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STATE OF NEW JERSEY

In the Matter of Stephen Hill
Township of Lakewood,
Department of Public Works

DECISION OF THE
CIVIL SERVICE COMMISSION

CSC DKT. NO. 2015-135
OAL DKT. NO. CSV 09021-14

ISSUED: MAY 7, 2015 BW

The appeal of Stephen Hill, Municipal Recycling Coordinator, Township of Lakewood, Department of Public Works, removal effective June 27, 2014, on charges, was heard by Administrative Law Judge Sarah G. Crowley, who rendered her initial decision on April 16, 2015. 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, at its meeting on May 6, 2015, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

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 However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, unpublished, Docket No. A-5581-01T2F (App.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 and counsel fees are finally resolved.

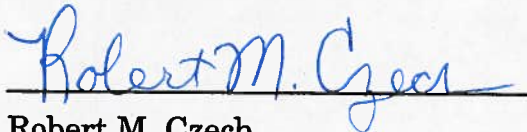
ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore modified the removal to a 30 working day suspension. The amount of back pay awarded is to be reduced and mitigated to the extent of any income earned by the appellant during this period. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

N.J.A.C. 4A:2-2.12(a) provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in the disciplinary appeal is the merits of the charges. See *Johnny Walcott v. City of Plainfield*, 282 N.J. Super. 121,128 (App. Div. 1995); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, the charges were sustained. Consequently, as appellant has failed to meet the standard set forth at *N.J.A.C. 4A:2-2.12*, counsel fees must be denied.

The parties must inform the Commission, in writing, if there is any dispute as to back pay 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
MAY 6, 2015



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
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Henry Maurer
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attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 09021-14

AGENCY DKT. NO. 2015-135

**IN THE MATTER OF STEPHEN
HILL, TOWNSHIP OF LAKEWOOD,
DEPARTMENT OF PUBLIC WORKS.**

Timothy R. Hott, Esq., for appellant Stephen Hill (Timothy R. Hott, P.C.,
attorneys)

Steven Secare, Esq., for respondent Township of Lakewood (Secare and
Hensel, attorneys)

Record Closed: March 4, 2015

Decided: April 16, 2015

BEFORE **SARAH G. CROWLEY, ALJ**:

STATEMENT OF THE CASE

Appellant, Stephen Hill, is the municipal recycling coordinator for the Township of Lakewood, Department of Public Works. He has been employed by Lakewood Township for twenty-two years. Respondent seeks to remove appellant from his position as a result of an altercation that he had with another employee on April 29, 2014. He has been charged with incompetency, inefficiency or failure to perform duties; conduct unbecoming a public employee; and other sufficient cause-violation of the

Collective Bargaining Agreement between the Township of Lakewood and Local 469 IBT, specifically, assault on another employee. The appellant alleges that the other employee was the aggressor in the ultimate altercation.

PROCEDURAL HISTORY

On April 30, 2014, the appellant was suspended without pay and served with a Preliminary Notice of Disciplinary Action seeking his immediate removal. A Final Notice of Disciplinary Action sustaining the termination was issued on June 27, 2014. The appellant requested a hearing and the matter was transmitted to the Office of Administrative Law (OAL), where it was filed on July 18, 2014, to be heard as a contested case. N.J.S.A. 52:14B-1 to -15 and 14F-1 to -13. The matter was heard on March 4, 2015, and the record closed on that date.

TESTIMONY

For Respondent

Alvin Burdge

Mr. Burdge is the acting director of the Lakewood Township Department of Public Works. He has been employed by Lakewood Township for thirty-two years. Mr. Burdge testified that he was not aware of any problems between Mr. Hill and his coworker Brian Sauers or any history between them. However, he later testified that they have had ongoing issues regarding repairs to equipment in Mr. Hill's department, and that Mr. Hill had, in fact, called him at home about Mr. Sauers the night before the incident at issue. Mr. Hill was in charge of recycling for the Township, and Mr. Sauers was responsible for the repair of equipment for the Department of Public Works. He testified that Mr. Hill had complained that Mr. Sauers was not repairing the recycling vehicles, which made it difficult for Mr. Hill to get the recycling done for the Township.

