STATE OF NEW JERSEY

In the Matter of Covvie Scott,
Trenton Public Library

CSC Docket No. 2023-1091
OAL Docket No. CSV 10573-22

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: JULY 3, 2024

The appeal of Covvie Scott, Senior Building Maintenance Worker, Low Pressure License, Trenton Public Library, removal, effective October 20, 2022, on charges, was heard by Administrative Law Judge Judith Lieberman (ALJ), who rendered her initial decision on May 28, 2024. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, including a thorough review of the exceptions and reply, the Civil Service Commission (Commission), at its meeting on July 3, 2024 adopted the ALJ's Findings of Facts and Conclusions of Law and her recommendation to reverse the removal.

As indicated above, the Commission has reviewed the appointing authority's exceptions in this matter and finds them wholly unpersuasive. It makes the following comment. The burden of proof in a disciplinary matter is on the appointing authority to show by a preponderance of the credible evidence in the record that the proffered charges are sustainable. For all the reasons expressed by the ALJ in her initial decision, the Commission agrees that the appointing authority has fallen short of this burden in this matter.

Since the removal has been reversed, the appellant is entitled to be reinstated with mitigated back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10 from the first date of separation without pay until the date of reinstatement. Moreover, as the removal has been reversed, 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, per the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, 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 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 Covvie Scott. The Commission further orders that the appellant be granted back pay, benefits, and seniority from the first date of separation without pay until the 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 the 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 or 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 3RD DAY OF JULY, 2024

Allison Chris Myers

Allison Chris Myers
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 10573-22
AGENCY DKT. NO. 2023-1091

IN THE MATTER OF COVVIE SCOTT,
TRENTON PUBLIC LIBRARY.

Seth Gollin, Esq., for appellant Covvie Scott (AFSCME 63)

Victoria A. Flynn, Esq., for respondent Trenton Public Library (Law Offices of Victoria A. Flynn, LLC, attorneys)

Record Closed: April 12, 2024 Decided: May 28, 2024

BEFORE **JUDITH LIEBERMAN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant Covvie Scott was removed from his position with respondent, Trenton Public Library (Library or appointing authority), based on findings that he violated anti-discrimination and workplace-violence policies and laws; engaged in discrimination that affected equal employment opportunities, including sexual harassment; engaged in conduct unbecoming a public employee; and neglected his work duties.

The appointing authority issued a Preliminary Notice of Disciplinary Action (PNDA) on September 13, 2022. After a departmental hearing, which was held on October 5,

2022, the appointing authority issued a Final Notice of Disciplinary Action (FNDA), sustaining the charges in the PNDA and removing the appellant from employment effective October 20, 2022.[1] The appellant filed a timely appeal and the matter was transmitted to the Office of Administrative Law on November 29, 2022, for hearing as a contested case.

The matter was assigned to me on December 14, 2022, and an initial prehearing status conference was scheduled to be held on January 5, 2023. The appointing authority failed to appear, and the status conference was rescheduled to February 3, 2023. Additional status conferences were held on March 27, 2023, and April 25, 2023. During the latter status conference, the hearing was scheduled to be held, by Zoom video technology, on October 12, 2023.

Counsel and appellant appeared for the October 12, 2023, hearing. None of the appointing authority's witnesses appeared. Additional time was permitted for its counsel to attempt to reach the witnesses and for them to join the hearing. After over forty-five minutes had elapsed, none of the witnesses had appeared. Counsel for the appointing authority represented that she communicated with the witnesses prior to the hearing date and attempted to ensure each witness's appearance on the day of the hearing. She advised that one of the witnesses refused to appear, citing trauma associated with her appearance during the departmental hearing. Counsel asked the director of the appointing authority to contact another employee; the director advised that she was unable to reach that employee. Counsel further advised that she had recently communicated with the former director of the appointing authority, who stated that she would testify during the hearing. However, on the day of the hearing, counsel was unable to contact the former director. Counsel advised that this was "most startling," as she and the former director had recently communicated, and it was out of character for her to not respond. Counsel was perplexed by the failure of all witnesses to appear and stated that, if she had reason to anticipate this problem, she would have addressed the need for subpoenas. Counsel requested an adjournment of the hearing or, in the alternative, that she be permitted to submit and rely upon exhibits.

