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STATE OF NEW JERSEY

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| In the Matter of Mark Torsiello, Township of Nutley | FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION |
| CSC Docket Nos. 2012-950 and 2013-83<br>OAL Docket Nos. CSV 12873-11 and 9557-12 (consolidated) | |

ISSUED: NOV 05 2015 (DASV)

The appeals of Mark Torsiello, a Mechanic with the Township of Nutley, of his 60 working day suspension, demotion to Truck Driver, and removal, effective November 4, 2011, on charges, were heard by Administrative Law Judge Margaret M. Monaco (ALJ), who rendered her initial decision on September 23, 2015. Exceptions were 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, the Civil Service Commission (Commission), at its meeting on October 21, 2015, accepted and adopted the Findings of Fact as contained in the initial decision and the recommendation of the ALJ to uphold the appellant's removal. However, the Commission did not accept the recommendation to award the appellant back pay during the period of his immediate suspension.

## DISCUSSION

The appellant was issued a Preliminary Notice of Disciplinary Action (PNDA), dated August 12, 2011, which immediately suspended him and sought his removal effective August 16, 2011, on charges of insubordination and conduct unbecoming a public employee. Specifically, the appointing authority asserted that, on August 9, 2011, while on duty, the appellant was involved in an altercation with a member of the public in violation of a "last chance agreement," which was

executed on November 16, 2004.[1] It is noted that the PNDA indicated that the departmental hearing, if requested, would be held on September 1, 2011. At the hearing, the parties entered into a "Settlement Agreement & Last Chance Agreement" on September 1, 2011, in which the appointing authority agreed to withdraw the August 12, 2011 PNDA in exchange for, among other things, the appellant's acceptance of a 60 working day suspension and a demotion to Truck Driver effective August 10, 2011. A Final Notice of Disciplinary Action (FNDA), dated September 2, 2011, was issued memorializing the agreement to the 60 working day suspension and demotion on charges of conduct unbecoming a public employee and assault and battery. The specifications indicated that while on duty, the appellant "assaulted a member of the public" in violation of the 2004 agreement. However, on September 16, 2011, the appellant filed an appeal of the September 2, 2011 FNDA with the Commission. Subsequently, the appointing authority served the appellant with a second PNDA, dated November 7, 2011, on charges of insubordination, conduct unbecoming a public employee, and failure to comply with the Settlement Agreement & Last Chance Agreement. A second FNDA, dated June 22, 2012, was issued removing the appellant from employment, effective November 4, 2011, on the charge of conduct unbecoming a public employee for the appellant's August 9, 2011 "altercation with a member of the public," which violated the 2004 agreement. The appellant appealed the June 22, 2012 FNDA to the Commission. Upon the appellant's appeals, the matters were transmitted to the Office of Administrative Law (OAL) for hearings as contested cases. At the OAL, the matters were consolidated.

In the initial decision, the ALJ set forth the testimony of the witnesses, including testimony regarding the appellant's prior disciplinary history and events that occurred beginning in 2004, including the 2004 settlement which memorialized an agreement between the appellant and the appointing authority that "further incidents of such a nature may result in the [appellant's] discipline and/or termination." The appellant had previously been suspended and was issued written and verbal warnings regarding the use of profanity and threatening a co-worker. The appellant was also reassigned from the mechanics department to the roads department because of his behavior. It is noted that although much testimony was given regarding these past events, the ALJ determined that the propriety of the appellant's reassignment and prior discipline was "plainly beyond the issues presented in the within appeal" and afforded no weight to the arguments suggesting that the appellant's current discipline was "politically motivated" or part of a "campaign to terminate" the appellant beginning in 2004. Additionally, the ALJ indicated that the unambiguous terms of the 2011 Settlement Agreement & Last Chance Agreement did not support the appellant's belief that he could later rescind that settlement. Nevertheless, the ALJ concluded that since the appointing

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[1] The appellant and the appointing authority signed the agreement on November 12, 2004. The appellant's union representative signed the agreement on November 16, 2004. The agreement was not actually entitled a "last chance agreement."

authority issued a new PNDA and FNDA, removing the appellant from employment, the enforceability of the 2011 Settlement Agreement & Last Chance Agreement was moot.

Additionally, the ALJ summarized the testimony of the appellant, as well as the testimony of Peter Pancaro, who is a former employee of the Township of Nutley and a neighbor of the appellant. The ALJ found that while the appellant was on duty and assigned to clean a parking lot, he engaged in an altercation with Pancaro. The ALJ did not find the appellant's testimony regarding what occurred to be credible as the appellant's version of the incident was "improbable" and was not "hanging together" with other credible evidence in the record. The appellant had testified that Pancaro yelled at him, called him names, and punched him. However, the ALJ found that the appellant gave inconsistent statements and his testimony that Pancaro walked towards him when the appellant was approximately 10 feet from the corner was "irreconcilable" with witness testimony with respect to the locations of Pancaro and the appellant. The ALJ also did not find credible that the appellant spoke only "calmly" and was "simply going to talk about the problem." While the ALJ afforded little weight to the testimony of Pancaro that he did not say anything to provoke the appellant, his version of what occurred, that the appellant approached him and actively engaged in the altercation, was more probable than the appellant's testimony. Additionally, the ALJ found other witness testimony to be credible, determining that no competent evidence was presented demonstrating any ill motive or bias from these witnesses. Therefore, the ALJ concluded that regardless of the exact verbiage of the words and the profanity that may have been used, the appellant and Pancaro exchanged words and the appellant did not retreat or try to avoid Pancaro. Rather, the appellant "instigated and initiated" the confrontation by walking towards Pancaro's direction, confronting him, chest-bumping him, and engaging in a physical altercation. Accordingly, the ALJ determined that the appellant's conduct was unbecoming a public employee and the appointing authority had met its burden of proof.

Regarding the appellant's penalty, the ALJ indicated that there was a dispute as to whether the 2004 agreement was actually a "last chance agreement," as it was not identified as such. Nonetheless, the appellant had ample notice that any further incidents of inappropriate behavior involving threatening or using profanities would be a basis for further disciplinary action up to and including removal. The ALJ found that the current incident involved similar conduct. The ALJ stated that the appellant "unnecessarily engaged in a physical altercation on a public street during work hours while wearing his work uniform." His altercation was "with a member of the public that ultimately led to police intervention." Accordingly, the ALJ concluded that, even without considering his prior infractions, the appellant's actions in the instant matter were egregious and warranted his removal. However, the ALJ noted that there was insufficient evidence to demonstrate the basis for the appellant's immediate suspension or that the

appointing authority apprised the appellant either orally or in writing why the immediate suspension was sought and the charges and the general evidence in support of the charges. Further, the ALJ emphasized that the issuance of the November 7, 2011 PNDA and June 22, 2012 FNDA was equivalent to a withdrawal of the earlier PNDA and FNDA, and the appellant's suspension had extended beyond six months. Therefore, although the ALJ noted that the appellant was not blameless in this "procedural conundrum" since he reneged on the settlement and appealed, the ALJ recommended that the appellant be awarded back pay from the date of the immediate suspension on either August 9, 2011 or August 10, 2011 to the date of the June 22, 2012 FNDA, subject to a reduction of any amount already given to him after the execution of the Settlement Agreement & Last Chance Agreement.

In his exceptions, the appellant asserts that the ALJ's initial decision should be rejected, as the ALJ failed to consider the cross examination of the appointing authority's witnesses. Moreover, the ALJ disregarded the fact that Pancaro repeatedly lied under oath regarding his criminal background and perjured himself in this matter. The appellant also disagrees that his conduct is worthy of removal. In addition, the appellant contends that the appointing authority was not permitted to issue two sets of PNDAs and FNDAs on the same exact facts, which the ALJ failed to resolve. He notes that the ALJ's decision should have determined that the appointing authority's sole remedy in this case was to enforce the Settlement Agreement & Last Chance Agreement or that no discipline was warranted at all. In other words, the appellant states that the ALJ should have heard his appeal and determined whether he was forced to enter the settlement. If the ALJ could not determine as such, the settlement terms should have been enforced.

Further, while the appellant agrees with the ALJ that the appointing authority improperly suspended him, he disagrees that the award of back pay should be reduced. He indicates that he was paid 30 days of vacation leave, which he earned and was owed to him. The appellant also claims that he did not assault Pancaro, but rather, Pancaro assaulted him, which the ALJ disregarded. He states that Pancaro "berated him with profanity," punched him in the face, and "choked him with his forearm and continued to land blows to all areas" of his body. Moreover, the appellant argues that the testimony in this case makes it clear that beginning in 2004, he was no longer wanted as an employee due to "favoritism and politics." In the four incidents that occurred during that time period, including an incident in 2005, none involved an assault. The appellant reiterates his version of the altercation and maintains that his actions were "wholly defensive and intended to prevent Mr. Pancaro from harming him." He notes that, even if he wanted to fight back, he had been on light duty, recovering from surgery. Moreover, the appellant indicates that the responding police officer testified at OAL that Pancaro was still highly agitated and yelling at the appellant when he arrived at the scene. Therefore, the appellant maintains that he did not engage in unbecoming conduct.

He also claims that he has not been subject to major discipline in his 17 years of employment.[2] Considering his disciplinary history and the principles of progressive discipline, the appellant submits he should not be removed.

In addition, the appellant claims that after he was attacked by Pancaro on August 9, 2011, at approximately 10:30 a.m., he was told he was suspended and "forced" to go home. By letter dated August 10, 2011, he was advised by the superintendent that he was suspended for four days "for being involved in an altercation (street fight) with a resident while on town time. This is conduct unbecoming a public employee. Further action may be taken pending an investigation." The appellant claims that no investigation was conducted and there is no support for any "admission" he allegedly made on August 9, 2011 regarding the altercation. The appellant states that he then reported for duty on August 16, 2011 and was told to return home. Thereafter, he asserts that he received the August 12, 2011 PNDA. It is noted that the ALJ found that the a copy of the August 10, 2011 letter was also sent to the appellant's union representative and a meeting was held with the union representative and the appellant on August 12, 2011, at which time the appellant had been advised of the charges against him and that the appointing authority was moving forward with his termination. However, the appellant claims that, despite being immediately suspended without pay on August 9, 2011, he did not receive a hearing within five days of his suspension nor was he apprised orally or in writing of the charges and the evidence against him. Prior to the September 1, 2011 departmental hearing on the charges, the appellant states that he requested the evidence against him and his request was denied. At the hearing, the appellant alleges that he was told "in no uncertain terms that he would be terminated unless he signed the Settlement Agreement." Thus, as a result of this "intense pressure," he signed the settlement but was assured he could rescind his consent while the formal agreement was typed. Moreover, the appellant asserts that he attempted to return to work after the 60 working day suspension expired on November 4, 2011, but was again sent home. He indicates that he has not been paid since September 5, 2011.

Upon its *de novo* review, the Commission agrees with the ALJ's assessment of the charges and the recommendation to remove the appellant. However, the Commission disagrees that the appellant's immediate suspension was procedurally deficient to warrant an award of back pay. Initially, it is undisputed that there was an altercation between the appellant and Pancaro. While the appellant claims that he was the one who was assaulted by Pancaro and was defending himself, the ALJ found that the appellant "instigated and initiated" the confrontation and did not find the appellant's testimony of what occurred to be credible. It is emphasized that the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility

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[2] The ALJ referenced an eight-day suspension, but the appellant indicates that he was only suspended for three days in 2004.

and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 *N.J.* 644 (1999) (quoting *State v. Locurto*, 157 *N.J.* 463, 474 (1999) ). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). Nevertheless, upon its review of the entire record, the Commission finds that there is sufficient evidence in the record to support the ALJ's credibility determinations. The ALJ explicitly delineated her credibility findings, identifying the appellant's inconsistent statements and implausible testimony. The ALJ also afforded little weight to some of the testimony of Pancaro, but nevertheless appropriately found, in conjunction with the testimony of the other witnesses, that the appellant approached Pancaro and actively engaged in the altercation. Accordingly, the appellant's exceptions in that regard are not persuasive. Furthermore, there is no credible evidence to support the appellant's theory that his removal was "politically motivated" or part of a "campaign to terminate" him which began in 2004. The incidents of 2004 and 2005 are too remote and do not provide the claimed nexus for the appellant's removal in 2011. The fact remains that, regardless of any purported campaign against the appellant, the appellant engaged in prohibited conduct. Therefore, the Commission finds that the appellant is guilty of unbecoming conduct as set forth in the June 22, 2012 FNDA.

It is noted that although two sets of disciplinary notices were issued regarding the altercation, it is clear that neither party proceeded as if the settlement agreement was valid. Specifically, the appellant sought to rescind the settlement by appealing his discipline and the appointing authority never moved to have the agreement enforced. As such, the issue as to whether the appellant was forced to sign the settlement agreement need not be addressed. Further, the appointing authority issued the second PNDA and FNDA, which the appellant appealed. It also appears that the appointing authority did not pursue the charge at the OAL hearing that the appellant violated the settlement agreement. Thus, the ALJ correctly found that the enforceability of the 2011 Settlement Agreement & Last Chance Agreement was moot and the issuance of the November 7, 2011 PNDA and June 22, 2012 FNDA was equivalent to a withdrawal of the earlier PNDA and FNDA. Accordingly, since the settlement between the parties clearly failed and the September 2, 2011 FNDA was considered withdrawn, the 60 working day suspension and demotion to Truck Driver are no longer in effect.

