STATE OF NEW JERSEY

In the Matter of Bruce Greenwood,
Department of Transportation

CSC DKT. NO. 2019-3024
OAL DKT. NO. CSV 06456-19

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: DECEMBER 21, 2022

The appeal of Bruce Greenwood, Electrical Mechanic, Department of Transportation, 15 working day suspension, on charges, was heard by Administrative Law Judge Judith Lieberman (ALJ), who rendered her initial decision on November 21, 2022. No exceptions were filed.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting of December 21, 2022, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Bruce Greenwood.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 21ST DAY OF DECEMBER, 2022

Deirdré L. Webster Cobb

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 06456-19
AGENCY DKT. NO. 2019-3024

**IN THE MATTER OF BRUCE GREENWOOD, DEPARTMENT OF TRANSPORTATION.**

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**Bruce Greenwood**, appellant, pro se

**Nonee L. Wagner**, for respondent Department of Transportation (Matthew J. Platkin, Attorney General of New Jersey, attorney)

Record Closed: October 7, 2022 Decided: November 21, 2022

BEFORE **JUDITH LIEBERMAN**, ALJ:

## STATEMENT OF THE CASE

Appellant Bruce Greenwood ("appellant") appeals his fifteen working day suspension by respondent, New Jersey Department of Transportation ("Department", "respondent" or "appointing authority"), due to a determination that he committed workplace violence in violation of workplace policies. He was charged with Conduct Unbecoming a Public Employee, in violation of N.J.A.C. 4A:2-2.3(a)6, and other sufficient cause, in violation of N.J.A.C. 4A:2-2.3(a)(12).

## PROCEDURAL HISTORY

On November 15, 2019, the appointing authority issued a Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and specifications made against the appellant. Appellant requested a departmental hearing, which was conducted on March 12, 2019. On March 29, 2019, the appointing authority issued a Final Notice of Disciplinary Action (FNDA) sustaining the charges in the PNDA and suspending appellant for fifteen working days, from April 24, 2019, through May 14, 2019. Appellant filed a timely appeal for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to N.J.S.A. 52:14B -15 and N.J.S.A. 52:14F-1 to N.J.S.A. 52:14F -13. The Office of Administrative Law received the appeal on May 13, 2019. The matter was assigned to me on August 8, 2019. The hearing was scheduled to be conducted on February 14, 2020, and February 18, 2020. The hearing was conducted on February 14, 2020. I adjourned the second hearing date due to an emergent scheduling conflict. The second hearing date was adjourned to July 17, 2020. At that time, hearings were being conducted by way of Zoom video technology due to the COVID-19 pandemic. During a June 29, 2020, prehearing conference, appellant advised that he wished to proceed by way of an in-person hearing. The hearing was thus adjourned until an in-person hearing could be scheduled. Appellant reiterated his desire for an in-person hearing during subsequent status conferences. When in-person hearings were authorized, a hearing date of May 13, 2022, was scheduled. The hearing concluded that day and the record remained open to permit the parties to submit post-hearing briefs. All briefs were received by July 6, 2022, and the record closed that day. An extension of time to file this Initial Decision was granted on August 16, 2022. On September 29, 2022, and October 7, 2022, respondent was asked to produce appellant's disciplinary history and documents concerning penalty ranges. It provided all of the requested documents by October 7, 2022, and the record closed that day.[1]

[1] On October 4, 2022, appellant submitted a letter addressing his disciplinary history.

## FACTUAL DISCUSSION AND FINDINGS

The following is undisputed. I, therefore, **FIND** the following as **FACT**:

1. Appellant was an employee of the Department's Totowa Yard during the times at issue. He worked on the ladder truck crew.

2. The ladder truck that appellant and his coworkers drove is a large truck with a cab, a cargo box and a forty-two-foot ariel. It weighs approximately 19,000 pounds.

3. On November 15, 2018, appellant was served with a PNDA that charged him with Conduct Unbecoming a Public Employee, in violation of N.J.A.C. 4A:2-2.3(a)6 and other sufficient cause, in violation of N.J.A.C. 4A:2-2.3(a)(12). He was also charged with violating Department Guidelines concerning employee conduct by engaging in workplace violence.

4. The PNDA described the incident that led to the charges as follows:

> Based on a workplace violence investigation, it has been substantiated in a report by the Internal Investigations Unit that on June 5, 2018, you used your state assigned vehicle in a reckless and aggressive manner toward a coworker. Specifically, you accelerated your vehicle in front of a coworker's vehicle as he was driving out of the yard. In addition, an employee was standing by the gate and could have been injured. Your actions are deemed to be a serious act of misconduct. You have been previously counseled regarding your inappropriate interactions with certain coworkers. Your antagonistic behavior toward employees of this Department has escalated to more serious workplace violence consistent with violations of the Workplace Violation Policy and will not be tolerated.
>
> [R-3.]

5. A hearing concerning the charges was conducted on March 12, 2019.

6. A March 29, 2019, FNDA advised that the charges in the PNDA were sustained. Appellant was required to serve a fifteen working day suspension. R-4.

