STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION

In the Matter of Juan Cortes, Jersey City School District

CSC Docket No. 2017-3112
OAL Docket No. CSV 05253-17

Remand to the
Office of Administrative Law

ISSUED: MAY 25, 2018 (ABR)

The appeal of Juan Cortes, a Boiler Operator with the Jersey City School District, of his 90 working day suspension, on charges, was heard by Administrative Law Judge Kimberly A. Moss (ALJ), who rendered her initial decision on March 19, 2018. Exceptions were filed on behalf of the appointing authority.

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 2, 2018, ordered that the matter be remanded to the Office of Administrative Law (OAL).

DISCUSSION

The appellant, a male, was charged with conduct unbecoming a public employee and other sufficient cause. Specifically, the appointing authority asserted that the appellant had sexually harassed S.W., a female Custodial Worker, on multiple occasions. Upon the appellant's appeal to the Commission, the matter was transmitted to the OAL as a contested case.

At the OAL, only four witnesses testified: the appellant; Henry Padua, a Maintenance Supervisor; Jody Walker, Esq., an attorney retained by the appointing authority to investigate S.W.'s complaint; and Celeste Williams, Chief of Talent, who supervised the Affirmative Action Office and the discipline of instructional and non-instructional employees. Padua had received S.W.'s complaint and initially

investigated the matter. Padua interviewed four witnesses[1] before the matter was referred to the appointing authority's Human Resources Department. Padua recorded S.W.'s statement with her consent. Walker was subsequently retained by the appointing authority to investigate the matter. During her investigation, she interviewed the appellant, S.W., Serrano, Santiago and Smith. She also interviewed Michael Charles, a Boiler Operator, along with Glenda Jennings and Robert O'Connor, the Principal and the Assistant Principal, respectively, at P.S. #41, where the incidents were alleged to have occurred. Padua and Walker testified that Serrano and Santiago claimed that the appellant had asked Serrano if he was having sex with S.W. and he told Serrano that if he was having sex with S.W., then the rest of them should also get to have sex with her. During her interview with Padua, Smith denied hearing those comments. However, during her interview with Walker, Smith indicated that she heard the appellant ask Serrano if he was having sex with S.W. Walker testified that Serrano and Santiago also stated that they witnessed another incident where the appellant leered at S.W.'s genital area in a sexually suggestive manner. The ALJ noted that although S.W., Serrano, Smith and Santiago were witnesses to alleged incidents of harassment, none of them testified. The ALJ also observed that Smith had given conflicting statements about what she did and did not observe to Walker and Padua. Accordingly, the ALJ found that the only evidence against Cortes that was presented was hearsay and that no legally competent evidence existed in the matter to support the finding that the appellant sexually harassed S.W. Therefore, the ALJ concluded that the appointing authority failed to prove by a preponderance of evidence that the appellant was guilty of the charges. Accordingly, the ALJ recommended that the appellant's 90 working day suspension be reversed.

In its exceptions, the appointing authority argues, in relevant part, that the ALJ failed to recognize that Padua's testimony supported a finding of fact that Santiago was present when the appellant asked Serrano if he had sexual relations with S.W. and it maintains that such a finding could have changed the outcome of the ALJ's initial decision. Additionally, the appointing authority maintains that the credible testimony of Walker and Padua provided a residuum of legally competent evidence that was sufficient to support a finding of fact that the appellant asked Serrano if he was having sex with S.W. It maintains that because the ALJ did not find that the admission of that hearsay evidence would have consumed an undue amount of time, created substantial undue prejudice or caused confusion, the ALJ should have weighed its probative value. Finally, it contends that the ALJ failed to accord sufficient probative value to Padua's recording of S.W.'s complaint. Accordingly, it argues that the evidence it presented at the OAL supports the charges and the major suspension it imposed.

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[1] Padua interviewed Peter Serrano, a Head Custodian; Robert Santiago, a Custodial Worker; Maranda Smith, a Custodial Worker; and Leroy Minatee, a Custodial Worker.

