



DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 2<sup>ND</sup> DAY OF NOVEMBER, 2022

*Deirdre' L. Webster Cobb*

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Deirdré L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries  
and  
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Attachment



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

**INITIAL DECISION**

OAL DKT. NO. CSV 09817-21

AGENCY DKT. NO. 2022-1160

**IN THE MATTER OF GERARDO DEOLIVERA,  
OCEAN COUNTY, DEPARTMENT OF BUILDINGS  
AND GROUNDS, APPOINTING AUTHORITY.**

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**Charlette Matts**, Esq., for appellant, Gerardo DeOlivera (Weissman & Mintz, attorneys)

**Robert D. Budes**a, Esq., for respondent Ocean County, Department of Buildings and Grounds, Appointing Authority (Berry, Sahradnik, Kotzas & Benson, attorneys)

**BEFORE SARAH H. SURGENT, ALJ:**

Record Closed: August 15, 2022

Decided: September 29, 2022

**STATEMENT OF THE CASE**

Appellant Gerardo DeOlivera (DeOlivera) appeals from respondent Ocean County, Department of Buildings and Grounds' (County) disciplinary action terminating his employment as a building maintenance worker for failing to reside in Ocean County.

DeOlivera seeks reinstatement and maintains that his termination was unjust because the County's residency requirements are unclear, and because the County treated him disparately by allowing other County employees to reside outside of the County. The County maintains that its residency requirements are clear, and that an exception for non-County residents does not apply to DeOlivera's position.

### **PROCEDURAL HISTORY**

On September 7, 2021, the County served DeOlivera with a Preliminary Notice of Disciplinary Action (PNDA), notifying DeOlivera of the charges against him. (R-1). After a local hearing on October 21, 2021, the County sustained both of the charges: N.J.A.C. 4A:2-2.3(a)2, insubordination, and -2.3(a)12, other sufficient cause. (R-2). By a Final Notice of Disciplinary Action (FNDA) dated October 22, 2021, the County notified DeOlivera accordingly and imposed a penalty of removal effective on that date. Ibid.

On November 9, 2021, DeOlivera timely requested a fair hearing. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on December 1, 2021, to be heard as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. After several telephone conferences and an exchange of discovery, the hearing was conducted remotely via videoconference on May 20, 2022, due to the ongoing COVID-19 pandemic. The record was held open until August 15, 2022, for the parties' written summations, and closed on that date.

### **FACTUAL DISCUSSION AND FINDINGS**

These salient points are undisputed or indisputable. I therefore **FIND** the following as **FACT**.

On April 2, 1969, the County's Board of Chosen Freeholders adopted a resolution that "effective May 1, 1969, all applicants for employment by the County of Ocean and all employees currently or in the future in the employment of the County shall be legal

residents of the County of Ocean.” (R-4). A certified copy of that resolution was forwarded to the Civil Service Commission (CSC) in 1969. Ibid. The County’s Personnel Handbook also states that “[a]ll applicants for employment by the County of Ocean and all employees currently, or in the future, in the employment of the County shall be bonafide residents of the County of Ocean.” (R-5). Neither policy contains any waiver or exemption provisions. (R-4; R-5). Notwithstanding those policies, the County produced a list of thirty-five current County employees who reside outside of the County. (R-12). Of those, two work in the Engineering Department, seven work in the Information Technology Department, two work for the Medical Examiner, and one works for the Planning Board. Ibid. The remainder work for the County Prosecutor’s Office or the Sheriff’s Office. Ibid.

DeOlivera was hired by the County as a Building Maintenance Worker on May 27, 2003. (A-1). At the time of his hiring, DeOlivera reported that he lived at his mother’s Toms River, Ocean County address. (A-2; R-7). On July 22, 2009, DeOlivera purchased a home in Jackson Township (Jackson), Ocean County, together with E.S and A.S, a husband and wife (the S couple), who were joint tenants with rights of survivorship. (R-11). After her husband’s death, A.S. became the surviving tenant by the entirety on November 5, 2012. Ibid. When A.S. died on December 5, 2019, DeOlivera became the surviving joint tenant. Ibid. DeOlivera’s relationship, if any, to E.S. and A.S. is unknown.

On March 10, 2017, DeOlivera and his wife purchased a home in Howell Township (Howell), Monmouth County, which they refinanced on October 26, 2020. (R-10). On or about October 25, 2017, DeOlivera went on a twelve-week leave of absence due to a Workers’ Compensation Injury. (A-3). The letter of approval for leave time was sent to DeOlivera’s mother’s address in Toms River. Ibid.