## Testimony

The following is not a verbatim recitation of the testimony but a summary of the testimonial and documentary evidence that I found relevant to the above-described issue.[2]

### For respondent

**Joseph Fahy** was employed as an electrical mechanic for the Department and was assigned to the Totowa Yard ladder truck during the times at issue. He stopped working for the Department in July 2019. Ladder trucks are used to conduct traffic signal control repairs. The truck has a cab like that of a pickup truck, with a cargo box and a forty-two-foot ariel. "For the common person it's a large truck." T2 9:4. The Totowa Yard was an enclosed area that was entered by driving trucks through a main double gate. He and members of the ladder crew were usually "on the road all the time." T2 10:24. When in the yard, they parked their trucks "wherever." T2 11:3. The last person to leave the yard was responsible for opening and closing the gate at the end of the day.

Fahy described the incident that is the subject of appellant's disciplinary action. On June 5, 2018, appellant was in his truck, which was to the left of and a little behind Fahy's truck. At 3:55 p.m., Fahy started to operate his truck, in preparation for leaving the yard through the gate. As he started to "pull out, [he] saw [appellant's] truck come around [and] almost hit the front of [his] truck." T2 14:7–9. Fahy's truck had started

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[2] The transcripts of the February 14, 2020, and May 13, 2022, hearing dates are cited here as "T" and "T2," respectively. These citations are followed by the referenced page and line numbers.

This summary of the testimony includes a summary of appellant's cross-examination of respondent's witnesses. During the cross-examination, appellant offered facts or arguments in support of his claims. Because appellant proceeded pro se, he was afforded some latitude in this regard. Thus, the summary of the witness' testimony includes, in some instances, summaries of appellant's assertions of fact or arguments.

moving before appellant's truck. Because he had "just started," he estimated that his truck's speed was "maybe five miles an hour, if that probably." T2 14:18–19. Since he started driving before appellant did, he expected to exit the yard before appellant. However, appellant "came around, cut [him] off and . . . sped out of the gate." T2 15:3–4. He did this in "one swift motion" and did not brake. T2 15:15. Fahy estimated that appellant's speed exceeded his. Fahy braked to avoid colliding with appellant's truck.

Mark Boccher witnessed the incident. He stood at the gate and was prepared to close it. He said to Fahy, "What the fuck was that?" T2 17:16. Fahy believed that John Peterson called him later to ask, "what was that about?" T2 18:2. Peterson learned about the incident from someone, as "the rest of the crew were very friendly." T2 18:6–7.

Fahy reported the incident to his supervisor. He said that appellant intentionally drove carelessly. Department Investigator Rochelle Miller conducted an investigation.

On cross-examination, Fahy was asked about a diagram[3] that shows that, during the incident at issue, appellant's truck was travelling at two miles per hour while Fahy's traveled at twenty miles per hour. Fahy replied that it is "common knowledge" that GPS data, which the diagram was based upon, is "not updated in real time." T2 28:20–21. He explained that his truck could not have travelled at twenty miles per hour:

> These are I'm guessing around the area of 15 to 20,000 pound trucks with all of our equipment and stuff in them. You're talking about a hundred . . . maybe a hundred, two hundred foot run from the front of the yard to the back of the yard. It's only . . . a simple diesel motor. There's no way in that yard you can get up to twenty miles an hour, which is why I . . . once again I want to remind, the GPS units are — if I remember what Rochelle told me is every three to five minutes it pings. . . . They're not in real time. . . . What Mr. Greenwood keeps saying is about the speed, that might have been me leaving the — going up the street . . . to Minnisink Road.
>
> [T2 42:12 to 43:2.]

[3] The diagram, marked "D-6" by appellant, is the same as Exhibit R-14. Appellant also produced documents purporting to present GPS data (D-2 through D-4). However, no expert or other authority testified concerning the data or its interpretation.

Fahy explained that, as the GPS only records speed at the time of each "ping," and there is a gap between the "pings," the GPS would not record faster or slower speeds between each "ping."

Fahy denied that he was upset that appellant caused him to have to close the gate at the end of the day, because "Mark Bocher (sic) was already standing there ready to close the gate." T2 32:9–10. Regardless, closing the gate is not a burdensome task.

Appellant asked Fahy about the connection between the incident at issue and a prior incident involving the removal of a dashboard camera that appellant placed in his truck. Appellant asked Fahy whether he recalled that appellant had a dash camera in his truck for a few months prior to the incident. Fahy did not recall the camera. When asked if Fahy took the camera from appellant's truck and gave it to a supervisor, Fahy replied, "You're talking about four or five years ago[,]" suggesting that he did not remember. T2 36:14. Fahy asserted that he did not remember the camera. Later, he suggested that "if he saw this camera . . . it was given back to the supervisor when the truck was cleaned out. I don't know what to tell you." T2 38:19–23.

Fahy was asked about a clash between himself and appellant. A bucket loader was involved. Fahy did not recall the incident. He recalled that appellant filed a criminal complaint against him with the Totowa Police Department and that the complaint was dismissed. He acknowledged that he maintained a list of complaints about actions taken by appellant against him. He gave the list to Investigator Rochelle Miller.