Upon its *de novo* review of the record, the Commission finds it necessary to remand this matter so that S.W., Santiago, Serrano and Smith can be called as witnesses. In this regard, it is well established that hearsay evidence is admissible before the OAL as long as some legally competent evidence exists to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. *See N.J.A.C.* 1:1-15.5(b) (Also known as the Residuum Rule); *See also e.g., Matter of Tenure Hearing of Cowan,* 224 *N.J. Super.* 737 (App. Div. 1988). Based on the current record of this case, the Commission agrees that there was no legally competent evidence to support a finding that the appellant sexually harassed S.W. However, the seriousness of the accusation of significant and repeated instances of sexual harassment cannot be ignored. To reverse the appellant's 90 working day suspension is especially troubling given the fact that the record shows that S.W., Serrano, Santiago and Smith claimed to have witnessed the appellant's conduct and yet were not called to testify at the OAL. The appellant was the only witness to the incidents who testified at the OAL and although he denied staring at S.W.'s genitals, he confirmed that Serrano, Santiago, Minatee and Smith were present when he asked if a relationship existed between Serrano and S.W. because she was not assigned as much work as other staff members.

Thus, the Commission is compelled to invoke its subpoena powers pursuant to *N.J.S.A.* 11A:2-7 which states in pertinent part that:

> The commission may subpoena and require the attendance of witnesses in this State and the production of evidence or documents relevant to any proceeding under this title. Those persons may also administer oaths and take testimony.

Therefore, in the interest of the public and so that justice may be served, the Commission orders that the case be remanded back to the OAL for the appointing authority to call S.W., Serrano, Santiago and Smith as witnesses. The appellant will have the opportunity to cross examine these witnesses. If the appointing authority does not call these witnesses, the Commission authorizes the ALJ, pursuant to her powers under *N.J.A.C.* 1:1-14.6(n), to act in its stead to take the testimony of these witnesses. Without such testimony, the Commission cannot determine whether or not the recommendation of the ALJ to dismiss the charges is appropriate.

ORDER

The Commission orders that this matter be remanded to the OAL for further proceedings as set forth above.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 2ND DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 05253-17
AGENCY DKT NO. N/A

IN THE MATTER OF JUAN CORTEZ,
JERSEY CITY SCHOOL DISTRICT.

Theresa L. Moore, Esq., for petitioner (Riker, Danzig, Scherer, Hyland, Perreti)

Seth Gollin, Esq., for respondent appearing pursuant to N.J.A.C. 1:1-5.5(g)

Record Closed: March 5, 2018 Decided: March 19, 2018

BEFORE **KIMBERLY A. MOSS**, ALJ:

STATEMENT OF THE CASE

Juan Cortez (Cortez or petitioner), filed an appeal of respondent, Jersey City School District's (JCSD or respondent), ninety-day civil service suspension from the position of Boiler Operator for conduct unbecoming and other sufficient cause for allegations of sexual harassment.

PROCEDURAL HISTORY

The matter was transmitted to the Office of Administrative Law (OAL) and filed on April 19, 2017. This matter was heard on October 31, 2017, November 16, 2017, and January 16, 2018. The parties submitted closing briefs on March 5, 2018, on which date the record closed.

STIPULATION OF FACTS

The parties stipulated to the following **FACTS**:

1. On May 25, 1999, petitioner Juan Cortez was appointed by the Jersey City Public Schools as a custodial worker.

2. On June 1, 2016, petitioner was transferred from P.S. #33 to P.S. #41, as a boiler operator on the day shift.

3. On August 19, 2016, a female custodian (S.W.) complained in an email to Peter Serrano of harassment by petitioner at P.S.#41.

4. On August 29, 2016, the School District placed petitioner on administrative leave with pay pending the investigation of S.W.'s complaint by the School District's OAA.

5. On or about November 18, 2016, the OAA investigation was concluded and a report was provided to the School District.

6. On January 3, 2017, the School district brought disciplinary charges against Petitioner based on unbecoming conduct and other sufficient cause, based on the results of the OAA investigation.

7. By letter dated January 10, 2017, an Affirmative Action Officer advised petitioner that a written complaint of sexual harassment by him was received on September 15, 2016, and that an independent investigation was conducted which yielded substantial evidence to support the conclusion that petitioner violated the district policy against sexual harassment.

