A-12

STATE OF NEW JERSEY

In the Matter of Charles Nemeth,
Morris County

CSC Docket No. 2014-1748
OAL Docket No. CSV 01031-14

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUN 03 2015 (HS)

The appeal of Charles Nemeth, an Equipment Operator with Morris County, of his removal, effective January 3, 2014, on charges, was heard by Administrative Law Judge Imre Karaszegi, Jr. (ALJ), who rendered his initial decision on April 13, 2015. Exceptions were filed on behalf of the appointing authority, and cross-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 May 20, 2015, accepted and adopted the Findings of Fact as contained in the initial decision. However, the Commission did not adopt the ALJ's recommendation to reverse the removal. Rather, the Commission upheld the removal.

DISCUSSION

The appointing authority removed the appellant on charges of incompetency, inefficiency or failure to perform duties; conduct unbecoming a public employee; neglect of duty; misuse of public property, including motor vehicles; and other sufficient cause. Specifically, it asserted that on October 25, 2013, the appellant "jackknifed" his County vehicle and either disregarded or failed to understand a supervisor's instruction, and that on November 14, 2013, the appellant failed to keep a safe distance from composting equipment and failed to maintain a front loader in a safe manner. The appointing authority also asserted that both incidents constituted "just cause" under a last chance agreement, dated February 7, 2013,

justifying the appellant's termination. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In his initial decision and based on the testimonial and documentary evidence presented, the ALJ found that the appellant was promoted to Equipment Operator on December 23, 2006. A January 3, 2013 Final Notice of Disciplinary Action (FNDA) indicated that on September 24, 2012, the appellant operated a loader and ran into a grinder causing damage to the equipment. The January 3, 2013 FNDA further stated that the appellant's carelessness with County equipment caused an increase in liability to the equipment and jeopardized the safety of County employees and members of the public. As a result, the appellant and the appointing authority entered into a last chance agreement, dated February 7, 2013, allowing the appellant to serve a 90-day suspension rather than the initially proposed 182-day suspension. The last chance agreement also set forth that the appellant acknowledged and agreed that if he engaged in any of the conduct outlined in the January 3, 2013 FNDA, that said conduct would constitute "just cause" for the appellant's discharge from his employment with the appointing authority.

With regard to the current matter, the ALJ indicated that Keith Bibeault, Supervisor, Compost Project, testified that on October 25, 2013 the appellant attempted to back-up a trailer, which was hooked to a pickup truck. Bibeault stated that the appellant started backing up the trailer and jackknifed it, but Bibeault also stated that he stopped the appellant before the appellant jackknifed the trailer "completely." Bibeault noted that the appellant had "turned the wheel the wrong way." Bibeault stated that he told the appellant to watch him and "go backwards," but instead the appellant moved forward. When asked whether the appellant had endangered any pedestrians, Bibeault responded that as he and Victor Delmont, Equipment Operator, were the only individuals on site, he was unsure as to how to answer that question. Bibeault noted that he and Delmont were on foot in front of the vehicle and "off to the side a little bit, probably about four feet." Delmont testified that Bibeault stopped the appellant from jackknifing the truck. Specifically, Delmont stated that the truck continued to move forward while the appellant was "looking toward the tailgate of the vehicle," but that the appellant stopped the vehicle when Bibeault told the appellant to stop.

Turning to the November 14, 2013 incident, the ALJ found that the appellant was assigned to operate a front-end loader that day. Bibeault testified that with the blowing wind, the appellant's loader overheated, but that it was "nobody's fault" as the loader would have overheated no matter who drove it that day. Regarding the allegation that the appellant did not maintain a safe distance from the grinder as instructed numerous times, Bibeault testified that the appellant "just drove away" from the grinder as it was "spitting leaves." Bibeault specified that this was

improper because the appellant should have waited to be relieved and should have called him. Although Bibeault acknowledged that there was no radio dispatch in the loader, he noted that the appellant could have used a private cell phone to call in. Bibeault added that the appellant did call him on the cell phone after driving away. Bibeault stated that had the appellant called sooner, Bibeault could have reached the grinder before the appellant drove away, and the grinder would not have "spit out." Bibeault further stated that the appellant was verbally instructed numerous times regarding the operation of the grinder but noted that there were no written procedures or specialized training regarding the operation of the equipment. Delmont testified that he had observed the grinder "spit" prior to November 14, 2013 and noted that spitting can occur whether or not someone is present. Delmont added that other factors such as insufficient weight in the grinder tub, foreign objects or "fluffy leaves" could also lead to spitting.