Mr. Burdge testified that Mr. Hill called him at home to advise him about a memo that Mr. Sauers had written just before he went on vacation instructing his staff not to repair any of the recycling equipment in his absence. The memo was written a week before the incident, and coincided with the Jewish holidays, which are a very busy recycling week for Lakewood Township. Mr. Burdge confirmed that he had seen the memo from Mr. Sauers. He testified that Mr. Hill was very upset when he found out about the memo and called him at home to discuss it.

Mr. Burdge testified that although he was on vacation the week the incident occurred, the day after he received the phone call from Mr. Hill he went into the office just to "see how things were going." He testified that he was talking to Mr. Sauers in the hallway of the machine shop when Mr. Hill approached them. Sauers and Hill began shouting at each other, but he did not recall what they were saying. He stated that "they both got in each other's faces," and Mr. Hill pushed Mr. Sauers back. He demonstrated the type of push that he observed by placing two hands on the chest of the Township attorney who was questioning him and pushing him back. Mr. Burdge testified that Mr. Sauers then approached Mr. Hill again, and Mr. Hill pushed him back again.

Mr. Burdge testified that he got between the two men, and told them to "knock it off and return to their offices." Mr. Burdge drew a diagram indicating where they were standing and where their respective offices were. (R-1.) Mr. Burdge testified that Mr. Sauers proceeded to his office, but Mr. Hill remained next to him. He indicated on the diagram where he was standing and Mr. Sauers's office a short distance away. Mr. Burdge characterized Mr. Sauers's conduct as "compliant" and Mr. Hill's as "non-compliant," although admittedly Mr. Sauers never went into his office, and continued shouting at Mr. Hill. Mr. Burdge testified that Mr. Hill then proceeded down the hall toward his office. He stated that Mr. Hill had to pass Mr. Sauers's office to get to his office. Mr. Sauers was still in the hallway, and he and Mr. Hill "got into a fight and ended up in a heap on the floor." Mr. Burdge stated that Mr. Hill attacked Mr. Sauers, and during the altercation on the floor, Mr. Sauers got hit in the face. He testified that the entire altercation took less than a minute and it was broken up by other individuals who were nearby. There were no other witnesses to the altercation. He testified that he

was still standing down the hallway and could not describe in any detail what happened, but he maintained that Mr. Hill attacked Mr. Sauers and they ended up on the floor. He testified that he turned the matter over to Anthony Arrechi, and he was not involved in any decisions about discipline.

Anthony Arrechi

Mr. Arrechi is the assistant director of the Lakewood Township Department of Public Works. He is in charge of directing the workforce, payroll and personal matters. He testified that he was aware that there was some history between Mr. Sauers and Mr. Hill as a result of Mr. Hill's claim that his vehicles were not being repaired in a timely matter. Mr. Hill had told him about several incidents involving Mr. Sauers's failure to fix equipment for his department. Mr. Hill advised him about a memo that Mr. Sauers had written to his staff, which essentially told them not to fix any of Mr. Hill's equipment in his absence. He testified that he told Mr. Hill that he would talk to Mr. Sauers about it. He confirmed that he had seen the memo and that Mr. Sauers admitted to writing the memo before he went on vacation.