8. On January 25, 2017, a departmental hearing was held on the charges of unbecoming conduct and other sufficient charge.

9. The School District issued to petitioner a Final Notice of Disciplinary Action dated March 17, 2017.

10. The School District imposed a ninety-day suspension on petitioner for unbecoming conduct, effective March 20, 2017.

11. On or about July 21, 2017, petitioner was reinstated to employment with the School District and assigned as a boiler operated at M.S. #41.

TESTIMONY

Jody Walker

Jody Walker (Walker) is an attorney with the Law Firm of Schwartz, Simon, Edelstein Celso. She has been employed there for three years. Ninety-five percent of her work is in employment law. She has conducted investigations of workplace harassment.

Walker investigated a complaint of sexual harassment made by S.W. against Cortez. She had previously investigated a sexual harassment complaint against Cortez for JCSD. She met with Cortez in regard to the prior allegation. Regarding the prior allegation she did not find enough information to prove the he sexually assaulted the woman in that incident. Hope Blackburn, general counsel for JCSD, requested Walker

conduct this investigation. Walker had an initial meeting with Gary Murphy, the Affirmative Action Officer for JCSD.

S.W. filed a complaint of harassment on September 15, 2016. Walker received a copy of the complaint. S.W. was a custodian at M.S. 41 and Cortez was a boiler operator at M.S. 41 during the summer of 2016. Peter Serrano (Serrano) was the head custodian at M.S. 41. Henry Padua (Padua) was the supervisor of custodial staff for M.S. 41.

On August 19, 2016, S.W. emailed Serrano that she was uncomfortable with Cortez. He would override assignments given to her by the head custodian. He singled her out. She told him to only say hello or good-bye to her and he said that was not good with him. Cortez was placed on administrative leave with pay on August 29, 2016, pending the investigation.

Walker testified that S.W.'s complaint was based on sexual harassment. In the complaint, she also listed affectional sexual orientation as the basis for her complaint, but she stated that was a mistake. S.W. wrote a statement regarding her complaint. She stated that Cortez told the head custodian of S.W. "she gets a lot of privileges—you must be fucking her and if you are fucking her we all need to fuck her." Serrano and Santiago confirmed this comment. Serrano looks at her in an intimidating manner. She knows that she does not take orders from Cortez. On August 16, 2016, S.W. was talking to Mike Charles, the night boiler operator, and Cortez interrupted their conversation to ask why was she always late. Cortez appeared to be attempting to record S.W.

Walker met with Art Youmans, the head of security for JCSD. They interviewed several witnesses together. S.W. was interviewed at MS 41. During the interview S.W. stated that originally, she did not have a problem with Cortez. He told her she was pretty and she was okay with that. He later became aggressive. He would stand in her space and become angry when she spoke to other men. He tried to give orders and

became preoccupied with her when she came to work. He leered at her in sexually suggestive ways. S.W. recalled once when she was sitting with her legs open and Cortez leered at her vaginal area. She did not feel safe with Cortez. There were multiple times that Cortez made S.W. feel uncomfortable. S.W. went to the Affirmative Action Officer to complain of Cortez sexual harassment.

Walker interviewed Henry Padua. Gary Murphy, the Affirmative Action Officer, was present for the interview, which took place at the Board's main office. Padua knew Cortez and that Cortez had a history of conflict with employees. Cortez was assigned to the Board's main office because of a physical confrontation with a student's uncle. In addition, a female custodian stated that Cortez had been aggressive with her. A female custodian complained that Cortez was recording her. Padua spoke to Cortez about recording employees. Padua spoke to Serrano, Santiago, and S.W. Santiago and Serrano confirmed that Cortez asked Serrano if he was having sex with S.W.

Walker interviewed Serrano at MS 41. Serrano stated that Cortez was preoccupied with S.W. and had asked if she had a boyfriend. He talked about how she looked and where she was. Cortez asked Serrano if he was having sex with S.W. and stated that they all needed to have sex with her. Serrano was offended and denied sleeping with S.W. Serrano was present when Cortez was leering at S.W. vaginal area.