Based on the foregoing, the ALJ determined that the appointing authority had not met its burden of proving the charges. The ALJ determined that the evidence established a lack of written policies or standard operating procedures and formal training regarding the safe and proper operation of County equipment. The ALJ also determined that the February 7, 2013 last chance agreement was not applicable. In this regard, the ALJ determined that the agreement referred to the conduct noted in the January 3, 2013 FNDA rather than the charges. The ALJ rejected the appointing authority's contention that in consideration of a reduced penalty, the appellant agreed that if he engaged in any additional acts of incompetence, conduct unbecoming, neglect of duty, misuse of property or other sufficient cause, such conduct would constitute "just cause" for termination. Thus, the ALJ determined that since the conduct detailed as part of the October 25, 2013 and November 14, 2013 incidents substantially differed from the appellant's conduct noted in the January 3, 2013 FNDA, and since the appointing authority had not met its burden of proving the charges, the appointing authority lacked "just cause" to terminate the appellant. Accordingly, the ALJ recommended reversal of the removal.

In its exceptions, the appointing authority contends that the ALJ improperly understated and minimized the seriousness of the appellant's conduct, ignoring the safety risks posed by his continued employment. In this regard, the appointing authority argues, with respect to the October 25, 2013 incident, that the appellant did not know what gear he had the vehicle in since he moved his vehicle forward while looking backward. The appointing authority argues that the appellant should not escape responsibility for his actions because more skilled employees were able to prevent the otherwise inevitable damage the appellant would have caused if left to rely on his own skills. Since it is not practical to assume that more skilled employees will always be available, the appellant's continued employment would place the County, its employees and residents at risk. The appointing authority argues, with respect to the November 14, 2013 incident, that the appellant failed to

heed repeated instructions that the grinder, which could contain dangerous objects such as steel and rock, should not be left unattended and notes that the appellant did not dispute having been instructed of the dangers of leaving the grinder unattended. By doing so, the appellant allowed the grinder to expel its contents and endanger bystanders and County property. The appointing authority notes the critical importance of keeping the grinder at least three-quarters full to prevent expulsion of its contents. Moreover, the appointing authority argues that the lack of a radio dispatch in the loader did not absolve the appellant of his responsibility to communicate with his supervisor via cell phone before leaving the grinder. The appointing authority also argues that the ALJ did not consider these incidents in conjunction with the appellant's previous violations of safety principles. Specifically, it notes that the appellant had been disciplined for running two red lights while driving County vehicles; driving a County vehicle without replacing the fuel cap allowing fuel to spill onto public roads, for which he received a 20-day suspension; and backing a loader into a grinder causing damage to County property, for which he received a 90-day suspension. The appointing authority states that it was the safety concerns stemming from these incidents that rendered the appellant subject to the last chance agreement providing that he would be terminated should he later engage in similar conduct to include incompetence, conduct unbecoming a public employee, neglect of duty, misuse of property and other sufficient cause, the same misconduct with which the appellant was charged following the October 25, 2013 and November 14, 2013 incidents. The appointing authority maintains that the appellant has demonstrated a pattern of inability or unwillingness to safely fulfill his duties.

The appointing authority next contends that the ALJ erred by accepting the appellant's argument that his gross misconduct resulted from a lack of training rather than his own failure to satisfy the skill requirements of his position. In this regard, the appointing authority argues that as the appellant had been an Equipment Operator for seven years prior to these incidents, it was not necessary, nor was the appointing authority obligated, to provide him with written policies or standards and formal training. Rather, the appellant should already have possessed the ability to back up a pickup truck and safely load leaves into a grinder without leaving the grinder unattended, or he should have been able to gain these abilities through oral instruction, which was provided to the appellant.

Finally, the appointing authority contends that the ALJ erred by failing to enforce the last chance agreement. In this regard, the appointing authority argues that since the misconduct in the instant matter was of the same type for which he had previously been disciplined, he was on notice that such conduct would result in termination according to the last chance agreement. While the appointing authority avers that it is not necessary to apply progressive discipline in light of the last chance agreement, it argues that the appellant has regardless been subject to progressive discipline, making termination the appropriate penalty. Specifically, it

notes that the appellant has been subject to four suspensions of increasing duration with each suspension relating to charges of unsafely performing his duties. It maintains, in light of the lengthy suspensions the appellant has already received, that additional suspensions will do little to improve his performance.