**Mark Boccher** was employed by the Department as an electrical mechanic for the ladder truck crew at the Totowa Yard. The employees who used ladder trucks drove them home each night so that they could respond to emergencies. Ladder trucks are diesel utility trucks that have hydraulic cherry pickers mounted on them and cabinets on their sides. They are "quite big;" "bigger than a pickup truck but . . . smaller than a dump truck." T 34:12–19. Parking was available on a "first come, first served" basis. "If there's no parking spot, then you park elsewhere in the yard, as long as you're not parked blocking traffic." T 34:25 to T 35:3. The gate, through which truck drivers exited the yard, was "on

the edge of the fenced-in yard." T 35:11–12. The gate is comprised of two parts, which are approximately ten to twelve feet tall and ten feet wide. Yard policy was that the last person who left the yard was responsible for locking the gate; the first person to arrive was responsible for opening the gates.

Boccher worked with appellant and Fahy on June 5, 2018. He "guessed" that appellant and Fahy "got along" at that time. T 37:7–10. He witnessed the incident and described it as follows:

> On that day I had pulled my truck out on the other side of the gates, parked it along the fence, got out of my truck. I closed the one gate and I went to the other gate and was standing there waiting for everybody to leave the yard. I saw Joey Fahy come straight at me to exit the gate and I saw Bruce Greenwood cut right in front of him. If Joey Fahy did not step on his brakes, actually, slam on his brakes, he would have hit Bruce's truck, and then Bruce exits the yard.
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> [T 37:20 to 38:4.]

Boccher underscored that "[i]n the beginning Joey Fahy was coming towards me and I saw him coming to exit and then I saw Mr. Greenwood cut right in front of him." T 39:8–10. Fahy's truck would have struck appellant's if Fahy did not "slam on the brakes." T 45:11. Fahy's truck was approximately twenty-five feet from Boccher when he stopped. Appellant did not stop and he exited the gate before Fahy. Boccher observed appellant "chuckle" or "smirk." T 40:15.

Investigator Rochelle Miller interviewed Boccher on June 7, 2018. A memorandum summarizing the interview was prepared. R-10. Although Boccher did not sign the document, he reviewed and approved it. It provided the following summary of the incident:

> Boccher said that he pulled out and took the initiative to lock the gate for the day after everyone exited. Boccher saw Fahy proceed toward the exit to pull out and said that Greenwood accelerated and went around Fahy. Boccher stated this maneuver by Greenwood was aggressive and Greenwood

> almost hit Fahy's truck. Boccher said that when Greenwood did this, he looked at Boccher with a smirk on his face.
>
> [Ibid.]

Prior to the day of the incident, Boccher and appellant got along with each other "[f]or the most part." T 40:19.

On cross-examination, appellant asked about "several instances" when Boccher parked his truck in a manner that prevented appellant from being able to open his truck door or blocked it in the yard. T 46:3. Boccher did not recall this. Appellant showed Boccher a photograph he took that purports to show Boccher standing in front of a gate that was closed in front of appellant's truck. P-1 at 12.[4] Appellant contended that the gate should have been moved away from the truck and that its position blocked his exit. Boccher replied that the gates can be moved in either direction and appellant could have driven around the gate shown in the photo, as the other gate was not closed. Appellant, however, claimed that the other gate was closed. Boccher did not see this depicted in the photo. Appellant acknowledged that the photograph did not depict the other gate.

On redirect examination, Boccher clarified that, although he could not say which truck would have struck the other, he was certain that, had Fahy not engaged his brakes, the two trucks would have collided. Fahy "slammed on his brakes . . . and [appellant] proceeded and [appellant] cut him off." T 61:14–15. Appellant did not apply his brakes.

**John Peterson** was an electrical mechanic at the Totowa Yard for approximately one year at the time of the incident. He got along well with appellant and had no personal problems with him. Appellant did not file any complaints against him and he was not subject to disciplinary action in association with interactions with appellant.

As a "common courtesy," the last person to exit the yard through the front gate would close the gate. T 67:1–2. The formal policy required the supervisor to close the gate at the end of the day.

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[4] P-1 includes twenty-one photographs taken by appellant and photocopies of the photographs. The photographs are numbered one through twenty-one.

On the day of the incident, Peterson's truck was parked and the gate was behind the truck, to the right. He did not view the incident. He exited the yard after Fahy and appellant. After the incident, Boccher told him that appellant's truck almost hit Fahy's truck. Peterson phoned Fahy to ask if this was correct. Fahy, who seemed startled and upset, said it was correct. He told Fahy to report the incident because it was inappropriate at the workplace and elsewhere.

Peterson was interviewed by Miller and reviewed the written statement that was prepared after his interview. R-11. During cross-examination, appellant acknowledged that he and Peterson got along well. Appellant noted that Peterson "treated everybody [including appellant] like we were family members." T 75:10–11.