At some point prior to March 1, 2021, DeOlivera’s mother filed a retirement application with the New Jersey Division of Pensions and Benefits. (R-6). She listed DeOlivera as her sole beneficiary, with the Howell address, triggering an investigation by the County as to DeOlivera’s actual county of residence. (R-6; R-7). On March 18, 2021,

Robert Milana (Milana), then of the County's Division of Risk Management, was assigned by the County's Employee Relations Director, Robert Greitz (Greitz), to determine DeOlivera's residence. (R-7). At the time of the hearing, Milana was no longer employed by the County, had moved to Alabama, and did not testify, although his report was submitted as an exhibit. Ibid. I initially agreed that Milana's report was inadmissible hearsay, but having reviewed the record, I find that there is a residuum of competent credible evidence to support its admission, including contemporaneous photographs of DeOlivera's Howell address and mailbox and DeOlivera's own testimony about his work hours.

Milana's report claims, in relevant part, the following. He saw DeOlivera leave his Howell address on March 18, 2021, at 3:13 p.m. in a silver Ford van (the van) and on March 19, 2021, at 12:09 p.m. (R-7). On both occasions, a blue Range Rover (the SUV) was present. Ibid. On March 22, April 7, April 8, and April 9, 2021, the van and the SUV were parked at the Howell address, but no activity was observed. Ibid. On April 12, 2021, starting at 11:47 a.m., DeOlivera was observed outside the Howell address on two occasions—sitting on the porch smoking a cigarette, and taking out the recycling. Ibid. The van and the SUV were both present. Ibid. On April 13, 2021, DeOlivera was observed at the Howell address, working on the van for several hours. The SUV was also present. Ibid. On April 14, 2021, DeOlivera was observed at the Howell address, working on the van for several hours. Ibid. At 3:12 p.m., DeOlivera departed the Howell address in the SUV and drove to work. Ibid. On April 15, 2021, the van and the SUV were present, and DeOlivera departed the Howell address in the SUV and drove to work. Ibid. On April 16, 2021, the van and the SUV were both present. At 3:17 p.m., DeOlivera departed the Howell address and drove to work in the SUV. Ibid. On April 19, 2021, at 11:40 a.m., DeOlivera arrived at the Howell address in the SUV and entered the house. Ibid. On April 20, 2021, the van and the SUV were both parked at the Howell address, but no activity was observed. Ibid. During the investigation, Milana took color photographs of the house, the mailbox, the SUV, the van, and DeOlivera working on the van. (R-8). On April 21, 2021, Greitz emailed Milana and advised him that no further surveillance was necessary. (R-7).

Milana's report also claims that he conducted surveillance of DeOlivera on two other occasions for unrelated reasons. Ibid. On November 3, 2017, Milana commenced a six-week surveillance of the Howell address during which the van was observed "nearly every day." Ibid. On December 11, 2020, Milana commenced a six-week surveillance of DeOlivera's mother's address while DeOlivera was out on medical leave, and DeOlivera was never observed at his mother's address. Ibid.

On May 27, 2021, Greitz sent a letter to DeOlivera at the Howell address stating that DeOlivera did not reside in Ocean County, in violation of longstanding policy, and that DeOlivera had ninety days to become a resident of Ocean County, or his employment would be terminated. (R-3). That letter was sent via certified mail, return receipt requested, and the return receipt was received by the County. Ibid. On June 28, 2021, DeOlivera sold the property in Jackson as the surviving joint tenant. (R-11). His address listed on the deed and the Seller's Residency Certification/Exemption (Certification) is the Howell, Monmouth County, address. Ibid. The Certification is signed by DeOlivera, and states, in relevant part:

The undersigned understands that this declaration and its contents may be disclosed or provided to the New Jersey Division of Taxation and that any false statement contained herein may be punished by fine, imprisonment, or both. I furthermore declare that I have examined this declaration and, to the best of my knowledge and belief, it is true, correct and complete.

[Ibid.]

The September 7, 2021, PNDA states that the incidents giving rise to the insubordination and other sufficient charges are as follows:

G. DeOlivera does not live in Ocean County in violation of County Policy and the Policies set forth in the Personnel Handbook. He has resided in Howell Township (Monmouth County) since March 2017.

On May 27, 2021, Mr. DeOlivera was advised he had ninety (90) days to move to Ocean County. As of this date, the ninety days have passed, and Mr. DeOlivera has not moved to Ocean County, and still resides in Howell, [Monmouth County,] New Jersey.

[R-1.]

The PNDA specified that DeOlivera's removal pending the outcome of the charges was September 13, 2021. Ibid. After DeOlivera's departmental hearing, he was removed effective October 22, 2021. (R-2).

**SUMMARY OF RELEVANT TESTIMONY, CREDIBILITY DETERMINATIONS,  
AND FURTHER FINDINGS OF FACT**

Greitz testified on behalf of the County. DeOlivera testified on his own behalf, and his CWA representative, Thomas Fagan (Fagan), testified on DeOlivera's behalf as to DeOlivera's final salary at the time of his termination.