In his cross-exceptions, the appellant maintains, with respect to the October 25, 2013 incident, that he never jackknifed the vehicle and that any attempt to distinguish between a "partial jackknifing" and a "complete jackknifing" is disingenuous as a vehicle is either jackknifed or not. The appellant also maintains that no one was directly in front of the vehicle and that no one was in danger. The appellant disputes the appointing authority's contention that he would inevitably cause damage if left to his own skills as a "stretch of the imagination" and he adds that supervisors are obliged to be responsible for their subordinates' actions. Turning to the November 14, 2013 incident, the appellant stresses that he did not cause the overheating of the front end loader. The appellant argues that the charges were confusing and did not provide adequate notice since he was charged with failing to keep a safe distance from the grinder, yet the witnesses referred to the appellant's leaving the grinder unattended. Regardless, he argues that leaving the grinder unattended has no bearing on whether it will spit out debris. With respect to the issue of written policies and procedures, the appellant argues that these are important in that they are not ambiguous and provide employees with a handbook to deal with certain situations.

Based on its *de novo* review of the record, the Commission disagrees with the ALJ's assessment of this matter. In this regard, the ALJ's factual findings were sufficient to uphold several of the charges. Regarding the October 25, 2013 incident, Bibeault testified that the appellant backed a trailer hooked to a pickup truck in an improper manner. Bibeault intervened, observing that the appellant had turned the wheel in the wrong direction. Moreover, although Bibeault instructed the appellant to watch him and move backwards, the appellant failed to follow that instruction and instead moved forward. Delmont testified that he observed the appellant's truck move forward as the appellant was looking toward the rear of the vehicle. The seriousness of the appellant's actions was amplified by the fact that, according to Bibeault's testimony, he and Delmont were on foot and were about four feet to the front and side of the vehicle. Bibeault and Delmont were close enough to the vehicle to be potentially endangered by the appellant's negligent operation of the vehicle, especially viewed in light of Delmont's testimony that the appellant was looking backward while driving forward. Regarding the November 14, 2013 incident, Bibeault testified that despite previously being instructed in the operation of the grinder, the appellant drove away as the grinder was "spitting" leaves out without waiting to be relieved or calling in to his supervisor. Bibeault further testified that the grinder would not have "spit out" debris had he been able to reach the grinder before the appellant drove away. As such, the testimony presented indicated that the appellant did not employ the requisite level of skill;

failed to follow instructions; was careless in the operation of County property; and potentially endangered other employees. Accordingly, based on the testimony of the witnesses and the appointing authority's exceptions, which are persuasive, the charges of incompetency, inefficiency or failure to perform duties; neglect of duty; and misuse of public property, including motor vehicles are sustained.

With regard to the penalty, the Commission's review is also *de novo*. In addition to its consideration of 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). In determining the propriety of the penalty, several factors must be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. Moreover, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory 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). It is also noted that the use of a last chance agreement is solely for the purpose of determining the appropriate penalty. The OAL and the Commission are not strictly bound by the terms set forth in a last chance agreement, since neither entity was a party to the settlement. However, the Commission gives significant weight to a last chance agreement. *See e.g., In the Matter of Phillip Montgomery* (MSB, decided May 9, 2000) (In denying a request for reconsideration of an employee's removal, it was indicated that in addition to the employee's extensive history of infractions and the concept of progressive discipline, significant weight was given to the fact that the employee signed an agreement acknowledging that further instances of certain infractions would result in further disciplinary action up to and including removal). Additionally, last chance agreements are construed in favor of appointing authorities because to do otherwise would discourage their use by making their terms meaningless. *See Watson v. City of East Orang*e, 175 *N.J.* 442 (2003) (The Supreme Court found an employee's termination was warranted when that employee did not perform in compliance with a last chance agreement as contemplated by the parties. The Court added that a contrary conclusion would likely chill employers from entering into such agreements to the detriment of future employees).