**Investigator Rochelle Miller** was an investigator with the Office of the Inspector General (IG) for the Department of Transportation for fifteen years at the time of her testimony. She has a background in criminal justice, having trained to join the State Police until she suffered an injury. She was the lead investigator for this matter.

Miller interviewed witnesses and prepared memoranda summarizing the interviews. The witnesses did not review or sign the memoranda. Her recommended findings were reviewed by the Inspector General and then the Department's Employee Relations Office, which determined if discipline was warranted.

The Department's "Violence or Threats of Violence in the Workplace" policy prohibits violence or threats of violence in the workplace. R-2. Although it was effective July 22, 2019, it has been revised over a period of years. Miller is familiar with the policy and the versions that preceded it during the fifteen years she worked for the Department IG. At all times, the policy was "no-tolerance;" that is, "the Department doesn't tolerate any type of workplace violence." T 86:19–25. Also, at all times, a finding that the policy was violated required a finding of an intent to harm. Any revisions to the policy concerned only the procedure used for reporting violations.

Miller was familiar with the Totowa Yard, having conducted prior investigations that involved that location. Its gate is "two gates wide, closes together. So, what they generally do is close one side, let the trucks out and then close the other side of the gate. One person closes the gate after everybody leaves." T 91:20–24. She prepared a diagram of the site. R-14.

Miller used GPS data as part of her investigation. The Department employs GPS to monitor the location of all equipment and vehicles and is used to determine whether employees are misusing vehicles. She was trained to understand and use GPS data, which she obtained from Motorola, which is the owner of the GPS.[5] When analyzing the GPS data, she consulted with the creator of the system, to "make sure that there was no other way [she] could identify . . . the vehicles' . . . exact steps every second." T 98:8–10. She explained that "sometimes GPS can show you the positions and stuff like that. Not a hundred percent accurate, but it'll show you locations and movement. So, in this case they went from being parked to accelerating, and the GPS registers every thirty to thirty-two seconds to a minute. . . . [T]here will be a thirty-second blank before it may register again." T 92:3–10. Using the GPS data, she created the diagram, which she explained as follows:

> Greenwood was the long diagonal mark and Fahy was parked closer up to these storage containers. So, in running the GPS to see if it would give me any type of identifiers and where they were at, it shows their start from parked to accelerating. It doesn't have an exact point of impact at the gate because it was within that thirty seconds, which to most probably wouldn't sound like a lot, but if you wait thirty seconds it's a long period of time when something this quick occurs. So, I did this as a guide because it's a little . . . complicated to read and or explain, so I wanted somebody to have a visual of the yard and where their positioning was to understand why the GPS records won't confirm the exact point of impact.
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> [T 93:4–19.]

[5] Miller also referred to the GPS data as MARVLIS data, as the system's formal name is MARVLIS. T 97:1–5. She and Department personnel received training concerning use of MARVLIS data from the individual who created the system.

Miller further explained that GPS provides longitude and latitude and roads and locations, within thirty or thirty-five feet. It does not provide an exact location. However, the diagram "depict[s] exactly the positioning of the vehicles and shows the trajectory in which [they] were going." T 94:1–2. The GPS system permits a playback of the data that "will show you the track which a vehicle travels." T 140:22–23. She used this data, in conjunction with appellant's and the witness' statements to create her diagram of the event. R-14.

Miller was provided a Workplace Violence Incident Report Form completed by Fahy before she began her interviews. He identified Boccher and Peterson as witnesses. R-5. He wrote that, "while exiting the gated area, [appellant] operating [truck] accelerated around me and slowed down, after almost causing an accident, and glared at me in a threatening manner." Ibid.

Miller interviewed Fahy on June 8, 2018. He told her that, when he started to leave the yard, appellant accelerated and almost hit Fahy's vehicle. They would have collided if Fahy did not depress his brakes. Fahy was "visibly shaken" and "pretty upset about the whole thing." T 104:23–24. Miller evaluated documents. Fahy gave Miller a copy of a June 5, 2018, letter he wrote to Supervisors Fred Mable, and Thomas Lauerman, in which he discussed his difficult relationship with appellant and prior allegations of wrongdoing. Miller did not consider the history of their interactions when she evaluated the allegation about the June 5, 2018, incident. While she previously investigated allegations concerning the two men, neither their past allegations nor her prior investigations were relevant to her investigation of the June 5, 2018, incident.

Miller prepared a memorandum summarizing her interview of Fahy. She wrote, "Fahy began to move his vehicle towards the exit and Greenwood rapidly accelerated and went around Fahy cutting him off to get through the gate, almost hitting Fahy's truck. Fahy said that Greenwood gave him a threatening stare[.]" R-7. She also wrote, "Fahy explained that he believes Greenwood's actions relative to this incident are retaliation toward Fahy since he was the one that . . . complained about Greenwood's dash cam, which as a result, Greenwood was ordered to remove." Ibid. She added that one of the incidents Fahy addressed in his letter to Lauerman concerned "a recording device that

Fahy found when using Greenwood's take home vehicle for the day while Greenwood was at training. Fahy provided [Miller] with a picture of the recording device found." Ibid.