[1] The FNDA was dated September 13, 2022, the same date as the PNDA.

Appellant objected to both requests, noting that the hearing had been scheduled months earlier; the appointing authority could have subpoenaed its witnesses prior to the hearing; and reasons for the witnesses' failure to appear were not provided.[2] He objected to the admission of the appointing authority's exhibits without testimony to establish a foundation for them and cross-examination of the relevant witnesses. He asserted that he would contest the assertions in the exhibits, which were memoranda written by the former director that contained the hearsay statements of the witnesses.[3]

The appointing authority's request for an adjournment was denied because there was no basis for understanding the witnesses' failure to appear, other than the witness who refused due to unspecified "trauma," and, thus, there was no indication that they would appear at a later date. The request to admit exhibits without testimony was also denied. Without the testimony of witnesses with firsthand knowledge, the exhibits offered only hearsay, which was insufficient on its own to permit factual findings.[4] Appellant sought leave to file a motion for summary decision based upon the absence of evidence sufficient to permit a finding in favor of the appointing authority. Appellant's request was granted,[5] and he filed his motion on October 20, 2023. The appointing authority filed its opposition brief on November 6, 2023, and appellant filed his reply on November 28, 2023.

On December 19, 2023, I issued the following Order:

> I **ORDER** that appellant's motion for summary decision is **DENIED**. Respondent's motion for reconsideration of the denial of its request for an adjournment is **GRANTED**. Respondent's request to rely solely upon its exhibits is **DENIED**. A new hearing date will be scheduled in conjunction with the parties. I further **ORDER** that the Appointing Authority shall subpoena each of the witnesses it intended to

[2] With the exception of the one witness who refused to appear.

[3] The other exhibits were the PNDA, the FNDA, the report written after the departmental hearing, and memoranda concerning appellant's job duties.

[4] None of the witnesses submitted an affidavit to support the exhibits.

[5] The colloquy and oral orders (denying the appointing authority's request for an adjournment, denying the appointing authority's request to rely exclusively upon exhibits, and granting appellant's request to file a motion for summary decision) were put on the record on October 12, 2023.

> call during the October 12, 2023, hearing. The Appointing Authority shall also communicate with appellant, to ensure that all necessary witnesses have been subpoenaed.

A hearing was held on March 6, 2024. Appellant and respondent filed post-hearing briefs on March 19, 2024, and April 12, 2024, respectively. The record closed on April 12, 2024.

FACTUAL DISCUSSION AND FINDINGS

The following is undisputed. I therefore **FIND** it as **FACT**:

Appellant Covvie Scott was employed by respondent Trenton Public Library as a senior building maintenance worker during the times relevant to this matter. On September 13, 2022, respondent issued a Preliminary Notice of Disciplinary Action (PNDA) charging him with violating anti-discrimination laws and policies and workplace-violence laws and policies; engaging in conduct unbecoming a public employee; engaging in discrimination that affects equal employment opportunity, including sexual harassment; neglect of duty; and other sufficient cause. The PNDA detailed the basis for the charges:

> Employees have complained about multiple incidents that have occurred over the past few months and weeks whereby Mr. Scott engaged in incidents of workplace violence; disruptive or aggressive behavior intended to disturb, frighten, interfere [with], or prevent normal work activities; sexual harassment; threats of physical harm; harassment and intimidation of employees. The incidents, whether individually or collectively, give rise to major discipline up to and including termination pursuant to N.J.A.C. 4A:2-2.2, -2.3.
>
> [R-3.]

The charges were sustained after a departmental hearing, and a Final Notice of Disciplinary Action (FNDA) dated September 13, 2022, removing appellant from his position effective October 20, 2022, was issued. R-1; R-1(a).

Testimony

For respondent:

Telly Brown, a maintenance supervisor for respondent, testified that he was appellant's supervisor for four or five years. When Brown was not present, appellant would supervise the building maintenance workers. Brown also supervised Ms. Ortiz, another maintenance worker. She and appellant worked different shifts, but their work hours overlapped regularly.