With regard to the penalty, the Commission's review is also *de novo*. In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway State Prison*, 81 *N.J.* 571, 580 (1980). It is settled that the principle of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007). In the instant matter, the appellant's prior record does not mitigate his offense. It is well settled public policy that all public employees are expected to exhibit appropriate behavior, both on and off the job, in order to project a positive image to the public that they serve and the taxpayers who fund their positions. Any conduct that serves to diminish the public's trust in the integrity of its employees is intolerable. This is especially true where, as here, the appellant was in his work uniform and engaged in an altercation while on duty and has had issues on the job with similar behavior. Therefore, the Commission finds that the only appropriate course of action is to remove the appellant from employment. Accordingly, since the appellant was separated from duty on August 9, 2011 and there is no indication in the record that he was not paid for that day and the subsequent pay was in the form of vacation days owed to him, the effective date of the appellant's removal shall be recorded as August 10, 2011.

Furthermore, it is not appropriate to grant the appellant back pay. In that regard, the ALJ recommended granting back pay for a procedurally deficient immediate suspension. *N.J.S.A.* 11A:2-13 and *N.J.A.C.* 4A:2-2.5(a)1 provide that an employee may be suspended immediately without a hearing if the appointing authority determines that the employee is unfit for duty or is a hazard to any person if allowed to remain on the job or that an immediate suspension is necessary to maintain safety, health, order, or effective direction of public services. The appellant was alleged to have committed a serious infraction. An employee who engages in a physical altercation with a member of the public during work hours indisputably impugns the integrity of a government entity and adversely affects its ability to direct public services. Additionally, the appellant's initiated confrontation with Pancaro and his physical altercation with him deemed the appellant unfit for duty and a hazard to the public. Therefore, the standard for an immediate suspension was met.

Moreover, the appellant claims that despite that he had been immediately suspended on August 9, 2011, he did not receive a hearing within five days of his suspension nor was he apprised orally or in writing of the charges and the evidence

against him. *N.J.A.C.* 4A:2-2.5(a)1 provides that where the suspension is immediate, the PNDA must be served within five days following the immediate suspension. Further, *N.J.A.C.* 4A:2-2.5(b) states that where the suspension is immediate and is without pay, the employee must first be apprised either orally or in writing, of why an immediate suspension is sought, the charges and general evidence in support of the charges and provided with sufficient opportunity to review the charges and the evidence in order to respond to the charges before a representative of the appointing authority. The response may be oral or in writing, at the discretion of the appointing authority. *See Cleveland Board of Education v. Loudermill*, 470 *U.S.* 532 (1985). In a prior case addressing this issue, *In the Matter of Anthony Recine* (MSB, decided March 10, 1998), the Merit System Board (Board)[3] found that the Township of Hamilton did not provide a proper pretermination hearing since Recine was not made aware of the charges and the general evidence in support of the charges at the time of his suspension. Recine was later returned to full pay status. The Board reversed Recine's suspension and granted him mitigated back pay, seniority and benefits from the date of his immediate suspension through the date on which he returned to full pay status.

The instant matter is distinguishable There is no dispute that the appellant was well aware of the charges against him by August 10, 2011. Specifically, although the August 12, 2011 PNDA indicated that the appellant was to be immediately suspended on August 16, 2011 and that the penalty of removal was being sought effective the same date, the record shows that the appellant was informed that he was suspended on August 9, 2011 and was then given written confirmation of the charges against him. In that regard, by letter dated August 10, 2011, the appellant was advised by the superintendent that he was suspended "for being involved in an altercation (street fight) with a resident while on town time." *See e.g., In the Matter of Frederick Roll* (CSC, decided June 6, 2012) (Failure to utilize the PNDA form is not fatal to the discipline of an employee so long as the requisite notice is provided, as the petitioner was afforded notice of the charges levied against him in the "Immediate Suspension Notice" and he was provided a statement of facts supporting the charges in the "Request for Disciplinary Action.") Additionally, within two days on August 12, 2011, a meeting was held with the appellant and his union representative, at which time the appellant was advised of the charge against him, namely the charge of conduct unbecoming a public employee, and that the appointing authority was seeking his removal for the altercation. Under these circumstances, this meeting complies with the requirement of *N.J.A.C.* 4A:2-2.5(b) and is considered an acceptable *Loudermill* hearing, where the appellant had the opportunity to respond to the charges brought before him. Furthermore, the appellant was served with a PNDA, which also provided the appellant with the written charges against him and the general

[3] On June 30, 2008, Public Law 2008, Chapter 29 was signed into law and took effect, changing the Merit System Board to the Commission, abolishing the Department of Personnel and transferring its functions, powers and duties primarily to the Commission.

evidence in support of the charges. It is noted that the specification portion of the PNDA constitutes the general evidence in support of the charges. *See In the Matter of Robert Totten* (MSB, decided August 12, 2003); *In the Matter of Joseph Auer* (MSB, decided October 23, 2002). Therefore, the appellant was not deprived of any substantive due process. Accordingly, there is no basis to grant the appellant back pay for a procedurally deficient immediate suspension. As a final note, *N.J.A.C.* 4A:2-2.5(d) provides that a departmental hearing, if requested, shall be held within 30 days of the PNDA unless waived by the employee or a later date as agreed to by the parties. A departmental hearing was scheduled to begin within 30 days, but delays beyond that date were caused substantially by the appellant's rejection of the settlement agreement. Regardless, given that there is a basis to uphold the appellant's immediate suspension and removal based on the charges, any procedural violations at the departmental level would be deemed cured by the appellant's *de novo* hearing at the OAL. *See Ensslin v. Township of North Bergen*, 275 *N.J. Super.* 352, 361 (App. Div. 1994), *cert. denied*, 142 *N.J.* 446 (1995); *In re Darcy*, 114 *N.J. Super.* 454 (App. Div. 1971) (Procedural deficiencies at the departmental level which are not significantly prejudicial to an appellant are deemed cured through the *de novo* hearing received at the OAL.) Thus, there is no basis for a remedy in that regard.

## ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission, therefore, affirms that action and dismisses the appeal of Mark Torsiello.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 21ST DAY OF OCTOBER, 2015

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
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Attachment

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

**INITIAL DECISION**
**CONSOLIDATED**
OAL DKT. NOS. CSV 12873-11
and CSV 09557-12
AGENCY DKT. NOS. 2012-950
and 2013-83

**IN THE MATTER OF MARK TORSIELLO, TOWNSHIP OF NUTLEY DEPARTMENT OF PUBLIC WORKS.**

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**Charles I. Auffant**, Esq., for appellant Mark Torsiello (Stuart Ball, attorneys)

**Alan Genitempo**, Esq., for respondent Township of Nutley

Record Closed: April 28, 2014 Decided: September 23, 2015

BEFORE **MARGARET M. MONACO**, ALJ:

## STATEMENT OF THE CASE

Appellant Mark Torsiello appeals his removal from employment with the Township of Nutley (Nutley), Department of Public Works. Respondent took this action predicated on the charge that appellant engaged in conduct unbecoming a public

employee stemming from his alleged involvement, while on duty, in a physical altercation with a Township resident.

## PROCEDURAL HISTORY

By Preliminary Notice of Disciplinary Action (PNDA) dated August 12, 2011, respondent charged appellant with insubordination, conduct unbecoming a public employee and violation of Article VIII, Section 1, of the Union Contract stemming from his alleged involvement in an altercation with a member of the public while on duty on August 9, 2011.[1] Subsequently, respondent issued a Final Notice of Disciplinary Action (FNDA) dated September 2, 2011, providing for appellant's suspension for sixty days and demotion to the position of truck driver. As hereinafter addressed, that FNDA was issued after the parties executed a "Settlement Agreement & Last Chance Agreement." Appellant filed an appeal and the Civil Service Commission transmitted the matter to the OAL, where it was filed under OAL docket number CSV 12873-11 and assigned to the undersigned for a hearing.

During the pendency of that matter, respondent issued a separate PNDA dated November 7, 2011, charging appellant with the above charges based upon his alleged actions on August 9, 2011, and further charged appellant with failure to comply with the Settlement Agreement & Last Chance Agreement. Following a departmental hearing, respondent issued an FNDA dated June 22, 2012, memorializing its determination sustaining the charge of conduct unbecoming a public employee and providing for appellant's termination effective November 4, 2011. Appellant filed an appeal and the Civil Service Commission transmitted the matter to the OAL, where it was filed under OAL docket number CSV 09557-12 and assigned to Administrative Law Judge Gail M. Cookson for a hearing. The matter was reassigned to the undersigned and consolidated with appellant's earlier appeal. Although counsel agreed that the issue presented involves whether or not the charge, if proved, warrants appellant's removal as set forth in the FNDA dated June 22, 2012, the matters were consolidated at the

[1] The PNDA that accompanied the transmittal to the Office of Administrative Law (OAL) refers to appellant being involved in an altercation with a member of the public, while the PNDA introduced at the hearing refers to appellant assaulting a member of the public and includes an additional charge of assault and battery. (R-1.) This discrepancy, which the parties did not address, is not pertinent to the resolution of this matter.

parties' request for purposes of the issue of back pay, if any, due to appellant. The hearing was held over the course of nine days. Following the conclusion of the testimony, the record remained open for the receipt of transcripts of the hearing and post-hearing submissions. The record closed upon receipt of the last submission.

## FACTUAL DISCUSSION

At the hearing, Nutley offered testimony by Peter Pancaro, Michael Lombardozzi, Michael Luzzi, Joseph Scarpelli and Patrick Buccino. Appellant testified on his own behalf and presented testimony by Officer Eric Stabinski, Sergeant Robert Kordas, Thomas Gardiner and Glenn Wallace. Based upon a review of the documentary and testimonial evidence presented, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following preliminary **FACTS** and accept as **FACT** the testimony set forth below.

Appellant commenced employment with Nutley in 1993 as a laborer in the Department of Public Works (DPW) and later attained the title of mechanic. He was assigned to work in the mechanics garage until June 2004, where he worked with Thomas Gardiner (Gardiner) and Patrick Buccino (Buccino). Gardiner was a mechanic with the DPW from 1984 until his retirement in April 2004. Buccino worked as a mechanic with the DPW beginning in 1988, he was made a supervisor during the period that he worked in the mechanics garage, and he later transferred to the parks department in January 2007. Michael Lombardozzi (Lombardozzi) is the supervisor of the road department and oversees all work performed by employees of that department. Lombardozzi has worked for Nutley since 1992 and appellant worked under his supervision since 1996. Michael Luzzi (Luzzi) is Lombardozzi's supervisor and serves as the superintendent of the DPW. He has been employed by Nutley for approximately twenty years and oversees the road, recycling, water and sewer departments. Luzzi reports directly to Joseph Scarpelli (Scarpelli), the commissioner and director of the DPW. Scarpelli has served in that role for approximately four and one-half years and is in charge of, and the ultimate decision-maker relating to, the

DPW. Prior to Scarpelli serving in that position, Scarpelli's father was the commissioner of the DPW for twenty-four years.

This matter arises as a result of an incident between appellant and a Nutley resident, Peter Pancaro (Pancaro), on August 9, 2011. Appellant and Pancaro are neighbors and live approximately one or two houses away from each other. (See A-14.) Pancaro previously worked in Nutley's parks department from 1991 until 2002. Appellant and Pancaro both described that, apart from one verbal argument when Pancaro admonished appellant's daughter for writing in newly laid concrete in front of his home, which occurred approximately eight to nine months (according to Pancaro) or approximately two years (according to appellant) before August 9, 2011, there had been no problems or incidents between them, and their daughters used to play together.

On August 9, 2011, appellant was on light duty and wearing his work uniform. His assignment that day was to clean the town's parking lots located in the vicinity of William Street and Franklin Avenue with a broom and a receptacle. The incident occurred at approximately 10:00 a.m. and resulted in the police responding to the scene.

Officer Eric Stabinski (Stabinski), who has served as a police officer in Nutley for over ten years, was on patrol on August 9, 2011. While in the area of Franklin Avenue and Church Street, a passing vehicle alerted Stabinski that a fight was in progress at Franklin Avenue and William Street, and he responded to the area with his lights and siren on. (See R-9.) Upon his arrival, Stabinski observed appellant and Pancaro separating from one another. He did not witness any physical altercation between them, but testified that one could tell that they had been in a scuffle, with both having disheveled clothes. Pancaro advised Stabinski that there was a verbal argument between them, and appellant struck him first. Stabinski's report reflects that appellant and Pancaro each blamed the other for instigating the physical altercation; appellant "stated that he was working . . . when Mr. Pancaro walked passed [sic] him on the sidewalk making a derogatory comment about him [and the] [p]arties then began to

have a verbal dispute which led to Mr. Pancaro punching him in the face," and Pancaro "stated the exact opposite and stated that he was punched in the face by Mr. Torsiello during the dispute." (R-9.) Stabinski described Pancaro as very agitated at the scene, but stated that it is not unusual for someone who had been attacked to be agitated at the scene. He observed no obvious signs of serious bodily injury to either party, both declined needing medical attention, and no ambulance was called. Stabinski informed appellant and Pancaro of their option to sign a complaint for simple assault. Neither pressed charges as a result of the incident.

