A-16

STATE OF NEW JERSEY

In the Matter of Henry Green
City of Atlantic City,
Department of Public Works

CSC DKT. NO. 2015-1050
OAL DKT. NO. CSV 13691-14

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: JULY 16, 2015 BW

The appeal of Henry Green, Laborer 1, City of Atlantic City, Department of Public Works, removal effective September 16, 2014, on charges, was heard by Administrative Law Judge John S. Kennedy, who rendered his initial decision on June 8, 2015 reversing the removal. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on July 15, 2015, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. In the interim, as the court states in *Phillips, supra,* if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Henry Green. The Commission further orders that appellant be granted back pay, benefits, and seniority for the period of separation to the actual date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION
JULY 15, 2015

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
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attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 13691-14
AGENCY DKT. NO. 2015-1050

IN THE MATTER OF HENRY GREEN, CITY OF ATLANTIC CITY, DEPARTMENT OF PUBLIC WORKS.

Joseph Waite, AFSCME Representative, for appellant, appearing pursuant to N.J.A.C. 1:1-5.4(a)6

John Dominy, Esq., for respondent (Blaney & Donohue, PA, attorneys)

Record Closed: April 22, 2015 Decided: June 8, 2015

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE

Respondent, City of Atlantic City, Department of Public Works (hereinafter Appointing Authority), sustained charges seeking the removal of Henry Green (hereinafter appellant). The Appointing Authority alleges that appellant, a Laborer 1, reached maximum medical improvement (MMI) with permanent restrictions and is unable to perform the duties of his job. Appellant was charged with a violation of N.J.A.C. 4A:2-2.3(a)(3), Inability to Perform Duty.

PROCEDURAL HISTORY

On April 24, 2014, the Appointing Authority issued a Preliminary Notice of Disciplinary Action (J-1) setting forth the charges and specifications made against appellant. On September 16, 2014, after a departmental hearing on August 12, 2014, the Appointing Authority issued a Final Notice of Disciplinary Action (J-2) sustaining the charges in the Preliminary Notice and removing appellant from employment effective September 16, 2014. Appellant appealed on October 6, 2014, and the matter was filed at the Office of Administrative Law on October 22, 2014, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was heard on April 22, 2015, and at the conclusion of the hearing, the record closed.

FACTUAL DISCUSSION

Paul Jenkins has been employed by the Appointing Authority for approximately twenty years. He is currently the Director of Public Works. The public works department employs approximately 187 employees. Appellant was a Laborer 1 assigned to the streets department when he was originally hired in July 2009. In September 2013, appellant sustained a work injury that placed him on leave under the Workers' Compensation program. While on Workers' Compensation appellant was reassigned to the sanitation division as a result of a restructuring of the entire public works department (A-4). His position with the sanitation division would require the appellant to work on the back of a trash truck. On January 14, 2014, appellant was examined by a doctor associated with the Workers' Compensation program. As a result of that examination, appellant was determined to have reached MMI (P-1). On February 26, 2014, the appointing authority notified appellant to contact Jenkins to discuss any accommodations necessary to facilitate his return to work (A-1). Appellant was again examined by the Worker's Compensation doctor on March 6, 2014, who determined his work restrictions of no lifting greater than fifty pounds should continue (P-2). The maximum lifting requirements for the position of a Laborer 1 is fifty pounds.

On March 28, 2014, Jenkins prepared a memorandum to appellant wherein he described a meeting they had on that date (P-4). In that memorandum, Jenkins

confirmed that appellant requested to use accumulated sick and vacation days for the time he has missed since being eligible to return to work. This provision of the memorandum was initialed and dated by the appellant on March 28, 2014 (P-4). The March 28, 2014 memorandum also explained that appellant advised Jenkins that he would not be able to return to the streets division working in his previous capacity and cannot work on the back of a trash truck because of his permanent work restrictions (P-4).