Walker interviewed Michael Charles with Youmans present. He knew Cortez. Cortez asked him did S.W. have a boyfriend. Cortez interrupted a conversation between Charles and S.W. S.W. told Cortez to keep it professional and Cortez refused. Cortez then motioned to record S.W.

Walker and Youmans interviewed Santiago at M.S. 41. He had previously known Cortez. Cortez asked about S.W.'s skin and ethnicity. Cortez asked him if S.W. and Serrano were having sex. Youmans stated that he was present when Cortez asked Serrano if Serrano and S.W. were having sex. Santiago saw Cortez leer at S.W.'s vaginal area. It was obvious and made him uncomfortable.

Walker also interviewed Miranda Smith, a female custodian at MS 41. Smith did not hear Cortez comment on S.W.'s appearance or give her orders. She was present when Cortez asked Serrano if he was having sex with S.W. She thought the comment was highly inappropriate. Walker also interviewed Glenda Jennings, the principal of MS. 41. Jennings said that Cortez was a great custodian and she did not know of S.W.'s allegations against Cortez. Cortez told Jennings that Serrano and S.W. were in a relationship. Jennings thought this was strange since Serrano had written up S.W.

Robert O'Connor received a complaint from S.W. regarding Cortez's treatment of her. O'Connor interviewed Cortez at the Board offices. Cortez's union representative was present. Cortez initially denied everything. He later admitted that he called S.W. pretty and asking Serrano if he and S.W. were in a relationship. O'Connor did not ask Cortez to supervise the staff. Cortez said that S.W. could come in when she wanted and took two weeks off. He was not interested in the other custodians. Cortez spoke to Serrano regarding S.W.'s punctuality, which was odd because Cortez had issues with punctuality.

Cortez called Walker and stated that Serrano and S.W. bullied him. He complained about the bullying to O'Connor. O'Connor denied this. Cortez stated that he was depressed on medication and had anxiety.

There was an incident where Cortez told S.W. to wet-vac the floor that had been stripped. S.W. refused because she did not have to take orders from Cortez. Serrano then asked her to change her footwear. Serrano did not generally give women custodians heavy work.

Walker is familiar with the JCSD's sexual harassment policy. She did not discuss the policy with the people she interviewed. She reviewed Cortez's personnel file. There was a previous complaint by a female custodian against Cortez at P.S. 33. She investigated that complaint. Walker reviewed the notes in the prior complaint as part of this investigation. She also reviewed S.W.'s personal file. S.W. had not filed any other

harassment complaints. She did have disciplines for falsifying a timesheet. Cortez received a written reprimand for an incident that occurred at Ferris High School with a female custodian in 2011. Cortez had exhibited aggressive and violent behavior at work. He had a history of intimidation of coworkers.

Walker concluded that Cortez's behavior violated the policy and created a hostile work environment based on sexual harassment because he leered at S.W., asked if she and Serrano were having sex, and tried to record her. Walker sent a report regarding her findings. She did not participate in Cortez departmental hearing.

Henry Padua

Henry Padua (Padua) is the maintenance supervisor for the Jersey City Board of Education. His office is in the Board's central office. MS 41 is one of the schools that he supervises. In September 2016 S.W. approached him stating she felt uncomfortable and listed complaints. She came to his office to make a statement, which he recorded with her consent. Padua told S.W. to file a complaint. The Board has web training on affirmative action. S.W. was in fear from Cortez and felt threatened by him.

Padua investigated S.W.'s complaint. He spoke to Serrano, Leroy Minatee, Miranda Smith, and Robert Santiago. Serrano stated that Cortez asked about the treatment S.W. received, if Serrano and S.W. were having sex, and if they were he should "share the wealth." Serrano stated that S.W. was not getting special privileges or treated special. When he is at MS 43 Serrano is in charge and gives directions. Minatee and Smith stated they did not hear anything at MS 41 during the summer of 2016. Padua spoke to Cortez within one week of S.W. allegations. He then turned the matter over to his supervisor, Kevin Reilly, who forwarded it to Human Resources. He did not record his interview of Serrano or anyone other than S.W.