Lombardozzi also arrived at the scene of the incident. He credibly described that as a supervisor he went around to check on employees every so often, and he became aware of the incident when he observed two police cars, appellant, another Nutley employee (Mr. Robertazzi) and Pancaro while driving south on Franklin Avenue. Lombardozzi spoke to Pancaro and appellant at the scene. Sgt. Robert Kordas (Kordas), who was on duty as a road supervisor, responded to the scene. He estimated that he arrived a few minutes after Stabinski, and testified that Lombardozzi was present when he arrived.

Lombardozzi reported the incident to Luzzi, who in turn reported it to Scarpelli. After learning of the incident, Scarpelli directed that appellant be sent home and immediately suspended him. By letter dated August 10, 2011, Luzzi informed appellant that he was being suspended for four days "for being involved in an altercation (street fight) with a resident while on town time," that "[t]his is conduct unbecoming a public employee," and that "[f]urther action may be taken pending an investigation." (A-1.) Luzzi sent a copy of that letter to appellant's union representative and a meeting was held with appellant and his union representative on August 12, 2011. (See R-30.) A PNDA dated August 12, 2011, was issued informing appellant of the charges against him and that such charges may subject him to removal from employment. (R-1.) The PNDA further advised appellant that he was suspended effective August 16, 2011. Luzzi informed appellant's union representative, via letter dated August 16, 2011, that Nutley had "moved forward . . . to terminate [appellant] on charges of conduct

unbecoming a public employee as we discussed at our last meeting on August 12, 2011." (R-30.)

Appellant requested a departmental hearing, which was scheduled for September 1, 2011. Appellant appeared on that date accompanied by his wife. A union representative and appellant's shop steward, Robertazzi, were also in attendance, along with the Commissioner and Luzzi. Prior to the commencement of that hearing, appellant, his union representative and Scarpelli signed a "Settlement Agreement & Last Chance Agreement." (R-2.) Pursuant to that agreement, Nutley agreed to withdraw the preliminary disciplinary notice of termination subject to various enumerated conditions. Specifically, appellant would be suspended for sixty days, retroactive to August 10, 2011, and returning on November 4, 2011, provided that thirty days of vacation time could be used, and demoted to a laborer/truck driver. The written agreement further required appellant to submit to a psychological evaluation to be conducted by a physician selected by Nutley, undergo counseling for anger management and execute a Last Chance Agreement, which would be drafted by Nutley's attorney, forwarded to appellant's union representative for review and approval and become part of the executed settlement agreement. The agreement also provided that appellant agreed, pled and consented to the charge of conduct unbecoming a public employee, and appellant shall be terminated if he violates any term of that agreement or the Last Chance Agreement. Subsequently, an FNDA dated September 2, 2011, was issued memorializing that the charge of conduct unbecoming a public employee had been sustained and providing for appellant's suspension for sixty days and demotion to the position of truck driver effective September 5, 2011. (R-15.)[2]

By letter dated September 15, 2011, appellant filed an appeal with the Civil Service Commission from the FNDA. (R-7.) The basis for that appeal, as stated in a later letter by appellant's attorney, is that "the conduct engaged in by [appellant] does not constitute conduct unbecoming or any other type of conduct warranting discipline under [the] Civil Service Rules and Regulations" and, "even if [his] conduct warrants

[2] Although the FNDA reflects that the charge of assault and battery had also been sustained, counsel for Nutley informed appellant's attorney by letter dated September 26, 2011, that he had instructed the Township to send an amended FNDA removing that language. (R-12.)

discipline, the discipline sought and imposed by the Township is excessive." (R-11.) Appellant also sent a letter to Scarpelli dated September 20, 2011, advising that he has "withdrawn [his] consent to the Settlement Agreement" and "decided to pursue [his] right to Appeal this matter to the Civil Service Commission." (R-8.) After receiving this letter, a new PNDA dated November 7, 2011, was issued seeking appellant's removal effective August 16, 2011, based upon his actions on August 9, 2011, as well as his failure to comply with the Settlement Agreement & Last Chance Agreement. (R-3.) By letter dated November 8, 2011, counsel for Nutley informed appellant's attorney that appellant would shortly be receiving a disciplinary notice seeking his termination "based on the fact that [he] refused to comply with the terms of the settlement agreement that he entered into and signed on the date of the hearing," and "also since he is seeking to rescind the settlement agreement [Nutley is] returning to [its] original position of seeking the termination of [appellant]." (R-13.) Following a disciplinary hearing, counsel for appellant was advised, by letter dated March 14, 2012, of Scarpelli's decision agreeing with the hearing officer's decision (R-6), and an FNDA dated June 22, 2012, was issued memorializing the determination that the charge of conduct unbecoming a public employee had been sustained and providing for appellant's removal effective November 4, 2011. (R-4.)

As noted, appellant worked in the mechanics garage until June 2004 and reported to Buccino. Luzzi credibly described and documented that on June 8, 2004, he informed appellant that he would no longer work out of the mechanics department due to the problems Buccino and appellant were experiencing, and that appellant was to clean his belongings out of the mechanics garage by the end of the week and report to the road department that Monday. (See R-19.) The documentation and testimony reveals that when Buccino returned to the office in the mechanics shop on June 8, 2004, at approximately 3:30 p.m. he observed damage and other things in the office, which had not been there when he left the garage that morning. (See R-31; R-32.) Buccino reported the incident to Luzzi, who observed the condition of the office. Buccino also took photographs of the office and reported the incident to the police. (R-33; R-20(a) to R-20(f).) The photographs depict a chair with the wheels broken off, three bead necklaces hanging from the ceiling in the vicinity of Buccino's desk and a

stereo speaker cabinet that belonged to appellant broken in pieces. (R-20(a) to R-20(d).) They also depict a dent in the lower desk drawer of the larger desk in the office. (R-20(e).) The testimony indicates that this desk had been secured by Gardiner from another town agency that was throwing it away; he shared this desk with appellant; and appellant continued to work at the desk after Gardiner's retirement. Buccino and appellant further described that in or around this time period Buccino had informed appellant that he wanted the larger desk. A photograph depicts a toy action figure on that desk with a rod or spike through its head. (R-20(f).) Luzzi documented that he called appellant in the office the following morning with supervisors Lombardozzi and John Riccio; Luzzi informed appellant that he was to remove his belongings from the mechanics garage that day due to the incident; and appellant "proceeded to get aggravated and started yelling stating that he was not leaving the f***king mechanics garage [and] he did not f***king care what [Luzzi] said or anybody else." (R-19.) Subsequently, appellant worked out of the road department, where he performed the duties of an operator and/or a truck driver/laborer. Appellant continued to receive his higher mechanic rate of pay after his reassignment.

During his employment with Nutley, appellant was involved in other incidents that resulted in written warnings and/or suspensions. By letter dated July 8, 2004, Luzzi informed appellant that "[d]ue to the incident that occurred on July 6, 2004, you are officially warned that any future incidents involving threatening or using profanities at Pat Buccino or any type of insubordination will result in a three-day suspension without pay or possible termination of employment [and that] [t]his behavior is unacceptable and will not be tolerated." (R-22.) A supervisor of the road department, John Riccio (Riccio), informed Luzzi of the July 6, 2004, incident, which is documented in a memorandum in appellant's personnel file. (R-21.) The memorandum reports that Riccio mentioned to appellant a problem experienced with a sweeper and that Buccino said it was possible that the emergency brake had been left on; appellant thought he was being accused of leaving the brake on; Riccio explained that he was not being accused and to not approach Buccino; appellant saw Buccino and began cursing at him about the sweeper incident; Riccio told appellant to get in his truck, but he was angry and carried on about this to Buccino; and Riccio took appellant back to the garage.

Luzzi issued a second warning letter to appellant stemming from an incident on October 1, 2004, which resulted in appellant's suspension for three days for insubordination. (See R-23; R-24.) The letter advised appellant that this was his "second warning," and that "any form of insubordination will cause you a suspension without pay [and] [t]he next incident will cause possible termination of employment." (R-23.) On October 1, 2004, appellant refused to clean up a spill after a hydraulic hose broke on a sweeper that he was operating. Lombardozzi credibly testified that he told appellant, "either you go and clean it up, Mark, or you are going to be sent home, suspended for the day," and that appellant responded, "I'll go home," and said as he walked out, "You guys are a bunch of p*****s," and kicked the door.

In October 2004, Luzzi suspended appellant for eight days due to an incident that occurred on October 8, 2004. Appellant's personnel file includes a report to Luzzi from James Santangelo (Santangelo), a mechanic who worked with Buccino, regarding the October 8, 2004, incident. (R-25.) It reports that he and Buccino went to the drop-off center to repair a loader; appellant was there when they entered the area; appellant started yelling at Buccino, "get out of here you fat bastard, the union said you can't be here when I'm here, get the F*** out of here"; appellant also stated that he "would put [Buccino] down right here"; Buccino did not respond to appellant's comments; Santangelo and Buccino left; and on the way back to the garage appellant transmitted over the radio something to the effect of, "union says 2 rat mechanics can come to the drop-off now." Buccino also authored a report to Luzzi providing similar advice regarding the incident. (R-35.) Luzzi sent a letter to appellant's union representative dated October 12, 2004, advising that, "[a]s per our conversation," Luzzi suspended appellant for eight working days (October 13 through October 22, 2004) due to the October 8, 2004, incident and, according to the letter, enclosed Buccino's report regarding the incident. (R-26.) Luzzi also sent a letter to appellant dated October 26, 2004, advising that his pay had been docked eight days "due to disciplinary action." The letter further informed appellant, "[a]s per your last 2 warnings, you were notified that any future incidents involving threatening or using profanities at Pat Buccino or any type of insubordination would result in a suspension without pay or possible termination

of employment," "[t]his behavior is unacceptable and will not be tolerated," and "this is your third and final warning [and] [y]our next incident will cause you to be terminated from your position." (R-27.)

On November 12, 2004, appellant signed an "Agreement," which was also signed by Luzzi and a union representative. (R-10.) That Agreement states in part:

> Whereas, the employer [Nutley] has previously disciplined and suspended the employee [appellant] in the past; and
>
> Whereas, the employer takes the position that it has also disciplined the employee in the form of written and verbal warnings for using profanity and threatening a fellow employee; and
>
> Whereas, the employee understands that this document shall serve as an Agreement between himself and the employer, and that any further incidents of such a nature may result in the employee's discipline and/or termination, with notice and in accordance with the rules and regulations of Civil Service; and
>
> Whereas, [the] employee agrees not to have any improper and/or inappropriate contact with . . . Buccino, either directly or through any third party. Employee agrees that should by coincidence or because of work assignments he be in the same room or area of . . . Buccino, he will immediately remove himself from the area, without discussion or comment, except that employee may advise a supervisor . . . .; and
>
> . . . .
>
> Whereas, the employee understands that should he fail[ ] to live up to the obligations listed above, he may be subjected to further disciplinary action up to and including termination in accordance with all relevant rules and regulations of Civil Service . . . .

Testimony and documentation were also introduced regarding a later incident on November 15, 2005, that resulted in a verbal warning to appellant. Luzzi credibly testified that appellant said over the radio, "I can't work with these idiots," which is documented in appellant's personnel file, and Luzzi heard. (See R-28; R-29.)

Appellant did not dispute that he made this comment. A meeting was later held during which appellant apologized and appellant was given a warning. Although divergent testimony was also offered regarding a verbal argument between appellant and Buccino in the 1990s or around the time of Hurricane Floyd (the forklift incident), I afford limited weight to this testimony, inasmuch as it did not result in a request for discipline against appellant or any discipline being imposed.

## THE TESTIMONY

Apart from the testimony that forms the basis for the above findings of fact, a summary of other pertinent testimony follows.