**I.**

**Greitz**

Greitz testified as follows. He has been the County's Director of Employee Relations since January 1, 2020. For approximately two weeks prior to that date, he was a confidential assistant to the predecessor Director. DeOlivera's residence issue was brought to Greitz's attention by an individual in Greitz's department who is primarily responsible for processing pension enrollments and applications. Greitz's department was notified by the State Division of Pension and Benefits that DeOlivera's mother, who also worked for the County, had filed a pension application. The department then checked the application and noted that DeOlivera's address, as his mother's beneficiary, was listed in Howell. (R-6). Greitz was aware of the County's residency requirements, as described above. (R-4).



Greitz researched DeOlivera's address on the internet and found that DeOlivera owned a property in Howell. Greitz found the property's deed and mortgages on the Monmouth County Clerk's Office website. Both mortgages contain provisions requiring that the property be the owners' primary residence for at least one year. (R-10).

Greitz then instructed Milana to investigate DeOlivera's residence. Milana was a retired New Jersey State Police Trooper (NJSP) who had worked for NJSP internal affairs, among other things, and was hired by Greitz's predecessor "some years back" as an investigator in insurance and risk in the County's Department of Employee Relations. Greitz reviewed Milana's investigation report and photographs with Milana and together they concluded that DeOlivera resided in Howell. As a result, Greitz sent the above-described May 27, 2021, letter to DeOlivera notifying him that he was in violation of the County's residency requirement. (R-3). After DeOlivera received the letter, he and Greitz spoke by telephone, and DeOlivera indicated that he owned a property in Jackson. DeOlivera indicated that he did not reside in Howell, that he resided in Jackson, and that he also had "a room" at his mother's house in Toms River. After that revelation, Greitz then did internet research about DeOlivera's property in Jackson and noted that it was sold by DeOlivera on June 25, 2021. (R-11).

DeOlivera's paychecks were direct deposited, but all employees received pay stubs, and DeOlivera's paystubs indicated his mother's address in Toms River. Ocean County has approximately 1,980 employees. Prospective employees are advised of the County's residency requirement when they are interviewed, and again when they are hired and are provided with the Employee Handbook. That information was also available to all County employees on the County's website, which was migrated away from within the past year, because it was no longer "supported" by the County's internet technology.

Ocean County is a Civil Service County, bound by the rules and regulations of Civil Service Commission (CSC) hiring policies. With respect to out-of-County employees, (R-12), in keeping with my above factual findings, Greitz testified that, with the exception of County Prosecutor's and Sheriff's Office personnel, the out-of-County employees

employed by the County consist of personnel employed in the Departments of Engineering, Information Technology, the Medical Examiner, and the Planning Board. Greitz explained that the County had difficulty filling those positions with residents of the County, and after requesting lists from the CSC of residents qualified for and interested in those positions, if none were found, the County then requested a list of names from surrounding counties, and if none were found, the County requested a list of names of qualified individuals Statewide. Greitz noted that recently the County had requested a list for 150 corrections officers' positions, only received a list of approximately 80 County residents, and was then instructed by the CSC that the County must look for individuals in surrounding Counties.

With respect to Engineering, Information Technology, the Planning Board, and the Medical Examiner's Office, Greitz noted that the individuals in those positions were required to have specialized training and certifications and were difficult to locate and retain. With respect to the out-of-County Prosecutor's Office employees, Greitz explained that those employees are hired directly by the Prosecutor and serve at the pleasure of the Prosecutor, and that the County has no say about that hiring process so long as there is money in the County budget to pay for those employees. With respect to the Sheriff's Office out-of-County employees, Greitz explained that while some positions fall within Civil Service guidelines, others do not, and they are hired by and serve at the pleasure of the Sheriff, subject to the County's budgetary capabilities. (A-4; A-5; A-6). Greitz conceded that Prosecutor's and Sheriff's Office employees are County employees, as they are paid by the County.

With respect to other County departments, such as Buildings and Grounds, Greitz's Department receives and screens applications, and denies hiring requests for those applicants who do not reside in the County. Aside from DeOlivera and those individuals listed in R-12, Greitz was unaware of any other employee who does not reside in the County. DeOlivera is the only employee whom Greitz has taken action against for being a non-resident, but Greitz conferred with his predecessor, who confirmed that he had terminated prior out-of-County residents.