Mr. Arrechi testified that when he heard about the fight between Mr. Hill and Mr. Sauers, he sent both of them home for the day. He said that Mr. Sauers told him that Mr. Hill had hit him in the face, and he observed a mark on Mr. Sauers's eye. He did not witness the altercation. He identified the police report, which provided a narrative description from both individuals regarding what happened. (R-3.) Although they both denied starting the fight, the Township decided that Mr. Hill was the aggressor and terminated him. This determination was based on the fact that Mr. Sauers ended up with a black eye from the altercation, and that he claimed that Mr. Hill attacked him. Mr. Arrechi testified that he thought Mr. Sauers received a twenty-day suspension for his involvement in the altercation. Mr. Arrechi identified the Collective Bargaining Agreement governing the employment relationship with the subject employees. He referenced the table of offenses, which provides for termination in the event of an assault on a fellow employee. (R-2.)

Brian Sauers

Brian Sauers is the vehicle maintenance supervisor for the Lakewood Township Department of Public Works. He has been in this position for the past four years. Mr. Sauers confirmed that he had an ongoing dispute with Mr. Hill about the timely repair of the recycling vehicles. He testified that when he returned from vacation he found out that someone had gone into his office and made a copy of a memo that he wrote to his staff about the repair of recycling vehicles. The memo directed his staff not to repair any recycling vehicles unless he specifically authorized it. He was annoyed that someone had gone into his office and that Mr. Hill got a copy of the memo and reported it to Mr. Arrechi and Mr. Burdge. He stated that he was aggravated that Mr. Hill had gone over his head to Mr. Burdge and Mr. Arrechi.

Mr. Sauers testified that he was talking to Mr. Burdge in the hallway in the machine shop on April 29, 2014, when Mr. Hill approached him. He said that they were both shouting at each other, and they "got into each other's faces." He testified that Mr. Hill pushed him back, and that he "moved back toward [Mr. Hill]." Mr. Burdge then got in between them, and told them to go to their offices. Mr. Sauers testified that he went to his office, and he pointed out where his office was on the diagram. (R-1.) He conceded that he was still shouting at Mr. Hill and did not go into his office. At first, Mr. Sauers did not state exactly what happened; he just said, "we ended up in a heap on the floor." He later stated that Mr. Hill came down the hallway and attacked him. Mr. Sauers was questioned on cross-examination as to why he was not in his office as instructed by Mr. Burdge, and he could not explain, except to say, "I'm German and I don't back down." Mr. Sauers acknowledged that he wrote a memo to George Reynolds, who was in charge in his office when he went away, that instructed him not to repair any recycling equipment unless Mr. Sauers specifically authorized it. He reiterated that he "was very aggravated that someone had obtained a copy of this memo," and that Mr. Hill had reported it to Mr. Burdge and Mr. Arrechi.

For Appellant

Stephen Hill

Mr. Hill has worked for Lakewood Township for twenty-two years and has been the recycling coordinator for approximately ten years. Prior to that he was in various other positions in Lakewood Township. He testified that he has had a lot of difficulty getting his equipment repaired since Mr. Sauers took over the repair shop. He testified that when Mr. Sauers went away on vacation over Passover week, he found out that Mr. Sauers had prepared a memo to his staff advising them not to fix any recycling vehicles. Mr. Hill explained that his was a very stressful week because it was the Jewish holidays, and the Public Works Department was very busy. The Township of Lakewood has a large Jewish population, and the recycling demand during the holiday week is enormous.

Mr. Hill testified that he called Mr. Burdge at home to tell him about the memo, and also told Mr. Arrechi about it. He said that he had complained about his equipment not being repaired in the past. The next day, he went to the machine shop to confront Mr. Sauers about the memo, and Mr. Sauers was there talking to Mr. Burdge. It turned into a shouting match, and Mr. Sauers got in his face. Mr. Hill stated that he pushed Mr. Sauers back, and then Mr. Sauers got in his face again. At that point, Mr. Burdge got in between them and told them both to "shut up and go to our offices." He stated that he remained next to Mr. Burdge, and Mr. Sauers walked down to his office, but they were still shouting at each other. Mr. Hill testified that when Mr. Sauers got to his office he turned around and continued to shout at him. Mr. Hill had to walk by Mr. Sauers to get to his office, and when he did, Mr. Sauers bull-charged him and they ended up on the ground. He testified that he must have hit him in the face during the skirmish on the floor. Mr. Hill stated that he did not intend to hit Mr. Sauers, and he was just defending himself. Someone broke up the fight shortly after it started. They went to their offices, and later were told to go home for the day. Mr. Hill talked to the police and told them what happened. He repeated that he did not attack Mr. Sauers, but rather it was

Mr. Sauers who head-butted him, and the next think he knew they were on the floor. He testified that he did not charge into Mr. Sauers and he did not start the altercation.