Peter Pancaro

Pancaro testified that at the time of the August 9, 2011, incident he was not working, and he suffered from severe lower back problems for which he had received various procedures and treatment, including a laminectomy in 1999–2000. He currently receives Social Security disability benefits due to his back problems. Pancaro described that he walks for exercise for his back two to three times a week, and he was walking his normal route down Franklin Avenue on August 9, 2011. He was wearing shorts, a t-shirt and sneakers and had his Walkman around his neck. According to Pancaro, he first saw appellant about the time that he got to the corner of William Street and Franklin Avenue and as he started crossing the street. (See R-16(b) at P.) Appellant was then working on William Street approximately thirty to fifty yards from the corner of Franklin Avenue and William Street. (See R-16(b) at T.) Pancaro testified that as he was crossing William Street they were "giving [their] usual hard looks to each other" and appellant said to him, "What are you looking at?" Pancaro responded, "I'm not looking at very much at all," and he continued his walk across William Street and straight on Franklin Avenue in front of the Janette shop. He described that when he was just about half way past the front of the Janette shop he heard appellant behind him stating comments like "That's it," "It's go time," "I've had it with you" and "It's time for me and you to do this." Pancaro testified that he was then 1 to 2 feet from the

building; appellant walked up to him and was "right on him" as he turned around; and, after he turned around appellant chest-bumped him, pushing him backwards, appellant grabbed him, and Pancaro wound up with his back against the front exterior of the Janette building. (See R-16(b) at X.) He described that he got scuffed up behind his legs and on his back from the brick wall of the building. He also testified that appellant "tried to throw elbows and knees" at him and Pancaro tried to "contain him" (i.e., tried to hold his hands and to stop from being hit, pushed and thrown to the ground) while yelling, "Get off me. Get off me." Pancaro stated that they then somehow fell to the ground and were separated and getting up when the police arrived. He admitted that he was "very" upset at the time and "very agitated" from the incident, explaining that his "back was totally raw from the brick wall" and the "back of [his] legs were a mess." Pancaro remembered saying to Robertazzi, "[G]et this guy off me. Get this guy off me." He described that Robertazzi did not physically try to break up the fight, but stated, "Mark, stop. You're going to get yourself in trouble. Mark, cut it out. You're going to get in trouble." Pancaro did not observe any injuries to appellant and denied making any comments about appellant's wife. Pancaro acknowledged that he previously had a substance-abuse problem and testified that he has not had alcohol or drugs in at least ten years. Testimony and documentation were also introduced regarding Pancaro's criminal history. (See A-4.) Pancaro admitted being suspended when he worked for Nutley due to a positive drug test, and later being subject to random testing and informed by letter dated December 19, 2002, that he "will [be] subject to immediate discharge" should any test indicate the unauthorized use of drugs. (See A-6, A-7.) He further acknowledged that his employment was terminated for refusing to take a requested drug test. (See A-8.)

Michael Lombardozzi

Lombardozzi testified that when he was driving south on Franklin Avenue he observed two police cars, appellant, Robertazzi and Pancaro standing at the doorway of the Janette Center. (R-16 at X.) He described that Pancaro was standing to the right of the doors of the Janette Center leaning against the building (A-2 at P), approximately 75 feet from the corner of William Street and Franklin Avenue. Appellant and

Robertazzi were standing on the sidewalk by one of the windows in the front of the building (A-2 at MT), at least 20 feet and as far as 40 feet from the corner and 20 to 30 feet from Pancaro. Lombardozzi walked across the street after parking his vehicle to investigate what was going on. He asked Pancaro, who he knew had previously worked for Nutley's parks department, what happened. According to Lombardozzi, Pancaro responded, "Mark attacked me. He attacked me." Lombardozzi did not observe any marks, bruises or bleeding on Pancaro's body and Pancaro indicated that he was okay in response to his inquiry. Lombardozzi then went to where appellant was standing and asked him what happened. He testified that appellant responded, "Mr. Pancaro, Pete walked by and said something to me," and appellant then said to Pancaro, "What did you say mother*****r?" Lombardozzi stated that appellant also relayed that the words were exchanged when he was on William Street, about halfway on the sidewalk of the Janette shop, and Pancaro was crossing the intersection of William Street and Franklin Avenue heading south on Franklin Avenue. (R-16 at MT and P.) Lombardozzi estimated that the distance between those points was over 150 feet. He testified that appellant further told him that he wound up coming around walking toward Franklin Avenue and meeting up with Pancaro, they chest-bumped, and the fight was on. According to Lombardozzi, appellant admitted that he chest-bumped with Pancaro and did not complain of any injuries. He did not observe any scratches, bruises or bleeding on appellant's body and appellant stated that he was okay in response to his inquiry. Lombardozzi also spoke to the police officers, who indicated that a report would be made, and estimated that he was at the scene for eight to ten minutes. He described that he reported the incident immediately to Luzzi. Although Lombardozzi did not write a report regarding the incident, he testified that he "vividly" remembered his conversation with appellant and he told Luzzi the exact comments appellant said to him. He also testified that appellant had told him in the past that he did not like Pancaro.

Lombardozzi testified that appellant's first assignment that day was to clean parking lot 1, which is the town's largest lot and takes "[a]t least a good hour" to clean. He described that, in general, appellant was required to clean all parking lots on the east side of Franklin Avenue and then clean the parking lot on the other side of Franklin

Avenue (see R-16), but acknowledged that there is no written instruction regarding the cleaning of the parking lots, including what must be done and the order in which one must do it. Lombardozzi stated that one of his job duties is to discipline employees, and prior to the incident in issue he had never sought the termination of an employee during his sixteen-year career. When asked if he had made a recommendation to Luzzi about what discipline, if any, appellant should receive, he stated, "[a]nyone that works for the [DPW] knows that fighting is unacceptable, with the results of termination." Lombardozzi testified that he has verbally issued a no-fighting rule numerous times to all of his workers, he has advised that fighting "will not be tolerated," and has at times told employees, "if I see you fighting I am going to fire you on the spot." Lombardozzi described that there were other incidents where he disciplined appellant, and appellant had numerous incidents of insubordination during the period he supervised appellant, citing, as an example, the October 1, 2004, incident. He acknowledged that appellant never hit anyone on the job, but stated that appellant had threatened Santangelo and Buccino. According to Lombardozzi, Santangelo had informed him of a threat by appellant, and Lombardozzi witnessed a threat by appellant to Buccino in connection with the forklift incident, which he did not report to his supervisors. He acknowledged that he never instituted a civil-service disciplinary complaint against appellant. Lombardozzi had no discussion about appellant being paid a higher rate of pay than a laborer and never thought that this was a concern of the administration.

Michael Luzzi

Luzzi testified that he is responsible for disciplining employees in his position and had never sought to terminate anyone's employment before the within incident. He became aware of the incident from Lombardozzi, who came to his office and explained what happened, including the presence of the police at the scene. Luzzi testified that Lombardozzi relayed that appellant was involved in a fight with Pancaro, and that appellant told Lombardozzi that Pancaro walked past him and said something to appellant; appellant responded, "What [did] you say mother****r?"; appellant approached Pancaro and bumped chests with him; and they started fighting. Luzzi described that Pancaro lives across the street from him and had been an employee of

Nutley, but did not work under his supervision. Appellant lives three houses away from Luzzi, he has known appellant since he was born, and he used to take appellant sleigh riding. He was not aware of any particular problems that appellant and Pancaro had with each other prior to the incident. After being apprised of the incident, Luzzi called Scarpelli, who made the decision to immediately suspend appellant. Luzzi testified that he had occasion to look at appellant's personnel file, which included prior discipline that he reported to Scarpelli. Luzzi was in agreement with Nutley's decision to seek appellant's termination as a result of the incident.

At the request of counsel, Luzzi ascertained the number of parking spots in the two lots on the east side of Franklin Avenue. There are approximately 200 parking spaces in lot 1 and approximately thirty-three spaces in the other lot, which Luzzi estimated would take hours to clean. Luzzi testified that Lombardozzi showed him where appellant claimed to have been on William Street when the words were exchanged between him and Pancaro. Luzzi measured with a measuring wheel how far apart appellant and Pancaro were when they exchanged words, which was 120 feet, and how far appellant had to walk to get to the area where Pancaro was eventually standing, which was an additional 57 feet. (See R-16A.) He articulated that it did not matter to him whether the incident was a fight or an assault, or the reason appellant and Pancaro came into contact. Luzzi testified, "It was irrelevant. He just never should have been involved in a fight with a member of the public."

Luzzi described that appellant could not "seem to let it go" with Buccino, it was "an ongoing problem," and, while the workers frequently curse, appellant's threats to Buccino took it to another level. He further described speaking to appellant on numerous occasions and advising him that his behavior was unacceptable. Luzzi testified that appellant was given "a last-chance agreement" in November 2004 as a result of the incidents (R-10), rather than being terminated, and that Luzzi was basically in favor of this course at the time because he had known appellant for a long time. Luzzi articulated that he thought termination was appropriate as a result of the 2011 incident and did not agree with the initial sixty-day suspension "[b]ecause this has happened before and again." He added, "His temper gets him in trouble. It's the

second time. I mean, most people don't get a second chance, let alone a third chance." Luzzi stated that appellant was not allowed to return to work in November 2011 "[b]ecause he didn't fulfill his obligation on the last-chance agreement." In explaining why he sought appellant's termination, Luzzi testified: "I have . . . 45 to 50 employees. I can't have a firecracker around. I got to think of the safety of everyone else . . . . I've got to consider the safety of the other employees that I have [and] . . . that's how I looked at it."

Luzzi acknowledged that he did not memorialize in writing what Lombardozzi had told him appellant said or his viewing of the scene. He admitted that he did not file a PNDA or FNDA in 2004 regarding appellant's discipline, but stated that no action was taken against appellant without his union knowing about it, and he did not believe that the union had filed any grievances on appellant's behalf as a result of any discipline against him. Luzzi acknowledged that he never spoke to appellant about the 2011 incident, but noted that at no time up to the hearing in 2011 did appellant reach out to him to talk. He acknowledged that he did not personally advise appellant why he was seeking his immediate suspension or the charges against him at the time of the suspension. Luzzi stated that a meeting had been held with the union shortly after appellant's suspension; the purpose of that meeting was to review the disciplinary actions that Nutley was going to take and appellant was advised of the charges against him. Luzzi testified that he did not base the decision to immediately suspend appellant on the police report, but he did rely upon information in that report in arriving at his determination to discipline appellant. He explained that in appellant's "own words to the police officer he said that Mr. Pancaro walked past him on the sidewalk . . . , he made some sort of derogatory comment about him [a]nd that coincided with Supervisor Lombardozzi's testimony that Mark told him that Mr. Pancaro said something to him and then Mark went up to Pancaro to bump chests with him."

Joseph Scarpelli

Scarpelli testified that from when he became commissioner in 2008 until August 2011, he never had occasion to bring disciplinary action against appellant and no

requests had been made to lower his grade of pay from mechanic to laborer. With respect to the 2011 incident, Luzzi informed Scarpelli that appellant had gotten into an altercation with a resident, who he later learned was Pancaro. Scarpelli testified that between the time of the August 9, 2011, incident and when he signed the first PNDA, he had a chance to investigate the incident, by speaking to appellant's supervisors, and also looked at appellant's file and found out that appellant had signed a last-chance agreement in 2004. Prior to the August 2011 incident, he never had occasion to review appellant's discipline file and he was not aware of the 2004 agreement at the time he initially suspended appellant. Scarpelli explained that he was seeking appellant's termination because of "[t]he seriousness of it," stating, "[w]e can't have employees assaulting and getting into altercations with residents," and "because of the last-chance agreement [he] felt as far as protecting the Township from liability, as well as protecting the employees that we should terminate Mr. Torsiello." He noted that appellant's file included other disciplinary matters that predated Scarpelli's tenure with the DPW, which also contributed to his decision to seek appellant's termination.

Scarpelli described that he has never sought to terminate any employee for disciplinary reasons before the within incident. He stated that he agreed to the settlement agreement on the day of the disciplinary hearing because he did not "want to see anybody lose their job" and "thought this was a way of resolving it [and] at the same time addressing some of the anger issues that [appellant] had exhibited in the past by allowing him to go to psychological counseling" and to be psychologically evaluated by a physician selected by Nutley. Scarpelli testified, "I think that protected the Township in some way [and] I allowed him to use his vacation time in order that he would receive a paycheck during that suspension time and to bring him back to work if he fulfilled all of the requirements of this agreement." He indicated that as part of that settlement agreement appellant agreed to take a demotion in title from mechanic to laborer or truck driver, which Scarpelli noted was the actual work appellant was performing. Scarpelli negotiated the settlement agreement with appellant's union representative and did not speak with appellant. He received a letter from appellant approximately two weeks later indicating that he was rescinding his agreement and settlement. Scarpelli stated that after appellant signed the settlement agreement he believed it was settled

and over and he was surprised when he found out that appellant had appealed. When appellant attempted to return to work on November 4, 2011, Scarpelli directed that appellant be sent home because he "didn't fulfill the stipulations in [the settlement] agreement [a]nd as far as [he was] concerned [appellant] was terminated." He initiated a new PNDA seeking appellant's termination. Scarpelli testified, "In hindsight I think coming to a settlement agreement based on everything that has happened subsequent to that signing of the settlement agreement shows me that [appellant] lacks some incite [sic] into his anger issues. He has some disregard for authority [a]nd in light of some of the other issues that have happened publicly, I owe it to the employees and the township of Nutley to protect them." Scarpelli described that the issue regarding who started the altercation did not affect his decision as to appellant's discipline. He explained, "[y]ou can't have public employees fighting with residents. He should have walked away."