On cross-examination, Greitz testified that he had prepared the PNDA specifications, described above. (R-1). With respect to the incidents giving rise to the charges, Greitz explained that his allegation that DeOlivera had resided in Howell since March 2017 was based upon the joint deed and mortgages for the Howell property with DeOlivera and his wife, which Greitz found on Monmouth County's website, with mortgage clauses requiring that DeOlivera make the Howell property his primary residence for at least one year, both in March 2017 and again in the fall of 2020, (R-10), and the fact that Greitz had previously spoken with DeOlivera, in another context, and learned that DeOlivera and his wife had a four- to five-year-old child. Greitz had no personal knowledge that DeOlivera had a property in Howell, until he learned of it in March 2021.

Greitz explained that his May 27, 2021, letter to DeOlivera stating that DeOlivera had ninety days to move to Ocean County, (R-3), was the only letter he provided to DeOlivera. When DeOlivera was removed on September 13, 2021, (R-1), pending the outcome of the PNDA charges, DeOlivera stopped working, but he was not suspended, and he remained on the payroll and continued to be paid while on administrative leave.

With respect to the residency requirement, Greitz explained that every County employee is provided with the Employee Handbook at the time of their hire, (R-5), and again if the Handbook is updated. The Handbook had not been updated during Greitz' tenure. Greitz was sure that DeOlivera would have been provided with the Handbook, (R-5), but he had no personal knowledge of that, or as to whether DeOlivera was provided with a copy of the County's 1969 residency resolution, (R-4). With respect to Greitz's internet research as to DeOlivera's residence, Greitz agreed that there is no set of specific procedures to determine a County employee's address, and that he assigned Milana to complete the investigation either shortly before or after Greitz's initial internet research. Greitz did not personally conduct the physical investigation of DeOlivera's Howell address, and was unaware of DeOlivera's Jackson address until DeOlivera informed Greitz of it after Greitz sent him the May 27, 2021 non-residency warning letter, (R-3).

With respect to the enforcement of the residency requirement, Greitz stated that he did not personally create the list of non-resident County employees, (R-12), and that he believed that it had been prepared in October 2020 in anticipation of DeOlivera's departmental hearing. Greitz acknowledged that the list of non-resident County employees can change, depending upon who is hired, and that the list was generated by his Chief of Administrative Services, who is more computer technology savvy. Greitz agreed that he did not have personal knowledge of the specific credentials required for the exempted out-of-County employees' positions, such as Mechanical Engineering Trainee, Graphic Information Systems Analyst, and Telephone Systems Analyst, and that he did not know how many candidates applied for those positions and when those positions were advertised and filled. Greitz also admitted that he was unaware of any separate County policy or resolution with respect to the time frame within which an out-of-County employee would be required to move to the County. Greitz explained that at the time of a prospective employee's application and potential hire, the County runs a background check through a third-party which then returns known addresses and criminal history, among other things. That procedure has been in place throughout Greitz's tenure. Greitz explained that those out-of-County employees listed in R-12 were not required to move to the County because their positions were difficult to fill, and the County wanted to retain the employees. The residency requirement was not even broached with those employees.

### **DeOlivera**

DeOlivera acknowledged that he was "deeded on the property" in Howell. Although his name is on the deed and mortgages for that property, he claimed that his name is not on the "banknote," and that he therefore did not "purchase" the home. He also claimed that his wife refinanced the Howell property, but maintained that his name and signature had to appear on the refinanced mortgage because his name was on the deed. When asked when he started living at the property in Howell, DeOlivera responded that "living there" is a "legal term," and that he had "dual residency" in Howell and Jackson, until he sold the property in Jackson in June 2021 "after this whole debacle happened."

DeOlivera explained that his mother listed his Howell property as his address when she applied for her retirement pension because it was just an address where correspondence would go “in the event of a tragic passing,” not because it was his residence. He did, however, concede that the Howell property was his home since it was purchased in 2017, and that he still lived there as of the date of the plenary hearing. He could not recall whether he ever updated his address on file with the County from his mother’s home in Toms River to his Jackson address or his Howell address, but then stated that he advised the County of his Jackson address, notwithstanding that in October 2017, he was still using his mother’s Toms River address. He then denied that at that time he was living in Howell, and stated that he considered his mother’s Toms River address “as a residence.” He agreed that in November 2021, he listed the Toms River address as his address for purposes of this appeal, but he denied that he was currently living in Toms River.

He explained that after he sold the property in Jackson in June 2021, he moved to his mother’s home in Toms River “temporarily” to avert the County’s disciplinary action and to “consolidate” his mail. He claimed that he was living in the Jackson property prior to its sale, and denied having any tenants at that property, notwithstanding the above-described documentary evidence to the contrary. He stated that his wife and child did not live with him in the Jackson property, which he bought in 2009, and that he lived there until June 2021, notwithstanding that he and his wife were married in 2014 and bought the Howell property in 2017. He explained that he had had “a previous relationship with someone else in the past,” and that he could not sell the house in Jackson until 2021 because it was “under water.” He stated that he decided to sell the Jackson property “probably around March – April, probably around April,” 2021. He stated that he slept both at the Jackson and Howell properties on an unfixed alternating basis, and that the properties were approximately one mile apart. He stated that his wife and child slept “most of the time” at the Howell address.