S.W.'s allegations regarding when Cortez gave her an order regarding stripping floors and Cortez sticking his chest out were not sexual harassment allegations. Prior

to the allegations Padua knew S.W. She had been disciplined for attendance and work not being up to par. He was involved in S.W. disciplinary hearing and did not believe her.

Celeste Williams

Celeste Williams (Williams) is the chief of talent at JCPS. The title chief of talent was previously chief of Human Resources. She supervised the Affirmative Action Office and discipline of instructional and non-instructional employees. She receives documents of discipline investigations, then works with the legal department to follow-up on disciplinary proceedings. There is zero tolerance for sexual harassment. There is an annual sexual harassment training for all employees by computer with follow up. Gary Murphy is the Affirmative Action Officer for JCPS. Murphy disseminated the sexual harassment policy.

In late August 2016, S.W. submitted a written sexual harassment complaint to Murphy. The complaint included inappropriate things that Cortez did to her and that she felt threatened by Cortez. The complaint was forwarded to Williams and the legal department, who decided to move forward immediately. A letter was issued to Cortez putting him on administrative leave with pay.

Williams received the investigation report then discussed it with the legal department and the superintendent to determine what type of action to take. It was decided to take the action of removal of Cortez. Williams had input into what charges would be brought against Cortez.

The March 17, 2017, Final Decision of Disciplinary Action (FDNA) lists the incorrect incident. It was revised on July 25, 2017. Cortez served a ninety-day suspension. On February 17, 2011, Cortez was given a written and verbal reprimand.

Juan Cortez

Cortez has worked for JCPS for nineteen years. He was a custodian for the first seventeen years and he has been a boiler operator for the past two years. Beginning in July of 2016 he was a boiler operator at MS 41. Serrano was the head custodian. Cortez was not the supervisor of the custodians, Serrano was their supervisor. At one point Serrano left Cortez in charge of stripping the floor in the building on the second floor. Cortez told the custodians to move the boxes around the elevator. There was an electrician present who was talking to S. W. while the others were working. On that day S.W. arrived late wearing sandals, which are not appropriate footwear for stripping floors. While the others were working stripping the floor, S.W. was playing with her phone. S.W. eventually changed into sneakers and began working. She was upset.

The hours of work were 6:00 a.m. to 2:00 p.m. Cortez stated that he worked with Robert, Leroy, Miranda, and S.W. Leroy and S.W. always came in late. Serrano and S.W. usually came in between at 9:30 and 10:00 a.m. S.W. did not always come to work. Cortez recalled a time when S.W. was out of work for two weeks. Cortez told Serrano. Serrano told the Board that S.W. was sick. Serrano and S.W. were upset by this.

S.W. would bring Serrano lunch and mainly worked with him. Cortez told Serrano it was not appropriate to let one custodian do whatever they wanted while the others had to work. Serrano stated that he was the boss.

When Vice Principal O'Connor returned from vacation, Cortez told him about the attendance issues of Serrano, Robert, and S.W. O'Connor said that he would let it go.

Cortez was never trained in the JCPS sexual harassment policy. He had not seen the sexual harassment policy before the summer of 2016.

Cortez did not record S.W. He did not walk any differently around her than he did around anyone else. Cortez later asked S.W. a question while she was talking to Charles. She answered the question which ended the conversation. He never stared or leered at S.W.'s vaginal area.

Cortez previously worked in PS 22, PS 23, PS 33, PS 41, and Ferris High School. He requested a transfer from all of the above schools except PS 33. At PS 33, Cortez had a problem with co-workers not coming in on time and not following directions. At PS 23 the Principal Ayala did not want him to leave. He never saw the letter from Ayala regarding his transfer. The boiler operator hit him at PS 23, which Cortez reported to the police. He was promoted to boiler operator at PS 33. He was not written up by the principal at Ferris High School. He did receive a letter regarding taking a key.

Serrano, Leroy, Robert, and Miranda were in the office when Cortez asked Serrano if anything was going on between Serrano and S.W. because she was not doing as much work as the others.