Scarpelli acknowledged that he directed that appellant be sent home when he attempted to return to work after his initial four-day suspension and on November 4, 2011. He admitted that he did not meet with appellant to ask him what happened and did not advise appellant that the suspension would continue or of the evidence against him. Scarpelli stated that at the point when appellant attempted to return to work after his initial suspension he had already determined to seek appellant's removal based on the investigation and the last-chance agreement in his file, and when appellant attempted to return to work on November 4, 2011, Scarpelli was then moving for appellant's termination, but the PNDA had not yet been issued. Although Scarpelli agreed that appellant's psychological evaluation was to be conducted by a physician selected by Nutley and that no physician had been selected, he explained that appellant had rescinded the settlement agreement before Nutley had the opportunity to select a physician or schedule appellant's evaluation. He further noted that at no time did appellant indicate to him that he was willing to undergo the psychological counseling or evaluation as per the settlement agreement, even though he was withdrawing his agreement to the settlement. According to Scarpelli, appellant was paid for thirty days after the settlement agreement. Although he did not know the rate at which appellant

was paid, he believed that appellant's pay was directed to be adjusted to the lower rate after the settlement agreement.

Patrick Buccino

Buccino testified about various incidents that he had with appellant, including the forklift incident during which he interpreted appellant's actions as "a threat." He relayed that appellant had also told him when they worked together that he did not want to work on the parks department's equipment. Buccino testified about the incident involving the condition of the office on June 8, 2004, and authored memoranda regarding that incident. (See R-31; R-32.) In his memorandum addressed to the Commissioner and Luzzi, Buccino advised that he was "deeply troubled . . . with this problem in the repair shop," expressed his "concern" with appellant's "behavior," and stated that he took the action figure "as a threat and a cause for alarm." Buccino acknowledged that he did not witness appellant doing the damage and other matters in the office on June 8, 2004. He testified about the July 6, 2004, incident, which he stated occurred after appellant's transfer and after they had been told by the Commissioner and Luzzi to keep their distance from one another. Buccino described that he was repairing a piece of equipment at the drop-off area; appellant was making his way toward him; appellant was yelling at him, "getting menacing" and called him a "chump"; and Riccio took appellant away before any physical confrontation could happen. Buccino reported the incident to the police. (R-34.) With regard to the October 8, 2004, incident, which Buccino documented in a report to Luzzi (R-35), he described that he went to the drop-off area with another employee to repair a bucket loader; he noticed appellant at the drop-off area with the sweeper; Buccino drove past him to the back of the drop-off area; and when Buccino got out and started working on the loader, appellant started making comments, trying to provoke him, and came over toward him. He testified and reported that appellant made comments that Buccino was not supposed to be there by him, and appellant was cursing, called him a "fat bastard" and "threatened to put [Buccino] down," which Buccino interpreted to mean that appellant "wanted to take him on" in a physical altercation. Buccino packed up his stuff, got in the truck and left, and heard appellant's comment over the radio. He documented in his report, "This is now the 3rd

time [appellant] has tried to provoke a fight with me." Buccino requested a transfer, which was granted. He was transferred to his present position as a supervisor with the parks department as of January 2007. He testified that the primary reason he requested a transfer was "because it was an unsafe working environment, [he] couldn't perform [his] job anymore, [a]nd the best thing for [him] to do was to get away from there." Although Buccino acknowledged that at the time of his transfer appellant was not in the mechanics garage, he stated that appellant was working next door to the garage.

Mark Torsiello

Appellant testified that he was on light duty on August 9, 2011, after returning from a leave of absence due to a hernia injury and surgery. He described that he took a leave of absence in April 2011, the doctor cleared him to return to light-duty work, and he returned to work in August 2011. Appellant stated that he had restrictions regarding, among other activities, lifting, sitting and standing because of the pain; he was still in constant pain and it hurt to walk. He testified that on August 9, 2011, he asked to use the Township truck to drive to the parking lots due to the pain, and he parked in lot 1. He said that he arrived around 7:10 a.m. if it was summer hours or by 7:40 a.m. if it was regular hours. Appellant indicated that there was no prescribed order for cleaning the lots, and described his routine on August 9, 2011, which was basically his general routine. He described that after parking the truck he cleaned the perimeter of lot 1, along with the back half of the alleyway; he crossed William Street and cleaned the parking lot behind the senior building; he crossed William Street to the side of lot 1 and cleaned William Street to the other lot; he crossed William Street to clean the other parking lot; and he then crossed William Street to the side of lot 1. (See A-13.) Appellant further described that he was not sweeping every spot in the lots, and was cleaning around the perimeter of the lots and anything obvious in the middle, and that lot 1 was "[n]ot bad because [he] had done it before." According to appellant, he then intended to clean William Street on the side by the former Janette shop to the corner of Franklin Avenue, make a left onto Franklin Avenue and clean out the flower pots and the cigarette butts to the walkway by the clock, along with the front-half entrance of the

newsstand, and then cross to the parking lot on the other side of Franklin Avenue. He estimated that it took approximately two to two and a half hours to clean the lots before the incident.

Appellant testified that when he was cleaning William Street on the side of the Janette shop he heard something, which he could not understand, and looked up. He then saw Pancaro crossing William Street walking south on Franklin Avenue. Appellant described that Pancaro, who was approximately 45 feet from appellant, was yelling and saying "derogatory things" to him. (See A-13 at MT 1 and PP 1.) Appellant knew Pancaro had a bad back, and prior back surgery, and walks around town for exercise. Although he observed Pancaro exercising regularly, appellant expressed his surprise to see Pancaro walking in that area of town, indicating that he usually walks in the lower half of Nutley. He described that he mostly observed Pancaro doing "quick, fast walking," and Pancaro was walking in that quick fashion when appellant saw him. Appellant testified that he stood where he was working "in disbelief" and calmly said words to the effect of, "that's what you think" or "what's the problem?" in response to Pancaro's comments. He stated that Pancaro never stopped walking; he did not walk toward appellant; and appellant watched him walk by "fairly quickly." Appellant described that he stood a few seconds "in disbelief," he "shook it off and continued to work," and he assumed the incident was over and Pancaro was gone because he continued walking at his pace.

Appellant testified that he continued working on William Street toward Franklin Avenue. When he got to the corner of William Street and Franklin Avenue, he heard a horn beeping behind him and someone yelling out to him, which was Robertazzi, who had just pulled up in a truck to the corner on William Street and was attempting to turn onto Franklin Avenue. Appellant described that he turned to the right, greeted Robertazzi, and then went to the left or south on Franklin Avenue and did not observe anything of note. He proceeded to walk south on Franklin Avenue picking up debris. According to appellant, after he walked about 10 feet he looked up and saw someone, whom he did not initially recognize. He stated that Pancaro was then approximately 25 feet from him and by the doorway area of the Janette shop. Appellant indicated that he

measured the distance from the corner of William Street and Franklin Avenue to the Janette-shop doorway, which was less than Luzzi's measurement of 57 feet, and approximately 35 feet. He testified that he was "shocked," and his best guess as to why he did not see Pancaro when he looked the first time was that he had to be standing inside the doorway entrance out of his sight. Appellant described that Pancaro started yelling at him and calling him names. He admitted that he did not recall exactly what Pancaro said, and also indicated that Pancaro called him a "piece of crap" and a "p***y." According to appellant, he responded, "what's your problem anyway?" or "what's your problem with me?" Appellant denied that he walked toward Pancaro, and testified that Pancaro started walking toward him, but not in a "crazy" manner. Appellant articulated his belief that they were just going to discuss the problem and that he did not believe Pancaro was going to hit him.

Appellant testified that Pancaro "got up" to him and did not stop walking, so appellant stepped to the side with his back to the street. Pancaro's back was toward the wall of the Janette building. According to appellant, Pancaro came up to him and chest-bumped him, appellant got pushed back a little bit, and his foot went down off the curb. As appellant was stepping back up the curb, he asked, "what's your problem with me, anyway," and then got hit with two punches. Appellant testified that he then tried to cover up and protect himself because he was injured and just wanted to stop getting hit. He described that he bent over and put his arms around Pancaro's waist area and tried to "clinch" him. He stated that he was "trying to push [Pancaro] against the wall just to hold him [and] keep him still." According to appellant, Pancaro managed to get his arms under appellant's neck in a headlock when appellant was trying to push him in the direction of the wall; Pancaro was punching him on the sides; and Pancaro "started to lift up and choke" him. He described that he was "choked out of breath," dazed and confused, and was starting to blackout, but did not actually lose consciousness. Appellant denied that he threw any punches at Pancaro. He testified that Robertazzi started coming over, yelling at them to break it up, as appellant was being choked; Robertazzi tried to push both of them against the wall to separate them, and appellant was released from the headlock once he got pushed toward the wall. According to appellant, after he was released from the headlock Pancaro was still trying to come

after him with his hands, and Robertazzi "concentrated [on] trying to keep him" while appellant was trying to push away from Pancaro. He described that, when Robertazzi let Pancaro go, he stepped into the street off the curb and appellant kind of went to the right a little bit and toward the street because he was "disorientated," "still out of breath" and not "thinking straight." Appellant stated that Pancaro then started coming back at him throwing punches, appellant tried to put his hands up to block and keep Pancaro back, and "immediately at that time" the police pulled up behind Pancaro and it stopped.

Appellant described that Pancaro was screaming and yelling after the police arrived. According to appellant, Pancaro said something about appellant's wife after he was assaulted, and not before. Appellant testified that Lombardozzi came up to him and asked if everything was okay. He indicated that Pancaro was then still loud with the police around him; Lombardozzi went over toward Pancaro; and Lombardozzi then came back to appellant and asked him what happened. Appellant testified that he "was still out of breath and disorientated," he had heard what Pancaro was telling the police because they were only about 10 feet apart, and he said to Lombardozzi, "Look, the easiest thing I can say is the exact opposite of what he's saying."

Appellant denied that he wanted a confrontation with Pancaro. He testified that he had no reason to be angry with Pancaro that day, there were "no big problems," and he had no desire to get into a physical altercation with him. He also stated that he had "a little slight bit" reason to be angry with Pancaro before the incident due to the incident two years before involving appellant's daughter. Appellant denied that he said anything to entice or antagonize Pancaro or that Pancaro was trying to fight appellant off because he had him in a bear hug and was pushing him against the wall. He denied that he told Lombardozzi or anyone else that he chest-bumped or hit Pancaro. He denied that Robertazzi told him to stop the fight or he was going to lose his job or get in trouble.

Appellant described that Robertazzi drove him to the police station after the incident to ascertain whether Pancaro had his cell phone because he "was still out of it"

and did not want to drive. Robertazzi then drove appellant back to the truck and appellant asked Robertazzi to follow him to the garage so they could drive slowly because he was "a little cloudy." According to appellant, Robertazzi allowed him to drive the truck after appellant said he was disorientated. Appellant relayed that he told Lombardozzi at the office that Pancaro walked up to him, chest-bumped him, and hit him. He testified that Lombardozzi sent him back out to work and he worked until the end of the day. Appellant stated that he advised Lombardozzi at the end of his shift that he thought he had strained his injury and asked what the procedure was, and Lombardozzi replied that they would take care of it the next day. According to appellant, Lombardozzi called him that night at around 6:00 p.m. or 6:30 p.m. and advised that he was suspended for the incident. Appellant described that Luzzi informed him when he returned to work after four days that he was going to be suspended upon investigation and that no one from Nutley took a statement from him.

Appellant testified that he suffered injuries as a result of the incident. He stated that his arms were bleeding, and he offered a photograph of his left arm, which is dated August 9, 2011, and depicts an injury on his forearm by his elbow. (A-17.) He acknowledged that he did not know the source of that injury, and opined that his arm got scratched up from either scraping on the Janette-shop wall, which is jagged brick, or when he fell to the ground after breaking away from being choked. Appellant also offered a photograph of his eye, which is dated August 9, 2011, and does not clearly depict any injury. (A-17.) According to appellant, he had black eyes approximately four days after the incident. He offered a blurry photograph, which is not dated and appears to depict a bruise under appellant's left eye. (A-18.) Appellant testified that he took the photograph approximately four or five days after the incident, and he took a picture of one eye because it was "the bad eye." He stated that he went to his general doctor approximately one to two weeks after the incident. He described that he went to a neurologist approximately three weeks to a month after the incident because he still felt "disorientated" and people were telling him that he had concussion symptoms. Appellant denied that he went to the doctor because he was being suspended and then facing termination. After the incident, appellant did not return to the doctor who performed his hernia surgery, but went to a chiropractor. Appellant admitted that he did

not file a workers' compensation claim and that he had previously filed approximately five compensation claims during his employment. According to appellant, he did not know that he could file a claim or what the process would be, because it was an attack. He admitted that he did not ask Robertazzi or anyone if he could file a compensation claim, and also stated that he did not recall whether he asked the union if he could file a claim.