He agreed that when he sold the Jackson property in June 2021, he listed the Howell property as his residence on the Certification, but maintained that he only did so

for "mailing" purposes. DeOlivera stated that his former work hours were from 4:00 p.m. to 11:30 p.m., that he performed janitorial duties at various County buildings, and that he was never specifically told what he needed to do to maintain residency in Ocean County.

DeOlivera stated that his August 26, 2021, driver's license lists his mother's address in Toms River, as does his car registration, but that he uses the Howell address on his income tax returns.

### **Fagan**

Fagan testified that at the time of DeOlivera's termination, his annual salary was \$47,605.

## **II.**

I must weigh the credibility of the witnesses to determine the ultimate issues. Credibility is the value that a factfinder gives to a witness's testimony. An ALJ's findings of fact as to issues of credibility of a witness' testimony may not be rejected or modified unless the record demonstrates that the findings are arbitrary, capricious or unreasonable, or are not supported by sufficient, competent, credible evidence in the record. N.J.S.A. 52:14B-10(c).

"Credibility involves more than demeanor. It [contemplates] the over-all evaluation of testimony in the 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. It must be such as the common experience and observation of mankind can approve as probable in the circumstances." State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955) (quoting In re Perrone's Estate, 5 N.J. 514, 522 (1950)).

A fact finder is expected to base credibility decisions on their common sense and life experiences. State v. Daniels, 182 N.J. 80, 99 (2004). Credibility is not dependent on the number of witnesses who appeared, State v. Thompson, 59 N.J. 396, 411 (1971), and a fact finder “is not bound to believe the testimony of any witness, in whole or in part,” State v. Muhammad, 182 N.J. 551, 577 (2005) (internal quotation marks omitted). Rather, they “may reject what in their conscientious judgment ought to be rejected and accept that which they believe to be credible.” Ibid. Testimony may be disbelieved but may not be disregarded at an administrative proceeding. Middletown Twp. v. Murdoch, 73 N.J. Super. 511, 523 (App. Div. 1962). “The interest, motive, bias, or prejudice of a witness may affect [their] credibility and justify the [trier of fact] . . . in disbelieving [their] testimony.” State v. Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952) (internal quotation marks omitted).

Having heard the witnesses’ testimony and observed their demeanors, I **FIND** Greitz’s testimony to be highly credible. He was concise, forthright, spontaneous, and consistent, both in his testimony, and with the documentary evidence.

I **FIND** DeOlivera’s testimony to be evasive and unreliable. It was internally inconsistent, non-sensical, and misleading. For instance, he denied that there were other tenants at the Jackson property, even though the documentary evidence shows that the S couple plainly was. He stated that the Howell address was simply a “mailing address,” even though his wife and child live there and he was observed there on numerous occasions. He admitted that he used his mother’s Toms River address for purposes of this appeal, but denied that he was living in Toms River. He admitted that he used the Howell address on his tax returns, but claimed that he used his mother’s address for his driver’s license and car registration. He admitted that he used the Howell address as his residence on the Jackson Seller’s Residency Certification, but claimed that he only did so “for mailing purposes.” In sum, his testimony simply does not add up.

I **FIND** Fagan’s testimony to be credible and straightforward.

III.

Based upon the foregoing credibility determinations and the competent, credible evidence of record, I further **FIND** the following **FACTS**.

I adopt Greitz's and Fagan's testimony in their entirety and therefore **FIND** their testimony as **FACT**. Based upon the documentary evidence and DeOlivera's contradictory testimony, I further **FIND** that DeOlivera resided in Howell during the relevant time period, and that he did not reside in Jackson with the Scouple or in Toms River with his mother. I also **FIND** that DeOlivera was most certainly aware of the County's residency requirement, as he used his mother's Toms River address not only on his driver's license and car registration, but also for his paystubs, because those could be easily verified by the County, as opposed to his tax returns address in Howell. In short, I **FIND** that DeOlivera intentionally deceived the County and this Tribunal as to his actual residence, particularly when his own mother listed his Howell address on her pension application, and because he misinformed Greitz that he resided in Jackson, knowing that the property was being sold less than one month later.

**LEGAL ANALYSIS AND CONCLUSIONS**

I.

A civil service employee's rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1 to 4A:10-3.2. The Act is an inducement to attract qualified individuals to public service positions and is to be liberally construed toward attainment of merit appointments and broad tenure protections. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576, 581 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583, 586 (App. Div. 1972). However, "[t]here is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998).