Miller interviewed Boccher, who reported that he observed Fahy proceed toward the exit when appellant accelerated and "went around Fahy." R-10. He described appellant as "aggressive" and noted that appellant almost hit Fahy's truck. Ibid. Appellant had a "smirk" on his face. Ibid. She also interviewed Peterson, although he did not witness the incident. His account was nonetheless useful because he "talked to Fahy immediately after it occurred after [Boccher] had told him about it, and then he talked to him personally and explained how shaken up he was." T 106:6–9.

The two witnesses corroborated Fahy's account. Peterson reported that he spoke with Fahy immediately after the incident and Fahy was "very upset." T 106:1. She noted that she "knew Fahy was already shaken up because [she] could see that when [she] did his interview and [Boccher] was standing right there when the incident occurred. Their stories were all the similar accounts of what happened which matched Fahy's original complaint, so there was enough corroboration for [her] to substantiate it." T 106:9–15. Their "reactions and their body language when [Miller] was interviewing them indicated that they were just shocked that it even occurred[.]" T 105:19–21. Miller explained, "when you have that and you have the witnesses saying if Fahy did not brake he would have hit him, that says a lot." T 105:21–23.

Miller interviewed appellant, whose union representative was present. She summarized appellant's account of the incident as follows:

> Greenwood explained that on June 5, 2018, he was parked facing the gate. As he was leaving the Totowa Electrical Yard and just as he reached the gate, Fahy was backed into a spot near the gate and accelerated to try and beat Greenwood out of the gate. Greenwood said that Fahy then stopped almost slamming into the passenger side of Greenwood's State assigned truck. Greenwood denies that he was the one who cut Fahy off. Greenwood stated that Fahy tried to cut him off and realized that if he didn't stop that he would have hit Fahy. Greenwood said, "I wish he would have hit me. I could have

> claimed a neck injury and lawyered up." Greenwood denies that he gave Fahy a look at all.
>
> [R-14.]

Miller observed that appellant's account of the incident was inconsistent, as he "changed a couple things that he was saying[.]" T 115:24–25. When asked to explain the inconsistencies, she replied, "[H]e said Fahy almost hit him and said Mark wasn't where Mark was standing and that's completely inaccurate. . . . Mark would have to stand there in order to close the gate, so that's all I can remember." T 118:8–12. Referencing the diagram, she created (R-14), she believed that Boccher stood "right on the point of where that gate is." T 119:12–14. She acknowledged that appellant did not say where Boccher "was physically standing." T 120:10. When asked if his omission of this information was problematic, she explained that was a "huge concern because Mark Boccher is a main witness. Had . . . there been a point of impact, that could have not been good for Boccher." T 120:14–18.

Miller also questioned appellant's credibility based upon her observation of his body language and general demeanor. His account did not "match up to the victim and the witnesses." T 116:4–5. Miller was disturbed by appellant's comment that he wished his truck had been struck by Fahy's truck. Appellant told Miller that he did not recall stating "as clearly as [she had]" that he wished Fahy's truck struck his. T 135:24. He explained that, at the time of the hearing, he had been an EMT for thirty-two years and "knows the results of car accidents, so [he] wouldn't wish that on [himself] in jest or anything else." T 136:7–9. Appellant questioned the accuracy of other portions of Miller's report, which did not relate to the incident at issue. She reiterated that she "write[s] down everything" and takes "very detailed notes." T 136:22–23. The other investigator who was present at the hearing also took notes. She included in her report those statements that "stood out" to both of them. T 137:2–5.

On cross-examination, Miller acknowledged that appellant's truck moved first. Regardless, Boccher was a credible eyewitness who observed the incident. Appellant asked Miller if she was aware that Boccher testified that he could not see Fahy's truck

because appellant's truck was blocking his view. Miller replied that she was not present for Boccher's testimony. T 139:23 to 140:4.

Miller also clarified that, in preparing her investigation and report, she relied upon the Department Workplace Violence Policy that was in effect at that time. R-2. She did not refer to the Policy that was in effect at the time of the incident. However, the earlier policy prohibited the use of threats to intimidate.

In response to appellant's assertion that the GPS showed that he had travelled at two miles per hour, Miller explained:

> I understand what you are reading on the GPS; however, like I stated before, there is a thirty-second interval, thirty-second to one minute interval. It does not sound like a lot. I understand that, but . . . you'd be surprised how long thirty seconds is. . . . [D]oing a site visit and knowing the distance it's not going to take you thirty seconds to move from once [sic] you've accelerated to through the gate, and when you accelerate it's not definitely going to show me that. . . . MARVLIS does not show me blinkers, turn signals, cutting off. It doesn't show me braking. . . . It's not equipped like that.
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> [T 144:8–24.]

Appellant noted that the diagram (R-14) shows that his truck was ahead of Fahy's, and closer to the gate. Thus, had there been an impact it would have been caused by Fahy striking his truck. Miller replied:

> You're absolutely right. You were further away from [Fahy] from the gate. Your car would have . . . initially started and then [Fahy] would have went [sic] to go, but you went through the gate causing [Fahy] to slam on his brakes. So, with that being said, [Fahy] would have hit you because you cut him off.
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> [T 145:9–15.]

