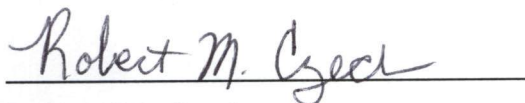


Re: Paul Pereira

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
MARCH 22, 2017

A handwritten signature in cursive script that reads "Robert M. Czech". The signature is written in black ink and is positioned above a horizontal line.

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 06152-16

AGENCY REF. NO. 2016-3197

**IN THE MATTER OF PAUL PEREIRA,
TOWNSHIP OF WOODBRIDGE, DEPARTMENT
OF PUBLIC WORKS.**

Arnold Shep Cohen, Esq., for appellant Paul Pereira (Oxford Cohen, attorneys)

Brett M. Pugach, Esq., for respondent Township of Woodbridge Department of
Public Works (Genova Burns, attorneys)

Record Closed: October 7, 2016

Decided: February 13, 2017

BEFORE **KELLY J. KIRK, ALJ**:

STATEMENT OF THE CASE

The Township of Woodbridge (Township) Department of Public Works (DPW) terminated heavy-equipment operator Paul Pereira after he was observed in a local bar drinking while on duty, for the following: incompetency, inefficiency, or failure to perform duties; insubordination; conduct unbecoming a public employee; misuse of public

property, including motor vehicles; violation of federal regulations concerning drug and alcohol use by and testing of employees who perform functions related to the operations of commercial motor vehicles, and State and local policies issued thereunder; violation of the Township's drug/alcohol policy; and violation of the Township's handbook policies and procedures.

PROCEDURAL HISTORY

Pereira was served with a Preliminary Notice of Disciplinary Action (PNDA) on February 16, 2016. The Township held a hearing on March 11, 2016, after which it issued a Final Notice of Disciplinary Action (FNDA) sustaining all charges and removing Pereira effective March 11, 2016.

Pereira appealed and the Civil Service Commission (Commission) transmitted the contested case to the Office of Administrative Law (OAL), pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, where it was filed on April 21, 2016. The hearing was held on August 1, 2016, and September 7, 2016. The record closed on October 7, 2016, upon receipt of post-hearing closing submissions from the parties.

EVIDENCE AND FINDINGS OF FACT

Background

The following material facts are largely undisputed. Accordingly, I **FIND** them to be the **FACTS** of this case:

Paul Pereira had been employed by the Township as a heavy-equipment operator (HEO) in the DPW since June 18, 2012. Pereira operated many types of heavy equipment, including backhoes, excavators, bulldozers, front loaders, and track loaders. A Class "A" commercial driver license (CDL) is required for an HEO position, because an HEO must be able to drive a tractor-trailer to transport heavy equipment to a job site. A Class "B" CDL is required for a truck driver. HEO is a "safety sensitive" position.

On or about January 23, 2016, and January 24, 2016, a winter storm had left close to thirty inches of snow in the Township. In order to perform the snow-removal operations for the Main Street business area, Main Street and its intersections had been closed from Route 35 all the way down to the Township Hall on January 27, 2016, into January 28, 2016. The Parks Division and Roads Division were on site operating equipment and had basically split the road. Some employees drove front loaders to scoop up the snow on the road or heavier piles and dump the snow into the tandems to be trucked out. Some employees used a backhoe to pull snow off the sidewalks by back-dragging it and removing it. There was also manpower on the sidewalks shoveling snow from areas that the equipment could not reach, like under benches and around street signs.

On January 27, 2016, Pereira had worked his regular shift, which ended at 3:30 p.m. He returned to work at 8:00 p.m. for overtime snow removal. The snow-removal job was not mandatory. Pereira was operating a backhoe on Main Street, back-dragging the snow off the sidewalks and then picking it up and loading it into trucks to be hauled away. The backhoe had the Township logo on each side. That evening (January 27, 2016, into January 28, 2016), while on duty and receiving double-time pay, Pereira entered the Main Tavern, a local bar on Main Street, and left his backhoe parked outside for at least ten minutes.

Some of the other employees performing snow removal complained to Joseph Gregus that Pereira had been in the Main Tavern. Gregus has been employed by the Township DPW as the safety officer since September 2012. Gregus interacts with and oversees DPW employees, but is not their direct supervisor. Gregus is on the road daily with the employees in various divisions.