In or about August 2022, Brown met with Ortiz to reprimand her due to her work performance. After he reprimanded her, Ortiz told Brown that appellant asked her to go to the library's roof and that this made her feel uncomfortable. She was emotional while she recounted the exchange. Brown did not witness the exchange, and he asked her if she understood it to be a sexual "pass." Ortiz replied, "Yes." Given the nature of the allegation, Brown asked to discuss it with library director Rebecca Franco Martin. Ortiz reported the incident to Franco Martin. Brown and Franco Martin discussed the serious nature of the allegation, and Franco Martin said she would look into it further. Brown was not involved with the actions subsequently taken in response to the allegation.

When Brown was asked if Ortiz believed appellant was trying to cause her to lose her job, he replied that she did. Ortiz told him that she thought appellant's behavior was related to his criticism of her work performance.

Rebecca Franco Martin was the director of the Trenton Public Library from August 2018 through July 2023. She was the director during the times relevant to this matter. Appellant was employed there when she began her employment.

Library staff, including appellant, were trained concerning harassment and discrimination during Staff Professional Development Day. The staff manual, which is given to employees when they are hired, and a new manual, address harassment and discrimination. Appellant received the manuals.

Franco Martin heard about Ortiz's complaint in August 2022. On August 9, 2022, Brown called her to discuss the complaint with Ortiz and him. Ortiz was upset and crying and said she wanted to leave her job because she was uncomfortable due to the "nasty" and derogatory things appellant said to her. His comments were of a sexual nature. Because Ortiz was so upset, Franco Martin said she could leave work early.

Ortiz also said that other employees had concerns about appellant. None of the other employees shared this with Franco Martin. She also said that appellant looked at her inappropriately while she was on a ladder. Franco Martin did not remember the account in detail.

Franco Martin contacted respondent's counsel the following day, and an investigation was conducted. Seven employees were interviewed. This generated additional allegations of inappropriate sexual comments by appellant: he made inappropriate noises while an employee adjusted their pants; he made inappropriate comments about a photograph of an employee in a bikini; and he made threats of violence during an argument with employees while in the children's room of the library. Franco Martin did not recall other allegations.

With respect to the latter allegation, three employees were in the children's room with appellant. There was yelling and screaming amongst them. An employee told one of the three employees that they found the encounter to be upsetting because they were a victim of domestic violence. Franco Martin questioned the employees. They said that they were nervous about being involved in an investigation of appellant's behavior. One, Demaris Rotano, stated that she was afraid to come forward because appellant's spouse also worked at the library and she feared retaliation. Franco Martin believed Rotano to be credible.

When asked how appellant referred to his coworkers negatively, Franco Martin recalled only the statement, "lazy bitches." She did not recall who reported this. She did not have negative personal interactions with appellant.

Appellant was terminated pursuant to library policy. There was no other assignment that would permit him to work at the library without having to interact with the complaining employees. The staff did not feel safe.

Franco Martin acknowledged that she did not have firsthand knowledge of the allegations made by the employees she interviewed, including Ortiz. She contemplated that she could have retained appellant as an employee if she could have kept him apart from the other employees.

For appellant:

Appellant **Covvie Scott** started working for the library in 2016. He became a senior maintenance worker in or about October 2021. In that capacity, he supervised Ortiz when Brown was not present. He would delegate duties and work assignments to her when he was acting as supervisor. He occasionally worked with her.

Appellant disputed both Brown and Franco Martin's accounts of Ortiz's allegations. He never asked her to go to the rooftop. He did write a letter to her about her job performance.

He also disputed Franco Martin's accounts of what she was told by other employees. He did not recall having a dispute with other employees in the children's room. He recalled stating in 2022 that he and one of those employees had an interaction during which the employee said someone could get punched in the face. He did not recall other aspects of the interaction. When questioned further, he recalled that he and the employee yelled at each other and used curse words. He did not refer to employees as "lazy bitches" or use other derogatory terms; did not accuse the employee of not working; did not refer to employees as "hot" or "sexy"; and did not threaten to punch anyone. Those employees who reported this were lying.