Cortez believed that S.W.'s problem with him was with the floor-stripping incident and her falsifying of her sign-in sheets. S.W. never mentioned sexual harassment to him. She made fun of the way he spoke.

FINDINGS OF FACT

Based upon a consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

In September 2016, S.W. made complaints to Padua regarding Cortez. Her complaints were:

1. She was on a fifteen-minute break speaking to the electrician when Cortez inserted himself between her and the electrician and told her to clean a certain area. There were other workers present but he only told her to clean.

2. Cortez told her to strip the floor. They argued and Serrano diffused the argument and told her to change her footwear.

3. She was speaking to Charles when Cortez asked her was she working at school fifteen. She said "no" and continued talking to Charles when Cortez asked her why was she always late.

4. Cortez told Serrano that S.W. gets special privileges so she must be sleeping with him.

5. S.W. did not feel comfortable around Cortez.

S.W. was subpoenaed to testify. On two occasions she failed to appear. Serrano and Santiago, who it is alleged heard Cortez say that Serrano and S.W. were having sex and he should share, and allegedly saw Cortez leer at S.W.'s vaginal area did not testify in this matter. Smith appears to have told Walker that she heard Cortez ask Serrano if he and S.W. were having sex. Smith told Padua that she did not hear anything. Smith did not testify in this matter.

The hours for custodians in the summer at MS 41 are 6:00 a.m. to 2:00 p.m. The head custodian at MS 41 is Peter Serrano. Cortez is the boiler operator. The head custodian oversees the building. If the head custodian is not in the boiler operator is in charge. When the head custodian gives an order to a custodian, the boiler operator cannot override the order.

Serrano told Cortez to begin stripping the floors. On that day S.W. was late and had on sandals which are not appropriate for stripping floors. Cortez told her to start stripping the floor. S.W. argued with Cortez and Serrano intervened. S.W. changed into sneakers and began stripping the floors but was upset. Cortez asked Serrano if he

and S.W. were in a relationship because S.W. was given preferential treatment by Serrano.

Cortez received a written reprimand for conduct unbecoming and other sufficient cause on June 20, 2016. On February 18, 2011, and February 25, 2011, Cortez received a warning to follow all directives from his immediate supervisors.

LEGAL ANALYSIS AND CONCLUSION

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the charges of conduct unbecoming a public employee and other sufficient cause are **not** sustained.

The purpose of the Civil Service Act is to remove public employment from political control, partisanship, and personal favoritism, as well as to maintain stability and continuity. Connors v. Bayonne, 36 N.J. Super. 390 (App. Div.), certif. denied, 19 N.J. 362 (1955). The appointing authority has the burden of proof in major disciplinary actions. N.J.A.C. 4A:2-1.4. The standard is by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962). Major discipline includes removal or fine or suspension for more than five working days. N.J.A.C. 4A:2-2.2. Employees may be disciplined for insubordination, neglect of duty, conduct unbecoming a public employee, and other sufficient cause, among other things. N.J.A.C. 4A:2-2.3. An employee may be removed for egregious conduct without regard to progressive discipline. In re Carter, 191 N.J. 474 (2007). Otherwise, progressive discipline would apply. W. New York v. Bock, 38 N.J. 500 (1962).

Hearings at the OAL are de novo. Ensslin v. Twp. of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994), certif. denied, 142 N.J. 446 (1995).

"Unbecoming conduct" is broadly defined as any conduct which adversely affects the morale or efficiency of the governmental unit or which has a tendency to destroy

public respect and confidences in the delivery of governmental services. The conduct need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior, which devolves upon one who stands in the public eye. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

N.J.A.C. 1:1-15.5, known as the residuum rule, states as follows:

> (a) Subject to the judge's discretion to exclude evidence under N.J.A.C. 1:1-15.1(c) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.
>
> (b) Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.