Indeed, a civil service employee who commits a wrongful act related to their employment may be subject to discipline, which may be a reprimand, suspension, or removal from employment, depending upon the incident. N.J.S.A. 11A:1-2c; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2(a). Public entities should not be burdened with an employee who fails to perform their duties satisfactorily or engages in misconduct related to their duties. N.J.S.A. 11A:1-2c. Thus, a public entity may impose major discipline upon a civil service employee, including termination/removal from their position. N.J.S.A. 11A:1-2c; N.J.A.C. 4A:2-2.2(a).

In appeals concerning major disciplinary action such as termination, the appointing authority bears the burden to prove the FNDA charges by a preponderance of the competent credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v Parsekian, 37 N.J. 143, 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) (internal quotation marks omitted). 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). OAL hearings on civil service removal appeals are de novo, both as to guilt and the penalty to be imposed. Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980); W. New York v. Bock, 38 N.J. 500, 522, n.1, n.3 (1962).

With respect to Civil Service County residency requirements, although there is no documentary evidence that the County formally adopted New Jersey's 1978 Civil Service Residency Act, N.J.S.A. 40A:9-1.3 to – 1.10, by resolution or otherwise, Greitz credibly testified that the County follows that Act in its employment practices and residency requirements. However, N.J.S.A. 40A:9-1.9 provides:

The provisions of this act shall apply to all residency requirements adopted on and after the effective date of this act. Nothing herein shall be construed as to alter, abrogate, repeal or otherwise affect any residency requirement in effect in any local unit by ordinance or resolution, or rule or regulation of a local unit, on the effective date of this act; provided, however, that any amendment, modification or other

change in any such residency requirement shall be subject to all the relevant provisions of this act.

[N.J.S.A 40A:9-1.9 (emphasis added).]

Thus, it appears that the County need not follow the letter of the Act, because there is no evidence of any subsequent resolution by the County as to residency requirements. In other words, the County appears to be exempt under the above Grandfather clause from following the letter of the Residency Act. See Forester v. Palmer, 401 N.J. Super. 286, 294-95 (App. Div. 2008).

N.J.S.A. 40A:9-1.3 provides:

Unless otherwise provided by law, the governing body of any local unit may by resolution or ordinance, as appropriate, require, subject to the provisions of this act, all officers and employees employed by the local unit after the effective date of this act to be bona fide residents therein. A bona fide resident for the purpose of this act is a person having a permanent domicile within the local unit and one which has not been adopted with the intention of again taking up or claiming a previous residence acquired outside of the local unit's boundaries. Any local unit wherein the provisions of Title 11 (Civil Service) of the Revised Statutes are operative, shall transmit a copy of the adopting ordinance or resolution, as the case may be, to the Civil Service Commission.

[N.J.S.A. 40A:9-1.3 (emphasis added).]

N.J.S.A. 40A:9-1.6 provides, in relevant part:

Any local unit which has adopted an ordinance or resolution, as the case may be, pursuant to section 1 of this act, shall provide therein that whenever the governing body, or appointing authority, shall determine that there cannot be recruited a sufficient number of qualified residents for available specific positions or employments, the local unit shall advertise for other qualified applicants. The local unit, or

the hiring authority thereof, shall thereupon classify all qualified applicants for such positions or employments so determined in the following manner:

**b. In the case of counties:**

- (1) Other residents of contiguous counties.
- (2) Other residents of the State.
- (3) All other qualified applicants.

The hiring authority shall first appoint all those in class 1 and then those in each succeeding class in the order above listed and shall appoint a person or persons in any such class only to a position or positions, or employment or employments, remaining after all qualified applicants in the preceding class or classes have been appointed or have declined an offer of appointment. The preference established by this section shall in no way diminish, reduce or affect the preferences granted pursuant to any other provisions of the law. A local unit which has recruited and hired officers and employees under the provisions of this section may require such officers and employees, as a condition of their continued employment, to become bona fide residents thereof. Such a requirement shall be specified at the time of appointment and a reasonable amount of time granted for such officers and employees to become bona fide residents of the local unit. The Civil Service Commission shall, upon any subsequent notice of the determination of the governing body or the hiring authority of any such local unit wherein Title 11 (Civil Service) of the Revised Statutes is operative that such preference schedule shall be applicable for any specific position or employment, classify all applicants for such position or employment accordingly.

[N.J.S.A. 40A:9-1.6 (emphasis added).]

Moreover, N.J.S.A. 40A:9-1.7 provides:

Any local unit adopting the provisions of section 1 of this act shall provide in the adopting ordinance or resolution, as the case may be, that whenever the governing body, or the hiring authority of the local unit, shall determine that there are certain

specific positions and employments, requiring special talents or skills which are necessary for the operations of the local unit and which are not likely to be found among the residents of the local unit, such positions or employments so determined shall be filled without reference to residency. Any such provision shall set forth the formal criteria pursuant to which such positions and employments shall be so determined.