In the instant matter, the record reflects that the appellant and appointing authority entered into a last chance agreement on February 7, 2013, which permitted the appellant to serve a 90-day suspension and indicated that if the appellant subsequently were to engage in any of the conduct outlined in the January 3, 2013 FNDA, such conduct would provide "just cause" for termination.

The January 3, 2013 FNDA described an incident in which the appellant ran into a grinder while operating a loader resulting in damage to the equipment and referred to the appellant's carelessness with County equipment. The Commission has upheld several of the charges stemming from the October 25, 2013 and November 14, 2013 incidents, which, as discussed above, involved the appellant's carelessness with County equipment. As such, the types of behaviors the appellant continued to exhibit while operating County equipment were in violation of the last chance agreement. The Commission ascribes significant weight to that agreement, which clearly advised the appellant that any further instances of carelessness with County equipment would warrant removal. *See Montgomery, supra*; *see also In the Matter of Tina Kirk* (CSC, decided January 27, 2010); *In the Matter of Brian Whittle* (MSB, decided May 28, 2003); *In the Matter of Ann Marie Collins-Cole* (MSB, decided December 18, 2002) and *In the Matter of Donald Hickerson* (MSB, decided September 10, 2002). Moreover, the appellant had also received other major disciplinary action for similar misconduct. Accordingly, the record does not evidence any reason to modify the penalty imposed by the appointing authority, and the Commission concludes that removal is appropriate.

ORDER

The Civil Service Commission finds that the appointing authority's action in removing the appellant was justified. Therefore, the Commission affirms that action and dismisses the appellant's appeal.

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 20TH DAY OF MAY, 2015

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, NJ 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 01031-14
AGENCY DKT. NO. 2014-1748

IN THE MATTER OF CHARLES NEMETH, MORRIS COUNTY DEPARTMENT OF UTILITIES AUTHORITY.

Ciro Spina, Esq., for petitioner/appellant (Law Offices of Jef Henninger, Esq., attorneys)

Stephen E. Trimboli, Esq., for respondent (Trimboli & Prusinowski, attorneys)

Record closed: November 5, 2014 Decided: April 13, 2015

BEFORE **IMRE KARASZEGI, JR.**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Morris County Department of Utilities Authority (County) seeks to impose major discipline against appellant, Charles Nemeth (Nemeth), an equipment operator, removing him effective January 3, 2014. The Township alleges that he violated N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency or failure to perform duties; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; N.J.A.C. 4A:2-2.3(a)(8), misuse of public property, including motor vehicles; and

N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause. Specifically, the County alleges that on October 25, 2013, Nemeth "jackknifed" his municipal vehicle and either disregarded or failed to understand a supervisor's instruction. On November 14, 2013, the County alleges that Nemeth failed to keep a safe distance from composting equipment and failed to maintain a front loader in a safe manner. The County maintains that the incidents of October 25, 2013, and November 14, 2013, constitute "just cause" under a Last Chance Agreement (February 7, 2013), justifying Nemeth's termination.

On December 3, 2013, the County prepared a Preliminary Notice of Disciplinary Action (PNDA) against appellant. After a departmental hearing, the County prepared a Final Notice of Disciplinary Hearing (FNDA), on January 3, 2014, removing Nemeth effective January 3, 2014. On January 9, 2014, Nemeth requested a hearing. The Civil Service Commission transmitted the contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, to the Office of Administrative Law (OAL), where it was filed on January 27, 2014. Hearings were scheduled on June 23, 2014, August 1, 2014, and September 12, 2014. The parties submitted written summations, and following their receipt, the record closed. Orders were entered extending the time for filing this decision.

FACTUAL DISCUSSION

After carefully considering the testimonial and documentary evidence presented, and having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, I **FIND** the following **FACTS**:

Nemeth was hired by the County as a sanitation worker on February 13, 2001; was promoted to equipment operator on or about December 23, 2006; and most recently, had been assigned to the composting operation located in Parsippany, New Jersey.

On January 3, 2013, a Final Notice of Disciplinary Action (FNDA) noted the following incident as giving rise to various disciplinary charges against Nemeth;

> Mr. Nemeth had returned from a (20) day suspension on September 24, 2012, as a result of numerous incidents involving the misuse of County equipment and failure to take direction. On September 24, 2012, at 9:19 a.m., Mr. Nemeth was operating a Loader and ran into a Grinder resulting in damage to the equipment. Mr. Nemeth's carelessness with County equipment causes an increase in liability to the equipment and jeopardizes the safety of County employees and members of the public.