Appellant asked Miller to explain why she found Fahy to be credible and appellant to not be credible. She replied that "Fahy was visibly shaken. He has had . . . major

concerns over this." T 149:11–12. She also referenced appellant's comment during the interview about wishing he had been hit. Appellant denied making that statement.

For appellant

Appellant **Bruce Greenwood** offered testimony throughout his examinations of the witnesses. Because he proceeded pro se, he was afforded significant latitude in this regard. He offered information and argument during his questioning, and this is included throughout the Factual Discussion. In his post-hearing written submission, he reiterated his argument that GPS data supported his assertion about the speed at which he and Fahy traveled and that his coworkers harbored animus toward him. He wrote, "When simply wanting to go home in a timely manner warrants a three-week suspension, the system is wrong. We all agreed that I left the yard before Joe Fahy. We all agreed that there was no contact or point of impact. I can assure everyone that I had no bad intentions in my mind on June 5th[.]" July 6, 2022, App. Brf. at 5 (emphasis in original). Further, he addressed the employees' "joke" about trying to not be the last one out of the yard." Ibid.

**Leo Higgins** was employed by the Department as an electrical mechanic I and worked at the Totowa Yard with appellant for two years. He started working for the Department in 1972 and retired in July 2019. He did not witness the incident that is the subject of this hearing. He described the yard as an "unhappy" place to work, particularly after Fahy started working there. While the general climate and work environment was unpleasant for most everyone there, there was a lack of respect for older employees. He described incidents in which he or the appellant was targeted. Higgins's truck was once blocked such that he could not exit the yard and get to his son, who had cancer and needed his help. Appellant's truck was also blocked. Their supervisor, Tom Lariman, and others, who Higgins considered to be "buddies" with each other, did not respond to their complaints about this. T 24:23. Higgins and appellant were also subjected to name calling, random commentary and extra criticism of their job performance. Higgins retired six months earlier than he planned due to the unpleasant nature of the workplace.

Higgins complimented appellant's demeanor and work ethic. Appellant never yelled, was very reliable and did excellent work. He is a "very nice guy," is "likeable" and "quite intelligent." T 26:9–10.

Higgins confirmed that the policy at the Totowa Yard was that the last person out must close the gate. The workers would "joke" about who should have to close it, each claiming that someone else should do it. T 29:14–28. He agreed with appellant's statement that, because the last person who left the yard was to close the gate, "that's why some of the gate blocking and parking spot blocking was done so you couldn't get out to get home for your problems and, obviously, [appellant] couldn't get out." T 29:21 to 30:4.

Additional Findings

It is the obligation of the fact finder to weigh the credibility of the witnesses before making a decision. Credibility is the value that a fact finder gives to a witness' testimony. Credibility is best described as that quality of testimony or evidence that makes it worthy of belief. "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." In re Estate of Perrone, 5 N.J. 514, 522 (1950). To assess credibility, the fact finder should consider the witness' interest in the outcome, motive, or bias. A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). In addition to considering each witness' interest in the outcome of the matter, I observed their demeanor, tone, and physical actions. I also considered the accuracy of their recollection; their ability to know and recall relevant facts and information; the reasonableness of their testimony; their demeanor, willingness, or reluctance to testify; their candor or evasiveness; any inconsistent or contradictory statements; and the inherent believability of their testimony.

Fahy testified clearly and directly and he acknowledged when he did not recall specific facts. However, his demeanor suggested that he did not respect appellant and his testimony was inconsistent to some extent. Significantly, he testified that appellant did not brake and sped out of the gate in "one swift motion." However, in his Workplace Violence Incident Report, he wrote that appellant "accelerated around [him] and slowed down, almost causing an accident." Also, during his testimony, Fahy claimed to not remember that appellant previously had a dash camera in his truck. However, Miller recorded that Fahy told her that he complained about appellant's dash camera and that he wrote about it in an April 9, 2018, letter to Lauerman. For these reasons, I cannot find Fahy's testimony to be wholly credible.[6] However, he was unambiguous about the essential part of his testimony — that appellant accelerated in a manner that caused him to need to quickly stop his truck. This was confirmed by Boccher, who testified clearly, directly and respectfully. His demeanor was appropriately serious and was consistent with the statement he provided to Miller close in time to the date of the incident. When asked if he lied in any way, he emphatically and genuinely objected, stating that he does not lie. I find his testimony to be credible.