Later that evening, Pereira again entered the Main Tavern and left his backhoe parked outside for at least ten to fifteen minutes. That time, through the glass window in the Main Tavern door, Gregus observed Pereira inside with a rocks glass in his hand. Gregus contacted Carmine Barbato and advised Barbato that Pereira had been in the Main Tavern. Barbato has been employed by the DPW for forty-one years, and has been the superintendent of Public Works, Division of Streets and Sewers, since 2010. He oversees various projects and crews of the DPW, including HEOs. Barbato was Pereira's

supervisor. Barbato had already left the snow-removal site, and by the time he returned several minutes later, Pereira was again operating his backhoe. Barbato confronted Pereira about being in the bar and removed him from the job site at approximately 12:30 a.m. on January 28, 2016.

Dennis Henry has been employed by the Township for forty-three years, and has been the DPW director for more than ten years. As DPW director, he oversees the operations of the entire DPW, which consists of approximately seven divisions, including Parks and Roads, and he supervises the DPW employees. Henry asked Gregus and Barbato to each provide him with a report of the incident.

Robert Landolfi has been employed by the Township for twelve years as the business administrator. In that capacity, he oversees the day-to-day operations of all the Township's departments, and all department heads report to him. Landolfi prepared the PNDA. A Loudermill hearing was held, at which hearing Pereira admitted he had been drinking on the job.

Pereira received and signed for the Township of Woodbridge Employee Handbook (Employee Handbook) and the DPW's Alcohol and Drug-Free Workplace Policy (DPW Alcohol/Drug Policy) upon being hired in 2012. (R-4; R-5.) Both the Employee Handbook and the DPW Alcohol/Drug Policy remained in effect at the time of the January 2016 incident.

Pereira has no prior disciplinary history with the Township.

Testimony

Paul Pereira testified on his own behalf. Dennis Henry, Carmine Barbato, Joseph Gregus, Robert Landolfi, and David Valguarnera testified on behalf of the Township.

Joseph Gregus

On the night of the January 2016 incident, Gregus was told by other Township employees that Pereira had entered a bar to use the bathroom. The Main Tavern is almost dead center between Route 35 and the other end of Main Street. Gregus saw Pereira come out of the Main Tavern. During the course of the evening, he noticed Pereira was operating the backhoe. Gregus spoke with quite a few employees, and several asked Gregus if he were going to let that go on all evening. One employee told Gregus he suspected Pereira had been drinking, and other employees also felt that Pereira may not have been in the bar for the bathroom.

Gregus later observed the backhoe parked in front of the Main Tavern, running. It struck Gregus as not being right. Gregus waited a few minutes, and then walked up to the Main Tavern door. He looked through the door's glass window and saw Pereira inside. Pereira was with several patrons, having a good time, drinking with a rocks glass in his hand. Gregus was devastated, angry, and could not believe what was happening. In his tenure as safety director, Gregus had never observed another employee in a bar drinking while on duty.

Gregus contacted Barbato, who was in charge of the entire snow-removal operation, and told Barbato what was going on and that he needed him there as fast as he could get there. Gregus observed Pereira leave the bar and get back into the Township backhoe. By the time Barbato arrived, Pereira had driven the backhoe up Main Street toward Route 35 near a hair salon to work on that operation. Barbato and Pereira seemed to have some words in the street. Pereira was removed from the job site. Pereira started to walk back to the DPW, but then Barbato picked him up and took him to the DPW. Gregus remained at the job site.

Barbato returned to the job site and Gregus told Barbato that he had seen Pereira inside the Main Tavern drinking with a rocks glass in his hand. Barbato asked Gregus to go back into the bar and talk to the bartender to verify that Pereira had been in there and that he had been drinking. Gregus went into the bar and introduced himself to the bartender, Tom Sullivan. Sullivan advised that Pereira had been in the Main

Tavern on two separate occasions that evening, and on both occasions had consumed alcohol.

Gregus spoke later with Barbato. They talked about what had happened and what Sullivan had said. Barbato and Gregus both entered the Main Tavern and had the same conversation with Sullivan, but Barbato took the lead. Sullivan again advised that Pereira had come into the Main Tavern on two separate occasions that evening and consumed alcohol.