FINDINGS OF FACT

In view of the contradictory testimony presented by the parties, the resolution of the charges against Stephen Hill requires that I make credibility determinations in order to find the critical facts. A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth. In re Perrone, 5 N.J. 514, 521-22 (1950) see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had the opportunity to carefully observe the demeanor of Mr. Burdge, it is my view that Mr. Burdge was not credible in his testimony. Mr. Burdge initially testified that he was unaware of any disagreement between Mr. Sauers and Mr. Hill. However, in later testimony he acknowledged that there were issues between the two, and, in fact, he had received a call at home from Mr. Hill about Mr. Sauers the night before the incident. Mr. Burdge acknowledged the continuing issues regarding the repair of recycling vehicles. Mr. Burdge's testimony with respect to the altercation was not credible. He testified that he directed Mr. Sauers and Mr. Hill to go to their offices, and he identified where they were when he gave this directive. He testified that Mr. Sauers obeyed the directive, but Mr. Hill did not. However, he then acknowledged that Mr. Sauers was still standing in the hallway outside his office and Mr. Hill was next to

Mr. Burdge. Clearly, Mr. Sauers did not obey the directive, or he would have been in his office. Mr. Hill, it seems, was prudent in waiting for a moment next to Mr. Burdge, who also acknowledged that Mr. Hill had to walk past Mr. Sauers's office to get to his.

Mr. Burdge's testimony about what happened before the two men ended up "in a heap on the floor" is not clear. His testimony that Mr. Sauers went to his office is contradicted by his own testimony that Mr. Sauers was still in the hallway shouting at Mr. Hill. Mr. Burdge concluded that Mr. Hill was the aggressor and "attacked" Mr. Sauers, but initially provided no details as to what happened, except to say that they ended up in a heap on the floor. He acknowledged that the two got into each other's faces, and that he "had to separate them," yet he concluded that Mr. Hill was the aggressor. I find Mr. Burdge's testimony regarding the details of the altercation and as to who was the aggressor not to be credible, and that his testimony does not support the finding that Mr. Hill was the aggressor or that he attacked Mr. Sauers.

With respect to Mr. Sauers's testimony, he initially was not honest and forthcoming about what happened between Mr. Hill and him at the time of the incident. When pushed about the events that led to the ultimate altercation, he conceded that after Mr. Burdge originally broke them up, he continued shouting at Mr. Hill and did not go to his office when he was told to do so. He also stated that he is German and he does not back down. Mr. Sauers did not provide any details as to exactly how the ultimate physical altercation started and how he and Mr. Hill ended up in a heap on the floor, except to say that Mr. Hill attacked him. He was told to go to his office and he did not. He was told to knock it off, and he continued to yell back at Mr. Hill. He admitted that he was still shouting at Mr. Hill during this time and admitted "not backing down." I found that Mr. Sauers's testimony was not credible.

Having had an opportunity to carefully observe the demeanor of Mr. Hill, it is my view that Mr. Hill was honest and sincere in his testimony. Mr. Hill conceded that he was annoyed with Mr. Sauers, and had had issues with him over the years with respect to getting his department's vehicles fixed, and he was having a heated discussion with him on April 29, 2014. He testified that he received a copy of a memo in which

Mr. Sauers directed his staff not to repair any recycling equipment while he was away during the busiest recycling week of the year. Mr. Hill honestly and sincerely testified that he was very annoyed, and called Mr. Burdge at home to discuss it. Mr. Hill testified that they were having a very heated discussion when Mr. Sauers returned from vacation, and that when Mr. Sauers got in his face he pushed him back. This testimony was consistent with that of Mr. Burdge and Mr. Sauers.