According to appellant, he did not ask Robertazzi, who is his shop steward, whether he witnessed the attack and he never had a discussion with Robertazzi about what he observed. He acknowledged that at the time of the incident he weighed approximately 200 pounds and Pancaro weighed approximately 160 pounds. Appellant admitted that when he first saw Pancaro while working on William Street, and when Pancaro was approximately 45 feet from him and yelling, appellant continued to walk in Pancaro's direction. He admitted that he had his cell phone and did not think of calling a supervisor. Appellant acknowledged that he could have walked back to the parking lot before he got to Franklin Avenue and drove his truck to the lot on the other side of Franklin Avenue. He also acknowledged that he could have crossed Franklin Avenue at William Street to get to the other parking lot and to avoid Pancaro if he saw him, and cleaned Franklin Avenue after Pancaro was gone. Appellant admitted that he could have walked away, and he did not retreat, when he first saw Pancaro on Franklin Avenue, who was then 25 feet from appellant and yelling at him. According to appellant, he never turned to see whether he could retreat to the safety of Robertazzi's vehicle. He testified that he at first figured that he was "going to stand [his] ground" and ask Pancaro what his problem was and they were going to talk about it. Appellant acknowledged that that he grabbed Pancaro and drove or shoved him into the brick wall of the Janette shop to hold him. He denied that when he got to the corner of Franklin Avenue he could see Pancaro on Franklin Avenue. Appellant admitted providing different testimony under oath at his unemployment hearing and testifying at that hearing that when he went to the corner he looked up and saw Pancaro. He agreed that Pancaro then would have been at least 35 feet away from him. According to appellant, he did not see Pancaro at that point and his testimony to the hearing officer was not accurate. He acknowledged that he testified at his unemployment hearing that

Pancaro was saying things about appellant's wife when appellant was on William Street, which was different than his testimony at the within hearing. Appellant admitted that he told the unemployment-hearing officer that he was asking for witnesses and no one was around, and he did not mention that Robertazzi was at the corner in his vehicle. He acknowledged testifying at that hearing that he sought medical attention a few days after the incident. According to appellant, he worked the entire day despite the fact that he was exhibiting concussion signs. He acknowledged that he stated in a prior certification that at "approximately 10:30 a.m., I returned to the shop and advised my supervisor that I had reinjured myself" and "I was advised that I was suspended as a result of Mr. Pancaro's attack and that I should return home." (R-40.)

Appellant agreed that he signed the "Settlement Agreement & Last Chance Agreement." According to appellant, he told the union representative that he would only sign the agreement if Nutley took off that he attacked or assaulted someone and if he and the union representative would have a chance to review and change the final draft of the agreement and get out of the agreement completely. Appellant testified that the union representative went in the other room with the Nutley representatives and told appellant when he returned that it was fine and appellant could get out of the agreement or change it when the formal typed version was prepared. He stated that his union representative and Robertazzi recommended that he sign the agreement. According to appellant, he was a "nervous wreck," the alleged assault still had him in a concussion state, and he did not understand exactly what he was doing. Appellant described that he could not concentrate on reading the agreement, the union representative read it to him, and the union representative also called the union lawyer in his presence. Appellant acknowledged that he did not ask for an adjournment to secure a lawyer, and that he knew at that time that he had signed the 2004 last-chance agreement and that anything he did after that could result in his termination. He admitted that he understood the terms of the settlement agreement when he signed it and that it does not state that he could get out of the agreement by filing an appeal. Appellant testified that August 9, 2011, was his last day at work, and he was pretty sure he was paid for the thirty days of leave time, but that payment was at the reduced rate. (See A-20.)

Appellant testified that he had no problems with his working relationship with Gardiner, they became more than work friends, and he and Buccino "just were work friends." He testified about the forklift incident in the 1990s, including the verbal argument he had with Buccino, which he described as being instigated by Buccino. He described that Nutley did not hire anyone after Gardiner's retirement, he and Buccino were then the only mechanics in the shop, the workload did not decrease, appellant was doing most of the heavy work, and work became "a little bit more stressful." According to appellant, he and Buccino "got along better" after the forklift incident; after that incident to when appellant was told that he was being reassigned there were no other problems between them; and they had no major arguments and it was "the same working relationship" after Gardiner's retirement. He described that he had a "little argument" with Buccino approximately the day before appellant was informed that he was going to be transferred, which involved a desk in the office. According to appellant, when he arrived at the garage all of his belongings were out of his desk drawers and in recycling bins and the office garbage pails and Buccino told him, "I need that desk because it's bigger." Appellant testified that he agreed to switch desks and he was "not really upset" about Buccino taking the desk, but that the "way he tried to do it was not right" and "[p]eople get aggravated when someone dumps everything out of your desk." He described that approximately a day before the desk incident he observed Luzzi in the shop with an individual appellant did not know; they went in the office with Buccino, and appellant later learned that the person was Santangelo. Appellant stated that Santangelo started employment in the mechanics garage sometime after June 2004, and articulated his belief that he was hired to replace Gardiner.

According to appellant, Luzzi informed him approximately the day after the desk incident that Scarpelli wanted him "gone" and "out of the shop," and appellant had two weeks to clean out his belongings. He also referred to being told to clean his belongings out by the end of the week. Appellant testified that when he asked why, Luzzi stated that maybe Scarpelli felt that appellant was "not educated enough" or did not have enough experience. Appellant articulated that he did not think that he was being moved because he could not get along with Buccino, but Luzzi had told him in or

around this time period that Buccino had talked to him and appellant never knew why or anything Buccino said. Appellant testified that he told Luzzi that he wanted to have a meeting with Scarpelli and appellant made many calls to set up a meeting with the Commissioner because he wanted an answer as to why he was being taken out of the garage, since he knew he was "skilled enough" and there were no disciplinary problems. He described that no meeting occurred, he could not get an answer, he was "upset" and "hurt," and he felt that the transfer was "degrading."

Appellant agreed that the photographs accurately depict the conditions in the mechanics office in or around June 8, 2004, except the one with the toy figure, and that the incidents with the toy figure, the beads, the desk and breaking the cassette holder all occurred on the same day. He denied that he broke the chair, which he indicated was the chair where he sat, and said that it was not unusual for the wheels to fall off that chair if it was lifted, and one could slip them back in. Appellant testified that he did not know whose beads were hanging up in the photographs or who hung the beads, and denied that he hung them. He stated that he received necklaces from Gardiner, who would bring beads from casinos to work for appellant's daughter (see A-12), and appellant kept the overflow of the beads at work on a nail behind his chair. Appellant testified that he came across the beads when he was cleaning his belongings out of the shop, "[i]n the mist of cleaning in a cluttered space when [he] moved the chair the chair came apart from the swivel" and "[o]ut of aggravation [he] just threw the necklaces over [his] head with [his] back facing . . . [Buccino's] desk." He stated that he realized that one of the bead strands was caught on the fluorescent lights that were behind appellant's desk, and later stated that he believed that one may have hit the light, but did not know if it stayed there. Appellant indicated that he had no idea where the other beads went, and that they could not have gotten caught where they are depicted in the photographs. He testified that while cleaning he realized that the stereo cassette tape holder, which belonged to him, was "cracked"; he "just finished breaking it" and cleaned up most of it; and he was going to clean up the remainder the next day. Appellant denied that he put the dent on the front desk drawer depicted in the photograph, and stated, "[i]f I recall, that desk came with that crease." He testified that the toy figure on the desk had been given to him by another employee, who he identified and is now

deceased, around the time that he was being taken out of the garage. According to appellant, that employee said to him, "If you think you're having a bad day look at this guy," and appellant threw it on his desk because he was in the middle of cleaning and working. He denied that he put the spike through the head of that doll, threatened anyone with the doll or the beads, or destroyed the furniture in the office in anger after finding out that Buccino had complained about him. Appellant did not receive any PNDA as a result of the incident, but was told by Luzzi at the end of the day that he then had one day to clean out his belongings. He also described meeting at some point with Lombardozzi and Luzzi, who told appellant that he was going to be transferred with a cut or cap to his pay; appellant "got a little aggravated"; he told them that he was not leaving the shop if they were going to cap his pay and would get the union and an attorney; and Luzzi later advised that his pay would remain the same.

Appellant acknowledged that the beads hanging in the office looked like the type of beads he received from Gardiner, and that he was "aggravated" when he threw his beads over his head because he was being taken out of the shop and had to move a lot of stuff. He stated that he was "hurt" at that time because he did not know what Buccino was complaining about. Appellant admitted that his interrogatory answers state that he put "a dent in [his] metal desk which happened when [he] accidentally tripped on debris which was on the shop floor." (R-38.) Appellant testified that the answer related to a different dent, and he accidentally dented the side of the desk by falling into it. He admitted that his interrogatory answers indicate that he "accidentally broke[ ] a chair when [he] attempted to pick it up and it separated from the casters which comprised the base of the chair." Appellant acknowledged that this "accidental" damage occurred when he was cleaning his belongings out of the garage. He admitted damaging the cassette tape holder, and then stated that he did not know whether it was already broken. Appellant described that he intentionally stepped on it because he was angry and out of frustration because he could not move in the shop due to the quantity of stuff in the office. He admitted that he threw the toy figure on his desk after he was told that he was being taken out of the mechanics shop, and he threw it on the desk that Buccino stated he was taking and he informed the police that he had nothing to do with the toy figure. Appellant acknowledged that at the meeting after the incident he

told Luzzi that he was not going to leave the shop; he raised his voice and he may have cursed. He testified that he agreed to the reassignment upon the advice of the union representative, he had the opportunity to discuss it with counsel weeks later, and he did not file any grievance regarding being taken out of the mechanics shop.

Appellant described that after June 8, 2004, there was a verbal agreement for him and Buccino to stay away from one another, which appellant reached with the administration. He stated that he did not know why that agreement was made or necessary. With regard to the July 6, 2004, incident, appellant testified he believed that he was being accused of leaving the emergency brake on the sweeper, and he got out of the truck and told Buccino that he did not like being accused. He described that Riccio was trying to talk to appellant while he was "debating back and forth" with Buccino if the brake was on, and "[t]hey got [appellant] back in the truck" and he left. Appellant acknowledged that he walked toward Buccino and had been advised not to have any contact with him. He agreed that as reflected in Riccio's memo he told appellant to get in his truck, but appellant was angry and carried on about this to Buccino. Appellant denied that he cursed at Buccino, but admitted that he may have cursed like he did not "f**ing leave the brake on." With regard to the October 1, 2004, incident, appellant admitted that he was suspended because he refused to clean up the spill from a leak on his sweeper; he was told if he did not do it he would have to go home; he left; and he lost that day of pay and was suspended for three days. Appellant stated his belief that he called the guys "p*****s" when he was walking out the door because he was angry at something, and indicated that it was not directed at the supervisors. With regard to the October 8, 2004, incident, appellant testified that he was at the drop-off center unloading the sweeper; Buccino and Santangelo pulled in to look at a front-end loader that broke; appellant was out of his vehicle; he got close up to the pickup truck, but was on the other side of the truck from where they were standing; and he "tried to let them know from a short distance away that they [didn't] belong there" until he was gone. According to appellant, they ignored him and "the ignoring . . . got [him] to raise [his] voice and start yelling," and they left. Appellant acknowledged that he probably cursed and that he was "very loud" and angry, stating that they kept going against the verbal agreement, which he interpreted to mean that they were not to

be in the same loading yard. He denied that he threatened Buccino or said he would put Buccino down right there, but admitted that he said, "I would put him out right now," meaning that he would physically remove Buccino from the yard if he had to. Appellant acknowledged that he said on the radio that the two rat mechanics can come back to the yard, which referred to Buccino and Santangelo, and testified that he was "aggravated, frustrated" because he "knew . . . what [Buccino] was going to do, run right to the bosses." He admitted that he was suspended due to the incident and that he did not appeal and accepted the eight-day suspension.

Appellant described attending a meeting concerning an agreement. According to appellant, he was told that if he did not sign the Agreement marked as R-10 he would be fired. Prior to signing the Agreement appellant was advised to hire counsel, and he retained counsel to review it. Appellant acknowledged that he spoke to his attorney and had his advice before he signed the Agreement; counsel reviewed and made changes to the Agreement before appellant signed it on November 12, 2004. He also had an opportunity to speak to his union representative. Appellant agreed that it was his understanding that if he got into a similar type of incident as he did with Buccino he could be terminated. According to appellant, he did not believe it was a last-chance agreement. He acknowledged that his answers to interrogatories state that "Buccino apparently complained to management, which them forced [him] to sign a last chance agreement" (R-38), and his certification also refers to it as a "Last Chance Agreement." (R-40.)

Robert Kordas

Kordas described that appellant and Pancaro were apart when he arrived on the scene and he did not witness any altercation. Similar to Lombardozzi, he stated that they were standing in the approximate location of the X on R-16 when he arrived. Kordas testified that he asked appellant what was going on, and appellant relayed that Pancaro went up to him and assaulted him. Appellant did not inform him of any details as to how the incident started. Kordas described that Pancaro was agitated and made comments about appellant's wife. He acknowledged that he did not speak to Pancaro,

he did not know who started the altercation, and he did not prepare a report. According to Kordas, appellant had a small cut on his nose and his clothes were disheveled. He did not observe any marks on Pancaro, but acknowledged that he did not walk over to Pancaro and did not recall the condition of his clothes. Kordas testified that he has known appellant on a "personal level," he "never had anything that was negative" about him, and he never saw appellant upset, mad or angry about anything. He has known appellant since high school, they live a couple blocks away from each other, and they previously belonged to the same pool. Kordas described that they are friendlier now than in high school, their families used to socialize at the pool, they still socialize, and he considered appellant a friend. According to Kordas, he was aware of issues that appellant had with Buccino, but never saw the police reports marked as R-33 and R-34 or was made aware of the incidents that led to Buccino making those reports.