Gregus did not speak to Pereira at all. Gregus did not stop Pereira from using the backhoe, and he testified that an alcohol test would have been Barbato's decision. Gregus thought Pereira was driving a little erratically—quickly going forward and backward, faster than it should have been done, multiple times. Gregus did not know why he omitted from his statement that Pereira had been driving erratically. Gregus had the authority to remove Pereira from the backhoe, but did not do so because it was such a sensitive issue and he thought it best that Barbato handle it. He did not call Barbato the first time Pereira went into the Main Tavern, because Pereira allegedly had gone in to use the bathroom.

At the request of Henry, Gregus returned to the Main Tavern on January 29, 2016, and asked Sullivan if he would be willing to provide a written statement of what he had told Gregus and Barbato. Sullivan provided Gregus with a written statement, which Gregus provided to Henry.

Gregus testified that the Main Tavern is not the place that you would want to go into even if it were just to use the bathroom, because other people were around and the perception would not have been good. Other places were open at the time, like the Rio Diner, the QuickChek, Township Hall, and the police department basement. The Rio Diner would have been, with the street closed, a thirty- to forty-second drive right to the top of the street, and QuickChek or Township Hall would have been a minute, because it would have been necessary to go around people and vehicles. All those establishments had restrooms and were within walking distance.

Paul Pereira

Pereira testified that the Main Tavern was located right where he had been clearing the snow, and that both times he had gone into the bar he used the bathroom. Pereira first went into the Main Tavern around 11:30/11:45 p.m. to use the bathroom. He testified that he saw a couple people he knew, said "hi" and "bye," and walked out. He also testified that he used the bathroom and was in and out in ten minutes, and also testified that he bought a beer and a shot for someone and walked out. Pereira clarified that after he came out of the bathroom the first time, he saw his two "friends." He later identified them as "Louie" and "Harry." He initially stated that he could not reveal their last names, but thereafter testified that he did not know their last names. Pereira asked them both if they wanted drinks, but Harry declined, so Pereira bought a beer and the shot for Louie.

The second time Pereira went inside was approximately fifteen to twenty minutes later, around midnight. He went inside because he had to use the bathroom again. He used the bathroom and then he bought a beer and a shot of Jack Daniels. He walked out of the bar and went back to his duties. He continued working for thirty to forty-five minutes before Barbato pulled up and called him out of the backhoe. He went to Barbato's truck. Barbato asked him if he was drinking. Pereira was scared and panicked and said "No." Barbato asked Pereira if he could call the police to get a breathalyzer and Pereira said, "Sure, no problem." After Barbato talked to Pereira, two supervisors, Ed Doering and Jim Mulrooney, came over and talked to Pereira. They were right in front of Pereira's face, having a conversation to try to detect the smell of alcohol.

Pereira testified that Barbato told him that Gregus had seen him drinking. Pereira panicked and said he was not drinking. Pereira did not deny going into the bar, because he had used the bar's bathroom. After the conversation with Barbato, Pereira was not permitted to continue working. Barbato took Pereira back to the DPW. Pereira punched out, drove his own vehicle home, and went to sleep. If Barbato had not made him leave, Pereira would have continued to work at the job site. Pereira was upset

because they accused him of being drunk and saying they were going to call for a breathalyzer, but he was not drunk and he thought he deserved to remain on duty.

Pereira knows it was inappropriate to leave his job site and drink alcohol while on duty. He had diarrhea and had to go to the bathroom "real bad," and the Main Tavern was a lot closer than QuickChek. He was clearing snow two stores away from the Main Tavern. QuickChek was two blocks away, and the Rio Diner was around the corner, one block away. He has had to go to the bathroom plenty of times while on duty, and goes to the closest store he can find. He testified that when you have to go to the bathroom, you go to the closest place, but he made a big mistake going into the bar.

According to Pereira, the time difference between going to the Main Tavern and going to the Rio Diner in his backhoe, with all the vehicles and salt spreaders and the road blocked, would have been maybe ten or fifteen minutes. It would have taken him about seven minutes to drive to Township Hall and fifteen minutes to walk there. The QuickChek is just before Township Hall, so maybe a minute less to go there.