Mr. Hill testified that after Mr. Burdge told them to go to their offices, he stood next to Mr. Burdge for a short period of time, before proceeding down the hall. This is consistent with Mr. Burdge's testimony and, moreover, seems to have been a rational course of conduct. When he proceeded down the hall to his office, Mr. Sauers was still in the hallway shouting at him, and Mr. Sauers head-butted him. He testified that they ended upon on the floor, and that he must have hit Mr. Sauers in the eye when they were on the floor fighting. He testified that he did not attack Mr. Sauers, but rather it was Mr. Sauers that bull-charged him as he walked by Mr. Sauers's office. This version of the story is more consistent with the facts and other evidence presented at the hearing.

I am left with making a determination as to who threw the first punch and who was responsible for the altercation. Having found credibility issues with the testimony of Mr. Sauers and Mr. Burdge as to who was responsible for starting the fight, I **FIND** as follows:

1. There was an ongoing dispute between Mr. Hill and Mr. Sauers regarding the repair of recycling equipment.
2. Before leaving on vacation, Mr. Sauers wrote a memo to his staff directing them not to repair any recycling equipment unless specifically authorized by him.
3. Mr. Hill found out about the memo, and complained to his superiors regarding the memo.

4. Mr. Hill was also upset because the memo and Mr. Sauers's vacation fell at one of the busiest times of the year for recycling services in Lakewood Township.
5. Mr. Sauers was annoyed that someone had taken the memo and that Mr. Hill had gone over his head and advised his supervisors about the memo.
6. On April 29, 2014, Mr. Sauers and Mr. Hill got into a heated discussion about the memo and the repair of Mr. Hill's equipment.
7. Mr. Sauers and Mr. Hill were shouting at each other and got in each other's faces.
8. Their supervisor, Mr. Burdge, separated them and directed them to go to their offices.
9. Mr. Sauers did not go directly to his office, and remained in the hallway in front of his office shouting at Mr. Hill.
10. Mr. Hill continued to shout at Mr. Sauers as well, and when he proceeded down the hall past Mr. Sauers's office, a physical altercation ensued and they ended up on the floor, until the fight was broken up moments later.
11. Mr. Sauers received a black eye during the fight on the floor.

LEGAL DISCUSSION AND CONCLUSION

A civil service employee's rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to 12.6. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointment and broad tenure protection. See Essex Council Number 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 Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide public officials with appropriate appointment, supervisory and other personnel authority in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). A public employee who is thus protected by the provisions of the Civil Service Act may nonetheless be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are enumerated in N.J.A.C. 4A:2-2.3.

In an appeal concerning major disciplinary action, the burden of proof is on the appointing authority to show that the action taken was justified. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). This applies to both permanent career service employees or those in their working test period relative to such issues as removal, suspension, or fine and disciplinary demotion. N.J.S.A. 11A:2-14, 2-6. The State has the burden to establish by a preponderance of the competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk License Revocation, 90 N.J. 550 (1982).

This matter involves a major disciplinary action brought by the respondent appointing authority against appellant seeking his removal. Specifically, Mr. Hill has been charged with the following offenses: 1) conduct unbecoming an employee; 2) incompetency, inefficient or failure to perform duties; and 3) other sufficient cause—violation of a collective bargaining agreement, specifically, assault on another employee.