As a result of the January 3, 2013, FNDA related to the September 24, 2012, incident, Nemeth and the County entered into a Last Chance Agreement on February 7, 2013, essentially allowing Nemeth to serve a ninety, instead of a 182-work-day suspension that had been initially proposed by the County. In addition, the Last Chance Agreement set forth the following;

> 6. Nemeth acknowledges and agrees that if Nemeth engages in any of the conduct outlined in the Final Notice of Disciplinary Action (Exhibit "B"), that said conduct shall constitute "just cause" for Nemeth's discharge from his employment with the MUA.

On or about January 2, 2014, a FNDA was served upon Nemeth seeking his removal, effective January 3, 2014. The following was noted in this recent FNDA and its corresponding PNDA dated December 3, 2013, as the incident(s) giving rise to the disciplinary charges;

> On October 25, 2013, you operated a vehicle in such a manner that resulted in it being jackknifed. Furthermore, when directed by your supervisor to back up, you pulled forward, potentially endangering pedestrians who could have been located in front of said equipment.
>
> . . .
>
> On November 14, 2013, you failed to keep a safe distance from the "Tub" as instructed numerous times. On the same date, you also failed to maintain a front loader in a safe manner, which caused the equipment to overheat.
>
> The aforementioned conduct constitutes "just cause" as noted within the Last Chance Agreement. Therefore, your employment is being terminated.

Keith Bibeault, supervisor of compost operations for the Morris County Utilities Authority, testified on behalf of the County. As to the October 25, 2013, incident, Bibeault described how Nemeth attempted to back a trailer, which was hooked to a pick-up truck, across the street from where Bibeault was standing. Bibeault noted that Nemeth "started backing up the trailer and he jackknifed the trailer." However, Bibeault also stated that he stopped Nemeth "before he jackknifed it completely." He described how Nemeth had "turned the wheel the wrong way." He told Nemeth to "watch me and go backwards"; however, Nemeth moved forward. When asked whether Nemeth had endangered any pedestrians, Bibeault responded;

> Other than Victor and myself, I don't know if you would consider us a pedestrian because we were on foot. There was nobody else on the site, so I'm not sure how to really answer that question. Just the two of us were on foot and we were to the front of the vehicle and off to the side a little bit, probably about four feet.

Victor Delmont, an equipment operator assigned to the composting operation, testified on behalf of the County. Delmont also noted his observations regarding the October 25, 2013, incident. Delmont stated that Bibeault "stopped Mr. Nemeth from jackknifing . . . ." Delmont then described Nemeth's truck as continuing to go forward while Nemeth was "looking toward the tailgate of the vehicle." Delmont also affirmed that Nemeth "stopped the vehicle" when Bibeault told him to stop and testified with certainty that Nemeth never jackknifed the vehicle.

Bibeault and Delmont were also asked to recall the incident of November 14, 2013. On that date, Nemeth was assigned to operate a front-end loader at the composting site in Parsippany. Bibeault stated that with the wind blowing everywhere, Nemeth's loader overheated. Bibeault added that "it was nobody's fault" and that the loader would have overheated no matter who would have driven it that day.

As to the allegation that Nemeth "failed to keep a safe distance from the 'Tub' as instructed numerous times," Bibeault stated that Nemeth just "drove away" from the tub/grinder as the machine was "spitting leaves." When asked what was improper as to

Nemeth's actions, Bibeault responded, "He drove away, he should've waited to be relieved, he should've called me." Bibeault indicated however, that there was no radio dispatch in the front-end loader that Nemeth was operating, but that Nemeth could have used a private cell phone to call in. Bibeault added that Nemeth did call him on the cell phone after Nemeth drove away. Bibeault stated, "Well, if he had called me sooner I could've got over there before he drove away and the machine wouldn't have spit out." While noting that Nemeth was verbally instructed numerous times as to the operation of the grinder, Bibeault added that there were no written procedures or specialized training regarding the operation of the equipment.

Delmont was also questioned about the "spitting" associated with the grinder. He indicated that he had witnessed the grinder "spit" before November 14, 2013. Delmont added that the spitting can occur whether someone is present or not. Other factors, such as insufficient weight within the grinder tub, the presence of a foreign object, or fluffy leaves could also lead to "spitting."