On the morning of January 28, 2016, Pereira was scheduled to work at 7:00 a.m. He was exhausted and overslept. A phone call from a coworker woke him up at 9:00 a.m., and Pereira got to work at approximately 10:30 a.m. When he arrived, he went to Barbato's office, but was told to go to Henry's office. Henry asked what happened, and Pereira told him that he went into the Main Tavern to use the bathroom, and he had a beer and a shot. Henry told Pereira that he was suspended and to go home and he would call him tomorrow. Pereira received a call the next day at 10:00 a.m. to take a drug-and-alcohol test at 11:00 a.m. The results were negative. Henry recommended that Pereira talk to a drug-and-alcohol counselor. Pereira did so and paid out of pocket. Pereira also completed an education and rehabilitation program, but they did not find anything wrong with him.

Pereira does not know what caused him to do what he did that evening. He was working overtime, and had been working nonstop. Pereira was not required to work overtime, but when it snows he never says no to money like that. He was exhausted, not thinking, and not in the right frame of mind. He is also diabetic. He has never been

in trouble, has had no problems, and anything they wanted him to do, he did. Pereira was not erratic. He lied to his supervisor because he was scared and wanted to protect his job.

Carminé Barbato

Barbato was unsure of what time he left the job site on the night of the January 2016 incident. Shortly after he left, Gregus called and texted him to tell him that he needed to return as soon as possible because men were complaining that Pereira had come out of the Main Tavern. Barbato returned to the job site within six to eight minutes. When he arrived, Pereira was operating the backhoe like he was supposed to be, but the guys were complaining that Pereira had come out of the Main Tavern. Barbato did not witness anything unusual or erratic about Pereira's driving, and no one told Barbato that night that Pereira's driving was unusual or erratic. Barbato pulled Pereira out of the backhoe and asked him if he had been in the Main Tavern. Pereira admitted that he had been in the Main Tavern, and when Barbato asked what he had been doing in there, Pereira told Barbato that he "went in to take a shit." Barbato asked Pereira if he had been drinking, but Pereira denied that he had been drinking. Barbato did tell Pereira that he would call for a breathalyzer, and Pereira told him that was not a problem. Barbato did not call for the breathalyzer because Pereira told him he "took a shit." Barbato had two supervisors on site, Jim Mulrooney and Ed Doering, get right in front of Pereira to determine if they detected an odor of alcohol, but reasonable suspicion was not established. Barbato thought the two had been trained in reasonable suspicion, but thereafter learned that they had not.

Barbato took Pereira back to the DPW and made him punch out and leave the premises. After Pereira punched out, Barbato returned to the job site. That is when Barbato found out that Gregus had observed Pereira in the Main Tavern with a rocks glass in his hand.

Barbato and Gregus went into the Main Tavern so Barbato could interview the bartender. The bartender told them he had served Pereira drinks. If Barbato had known earlier that Gregus had observed Pereira with a rocks glass or if Pereira had

admitted to drinking alcohol, he probably would have called the police and had the police administer a breathalyzer.

In a town of 100,000 people, Barbato cannot have an employee coming out of a bar while working. Pereira was operating a backhoe, pulling the snow off Main Street, which is very much considered a safety-sensitive function.

David Valguarnera

David Valguarnera has been employed by the Township for approximately ten years, and has been a truck driver for approximately the past four or five years. As a truck driver, he interacted with other DPW employees, including Pereira. Valguarnera was working with Pereira on the night of January 27, 2016, into January 28, 2016, cleaning snow from Main Street. Valguarnera was hauling snow from Main Street to the Community Center, where the ice melter was. The snow was getting loaded into Valguarnera's truck by an operator. Pereira was in a backhoe cleaning the street and sidewalks, getting ready to load the trucks.

Valguarnera saw Pereira's backhoe parked outside the Main Tavern, farther down from where they were working. Valguarnera was surprised to see it there and spoke to Craig Mackenzie and Gregus about it. It was a general conversation about whether Pereira perhaps had broken down, or there was something wrong with the machine, or if Pereira was on his cell phone, because they were waiting to get loaded up. It was weird that, out of the blue when they were working on upper Main Street, the backhoe was down at the Main Tavern.