[N.J.S.A. 40A:9-1.7 (emphasis added).]

In this case, in keeping with the above, Greitz credibly testified that the County searched for qualified County residents, then contiguous county residents, then Statewide residents, for the specialized positions of the thirty-five non-County resident employees. (R-12).

### The Charges

Although the Administrative Code does not specifically define the general causes for major discipline delineated in N.J.A.C. 4A:2-2.3(a), those general causes have been defined by well-established case law.

1. N.J.A.C. 4A:2-2.3(a)2: Insubordination

As to the charge of insubordination, N.J.A.C. 4A:2-2.3(a)2, case law generally construes the term to mean refusal to obey an order of a supervisor. In re Shavers-Johnson, OAL Dkt, No. CSV 10838-13, Initial Decision (July 30, 2014). According to Webster's II New College Dictionary (1995) "insubordination" refers to acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. In this case, DeOlivera was instructed that he was required to become a resident of Ocean County within ninety days of May 27, 2021. Rather than heeding that instruction, DeOlivera misled Greitz to believe that he resided in Jackson, and then DeOlivera actually sold his ownership interest in the Jackson property approximately one month later, on June 28, 2021. Whether he had "a room" at his mother's Toms River residence is

irrelevant, as there is no competent credible evidence that DeOlivera resided there, and there is overwhelming documentary evidence that he has resided with his family in Howell since March 2017.

I therefore **CONCLUDE** that the County has met its burden to prove by a preponderance of the credible evidence that DeOlivera was insubordinate by failing to establish a residence in Ocean County within the allotted ninety-day time period prescribed by Greitz. I further **CONCLUDE** that DeOlivera was well aware of the residency requirement, and that he used his mother's Toms River address for payroll and, perhaps motor vehicle records, to evade the County's detection of his Howell residence, which he listed on his tax returns.

Although DeOlivera complains that the residency requirement is applied disparately, I **CONCLUDE** that the County's explanation for its limited exemptions when no suitable candidates can be found within the County for highly skilled employees and law enforcement personnel is credible and rational, and in keeping with the CSC's guidelines to look first to neighboring counties, and then Statewide, for suitable employees. Conversely, janitorial work is not a highly specialized field, and the position is essentially fungible. I therefore **CONCLUDE** that the County's action was not arbitrary, capricious, or unreasonable.

2. N.J.A.C. 4A:2-2.3(a)12: Other sufficient cause

Other sufficient cause has been described as other conduct not specifically delineated in N.J.A.C. 4A:2-2.3(a) which would violate "the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." In re Boyd, Cumberland County Dep't of Corrs., 2019 N.J. CSC LEXIS 621, \*115 (July 3, 2019), adopted Comm'r, id. at 1-2 (Aug. 14, 2019). N.J.A.C. 4A:2-2.3(a)12 is essentially a catchall provision for why an employee may be subject to major discipline. "An appointing authority may discipline an employee

for sufficient cause, including failure to obey laws, rules and regulations of the appointing authority.” In re Mumford, 2014 N.J. CSC LEXIS 478, \*33, final decision, (June 5, 2014).

Although the “other sufficient cause” was not specifically delineated in the FNDA, Greitz credibly testified that the County’s 1969 Resolution and the County’s Personnel Handbook, which is distributed to all employees, requires County employees to be “bonafide residents” of Ocean County. However, certain exceptions have been granted by the CSC and the County for specialized occupations which cannot be filled by County residents. “Bonafide” is commonly defined as “neither specious nor counterfeit,” “genuine,” “made with earnest intent,” “sincere,” or “made in good faith without fraud or deceit.” <https://www.merriam-webster.com/dictionary/bona%20fide#examples> (last visited Sept. 13, 2022). As previously stated, I **CONCLUDE** that DeOlivera knew of the County’s residency requirement, and that he fraudulently represented that he was a resident of the County to evade that requirement. I therefore **CONCLUDE** that the County has met its burden to prove by a preponderance of competent credible evidence that the County’s action was also justified by other sufficient cause.

## II.

Normally, once a determination has been made that an employee violated a statute, rule, or regulation concerning their employment, the concept of progressive discipline requires consideration. In re Stallworth, 208 N.J. 182, 195-96 (2011); Bock, 38 N.J. at 523. When deciding what disciplinary action is an appropriate penalty, the fact finder shall consider the nature of the sustained charges and the appellant’s past record. Bock, 38 N.J. at 523-24. The employee’s past record is said to encompass their reasonably recent history of promotions or commendations on the one hand, and on the other hand, any “formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated . . . by having been previously called to the attention of and admitted by the employee.” Ibid. Consideration as to the timing of the most recently adjudicated disciplinary history should also be given. Id. at 524.