Miller's analysis of the GPS data is not dispositive here. First, she noted that GPS data is not "exact" with respect to reporting the locations of the trucks. Moreover, while she has experience working with GPS data, she was not qualified as an expert in its use and interpretation. Also, she did not testify concerning the data or explain how she reached her conclusion. In an administrative proceeding, the judge may admit expert testimony if it "will assist . . . to understand the evidence or determine a fact in issue." N.J.A.C. 1:1-15.9(b). Although Miller received training concerning GPS, there is insufficient factual foundation and explanation about how she interpreted and used the data here. Thus, to the extent her conclusion was based upon this data, it constituted an impermissible net opinion. See Vuocolo v. Diamond Shamrock Chemicals Co., 240 N.J. Super. 289, 300 (App. Div. 1990); Buckelew v. Grossbard, 87 N.J. 512, 524 (1981). "The net opinion rule requires that an expert 'give the why and wherefore' that supports the opinion, 'rather than a mere conclusion.'" Townsend v. Pierre, 221 N.J. 36, 53-54 (2015)

[6] I also do not credit Fahy's testimony concerning his interpretation of GPS data. He was not admitted as an expert in this area; did not reference the data to which he referred; and did not provide a factual basis for his assertions.

(quoting Borough of Saddle River v. 66 E. Allendale, LLC, 216 N.J. 115, 144 (2013); see also Buckelew, 87 N.J. at 524 ("an expert's bare conclusion[], unsupported by factual evidence, is inadmissible"). I, therefore, cannot rely upon her testimony to the extent it is based upon GPS data. However, she testified clearly, directly and credibly about her observations of the witness' and appellant's demeanor during their interviews.

Appellant testified earnestly and conveyed a sincere desire to "clear his name." However, he relied heavily upon GPS data, and documents purporting to be GPS data, to make his case without being qualified as an expert in this area and without explaining how he analyzed the data. He also relied to a great extent upon an apparent history of poor relationships between himself and his coworkers. While Fahy acknowledged discord between himself and appellant, this is insufficient to permit a finding concerning appellant's account of the incident.

Higgens, who testified in support of appellant's reliability, work ethic and demeanor, testified clearly, directly and respectfully. There is no basis to discount his testimony and his opinion of appellant. However, he did not witness the incident. Rather, he confirmed that there was discord amongst the coworkers at the Totowa Yard and suggested that older employees, like appellant, were treated disrespectfully. Despite Higgens' credible testimony, for the reasons stated above, I cannot rely upon it as support for appellant's account of the incident.

Peterson testified earnestly and sincerely. His demeanor was appropriate and appellant acknowledged that he was well intentioned. I find his testimony to be credible. However, he does not possess firsthand knowledge about the incident.

Having considered the testimony and documentary evidence and the credibility of the witnesses, I **FIND** the following as **FACT**: While at the Totowa Yard, which is appellant's worksite, appellant drove his assigned truck in a manner that interfered with the movements of Fahy's truck. His speed and proximity to Fahy's truck was sufficient to cause Fahy to need to depress his brakes in order to avoid a collision. Whether appellant or Fahy started driving first is not dispositive, as appellant operated his truck in a manner that cut off Fahy and could have caused an accident. I do not find, however, that appellant

intended to threaten Fahy. Respondent, which has the burden of proof, has not presented evidence to support a finding concerning appellant's state of mind.

## LEGAL ANALYSIS AND CONCLUSION

Appellant's rights and duties are governed by laws including the Civil Service Act and the regulations promulgated thereunder. A civil service employee who commits a wrongful act related to his or her employment, or provides other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6, -20; N.J.A.C. 4A:2-2.2, -2.3. 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, failure or inability to perform duties, 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 be applied. W. New York v. Bock, 38 N.J. 500 (1962).

The appointing authority has the burden of establishing the truth of the allegations by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

### Conduct unbecoming a public employee

Appellant is charged with having engaged in conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6). The regulation provides that "conduct unbecoming a public employee" is an "elastic" phrase that encompasses conduct that "adversely affects the morale or efficiency of a governmental unit . . . [or] which has a tendency to destroy public respect in the delivery of governmental services." Karins v. City of Atl. City, 152 N.J. 532, 554 (1998) (citing In re Emmons, 63 N.J. Super. 136, 140

(App. Div. 1960)). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (citation omitted). Such misconduct need not necessarily "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 as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Here, appellant operated his work-issued truck, which is a large and heavy vehicle, in a manner that was likely to cause an accident but for Fahy having abruptly slowed his truck. Plainly, misuse of a vehicle is inappropriate. I thus **CONCLUDE** that the Department has proven by a preponderance of the competent, reliable and credible evidence that appellant violated Department policy and engaged in conduct unbecoming a public employee. Accordingly, I **CONCLUDE** that the charge of a violation of N.J.A.C. 4A:2-2.3(a)(6) must be and is hereby **SUSTAINED**.

Other sufficient cause

Appellant has also been charged with a violation of N.J.A.C. 4A:2-2.3(a)(12) (other sufficient cause). Specifically, he is charged with violation of the Violence or Threats of Violence in the Workplace Policy, which prohibits "threat[s] of physical violence, harassment intimidation or other threatening disruptive behavior that occurs at the workplace." R-2 at 1. This includes "threats and verbal abuse[.]" Ibid. "Threats or threatening behavior" is defined as "an overt expression, verbal or nonverbal, or an intent to cause physical or mental harm. . . . An "expression" constitutes a threat without regard to whether the party communicating it has the present ability to carry out the threat or without regard as to whether the expression of harm is one of an immediate or future nature." Id. at 2. "Harassment or intimidation" includes "threats or other conduct, which in any way, create a hostile environment; impair agency or department operations; or frighten, alarm or inhibit others." Ibid. Also, "[p]hysical intimidation or harassment may including . . . blocking movement . . . or any other inappropriate physical conduct or

advances." Ibid. The Department has "zero tolerance for such behavior in the workplace" and discipline may include suspension or removal from employment. Id. at 1.