Valguarnera later saw Pereira operating his backhoe, scraping down the sidewalk and dumping the snow into the truck. Pereira was operating his vehicle somewhat "erratic" based on just the speed on a closed road at night, forward and reverse, when there were people standing around shoveling the sidewalks and Valguarnera was standing outside his truck watching it get loaded. Valguarnera felt that something was not right and that other operators do not act in that manner with the backhoe. Valguarnera was concerned because he did not want to get hit, and he is

responsible for his truck, so he did not want the backhoe to crash into his truck. Valguarnera spoke to Gregus about it that night because Gregus was the safety officer on duty.

Valguarnera explained that by "erratic" he meant moving faster than normal on a closed street. He did not recall anything else about Pereira's driving.

Dennis Henry

Rules regarding drugs and alcohol for a CDL holder are governed by federal regulations. Drinking on the job and operating a vehicle is a violation of Township policies and federal Department of Transportation (DOT) policies. Drinking before or while operating heavy equipment or performing safety-sensitive functions at work is prohibited. Drinking while on the job is prohibited even if not operating a vehicle. The Township has an Employee Handbook and a DPW Alcohol/Drug Policy. The purpose of the DPW Alcohol/Drug Policy is to keep employees, coworkers, and residents safe when the DPW is working. If the DPW Alcohol/Drug Policy is not followed, employees could damage equipment or injure themselves, coworkers, or residents.

Henry was not present for the January 2016 incident. He was advised of it by Barbato and Gregus the following morning. Henry asked them if Pereira were in, but he was not and had not called in for his 7:00-a.m. scheduled shift as required. Henry asked Barbato and Gregus each to provide him with a report, and to obtain a written statement from Sullivan. Henry received the reports and written statement.

Henry understood that Pereira had denied drinking when asked by Barbato, but later testified at the Loudermill hearing that he had been drinking. Pereira was on duty that night and being paid to work at the snow rate, which was double time, and he was operating a backhoe, performing safety-sensitive functions. Henry was also told by the safety officer that employees had concerns about the way he was operating the equipment on site.

Pereira's discipline was not based on a random drug or alcohol test. Per the DOT, the window of opportunity for an alcohol test is within two hours, and cannot exceed eight hours. Pereira did not show up for his scheduled shift, so he could not be tested. Henry did not attempt to contact Pereira. When Pereira was a no call/no show, Henry was not sure what was going on, and he was not going to be able to get a DOT alcohol test. If Pereira had worked his scheduled shift, the Township would have been within the required eight hours, and he would have been tested.

After a meeting with Barbato and Henry, Pereira volunteered to take a test, so he was given a test on January 29, 2016. Henry felt that there would have been reasonable suspicion to have tested Pereira on site because Gregus had seen Pereira in the tavern with a glass in his hand. However, Gregus did not have the authority to have Pereira tested. The authority would lie with Barbato, but Barbato's report stated that he was not aware that Gregus had seen Pereira with a drink in his hand until after he had escorted Pereira to the DPW to punch out and returned to the job site. An alcohol test was not administered on site because Pereira denied drinking and Barbato did not feel he had reasonable suspicion at that time. If Barbato had known Pereira was seen with a drink he would have felt he had reasonable suspicion.

Robert Landolfi

Landolfi signs all major discipline notices and served as the hearing officer for Pereira's Loudermill hearing and departmental hearing. Charges were brought against Pereira because his actions violated several policies and levels of decorum expected of a municipal employee, and removal was sought because of the setting. The Township was performing snow-plowing and snow-removal operations for the worst storm in Township history—over thirty inches. While on duty, receiving double pay, Pereira abandoned his safety-sensitive job and twice entered a local tavern, consumed alcohol, and fraternized with patrons. He returned to a clearly marked Township vehicle, and continued to perform his job in a manner that caused fellow employees to be concerned. He was asked by a supervisor if he had been drinking, but denied drinking. He was sent home and therefore was no longer able to aid Township efforts.

Pereira was insubordinate because he was asked a direct question by a supervisor and was purposefully deceitful when he denied drinking. He was expected to be truthful, and his lie impacted decisions that were made. Pereira misused municipal equipment, because he took a clearly marked municipal vehicle to a local tavern, consumed alcohol, and returned to and operated the equipment in an inappropriate manner, causing coworkers to be concerned for their equipment and safety. Pereira also violated federal CDL regulations and Township regulations by drinking and driving while on duty.

Pereira impeded the Township's obligation to its citizens and did so in a manner that reflected very poorly on the Township and his department. Anything less than termination would send the wrong message to coworkers and the public, who have a right to expect better of public employees and government in general.