Jenkins sent an email to the Appointing Authority's personnel department advising that he informed the appellant that he could not accommodate him (A-3). On April 21, 2014, appellant sent an email to Jenkins requesting a reasonable accommodation so that he can continue to work (A-2). In the April 21, 2014 email, appellant explained all the other jobs he has performed while employed with the city and stated that he is "qualified to work in some other capacity where opportunities may be available" (A-2). All of the job assignments appellant requested fall outside of the job description for a Laborer 1. While it is common for laborers to perform functions "out of title" or outside of the job description for short periods of time, if these out of title duties continue for greater than six months they are considered a permanent job assignment and the employee would be re-titled in a new position. Appellant was examined again by the Worker's Compensation doctor on May 29, 2014, who determined his work restrictions of no lifting greater than fifty pounds to be permanent (P-3). Appellant's removal was not based on any misconduct or discipline. Based on the comments appellant made that he was unable to return to work because of his permanent restrictions, the appointing authority had no other choice but to remove him. No functional capacity or other physical examination was conducted to determine if appellant could perform the functions of his employment.

Henry Green next testified on his own behalf. He has been employed as a Laborer 1 with Atlantic City for the past five years. He was injured on the job in September 2013 and obtained MMI with a permanent work restriction which limits his lifting capacity to fifty pounds. He never advised the Appointing Authority that he could not work. He asked for an accommodation as a result of his receiving the February 26, 2014 letter from the assistant personnel director (A-1). His intent was to get another

position with the city since he took the February 26, 2014 letter to mean that his options were to either resign or retire. He was never instructed to submit to a functional capacity examination to determine if he could perform his job functions.

Appellant acknowledges signing off on the paragraph of the March 28, 2014 memorandum regarding his request to use his sick and vacation time, but denies ever seeing the memorandum before. He disagrees with the other paragraphs of the memorandum and contends that he is able to work and never told Jenkins he was unable to return to work as a result of his restrictions. Appellant could not provide an answer as to how his initials are on the memorandum if he never saw it before.

FINDINGS OF FACT

The record in this matter includes documentary evidence and the testimony of the individuals who prepared the documents or had knowledge of the incidents they described. In order to resolve the inconsistencies in the witness testimony, the credibility of the witnesses must be determined. Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

I **FIND** that Mr. Jenkins testified in a credible manner. He provided direct and intelligent answers and provided clear insight to city procedures and requirements. He was candid that appellant's removal was not based on any misconduct. Instead, based on the comments appellant made that he was unable to return to work because of his permanent restrictions, the Appointing Authority had no other choice but to remove him.

I **FIND** appellant not to be a credible witness and his testimony is not believable. He testified that he never saw the March 28, 2014 memorandum but admits signing the paragraph where he expresses his desire to use sick and vacation time. He claims to have never been advised to return to work in spite of requesting to use sick and vacation time for the time he missed prior to March 28, 2014. Further, his April 21, 2014 email appears to be a request for a reassignment as opposed to requesting an accommodation to assist him in performing the job functions of a Laborer 1. As a result, I **FIND** as **FACT** that appellant advised the Appointing Authority that he could not return to work as a Laborer 1 because of his permanent work restrictions limiting his lifting capacity to a maximum of fifty pounds.

After carefully reviewing the exhibits and documentary evidence presented numerous times both during the hearing and after, and after having had the opportunity to listen to testimony and observe the demeanor of the witnesses, I **FIND** the following to be the additional relevant and credible **FACTS** in this matter: Appellant was a Laborer 1 assigned to the streets department when he was originally hired in July 2009. The maximum lifting requirements for the position of a Laborer 1 is fifty pounds. In September 2013, appellant sustained a work injury that placed him on leave under the Workers' Compensation program. While on Workers' Compensation appellant was reassigned to the sanitation division as a result of a restructuring of the entire public works department. His position with the sanitation division would require the appellant to work on the back of a trash truck. Appellant was determined to have reached MMI with a permanent work restriction of no lifting greater than fifty pounds. On February 26, 2014, the appointing authority notified appellant to contact Jenkins to discuss any accommodations necessary to facilitate his return to work. In an April 21, 2014 email, appellant explained all the other jobs he has performed while employed with the city and stated that he is "qualified to work in some other capacity where opportunities may be available. His intent was to get another position with the city.