Attempting to cut off or interfere with the route of another vehicle is a threatening and dangerous act. Although there has not been a finding concerning appellant's state of mind, attempting to cut off or interfere with the route of another vehicle is inherently threatening. As it has been found that appellant's conduct impaired operations, blocked movement and caused alarm, I **CONCLUDE** that the appointing authority has demonstrated by a preponderance of the competent, relevant, and credible evidence that appellant violated this policy. Accordingly, I **CONCLUDE** that the charge of a violation of N.J.A.C. 4A:2-2.3(a)(12) must be and is hereby **SUSTAINED**.

## PENALTY

A civil service employee who commits a wrongful act related to his duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), N.J.S.A. 11A:2-6, N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). This requires a de novo review of appellant's disciplinary action. In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983).

Notwithstanding the general principal of progressive discipline, the New Jersey Supreme Court wrote:

> [T]hat 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 . . . 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.
>
> [In re Herrmann, 192 N.J. 19, 33 (2007)].

The appointing authority seeks to suspend appellant fifteen working days. For conduct unbecoming a public employee, the Department's Guidelines for Employee Conduct and Discipline authorizes penalties of an official reprimand for a first offense, a suspension of four to nine days for a second offense, and a range of penalties from a ten-day suspension to removal for a third offense. R-16b at 13. For workplace violence offenses involving verbal or physical threats of violence, intimidation, coercion or interference, verbal abuse or harassment intended to harm another, the penalties range from an official reprimand through a five-day suspension for a first offense; a six- to forty-five-day suspension for a second offense; and removal for a third offense. Id. at 10.

As noted, progressive discipline is to be employed in civil service cases. Appellant has been disciplined twice before. On May 16, 2018, he received a written warning for conduct unbecoming a public employee, after it was determined that he filed a false workplace violence complaint. The written warning noted that the false complaint created "a negative working atmosphere, place[d] an undue hardship and cost on the operation and [was] detrimental to employee morale." SE-1 at 1. From June 14, 2019, through June 21, 2019, he served a five-day suspension for conduct unbecoming a public employee; unauthorized use of Department radio communications systems; and negligent operation of a vehicle and/or equipment. Ibid. at 7. The charges arose from an incident that involved appellant's operation of a Department vehicle. Ibid. at 4–5. Thus, appellant was twice disciplined for conduct unbecoming a public employee, which included an incident in which he was found to have misused a Department vehicle. For these reasons, I **CONCLUDE** that the action of the appointing authority in suspending the appellant for fifteen days is reasonable and consistent with progressive discipline and should be affirmed.[7]

[7] After the close of the record, appellant questioned, in a written submission, the propriety of consideration of his disciplinary history and sought to address the substance of his prior disciplines. The merits of the

## ORDER

I **ORDER** that the charges of conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6), and other sufficient cause, in violation of N.J.A.C. 4A:2-2.3(a)(12), be **SUSTAINED**. I **FURTHER ORDER** the appointing authority to suspend appellant for fifteen days.

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.

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prior disciplinary charges were not considered here. Only the sustained charges and the penalties were considered.

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.

November 21, 2022
DATE

**JUDITH LIEBERMAN**, ALJ

Date Received at Agency: November 21, 2022

Date Mailed to Parties: November 21, 2022

JL/jm

## APPENDIX

## WITNESSES

**For appellant**

Bruce Greenwood

Leo Higgins

**For respondent**

Mark Boccher

John Peterson

Rochelle Miller

Joseph Fahy

## EXHIBITS

**For appellant**

P-1 Photographs

P-D2 Data with heading "Bruce"

P-D4 Data with heading "Marc's truck"

P-D6 Diagram[8]

**For respondent**

R-2 Department Policy/Procedure, Violence or Threats of Violence in the Workplace

R-3 PNDA, November 15, 2018

R-4 FNDA, March 29, 2019 and amended, April 9, 2019 FNDA

R-5 Workplace Violence Incident Report Form

R-7 Memorandum of Boccher interview

[8] While appellant did not expressly offer these exhibits into evidence, he referenced them during his examination of witnesses. Given that appellant was pro se, and, thus, was afforded significant latitude, and respondent was provided these documents prior to the hearing and did not object to their use during the hearing, they are included in the list of hearing exhibits.

R-10 Memorandum of Boccher interview

R-11 Memorandum of Peterson interview

R-14 Memorandum of Greenwood interview, with diagram

R-16 Department Discipline Policy/Procedure with Appendix of Guidelines for Employee Conduct and Discipline

R-17 Appellant's disciplinary history