Glenn Wallace

Wallace has been employed as a truck driver/laborer in the Nutley DPW for approximately nine years and worked in the same department as appellant from approximately 2005 until 2011. He considered appellant a friend from work and articulated his hope that appellant gets his job back. Wallace testified that he never observed or heard anything concerning appellant threatening another worker or anyone feeling threatened by him, he never witnessed appellant lose his cool or raise his voice, and he did not recall seeing him get angry at anyone. In describing appellant's character as a worker, he testified that he would "put him right in the middle"; appellant "wasn't a slouch, but yet, he didn't kill himself." Wallace acknowledged that appellant never told him that he had been disciplined for insubordination, refusing an assignment, and had signed a last-chance agreement in 2004. He indicated that he had worked light duty cleaning the parking lots for a few months, and a routine existed with regard to that assignment. Wallace testified that the routine was to begin cleaning lot 1 and then the other parking lots east of Franklin Avenue, and that a thorough job of cleaning those lots could take more than a half day to a day, depending on the amount of debris in the lots. He stated that he would then turn left at the corner of William Street and Franklin Avenue, walk along and clean Franklin Avenue past the Janette shop, and go

to either Centre or the walkway to the lot on the other side of Franklin Avenue. Wallace acknowledged that he did not know appellant's exact routine on the day in issue.

Thomas Gardiner

Gardiner described his former working relationship with appellant as "great" and testified that appellant was "one of the finest guys" he ever worked with and "easy to get along with." According to Gardiner, appellant took direction from Buccino and did not have a lot of arguments with Buccino. Gardiner testified that he became "very good friends" with appellant and he is "very close" with appellant's family. He attended appellant's wedding, his daughter's christening and birthday parties, and appellant's family functions. He continues to speak to appellant approximately once a month and sees him socially. Gardiner testified that he witnessed the forklift incident, which he blamed on Buccino, and that this was the only time he heard appellant argue with anyone. As far as Gardiner was aware, appellant and Buccino did not have any out-of-the-ordinary problems after that incident. Gardiner stated that on approximately six or seven occasions he gave appellant at the shop and for his daughter Mardi Gras beads that Gardiner received at casinos, and appellant left some of the beads in the shop. He did not recall seeing the beads hung up on the walls or from the ceiling during his employment.

## ANALYSIS OF THE EVIDENCE

In this matter, respondent bears the burden of proving the disciplinary charge against appellant by a preponderance of the credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); see In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, and according to a reasonable probability of truth. Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind

to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Precisely what is needed to satisfy this burden necessarily must be judged on a case-by-case basis.

In undertaking this evaluation, it is necessary for me to assess the credibility of the witnesses for purposes of making factual findings as to the disputed facts. Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality or 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). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . 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." Id. at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may also reject testimony as "inherently incredible" and when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Further, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

Prior to analyzing the evidence presented, a few preliminary matters should be addressed. Although it was apparent that appellant did not believe that his reassignment out of the mechanics garage was warranted or fair, the propriety of that

action is plainly beyond the issues presented in the within appeal, which concern whether or not appellant engaged in unbecoming conduct stemming from his encounter with Pancaro more than seven years later. I afford no weight to the testimony and/or arguments suggesting that this reassignment or appellant's discipline was "politically motivated" or part of a "campaign to terminate" appellant that began in 2004. Indeed, appellant acknowledged that he had agreed to the reassignment upon the advice of his union representative and did not file any grievance as a result of that action, which had no impact on his rate of pay even though he was performing a lower paying job. Beyond this, the record paints a much different portrait than that suggested by appellant. It is bereft of evidence that Nutley took disciplinary action to terminate appellant before the instant infraction, and reveals that Nutley had also initially agreed to accept a sixty-day suspension, of which appellant could use thirty days of vacation time, subject to other conditions, as discipline for the incident in issue pursuant to the Settlement Agreement & Last Chance Agreement. The unambiguous terms of that agreement do not support appellant's claimed belief that he could later rescind the settlement reached. Further, I do not find credible appellant's assertions that he did not understand what he was doing at that time and was still in a concussion state from the incident that happened nearly a month earlier. The record also does not support appellant's argument that the "Township, through its threats of removal, was able to coerce [appellant] into signing" that agreement. Indeed, it is undisputed that appellant had the assistance of his union representative when he signed the agreement, and his shop steward, Robertazzi, as well as his wife, was also present. However, inasmuch as Nutley issued a new PNDA and FNDA after being apprised of appellant's purported withdrawal of his consent to the settlement, the enforceability of the Settlement Agreement & Last Chance Agreement is moot.

Although I found improbable appellant's testimony disclaiming any involvement in how the beads came to be hanging from the ceiling by Buccino's desk or the toy figure came to be situated on the desk that Buccino was soon to be taking, it is unnecessary to determine for purposes of resolving this appeal whether or not appellant caused the conditions in the office on June 8, 2004. In short, that incident did not result in Nutley taking disciplinary action against appellant. Notwithstanding, it is

observed that appellant admitted to intentionally damaging his stereo-cassette holder because he was angry and out of frustration, and admitted to damaging the chair and the desk, albeit accidentally according to appellant. Finally, I afford little weight to the testimony of appellant's friends recounting their experience with appellant. Clearly, these individuals did not witness the incident involving Pancaro and had no knowledge as to the actions appellant took at that time.

Succinctly stated, I found appellant's testimony regarding the events that transpired on August 9, 2011, to be inherently improbable and irreconcilable with, and discredited in significant respects by, his prior sworn testimony before unemployment and other credible evidence in the record. A canvas of the totality of the evidence casts substantial doubt on the accuracy, reliability and believability of his version of the events. I found appellant's rendition as to various matters to be improbable and not "hanging together" with, and significantly impaired and overborne by, other credible evidence in the record. For example, appellant offered a vastly different account than that given in his sworn testimony before unemployment concerning whether he observed Pancaro when he turned on Franklin Avenue. He also articulated a different scenario at that time as to when Pancaro allegedly made comments about appellant's wife and failed to mention Robertazzi's presence. His testimony as to working the full day was inconsistent with his prior certification and overborne by the testimony of the Nutley representatives, whom I found to be forthright and credible. Appellant's rendition as to Pancaro walking toward him when appellant was approximately 10 feet from the corner is irreconcilable with the consistent testimony by the witnesses vis-à-vis the location of Pancaro and appellant near the doorway in front of the Janette shop. The totality of the evidence also raises a cloud of suspicion regarding appellant's claim that he calmly only said words to the effect of "what's the problem?" in response to Pancaro yelling and saying derogatory comments to him, which is further at variance with appellant's advice shortly after the incident as recounted by Lombardozzi that appellant said to Pancaro, "What did you say mother*****r?" in response to Pancaro's comments. I found equally improbable appellant's version that he did not initially recognize Pancaro when he first saw him on Franklin Avenue, even though Pancaro was then, according to appellant, only approximately 25 feet from him and appellant had just seen him minutes

before and had a verbal exchange with him. I further found improbable appellant's rendition that he believed that they were simply going to talk about the problem on Franklin Avenue, even though, according to appellant, Pancaro was yelling and saying derogatory comments when appellant was on William Street and Pancaro continued that course when appellant saw him again on Franklin Avenue. It also makes no sense that appellant never asked Robertazzi what he observed, even though, according to appellant, he became actively involved while the fight was still in progress. And, appellant's testimony is not corroborated by any witness or other evidence.

In judging the strength of the evidence and evaluating the demeanor and credibility of the witnesses, I found Luzzi, Scarpelli and Lombardozzi to be forthright and credible witnesses. They presented detailed and candid testimony as to pertinent facts that was not, in my view, significantly undermined or impaired on cross-examination. Lombardozzi credibly testified that appellant admitted to him at the scene that after Pancaro walked by and said something to him appellant asked him, "What did you say mother*****r?"; appellant was then on William Street and Pancaro was crossing the intersection of William Street and Franklin Avenue; appellant then walked toward Franklin Avenue and met up with Pancaro; and they chest-bumped and started fighting. Luzzi offered credible and consistent testimony concerning Lombardozzi's report immediately after the incident concerning the information appellant relayed to him, and that advice is corroborated in part by appellant's version in the police report. The record is devoid of credible, competent evidence suggesting that any of these witnesses harbored any motive or bias to fabricate their versions of the relevant facts. Plainly, on balance, appellant has the greatest stake in the outcome of this matter since it involves his termination from employment. Further, notwithstanding counsel's thorough cross-examination, I do not embrace appellant's stance that Pancaro should be found to be "a person with utter disregard for the truth." Although I afford little weight to his testimony suggesting that he did not say anything to provoke appellant and his characterization of the incident as an attack, I found his version as to other pertinent facts, such as appellant approaching him before the physical fight commenced and appellant being actively involved in that altercation, to be more probable than the scenario articulated by appellant.

Based upon a review of the testimony and documentary evidence presented and having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I **FIND** the following additional pertinent **FACTS**:

Appellant and Pancaro exchanged words when appellant was working on William Street and Pancaro was on or about the corner of that street and Franklin Avenue. I find insufficient credible evidence establishing the exact words that were said or who started that verbal encounter, except to the extent that appellant admitted to Lombardozzi saying words to the effect of "What did you say mother*****r?" After the words were exchanged, Pancaro did not approach appellant and continued his walk heading south on Franklin Avenue. Notwithstanding that verbal exchange, appellant did not retreat or try to avoid Pancaro. Instead of walking away, appellant instigated and initiated a confrontation with Pancaro by walking in his direction and approaching him. Appellant walked down William Street, turned at the corner, and walked south on Franklin Avenue to Pancaro's location, where the incident occurred, which was approximately 150 feet from where they had first exchanged words. There were available options that appellant could have taken toward continuing his work and avoiding Pancaro, such as driving the work truck, or crossing at the intersection of William Street and Franklin Avenue, to assess and clean the lot on the other side of Franklin Avenue, and then resume cleaning Franklin Avenue after Pancaro left the vicinity. Instead of pursuing one of these options, appellant walked in Pancaro's direction, confronted him, chest-bumped with him and became involved in a physical altercation with him. Appellant admitted that he grabbed Pancaro and drove or shoved him into the brick wall of the Janette shop. The evidence falls short of demonstrating that either appellant or Pancaro attacked the other or that either caused any significant injury to the other.

## DISCUSSION AND CONCLUSIONS

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 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. 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 appellant is guilty of the charge brought against him 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).

An appointing authority may discipline an employee for, among other causes, conduct unbecoming a public employee. N.J.A.C. 4A:2-2.3(a)(6). Although the term "conduct unbecoming a public employee" is not defined in the New Jersey Administrative Code, it has been described as an "elastic" phrase that includes "'conduct which adversely affects the morale or efficiency'" of the public entity or "'which has a tendency to destroy public respect for [public] employees and confidence in the operation of [public] services.'" In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (citation omitted); see Karins v. City of Atl. City, 152 N.J. 532 (1998). Unbecoming conduct need not be predicated upon a violation of the employer's rules or policies and may be based merely upon a violation of the implicit standard of good behavior. See City of Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955); In re Tuch, 159 N.J. Super. 219, 224 (App. Div. 1978).

Prior to the imposition of major discipline, the employee must be served with a PNDA setting forth the charges and statement of facts supporting the charges (specifications), and afforded the opportunity for a hearing, which shall be held within thirty days of the PNDA unless waived by the employee or a later date as agreed to by the parties. N.J.A.C. 4A:2-2.5(a), (d); see N.J.S.A. 11A:2-13. Within twenty days of the hearing or such additional time as agreed by the parties, the appointing authority shall make a decision on the charges against the employee and shall furnish the employee with an FNDA. N.J.A.C. 4A:2-2.6(d); see N.J.S.A. 11A:2-14.

An employee may be immediately suspended under limited circumstances:

> 1. An employee may be suspended immediately and prior to a hearing where it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services. . . . However, a Preliminary Notice of Disciplinary Action with opportunity for a hearing must be served in person or by certified mail within five days following the immediate suspension.
>
> 2. An employee may be suspended immediately when the employee is formally charged with a crime of the first, second or third degree, or a crime of the fourth degree on the job or directly related to the job.
>
> [N.J.A.C. 4A:2-2.5(a); see N.J.S.A. 11A:2-13.]

Should the imposed immediate suspension be without pay, "the employee must first be apprised either orally or in writing, of why an immediate suspension is sought, the charges and general evidence in support of the charges and provided with sufficient opportunity to review the charges and the evidence in order to respond to the charges before a representative of the appointing authority." N.J.A.C. 4A:2-2.5(b). Except for suspensions pending a criminal complaint or indictment, no suspension shall exceed six months. N.J.A.C. 4A:2-2.4(a); see N.J.S.A. 11A:2-20.