Factual Discussion

A credibility determination requires an overall evaluation of the testimony in light of its rationality or internal consistency and the manner in which it "hangs together" with 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. Spagnuolo v. Bonnet, 16 N.J. 546, 555 (1954). It must be such as the common experience and observation of mankind can approve as probable in the circumstances. Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961). "The 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).

Pereira's testimony was contradicted by a number of witnesses, and at times was not probable under the circumstances. His testimony about the two patrons in the bar was stilted and inconsistent. He testified that the patrons who had purchased the alcohol for him, and for whom he had purchased alcohol, were friends, but then he was hesitant about their names and testified that he had only seen them around town while

he was plowing. Additionally, Pereira's testimony was that he had only gone into the Main Tavern rather than another establishment with a bathroom because that was the closest place and he had diarrhea. However, if that were true it seems unlikely that he would be inclined to consume alcohol.

Gregus testified that he saw Pereira's backhoe parked outside the Main Tavern, and he walked down and looked inside the bar and saw Pereira. His written report reflects that at 12:08 a.m. he saw Pereira enter the Main Tavern, and was then approached by several employees who asked how long he was going to allow that to go on. (R-1.) Given the difference, it is not entirely clear whether Gregus saw Pereira enter the Main Tavern or at what time he entered, but his testimony and statement, as well as the statements of others who spoke to Gregus, were consistent in that Gregus had observed Pereira with a rocks glass in his hand inside the bar. Additionally, the bartender's statement reflects that on two occasions that evening he served a Township employee beer and shots, and Pereira testified that he had a beer and a shot. (R-2.)

With respect to Pereira's driving, the testimony of Gregus and Valguarnera was almost identical in that Pereira's forward and reverse speed was "erratic," because it was too fast. Normally, consistency would bolster the reliability of the testimony, but in this case, the significant similarity in the terminology used, coupled with a general lack of specificity other than that Pereira was driving too quickly in forward and reverse, appeared contrived. Faster is not a manner generally expected or consistent with use of the term "erratic," and there was not a single incident report that referenced erratic driving or that Pereira's speed was too fast. The testimony that Pereira's driving was erratic or unsafe is further undermined by the failure of a single person, including supervisors on site, to instruct Pereira to drive slower or to remove him from his backhoe, and by Barbato's testimony that he did not observe Pereira driving erratically. Further, although Barbato had not had the opportunity to observe Pereira's driving for as long as some of the others, it is significant that no one told him that night that there was anything unusual about Pereira's driving. Accordingly, I ascribe greater reliability to Barbato's testimony, and credit Barbato's testimony that he was not aware that Gregus had seen Pereira with a rocks glass in his hand until after Pereira had punched out and gone home. Additionally, although Pereira testified that he told Barbato and Henry that

he had a beer and a shot later on January 28, 2016, I credit Barbato's and Henry's testimony that Pereira never admitted to them that he consumed alcohol. Rather, it was not until the Loudermill hearing on February 3, 2016, that Pereira admitted to having consumed alcohol.

Having had an opportunity to consider the evidence and to observe the witnesses and make credibility determinations based on the witnesses' testimony, I **FIND** the following additional material **FACTS** in this case:

After Pereira had entered the Main Tavern the second time, he was observed by Gregus with a rocks glass in his hand. Other patrons were inside the Main Tavern. Gregus contacted Barbato, who had left the site, and Barbato returned and briefly observed Pereira operating the backhoe. Barbato did not observe anything unusual or erratic about Pereira's driving and no employee advised Barbato that Pereira's driving had been unusual or erratic. Barbato escorted Pereira back to the DPW and Pereira punched out. Barbato returned to the job site, at which time Gregus advised him that he had observed Pereira with a rocks glass in his hand inside the bar. At the request of Barbato, Gregus went into the Main Tavern to confirm that Pereira had been inside drinking. Sullivan confirmed that he had on two separate occasions that evening served Pereira alcohol. Gregus informed Barbato of what Sullivan had said, and both Gregus and Barbato went into the Main Tavern to again speak to Sullivan, who again confirmed what he had told Gregus.

Pereira consumed at least one beer and at least one shot of whiskey while on duty that night.