LEGAL ANALYSIS AND CONCLUSIONS

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act

related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The Appointing Authority shoulders the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). 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). Stated differently, 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, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Appellant was charged with "Inability to perform duty," N.J.A.C. 4A:2-2.3(a)(3). There is no dispute here that appellant has a work restriction that limits his ability to lift greater than fifty pounds. Appellant asked for an accommodation in the form of an out of title position with the city. N.J.A.C. 13:13-2.5(b) states:

> An employer must make a reasonable accommodation to the limitations of an employee who is a person with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business. The determination as to whether an employer has failed to make reasonable accommodation will be made on a **case by case** basis.
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> [Emphasis added.]

The Court in Tynan v. Vicinage 13 of the Superior Court, 351 N.J. Super. 385, 400 (App. Div. 2002), held that "while there are no magic words to seek an accommodation," in order to receive an accommodation for a disability, the employee must make clear that assistance for his or her disability is desired. The employer is then to initiate an informal interactive process with the employee to "identify the potential reasonable accommodations that could be adopted to overcome the employee's precise limitation resulting from the disability." Ibid. The record herein contains no evidence that such an interactive process was initiated. The record merely

reflects that the Appointing Authority informed the appellant that they could not accommodate him (A-3).

Here, however, it is clear that the appellant can perform the functions of the position of a Laborer 1 without an accommodation. His only work restriction is to lift no more than fifty pounds. The maximum lifting requirements for the position of a Laborer 1 is fifty pounds. I **CONCLUDE** that the appellant has the ability to perform the duties of a Laborer 1 without accommodation. Therefore, I **CONCLUDE** that the Appointing Authority has not met its burden of proof that appellant has an inability to perform his duties.

Whether the appellant abandoned his employment or refused to return to work as a Laborer 1 because he was of the opinion that he could not perform the job requirements based on his work restrictions is not before this tribunal. Pursuant to N.J.S.A. 11A:2-15, appeals are from "adverse actions" of the appointing authority. In City of Orange v. De Stefano, 48 N.J. Super. 407, 419-20 (App. Div. 1958), the court found:

> Properly stated charges are a sine qua non of a valid disciplinary proceeding. It is elementary that an employee cannot legally be tried or found guilty on charges of which he has not been given plain notice by the appointing authority. The de novo hearing on the administrative appeal is limited to the charges made below.
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> [West New York v. Bock, 38 N.J. 500, 522 (1962).]

Plain notice is the standard to be applied when considering the adequacy of disciplinary charges filed against public employees. Pepe v. Township of Springfield, 337 N.J. Super. 94, 97 (App. Div. 2001). Here, the appellant was only charged with inability to perform duties. The de novo hearing on this appeal is limited to that charge alone.

DISPOSITION

I **CONCLUDE** that the Appointing Authority has not sustained its burden of proof as to the charge of inability to perform duty.

Accordingly, I **ORDER** that the action of the Appointing Authority is **REVERSED** and Henry Green be reinstated to his position of Laborer 1 and be awarded back pay in accordance with the guidelines set forth in N.J.A.C. 4A:2-2.10.

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.

June 8, 2015
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: June 8, 2015

Date Mailed to Parties: June 8, 2015

cmo

APPENDIX
LIST OF WITNESSES

For Appellant:

Henry Green, Appellant

For Respondent:

Paul Jenkins, Director of Public Works

LIST OF EXHIBITS

Joint Exhibits:

J-1 Preliminary Notice of Disciplinary Action dated 4/28/14
J-2 Final Notice of Disciplinary Action Dated 9/16/14

For Appellant:

P-1 Medical Evaluation dated 1/14/14
P-2 Medical Evaluation dated 3/6/14
P-3 Medical Evaluation dated 5/29/14
P-4 Public Works Memorandum dated 3/28/14

For Respondent:

A-1 Correspondence from Assistant Personnel Director dated 2/26/14
A-2 Correspondence from appellant to Paul Jenkins dated 4/21/14
A-3 Email from Paul Jenkins to Assistant Personnel Director dated 4/21/14
A-4 Public Works Memorandum dated 12/16/13