However, the theory of progressive discipline is not a fixed rule to be followed without question. In re Carter, 191 N.J. 474, 484 (2007). “[S]ome disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record.” Ibid. The question for the fact finder is whether the disciplinary action is so disproportionate to the offense, considering all the circumstances, to shock one’s sense of fairness. Ibid. Removal has been upheld where the acts charged, with or without a prior disciplinary history, have warranted imposition of that sanction. Ibid. Hence an employee may be removed, without regard to progressive discipline, if their conduct was egregious. Ibid.; In re Herrmann, 192 N.J. 19, 33-34 (2007). Indeed, progressive discipline “is not a necessary consideration when . . . it is unbecoming to the employee’s position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.” Herrmann, 192 N.J. at 33.

In this case, N.J.S.A. 40A:9-1.5 provides:

It shall be the duty of the hiring authority to insure [sic] that all employees hired after the effective date of this act remain bona fide residents of the local unit in which they are employed. Failure of any such employee to maintain residency in a local unit shall be cause for removal or discharge from service. In the event such employee does not maintain bona fide residency, the hiring authority shall notify said employee that failure to again take up bona fide residency in the local unit within 6 months of such notification will result in removal or discharge from service. Such removal or discharge shall take effect on the date specified in such notice

[N.J.S.A. 40A:9-1.5 (emphasis added).]

In light of my legal conclusions on the sustained charges and in keeping with the above provisions, I **CONCLUDE** that DeOlivera’s misconduct and deceit were not only so egregious as to warrant automatic removal, without regard to progressive discipline, but also because N.J.S.A. 40A:9-1.5 mandates his removal. Although Greitz’s May 27, 2021,

warning letter only provided DeOlivera with ninety days to comply with the County's residency requirement, (R-3), the departmental hearing was not held until October 21, 2021, almost five months hence, and there is no competent credible evidence of record that DeOlivera made any efforts to establish a residence in the County in the interim. Indeed, one month after Greitz's warning letter was issued, DeOlivera actually sold his property interest in Jackson, on June 28, 2021. Moreover, although DeOlivera argues that N.J.S.A. 40A:9-1.3 to -1.10 are inapposite because the County's 1969 resolution was apparently never amended to conform with the 1978 Residency Act, I **CONCLUDE** that is of no moment under the Act's Grandfather clause. Forester, 401 N.J. Super. at 294-95; N.J.S.A 40A:9-1.9. I therefore **CONCLUDE** that the County complied with its own resolution and substantially complied with N.J.S.A. 40A:9-1.5, and that DeOlivera's removal was mandated by law.

### **ORDER**

It is therefore **ORDERED** that the charges in the October 22, 2021, FNDA are hereby **SUSTAINED**; and it is further

**ORDERED** that DeOlivera be and is hereby removed from his position with the County, effective October 22, 2021; and it is further

**ORDERED** that DeOlivera's petition of appeal is hereby **DISMISSED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.



Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the Judge and to the other parties.

September 29, 2022  
DATE

  
SARAH H. SURGENT ALJ

Date Received at Agency: September 29, 2022

Date Mailed to Parties: September 29, 2022

SHS

**APPENDIX**

**Witnesses**

**For appellant:**

Gerardo DeOlivera  
Thomas Fagan

**For respondent:**

Robert Greitz

**Exhibits**

**For appellant:**

- A-1 County Employee Probationary Evaluation, dated August 14, 2003
- A-2 DeOlivera's Employee Information sheet, dated May 30, 2003
- A-3 County's letter to DeOlivera granting twelve weeks of absence under the Federal Family Medical Leave Act, dated October 25, 2017
- A-4 County's Personnel Resolution, dated March 17, 2021
- A-5 County's Personnel Resolution, dated April 21, 2021
- A-6 County's Personnel Resolution, dated December 15, 2021

**For respondent:**

- R-1 PNDA, dated September 7, 2021
- R-2 FNDA, dated October 22, 2021
- R-3 Letter from Greitz to DeOlivera regarding non-residency, dated May 27, 2021

- R-4 County's employees' residency requirement Resolution, dated April 2, 1969
- R-5 Excerpt of County's Personnel Handbook regarding employee residency requirements
- R-6 Retirement application of DeOlivera's mother, printed March 18, 2021
- R-7 Investigation Report by Robert Milana, last dated April 21, 2021
- R-8 Copies of colored investigation photographs taken by Robert Milana
- R-9 Property records for DeOlivera's mother's home in Toms River address
- R-10 Property records for DeOlivera's residence in Howell address
- R-11 Property records for DeOlivera's property interest in Jackson address
- R-12 Redacted list of County employees who do not reside within the County