N.J.A.C. 1:1-15.5(b) recites what is commonly referred to as the residuum rule, which was best described in Justice Francis's foundational opinion for the New Jersey Supreme Court in Weston v. State, 60 N.J. 36, 50-51 (1972):

> It is common practice for administrative agencies to receive hearsay evidence at their hearings. . . . As Judge Learned Hand said for the Court of Appeals for the Second Circuit in NLRB v. Remington Rand, 94 F.2d 862, 873 (1938), mere rumor would not support a board finding, "but hearsay may do so, at least if more is not conveniently available, and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs." And see Goldsmith v. Kingsford, 92 N.H. 442, 32 A.2d 810 (1943) . . . . However, in our State as well as in many other jurisdictions the rule is that a fact finding or a legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added

> probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it.

In this matter JCSD alleged that Cortez sexually harassed S.W. There was no testimony from anyone who was present during any of the alleged harassment. Although S.W. filed a complaint and spoke to Padua, she did not testify in this matter. She was scheduled to testify on two separate days and failed to appear each time. Serrano and Santiago, who spoke to Walker stating that they heard Cortez ask Serrano if he was having sex with S.W. and he should share her, and that they saw Cortez leer at S.W. again did not testify in this matter. At no time did respondent have an opportunity to cross-examine S.W., Serrano or Santiago regarding their statements and observations. Smith gave conflicting statements to Walker and Padua and again she did not testify in this matter. The evidence against Cortez is hearsay. There is no legally competent evidence in this matter to support the ultimate finding of fact.

Prevailing employees in a civil service appeal are entitled to an award of back pay, benefits, seniority, and reasonable attorney fees "as provided by rule." N.J.S.A. 11A:2-22. Pursuant to its broad authority to adopt rules for effective implementation of a comprehensive personnel-management system, the Civil Service Commission has discretionary power to deduct mitigation from a back-pay award. N.J.S.A. 11A:2-6(d); cf. Mason v. Civil Serv. Comm'n, 51 N.J. 115 (1968) (interpreting predecessor legislation as authorizing the Civil Service Commission to require mitigation of back pay upon restoration to employment).

Under the circumstances, discipline is not appropriate; I **CONCLUDE** that the penalty of ninety-day suspension is not supported by the facts and evidence in this matter.

ORDER

Based on the foregoing findings of fact and applicable law, it is hereby **ORDERED** that the determination of Jersey City Public Schools that Juan Cortez be suspended for ninety days is **REVERSED**.

I further **ORDER** that appellant be awarded any back pay associated with the ninety-day suspension.

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.

3-19-18
DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: March 19, 2018

Date Mailed to Parties: MAR 20 2018

ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

WITNESSES

For Petitioner:

Juan Cortez

For Respondent:

Jody Walker

Henry Padua

Celeste Williams

EXHIBITS

For Petitioner:

P-1 Final Notice of Disciplinary Action of S.W. dated April 22, 2016

For Respondent:

R-1 Email from S.W. To Peter Serrano dated August 19, 2016

R-2 Harassment Complaint Form of S.W.

R-2(a) Statement of S.W.

R-3 Nondiscrimination/Affirmative Action Policy dated March 13, 2008

R-4 Final Notice of Disciplinary Action of Juan Cortez dated June 20, 2016

R-5 Letter from Frank Piccillo to Cortez dated March 11, 2015

R-6 Written Warning to Cortez dated February 25, 2011

R-7 Written Warning to Cortez dated February 18, 2011

R-8 Memo from Flavio Rubano to Jeannette Ayala dated November 3, 2006

R-9 Letter from Cortez dated August 21, 2006

R-10 Transcript of Taped recording of S.W. dated October 31, 2017

R-11 Letter to Cortez from Celest Williams dated August 29, 2016

R-12 Preliminary Notice of Disciplinary Action for Juan Cortez dated January 3, 2017

R-13 Letter from Gary Murphy to Cortez dated January 10, 2017

R-14 Rice Notice dated March 8, 2017

R-15 Final Notice of Disciplinary Action of Juan Cortez dated March 17, 2017

R-16 Revised Final Notice of Disciplinary Action of Juan Cortez dated July 25, 2017

R-17 Not in Evidence

R-18 Not in Evidence

R-19 Memo to Juan Cortez From Jaime Morales dated February 17, 2011