Against this backdrop, the credible evidence establishes that, while on duty and wearing his work uniform, appellant became involved in a verbal dispute and then a physical altercation with a Nutley resident. It further demonstrates that appellant had many options available to him to avoid any possible physical confrontation after his initial verbal exchange with Pancaro, which appellant elected not to pursue. Instead, appellant chose to walk in Pancaro's direction and become involved in a physical fight with him. I **CONCLUDE** that Nutley has shouldered its burden of proving, by a preponderance of the credible, competent evidence, that appellant's conduct in connection with his dealings with Pancaro was unbecoming a public employee. Simply put, appellant's actions, which led to police intervention after the fight was apparently

observed by a passing vehicle, fall significantly short of the type of conduct that the public has the right to expect from a public employee on duty. Appellant should be cognizant of the standard of conduct expected of his position given his lengthy career with Nutley and the prior warnings and/or discipline he received regarding his behavior. Clearly, appellant knew, or reasonably should have known, that it is unacceptable and unbecoming conduct to engage in a physical fight with a resident on a public street, particularly when he was on duty and wearing his work uniform. By engaging in the conduct he did, appellant failed to exercise good judgment and to act in a responsible manner. He failed to exercise tact and restraint during his encounter with Pancaro, who did not approach appellant. Irrespective of whatever words may have been exchanged, appellant's actions were not warranted or justified; appellant should not have become involved in a fight with a member of the public and should have walked away. Appellant engaged in conduct that has a tendency to destroy the public's respect and confidence in public employees. His behavior is of such a nature to bring disrepute to the DPW and Nutley. It also disrupted the work routine and placed both appellant and a Nutley resident at risk of harm.

The only remaining issue concerns the penalty that should be imposed. It is beyond debate that appellant's past disciplinary record may be considered for guidance in determining the appropriate penalty and the principle of progressive discipline is applied in this state. See Bock, supra, 38 N.J. at 522. Although an employee's past record may not be considered for purposes of proving the present charge, past misconduct can be a factor in determining the appropriate penalty for the current misconduct. In re Herrmann, 192 N.J. 19, 29 (2007); In re Carter, 191 N.J. 474, 484 (2007); Bock, supra, 38 N.J. at 522–23. The underlying purpose of progressive discipline is to provide an employee with notice of his or her deficiencies and the opportunity to correct them. In re Thomas, CSV 11069-97, Final Decision (September 26, 2000), <http://lawlibrary.rutgers.edu/oal/search.html>. The seriousness of appellant's infraction must also be balanced in the equation of whether removal or something less is appropriate under the circumstances. See Henry, supra, 81 N.J. at 580. The New Jersey Supreme Court has recognized that the principle of progressive or incremental discipline is not a "fixed and immutable rule" that must be applied in

every disciplinary setting. Herrmann, supra, 192 N.J. at 33; Carter, supra, 191 N.J. at 484. Rather, "some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." Carter, supra, 191 N.J. at 484. Progressive discipline is not a necessary consideration "when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest." Herrmann, supra, 192 N.J. at 33. Public-safety concerns may also bear upon the propriety of an employee's removal from employment. See Carter, supra, 191 N.J. at 485.

The evidence reveals that appellant possesses no major disciplinary record and his last suspension was in October 2004.[3] However, it also discloses that appellant's current infraction is not an aberration in an otherwise unblemished career and that he had received counselling, warnings and a three-day and an eight-day suspension stemming in large part from incidents that implicated verbal disputes with a fellow employee, confrontational behavior, and anger management. The evidence does not establish that appellant filed any grievance or appeal from the actions taken against him, and appellant admitted to many aspects of the documented incidents that led to the warnings and suspensions. Appellant further admits that he signed the "Agreement" on November 12, 2004, and had the benefit of counsel's advice before he signed it. The parties' paths diverge as to whether that Agreement is a "last-chance agreement." Although the agreement is not titled a "last-chance agreement" and does not expressly state that appellant shall be terminated if another incident occurs, it provided appellant with explicit and ample notice that his behavior must change and that "any further incidents of such a nature [i.e., the prior "written and verbal warnings for using profanity and threatening a fellow employee"] may result in [his] discipline and/or termination" and that "he may be subjected to further disciplinary action up to and including termination" if "he fails to live up to the obligations" in that agreement. Similarly, Luzzi's letter to appellant approximately two weeks before that agreement ambiguously informed appellant, "[a]s per your last 2 warnings, you were notified that any future incidents involving threatening or using profanities at Pat Buccino or any type

[3] Although Nutley had suspended appellant for eight days, it is undisputed that it did not issue a PNDA or an FNDA regarding that infraction.

of insubordination would result in a suspension without pay or possible termination of employment," "[t]his behavior is unacceptable and will not be tolerated," and "this is your third and final warning [and] [y]our next incident will cause you to be terminated from your position." (R-27.) Suffice it to say, the record supports that appellant has been repeatedly and sufficiently notified that his behavior must change, provided numerous opportunities to correct his shortcomings, and given fair warning of the consequences of failing to act in an appropriate manner. The within incident involves a similar type of inappropriate and unacceptable conduct.

Additionally, the gravity of appellant's infraction is a significant factor in the penalty determination. Simply put, appellant unnecessarily engaged in a physical altercation on a public street during work hours while wearing his work uniform. Regardless of whether Pancaro made comments that provoked appellant, appellant unjustifiably took action that led to a physical fight between them by electing to walk in Pancaro's direction to confront him. While verbal disputes between fellow employees are disruptive to the workplace and should not be tolerated, appellant's conduct in connection with his dealings with Pancaro is of a much more egregious and inexcusable nature, since it not only involved a physical altercation but one with a member of the public that ultimately led to police intervention. Nutley has an obligation to its employees as well as its residents to provide a safe working environment. Appellant's irresponsible conduct, while on duty and in his capacity as a representative of Nutley, could have resulted in injurious consequences to himself or Pancaro and cannot be countenanced.

I **CONCLUDE** that appellant's unbecoming conduct is sufficiently of an egregious nature to warrant his termination even without consideration of his disciplinary history. I **CONCLUDE** that a consideration of appellant's earlier infractions lends additional support for appellant's removal from employment. In sum, based upon the totality of the circumstances, I **CONCLUDE** that removal is the appropriate discipline and that Nutley acted appropriately by removing appellant from his position.

However, although the record indicates that Luzzi met with appellant and his union representative a few days after the incident, there is insufficient evidence demonstrating that Nutley immediately suspended appellant based upon a determination that he was unfit for duty, he was a hazard to any person if permitted to remain on the job, or that action was necessary to maintain safety, health, order or effective direction of public services, and that Nutley apprised appellant "either orally or in writing, of why an immediate suspension is sought, the charges and general evidence in support of the charges and provided with sufficient opportunity to review the charges and the evidence in order to respond to the charges before a representative of the appointing authority." N.J.A.C. 4A:2-2.5(a)(1), (b); see N.J.S.A. 11A:2-13. Further, Nutley's action in issuing the second PNDA dated November 7, 2011, and FNDA dated June 22, 2012, which memorialized the determination to terminate appellant, is tantamount to a withdrawal of the earlier PNDA and FNDA. And, to the extent that appellant's immediate suspension extended beyond six months, it was contrary to N.J.S.A. 11A:2-20 and N.J.A.C. 4A:2-2.4(a). Although appellant cannot be said to be blameless for the procedural conundrum that resulted after he reneged and appealed from the settlement, I **CONCLUDE** that appellant should be awarded back pay at the mechanic rate of pay from the date of his unpaid suspension on either August 9 or 10, 2011, to the date of the FNDA terminating his employment (June 22, 2012), subject to reduction by the amount of the thirty days of pay apparently received by him after the Settlement Agreement & Last Chance Agreement.

## ORDER

I **ORDER** that the charge of conduct unbecoming a public employee be and hereby is **SUSTAINED**. I further **ORDER** that, based upon the aforesaid sustained charge, appellant be and hereby is removed from his position as mechanic with respondent effective as of the Final Notice of Disciplinary Action dated June 22, 2012. I further **ORDER** that back pay at the mechanic rate of pay be issued to appellant for the period from the date of his immediate suspension in August 2011 until June 22, 2012, provided that it shall be reduced by the amount of pay issued to him after the Settlement Agreement & Last Chance Agreement.

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.

September 23, 2015 Margaret M Monaco

DATE **MARGARET M. MONACO**, ALJ

Date Received at Agency: September 23, 2015

Date Mailed to Parties: September 23, 2015

jb

# APPENDIX

## List of Witnesses

For Appellant:

Eric Stabinski

Robert Kordas

Glenn Wallace

Mark Torsiello

Thomas Gardiner

For Respondent:

Joseph Scarpelli

Michael Lombardozzi

Michael Luzzi

Peter Pancaro

Patrick Buccino

## List of Exhibits in Evidence

For Appellant:

| | |
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| A-1 | Letter from Michael Luzzi to Mark Torsiello dated August 10, 2011 |
| A-2 | Picture |
| A-3 | No exhibit admitted in evidence |
| A-4 | Judgment of Conviction |
| A-5 | No exhibit admitted in evidence |
| A-6 | Preliminary Notice of Disciplinary Action dated September 19, 2002 |
| A-7 | Letter from Tom Pandolfi to Peter Pancaro dated December 19, 2002 |
| A-8 | Final Notice of Disciplinary Action |
| A-9 | Operations Report dated May 20, 2010 |
| A-10 | Operations Report dated August 15, 2010 |
| A-11 | Investigation Report dated November 15, 2010 |

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| A-12 | Photograph |
| A-13 | Map |
| A-14 | Photograph |
| A-15 | Photograph |
| A-16 | Photograph |
| A-17 | Photograph |
| A-18 | Photograph |
| A-19 | Preliminary Notice of Disciplinary Action dated August 12, 2011 |
| A-20 | E-mail from Michael Luzzi to Rosemary Costa dated September 2, 2011 |

For Respondent:

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| R-1 | Preliminary Notice of Disciplinary Action dated August 12, 2011 |
| R-2 | Settlement Agreement & Last Chance Agreement dated September 1, 2011 |
| R-3 | Preliminary Notice of Disciplinary Action dated November 7, 2011 |
| R-4 | Final Notice of Disciplinary Action dated June 22, 2012 |
| R-5 | No exhibit admitted in evidence |
| R-6 | Letter from Alan Genitempo, Esq., to Charles Auffant, Esq., dated March 14, 2012 and letter from Joseph P. Scarpelli to Alan Genitempo, Esq., dated March 13, 2012 |
| R-7 | Letter from Mark Torsiello to the Civil Service Commission dated September 15, 2011 |
| R-8 | Letter from Mark Torsiello to Joseph Scarpelli dated September 20, 2011 |
| R-9 | Investigation Report dated August 9, 2011 |
| R-10 | Agreement dated November 2004 |
| R-11 | Letter from Charles Auffant, Esq., to the Civil Service Commission dated September 20, 2011 |
| R-12 | Letter from Alan Genitempo, Esq., to Charles I. Auffant, Esq., dated September 26, 2011 |
| R-13 | Letter from Alan Genitempo, Esq., to Charles I. Auffant, Esq., dated November 8, 2011 |

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| R-14 | Letter from Charles I. Auffant, Esq., to Alan Genitempo, Esq., dated December 2, 2011 |
| R-15 | Final Notice of Disciplinary Action dated September 2, 2011 |
| R-16 | Photograph |
| R-16(a) | Photograph |
| R-16(b) | Photograph |
| R-17 and R-18 | No exhibit admitted in evidence |
| R-19 | Memorandum by Mike Luzzi dated June 10, 2004 |
| R-20(a) | Photograph |
| R-20(b) | Photograph |
| R-20(c) | Photograph |
| R-20(d) | Photograph |
| R-20(e) | Photograph |
| R-20(f) | Photograph |
| R-21 | Memorandum by John Riccio dated July 6, 2004 |
| R-22 | Letter from Mike Luzzi to Mark Torsiello dated July 8, 2004 |
| R-23 | Letter from Mike Luzzi to Mark Torsiello dated October 1, 2004 |
| R-24 | Memorandum by Mike Luzzi dated October 4, 2004 |
| R-25 | Report from James Santangelo to Mike Luzzi dated October 8, 2004 |
| R-26 | Letter from Mike Luzzi to Ignazio Amodio dated October 12, 2004 |
| R-27 | Letter from Mike Luzzi to Mark Torsiello dated October 26, 2004 |
| R-28 | Memorandum dated November 15, 2005 |
| R-29 | Memorandum dated November 15, 2005 |
| R-30 | Letter from Mike Luzzi to Pat Guaschino dated August 16, 2011 |
| R-31 | Memorandum from Pat Buccino dated June 8, 2004 |
| R-32 | Memorandum from Pat Buccino to Peter Scarpelli and Mike Luzzi dated June 8, 2004 |
| R-33 | Investigation Report dated June 8, 2004 |
| R-34 | Investigation Report dated July 6, 2004 |
| R-35 | Report from Pat Buccino to Mike Luzzi dated October 8, 2004 |
| R-36 and R-37 | No exhibit admitted in evidence |
| R-38 | Answers to Interrogatories dated December 15, 2012 |

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| R-39 | Letter from Charles I. Auffant, Esq., to Alan Genitempo, Esq., dated December 15, 2012 |
| R-40 | Certification of Mark Torsiello dated March 22, 2012 |
| R-41 | No exhibit admitted in evidence |