and aggravation, insofar as he had just paid for his and the others' meal. No reasonable person would have taken that comment literally when placed in context.

16. It is not unusual or surprising that DPW laborers use curse words during normal and/or heated conversations.

17. Appellant, as one of the oldest laborers, as well as President of the Board of Education, was probably not emotionally prepared to be doing manual labor at the bottom of the DWP pecking order. He had a propensity to be a little bossy to younger workers who he perceived were not pulling their weight even though he had been given no supervisory authority.

18. Appellant did not bully, harass or threaten any other laborer during these two snowstorms. Similar to many others on that job, his speech to get back to work was sprinkled with some common curse words.

19. During these two heavy snow events, there was no supervisory presence

outside with the DPW crews shoveling and salting the public properties. Insofar as truck radios were non-functional, the DPW crews were pretty much on their own – self-governing -- during those long, overnight hours.

20. During regular Water Department jobs, appellant never harassed, threatened or bullied any fellow laborers.

21. Appellant did not threaten anyone's job in anticipation – that is, "if and when" – a new administration was to be elected in May 2014.

22. Every witness for respondent was politically and actively loyal to the Mayor. Appellant and Fiscella were politically and actively loyal to the challenger to the Mayor. Every person presented his belief that all the other person's witnesses were too political during working hours.

23. Appellant did not lobby other laborers to his political viewpoint in the break room. Appellant was rarely in the break room and even if he passed through, the conversation was just as likely to be about cigars as the election still months away.

24. Appellant did not threaten anyone's employment. Appellant expressed his opinion and observations that when elections are over and if new people are in positions of authority, changes are inevitable.

25. No laborer could reasonably have felt threatened, intimidated, or in a hostile work environment as a result of appellant's differing municipal allegiances.

26. Balsamo, who was in a supervisory position, did occasionally solicit laborers to purchase tickets to the Mayor's fundraising events that winter during working hours and on municipal property.

27. Balsamo let DPW workers know that their future employment prospects would not be hurt if they attended the Mayor's functions.

28. Only three laborers complained about appellant, and none of them felt that their jobs had been threatened.

29. This disciplinary action relies almost exclusively on verbal interactions between DPW laborers during two heavy snowstorms in February 2014.

30. No DPW employee's safety was ever at issue in any of the alleged complaints.

31. Neither Esposito or Balsamo attempted to discuss with appellant toning down his bossiness or viewpoints.

32. Appellant was given no verbal warning or written reprimand for these or any other allegations for his employment in Belleville.

33. Appellant was never given any minor or major period of suspension for these or any other allegations for his employment in Belleville.

ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). Governmental employers also have delineated rights and obligations. The Act sets forth that it is State policy to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against her and, if so,

the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In this matter, Belleville bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

For reasonable probability to exist, the evidence must be such as to “generate belief that the tendered hypothesis is in all human likelihood the fact.” Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Therefore, the tribunal must “decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth.” Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933).

Initially, appellant argues that the proceedings below were tainted by a conflict of interest in violation of the Ethics Law:

No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family . . . has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independent of judgment.

[N.J.S.A. 40A:9-22.5(d).]

Appellant asserts that during the period of the investigation of the complaints about him, Gilbert was the Mayor’s cousin and he was aware that appellant was not supporting the Mayor. Similarly, it is argued that Murphy investigated the complaints by interviewing the witnesses, but he had been the Master of Ceremonies for the Mayor at his fundraisers. Balsamo, the other managerial employee involved in this disciplinary action, sold tickets to laborers for the Mayor’s fundraising events. Appellant asserts that the appearance of impropriety standard should be applied in what he refers to as a quasi-judicial proceeding, thusly: “Would a reasonable, fully informed person have

doubts about the judge's impartiality?" Kane Properties, LLC v. City of Hoboken, 214 N.J. 199, 223 (2013) (quoting DeNike v. Cupo, 196 N.J. 502, 517 (2008)).

I **CONCLUDE** that the argument of an ethical conflict of interest at play in the bringing of the Preliminary Notice of Disciplinary Action must be set aside because the proceedings here at the OAL are de novo. Accordingly, appellant's challenge as to validity of his suspension and termination after a local hearing based on political bias, and that the proceedings should be held to be void ab initio must fail. In re Morrison, 216 N.J. Super. 143, 151 (App. Div. 1987). Even if the municipal attorney and DPW management were prejudiced and should have recused themselves, this is an entirely new hearing in which all evidence bearing on the case must be sought, and a substituted decision as to substantiation is made as if there had been no prior hearing and decision, thus correcting any prejudice which may have existed at the local level. See also Marro v. Civil Serv. Dep't, 57 N.J. Super. 335, 345-46 (App. Div. 1959); Carr v. Sharp, 454 F.2d 271, 272 (3d Cir. 1971).

Accordingly, this dispute turns solely on the factual underpinnings of the allegations, and not whether persons who drafted and investigated them for presentation at a departmental hearing were biased or had an appearance of impropriety.