Conduct unbecoming a public employee is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. 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)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Based upon the testimony and findings, I **CONCLUDE** that the respondent has not satisfied its burden of proving by a preponderance of the evidence that appellant assaulted a fellow employee. I further **CONCLUDE** that respondent did not satisfy its burden of proving that appellant was incompetent or inefficient or failed to perform any of his job duties. However, I **CONCLUDE** that the respondent has satisfied its burden of proving that appellant conducted himself in a manner unbecoming a public employee in violation of civil service rules regarding appropriate conduct in the workplace by engaging in a verbal argument with a fellow employee that resulted in a physical altercation. The issue then becomes the level of discipline to be imposed for conduct in question.

PENALTY

Once a determination is made that an employee has violated a statute, regulation or rule concerning his employment, the concept of progressive discipline must be considered. When dealing with the question of penalty in a de novo review of a disciplinary action against a civil service employee, the Civil Service Commission is required to evaluate the proofs and penalty on appeal, based on the charges. N.J.S.A. 11A:2-19; West New York v. Bock, 38 N.J. 500 (1962). With respect to the discipline, under the precedent established by West New York v. Bock, courts have stated, "[a]lthough we recognize that a tribunal may not consider an employee's past record to prove a present charge, that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990) (citing West New York v. Bock, supra, 38 N.J. at 523). Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter."

Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

The appellant has been employed by the Township of Lakewood for twenty-two years. He was subject to discipline once in 1996. He has received no other discipline and has received four separate promotions in his twenty-two years of service in Lakewood Township. The respondent has demonstrated that appellant engaged in a shouting match with another employee which culminated in a physical altercation. Although the respondent has failed to prove that the appellant was responsible for the physical altercation, or that he assaulted the other employee, the conduct of being involved in a significant verbal fight with another employee is conduct deserving of discipline. Accordingly, I **CONCLUDE** that an appropriate penalty for this violation is a thirty-day suspension.

ORDER

I **ORDER** that the penalty of removal imposed by the appointing authority is **MODIFIED** to a thirty-day suspension.

Since the penalty has been modified, I **ORDER** that appellant is entitled to back pay, benefits, and seniority pursuant to N.J.A.C. 4A:2-2.10. However, the appellant is not entitled to counsel fees. Pursuant to N.J.A.C. 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. See Walcott v. City of Plainfield, 282 N.J. Super. 121, 128 (App. Div. 1995); Smith v. Dep't of Personnel, No. A-1489-02T2 (App. Div. March 18, 2004). In the case at hand, while the penalty was modified and two of the charges were dismissed, one of the remaining charges has been sustained and major discipline imposed. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. See In re Bergus, CSV 5039-98 and CSV 9688-98, Final Decision (January 23, 2001), <<http://njlaw.rutgers.edu/collections/oal/>>, aff'd, Bergus v.

City of Newark, No. A-3382-00T5 (App. Div. June 3, 2002); In re Simmons, CSV 3750-98 (January 13, 2000), <<http://njlaw.rutgers.edu/collections/oal/>>; In re Rhoads, Final Decision (October 15, 2002), 2002 N.J. AGEN LEXIS 1642 (N.J. AGEN 2002) (counsel fees denied where removal on charges of insubordination, inability to perform duties, conduct unbecoming a public employee and neglect of duty was modified to a fifteen-day suspension on the charge of neglect of duty).

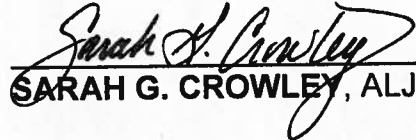
I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

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.

April 16, 2015

DATE


SARAH G. CROWLEY, ALJ

Date Received at Agency:

April 16, 2015

Date Mailed to Parties:

April 16, 2015

SGC/cb

APPENDIX

WITNESSES

For appellant:

Stephen Hill

For respondent:

Alvin Burdge

Anthony Arrechi

Brian Sauers

EXHIBITS

For respondent:

R-1 Diagram of Public Works Building

R-2 Collective Bargaining Agreement Local 469 and Lakewood Township

R-3 Lakewood Township Police Report dated April 29, 2014

R-4 Photograph

R-5 Photograph

For appellant:

None