Additional Factual Findings

The Administrative Procedure Act (APA) provides that the scope of review for hearings conducted before the OAL is de novo. See, e.g., N.J.S.A. 52:14B-10(c) ("A recommended report and decision which contains recommended findings of fact and conclusions of law and which shall be based upon sufficient, competent, and credible evidence shall be filed[.]"). "A trial de novo means 'trying the matter anew, the same as if it had not been heard before and as if no decision had been previously rendered.'" Housing Auth. of Newark v. Norfolk Realty Co., 71 N.J. 314, 326 (1976) (quoting Farmingdale Supermarket, Inc. v. United States, 336 F. Supp. 534, 536 (D. N.J. 1971)); see also Appeal of Darcy, 114 N.J. Super. 454, 459 (App. Div. 1971) (a hearing de novo "is not a new hearing 'on the record' below, but a new plenary hearing at which evidence and testimony are presented. The de novo hearing before the [Civil Service] Commission on an administrative appeal is limited to the charges made below but it is not confined to the precise testimony below.") (citations omitted).

Hearsay evidence is admissible in the trial of contested cases and shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability. N.J.A.C. 1:1-15.5(a). However, while hearsay evidence is admissible, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. N.J.A.C. 1:1-15.5(b). Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony, when there is a residuum of legal and competent evidence in the record. Weston v. State, 60 N.J. 36, 51 (1972).

Here, neither witness on behalf of respondent had firsthand knowledge of the key allegations against appellant. Both referenced the allegations that were made by employees who did not testify, and thus the testimony about the allegations is hearsay. Respondent did not offer admissible evidence to corroborate the hearsay statements. The only evidence it offered is the report issued by the departmental hearing officer that was attached to the FNDA. This does not offer the type of corroboration that is required

because this is a de novo hearing. Without more, I am unable to find that appellant engaged in the wrongdoing alleged in the PNDA and FNDA. Accordingly, I **FIND** as **FACT** that appellant did not engage in conduct that constituted harassment; discrimination; workplace violence; disruptive or aggressive behavior intended to disturb, frighten, interfere with, or prevent normal work activities; intimidation; sexual harassment; or threats of physical harm.

LEGAL ANALYSIS AND CONCLUSION

The Civil Service Act and the regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to N.J.S.A. 11A:12-6; N.J.A.C. 4A:1-1.1, et seq. A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. See 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 are whether the employee is guilty of the charges and, if so, the appropriate penalty, if any, that should be imposed. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

The appointing authority 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).

Here, the appointing authority had two opportunities to make its case. When no witnesses appeared for the first hearing, it was given a second opportunity to present witnesses and evidence. In an effort to ensure a complete record, the appointing authority was directed to subpoena, for the second hearing, each of the witnesses it intended to call during the first hearing. The appointing authority presented witnesses during the second hearing. However, those witnesses did not possess firsthand knowledge and relied exclusively upon hearsay to establish appellant's actions. Without more, I am compelled to **CONCLUDE** that respondent has not presented competent, admissible evidence that permits a finding that appellant engaged in the offending behavior charged in the FNDA. For this reason, I **CONCLUDE** that it has failed to sustain its burden and that the charges against appellant should be dismissed.

ORDER

For the reasons stated above, it is hereby **ORDERED** that the action of respondent Trenton Public Library of dismissing appellant from his position as a senior building maintenance worker is **REVERSED**.

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, 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 28, 2024
DATE

JUDITH LIEBERMAN, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

JL/mg

APPENDIX

WITNESSES

For appellant

Covvie Scott

For respondent

Telly Brown

Rebecca Franco Martin

EXHIBITS

For appellant

A-1 July 21, 2022, Incident Report

For respondent

R-1 Final Notice of Disciplinary Action

R-1(a) Hearing officer report

R-3 Preliminary Notice of Disciplinary Action

R-8 Memo to appellant, April 27, 2021

R-15 Staff manual

The nonsequential numbering of exhibits reflects the fact that numerous pre-marked exhibits were neither identified nor offered into evidence.