LEGAL ANALYSIS AND CONCLUSIONS

N.J.S.A. 11A:1-1 through 12-6, the "Civil Service Act," established the Civil Service Commission in the Department of Labor and Workforce Development in the Executive Branch of the New Jersey State government. N.J.S.A. 11A:2-1. The Commission establishes the general causes that constitute grounds for disciplinary action, and the kinds of disciplinary action that may be taken by appointing authorities

against permanent career-service employees. N.J.S.A. 11A:2-20. N.J.S.A. 11A:2-6 vests the Commission with the power, after a hearing, to render the final administrative decision on appeals concerning removal, suspension or fine, disciplinary demotion, and termination at the end of the working test period of permanent career-service employees.

N.J.A.C. 4A:2-2.2(a) provides that major discipline shall include removal, disciplinary demotion, and suspension or fine for more than five working days at any one time. An employee may be subject to discipline for a number of reasons enumerated in N.J.A.C. 4A:2-2.3(a), including incompetency, inefficiency or failure to perform duties (N.J.A.C. 4A:2-2.3(a)(1)); insubordination (N.J.A.C. 4A:2-2.3(a)(2)); conduct unbecoming a public employee (N.J.A.C. 4A:2-2.3(a)(6)); misuse of public property, including motor vehicles (N.J.A.C. 4A:2-2.3(a)(8)); violation of federal regulations concerning drug and alcohol use by and testing of employees who perform functions related to the operation of commercial motor vehicles, and State and local policies issued thereunder (N.J.A.C. 4A:2-2.3(a)(10)); and other sufficient cause (N.J.A.C. 4A:2-2.3(a)(12)). In appeals concerning such major disciplinary actions, the burden of proof shall be on the appointing authority to establish the truth of the charges by a preponderance of the believable evidence. N.J.A.C. 4A:2-1.4; N.J.S.A. 11A:2-21; Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

The Employee Handbook and the DPW Alcohol/Drug Policy state that “the abuse of alcohol and/or drugs by Township employees is incompatible with the Township’s obligation to seek to provide a safe and productive work environment and its responsibility to the public to insure their safety and trust in the Township.” (R-4; R-5.) The Employee Handbook and the DPW Alcohol/Drug Policy also state:

Any Township employee reporting for work and found to be under the influence of alcohol or drugs or using drugs or alcohol while at work . . . will be subject to disciplinary action up to and including termination. This policy is in effect for all employees while on Township property, to include the parking lots, or while engaged in Township business.

[R-4; R-5.]

Both provide for a drug-testing program, but the DPW Alcohol/Drug Policy is more extensive and includes random testing. The DPW Alcohol/Drug Policy additionally reflects that the drug-testing program would also be to comply with the Department of Transportation regulations that it would be in effect for all CDL holders. (R-5.)

Citing the "Return to Duty Testing," appellant argues that removal is inappropriate and that at most a thirty-day suspension should apply. The Return to Duty Testing states, in pertinent part:

Notwithstanding the above, the Township reserves the right to take disciplinary action against an employee for a positive drug or alcohol test. An employee who tests positive on a **random drug/alcohol test** may be subject to disciplinary action, but will not be terminated for testing positive on the first random drug/alcohol test. A first offense under a **random drug/alcohol test** shall result in a minimum of a thirty (30) day suspension. A first offense shall remain on an employee's record for a ten (10) year period. An employee shall be subjected to immediate termination for a second offense during the ten (10) year period. Employees who test positive to other types of drug and alcohol screening conducted in accordance with this policy may be subject to disciplinary action up to and including termination.

[R-5.]

From the emphasis, it is evident that the thirty-day suspension applies specifically to a "random" test, and a random test is not implicated in this matter. Further, it is noted that "SUBSTANCE ABUSE REALTED [SIC] BEHAVIOR" reflects that "[a]ny employee engaging in the manufacture, distribution, dispending [sic], possession or use of prohibited substances on Township premises, in Township vehicles, or while on Township business may face disciplinary action, up to and including termination." (Ibid.)