Based upon the facts set forth above, I **CONCLUDE** that the respondent has not proven by a preponderance of the credible evidence that appellant was a threat to the safety of other crew members who needed to be immediately suspended without pay on February 20, 2014, effective February 21, 2014. There were no reports that any worker felt that his safety was threatened by the presence of appellant on the job. No testimony was produced at these hearings that anyone was so distracted by thoughts of possibly losing a job several months later as a result of things appellant might have said that they could not concentrate on their jobs. These assertions strains credulity. There were also no complaints about the quality of the work appellant did or the effort he applied, notwithstanding a bad back, arm injury, and being older than the average laborer.

In addition, I **CONCLUDE** that the respondent has not proven by a preponderance of the credible evidence that appellant's offense of being occasionally outspoken about the local politics and at times crude or bossy in his vocal interactions with fellow laborers rose to the level of bullying, harassment, or creating a hostile work environment. This conclusion is buttressed by the record facts showing that no one complained about appellant or made his conversations a big deal until Balsamo and Gilbert brought the workers into a common interview session on February 19, 2014. Further, the use of common curse words by DPW laborers, especially during arduous snowstorm duty, is hardly grounds for termination. If it was, I dare say most towns would have empty DPW departments.

Accordingly, I **CONCLUDE** that respondent has not met its burden of proof on these disciplinary charges and that they must be dismissed. Whether this was politics at play, bad blood, or personalities rubbing the wrong way, there was simply barely any smoke to these charges and certainly not a blazing fire of outrageous work behavior as characterized by respondent. The respondent's assertions are also undermined by its failure to keep any underlying notes, complaints or statements, and by its utter failure to actually "investigate" both sides.

Even if I had concluded that Belleville had proven these disciplinary charges, I would **CONCLUDE** that the penalty imposed here was excessive and shocking to my sense of fairness. This entire situation could and should have been handled with a verbal warning or written reprimand. Put bluntly, these are trumped up charges on which Belleville has wasted its public resources, when the proper managerial approach would have been to remind everyone as to the behavior expected in that work environment.

ORDER

Accordingly, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action of the Township of Belleville, Department of Public Works against appellant John Rivera is hereby **REVERSED**. It is further **ORDERED** that

appellant John Rivera is entitled to back pay and any other benefits that would have otherwise accrued had he not been removed.

It is further **ORDERED** that reasonable counsel fees should be awarded to the appellant as the prevailing party, subject to submittal of an affidavit of services and supporting documentation to the appointing agency, if settlement of fees is not successful, in accordance with N.J.A.C. 4A:2-2.12.

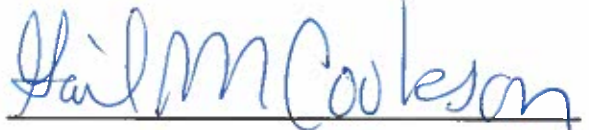
I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

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, 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.

November 2, 2018

DATE



GAIL M. COOKSON, ALJ

Date Received at Agency:

Date Mailed to Parties:

id

APPENDIX

LIST OF WITNESSES

For Appellant:

Vincent Fiscella, Jr.
John Rivera

For Respondent:

Robert Welter
Vincent Sousa
James DiModica
Michael Mauriello
Louis Sacchiero
Giuseppe D. Cofone
William Gilbert
Kevin Esposito
Rocco Balsamo

LIST OF EXHIBITS IN EVIDENCE

Joint:

J-1 Preliminary Notice of Disciplinary Action, dated February 20, 2014

For Appellant:

A-1 [not in evidence]
A-2 [not in evidence]
A-3 [not in evidence]
A-4 [not in evidence]
A-5 [not in evidence]
A-6 Testimony of Joseph Marra at Departmental Hearing, dated February 20, 2015;
Letters on hearing delays
A-7 Errata and Revisions, Township of Belleville Employee Manual

A-8 Discovery Demands – Attachments to Certification of Counsel, dated December 4, 2014

For Respondent:

R-1 Letter from Bill Gilbert and Rocco Balsamo, dated of February 20, 2014

R-2 Interoffice Memorandum from Thomas M. Murphy re John Rivera, dated February 19, 2014

R-3 Excerpts of Employee Manual on Workplace Violence and Anti-Harassment

R-4 Interoffice Memorandum from Kevin M. Esposito re Employee Transfer, dated December 11, 2013

R-5 Acknowledgement of Receipt of Employee Handbook, John R. Rivera, dated April 1, 2013

R-6 Township of Belleville Employee Manual

R-7 To Whom It May Concern Letter re harassment complainants, dated February 21, 2014

R-8 Acknowledgement of Receipt of Other H.R. Documents, John R. Rivera, dated April 1, 2013

R-9 Township of Belleville Resolution No. 12-116, re Civil Rights Policy, dated April 26, 2012