LEGAL ANALYSIS AND CONCLUSIONS

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. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Both guilt and penalty are redetermined on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

The County has charged Nemeth with violating N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency or failure to perform duties; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; N.J.A.C. 4A:2-2.3(a)(8), misuse of public property, including motor vehicles; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause. The County also maintains that the incidents of October 25, 2013, and November 14, 2013, constitute "just cause" under a Last Chance Agreement justifying Nemeth's termination.

Based on the foregoing facts and applicable law, I **CONCLUDE** that respondent has not proven, by a preponderance of the competent, credible evidence, that Nemeth "jackknifed" a vehicle while "potentially endangering pedestrians who could have been located" in front of the vehicle. I also **CONCLUDE** that respondent has not proven, by a preponderance of the competent, credible evidence, that Nemeth "failed to keep a safe distance" from the tub equipment and "failed to maintain a front-loader in a safe manner." I **CONCLUDE** that the evidence presented by respondent, regarding the incidents of October 25, 2013, and November 14, 2013, does establish a lack of written policies/standard operating procedures and formal training regarding the safe and proper operation of County equipment.

I must also **CONCLUDE**, as it relates to the issue of the February 7, 2013, Last Chance Agreement, that the conduct detailed as part of the incidents of October 25, 2013, and November 14, 2013, is substantially different conduct than what formed the basis for the charges associated with the incident of September 24, 2012. Respondent argues the following: "In consideration of the reduced penalty, Appellant agreed that, if he engaged in any further acts of incompetence, conduct unbecoming, neglect of duty, misuse of property or other sufficient cause, such conduct would constitute "just cause" for his discharge from employment." However, the Last Chance Agreement specifically refers back to the conduct and not the charges outlined in the FNDA as to whether "just cause" is established. In light of the foregoing therefore, and respondent's failure to meet its burden regarding Nemeth's conduct of October 25, 2013, and November 14, 2013, I must **CONCLUDE** that the County did not have "just cause" to terminate Nemeth's employment.

ORDER

It is **ORDERED** that the charges against appellant, Charles Nemeth, be **DISMISSED**. It is also **ORDERED** that the penalty of removal, be **REVERSED**.

It is further **ORDERED** that the appellant be reinstated to his position as an equipment operator.

Accordingly, it is **ORDERED** that the appointing authority pay back pay and benefits from the initial removal date of January 3, 2014. Consistent with the appellant's duty to mitigate his damages, I **ORDER** the appellant to submit to the appointing authority a certified statement detailing any employment and income for the period of his suspension, with copies of relevant tax and other records and names and addresses of employers. N.J.A.C. 4A:2-2.10; see also Phillips v. Dep't of Corr., A-5581-01T2F (App. Div. Feb. 26, 2003), http://njlaw.rutgers.edu/collections/courts/. Since the appellant has prevailed, I **ORDER** the appointing authority to pay reasonable attorney's fees to appellant's attorneys. The appellant's attorneys will submit to the appointing authority a certified bill itemizing their services. N.J.A.C. 4A:2-2.21.

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, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 13, 2015

DATE

IMRE KARASZEGI, JR., ALJ

Date Received at Agency:

Date Mailed to Parties: APR 14 2015

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

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APPENDIX

LIST OF WITNESSES

For Petitioner/Appellant:

None

For Respondent:

Keith Bibeault

Victor Delmont

LIST OF EXHIBITS IN EVIDENCE

For Petitioner/Appellant:

P-2 Diagram

For Respondent:

R-1 Preliminary Notice of Disciplinary Action dated December 3, 2013

R-2 Final Notice of Disciplinary Action dated January 3, 2013

R-3 Job Description for Equipment Operator

R-4 Civil Service CAMPS form

R-5 Photo of Komatsu front-end loader

R-6 Photo of Tub/grinder

R-7 Photo of back of Tub/grinder

R-8 Memorandum dated March 11, 2004

R-9 Memorandum dated April 7, 2006

R-10 Notice of Minor Disciplinary Action dated July 2, 2012

R-11 Notice of Minor Disciplinary Action dated July 2, 2012

R-12 Settlement Agreement dated March 19, 2013

R-13 PNDA/FNDA and Last Chance Agreement

R-14 Handwritten notations for 11-14-13 and 11-20-13 (MC000088)