Appellant argues that the Township failed to prove Pereira was under the influence of alcohol or that he was operating the backhoe unsafely, and that "he was merely taking an unauthorized break." While there is no dispute that Pereira consumed alcohol, I concur that there was no proof that Pereira was impaired. However, it is noted that there was no

test to establish Pereira's blood-alcohol concentration, in part because Pereira had denied consumption of alcohol when asked at the site by his supervisor. Additionally, while I concur that the evidence fell short of establishing that the backhoe was being operated "erratically," it likewise fell short of establishing that it was safe for Pereira to have been operating the backhoe. Further, had Pereira's conduct been merely an "unauthorized break," violations of State and federal law would not have been implicated.

The Civil Service Commission may increase or decrease the penalty imposed by the appointing authority, though removal cannot be substituted for a lesser penalty. N.J.S.A. 11A:2-19. When determining the appropriate penalty, the Board must utilize the evaluation process set forth in West New York v. Bock, 38 N.J. 500 (1962), and consider the employee's reasonably recent history of promotions, commendations and the like, as well as formally adjudicated disciplinary actions and instances of misconduct informally adjudicated. Since West New York v. Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct: to support the imposition of a more severe penalty for a public employee who engages in habitual misconduct, and to mitigate the penalty for a current offense. In re Herrmann, 192 N.J. 19, 30-33 (2007). However, in an instance where an employee commits an act sufficiently egregious, removal may be appropriate notwithstanding the lack of prior history of infractions. See, e.g., In re Herrmann, supra, 192 N.J. 19.

According to the Supreme Court, progressive discipline is a worthy principle, but it is not subject to universal application when determining a disciplined employee's quantum of discipline. Id. at 36.

Although progressive discipline is a recognized and accepted principle that has currency in the [Civil Service Commission's] sensitive task of meting out an appropriate penalty to classified employees in the public sector, that is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty 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.

Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580, 410 A.2d 686 (1980); Bowden v. Bayside State Prison, 268 N.J. Super. 301, 306, 633 A.2d 577 (App.Div. 1993), certif. denied, 135 N.J. 469, 640 A.2d 850 (1994).

[Id. at 33–34.]

The theory of progressive discipline is not a fixed and immutable rule to be followed without question, as some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007). The Supreme Court has noted that “the question for the courts is whether the punishment is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one’s sense of fairness.” Ibid. (citing In re Polk License Revocation, 90 N.J. 550, 578 (1982)). The Supreme Court also noted that the Appellate Division has likewise acknowledged and adhered to this principle where the acts charged, regardless of prior discipline, warranted the imposition of the sanction. In re Carter, supra, 191 N.J. at 485.

Pereira’s arguments for a suspension are unpersuasive in view of the totality of the circumstances. While on snow-removal duty receiving double-time pay, and in view of the general public, Pereira twice left his Township backhoe parked outside of the Main Tavern and entered the Main Tavern. He was inside at least ten minutes each time, and on at least one occasion he consumed beer and whiskey and fraternized with other patrons. Then, after consuming the alcohol, he returned to his Class-“A”-CDL-required HEO safety-sensitive job operating a backhoe in the vicinity of other heavy equipment and Township employees. Although there is no dispute that Pereira had no prior disciplinary history in his approximately three and a half years of employment with the DPW, his conduct was sufficiently egregious to warrant removal in the absence of prior disciplinary history, and I

CONCLUDE that sufficient cause was established by the Township to warrant Pereira's removal from his position as a heavy-equipment operator.

ORDER

I **ORDER** that the charges against Pereira are **SUSTAINED** and that the Township's removal of Pereira from his position of heavy-equipment operator, effective March 11, 2016, is hereby **AFFIRMED**.

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.

2/13/17
DATE

Kelly J. Kirk
KELLY J. KIRK, ALJ

Date Received at Agency:

2/14/17

Date Mailed to Parties:
dlc

2/14/17

APPENDIX

WITNESSES

For Appellant:

Paul Pereira

For Respondent:

Joseph Gregus

David Valguarnera

Carmine Barbato

Dennis Henry

Robert Landolfi

EXHIBITS IN EVIDENCE

Joint

J-1 PNDA

J-2 FNDA

For Appellant:

None

For Respondent:

R-1 Incident Report of Gregus, dated January 29, 2016

R-2 Statement of Sullivan, dated January 29, 2016

R-3 Incident Report of Barbato, dated January 28, 2016

R-4 Employee Handbook

R-5 Alcohol and Drug-Free Workplace Policy

R-6 Employee Handbook Acknowledgment

R-7 Appendix A