



STATE OF NEW JERSEY

In the Matter of Glenn Nolen,
Roselle, Department of Public Works

CSC DKT. NO. 2021-488
OAL DKT. NO. CSV 02408-21

**DECISION OF THE
CIVIL SERVICE COMMISSION**

ISSUED: MAY 18, 2022

The appeal of Glenn Nolen, Laborer 1, Roselle, Department of Public Works, of his removal, effective October 21, 2020, on charges, was heard by Administrative Law Judge Barry E. Moscovitz (ALJ), who rendered his initial decision on April 7, 2022. Exceptions and a reply were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, including a thorough review of the exceptions and reply, the Civil Service Commission (Commission), at its meeting of May 18, 2022, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision. However, it did not adopt his recommendation to modify the removal to a three working day suspension.¹ Rather, the Commission imposed a six working day suspension.

DISCUSSION

The Commission makes the following comments regarding the exceptions. The thrust of the appointing authority's exceptions is that the ALJ either ignored or mischaracterized the testimony of one witness, and thus, his conclusions therefrom were in error. The Commission disagrees. The ALJ's initial decision was

¹ In this regard, in the body of his decision, the ALJ indicates the reduction in penalty should be to a two working day suspension, but in the Order, he indicates a three working day suspension. Regardless, in this decision, the Commission is determining that the appropriate penalty is a six working day suspension.

predominately based on his assessment of the credibility of the witnesses. In this regard, upon its *de novo* review of the record, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 N.J. 108 (1997). “[T]rial courts’ credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record.” *See also, In re Taylor*, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ’s decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. *See N.J.S.A. 52:14B-10(c); Cavalieri u. Public Employees Retirement System*, 368 N.J. Super. 527 (App. Div. 2004). In this matter, the exceptions filed by the appointing authority are not persuasive in demonstrating that the ALJ’s credibility determinations, or his findings and conclusions based on those determinations, were arbitrary, capricious or unreasonable. As such, the Commission has no reason to question those determinations or the findings and conclusions made therefrom.

Regarding the penalty, the Commission’s review is also *de novo*. In this regard, while the Commission agrees that the upheld charges against the appellant merit a significantly reduced penalty, it does not agree that the proper penalty is a minor discipline. Rather, it believes the sustained misconduct is worthy of a major discipline. *See N.J.A.C. 4A:2-2.2(a)*. Accordingly, the Commission imposes a six working day suspension, which should be sufficient warning to the appellant that any similar misconduct in the future may subject him to more severe penalties, including removal from employment.

Since the removal has been modified, the appellant is entitled to be reinstated with mitigated back pay, benefits, and seniority pursuant to *N.J.A.C. 4A:2-2.10* from six working days after the first date of separation until the date of actual reinstatement. However, he is not entitled to counsel fees. *N.J.A.C. 4A:2-2.12(a)* provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in the disciplinary appeal is the merits of the charges. *See Johnny Walcott v. City of Plainfield*, 282 N.J. Super. 121,128 (App. Div. 1995); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, charges were sustained, and major discipline was imposed. Consequently, as appellant has failed to meet the standard

set forth at *N.J.A.C.* 4A:2-2.12, counsel fees must be denied.²

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

ORDER

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

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

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

² It is noted that the record in this matter shows that the appellant represented himself, *pro se*, during this entire matter while at the Office of Administrative Law. It was only after the ALJ's initial decision was rendered, and the appointing authority filed exceptions, did the appellant retain counsel, who filed a reply to the appointing authority's exceptions. As such, even if the appellant was entitled to counsel fees, it would have only been for his attorney's work on that reply.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF MAY, 2022

Deirdre' L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 02408-21

AGENCY DKT. NO. 2021-488

**IN THE MATTER OF GLENN NOLEN,
BOROUGH OF ROSELLE, DEPARTMENT
OF PUBLIC WORKS.**

Glenn Nolen, appellant, pro se

**Raymond J. Stine, Esq., for respondent Borough of Roselle, Department of Public
Works (Schaffer Shain Jalloh, PC, attorneys)**

Record Closed: February 24, 2022

Decided: April 7, 2022

BEFORE BARRY E. MOSCOWITZ, ALJ:

STATEMENT OF THE CASE

On February 26, 2020, appellant, Glenn Nolen, a laborer with respondent, Borough of Roselle, Department of Public Works, had a disagreement with a coworker. Nolen did not threaten anyone and has no prior discipline. Should Nolen be removed from his position? No. Progressive discipline may be bypassed only when the misconduct is severe, when the misconduct renders the employee unsuitable for continuation in the position, or when the application of progressive discipline would be contrary to the public interest. See In re Herrmann, 192 N.J. 19, 33 (2007).

PROCEDURAL HISTORY

On February 26, 2020, Roselle served Nolen with a Preliminary Notice of Disciplinary Action. In that notice, Roselle charged Nolen with conduct unbecoming a public employee, insubordination, and threatening remarks—including intimidating, coercing, or interfering with the proper performance of job duties by employees of the borough. The notice did not cite a statute or a regulation. In short, the notice specified that Nolen threatened to cause bodily harm to another employee and supervisors. As a result, Nolen was suspended pending an investigation.

Nolen requested a departmental hearing. On September 18, September 30, and October 7, 2020, the hearing was held, and on January 22, 2021, a Final Notice of Disciplinary Action was issued. The notice sustained all of the charges and most of the specifications. As a result, Nolen was removed from his position effective October 20, 2020.

The notice specifies that Nolen threatened to cause bodily harm to another employee and supervisors—but it omits certain details that had been included in the preliminary notice:

[On] February 26, 2020, Mr. Nolen threatened to cause bodily harm to another employee and supervisors. Mr. Nolen cursed his supervisors when they attempted to intervene in his threatening behavior toward another employee. After being asked to leave the grounds, Mr. Nolen continued to curse the supervisors and continued his threatening behavior toward the employee.

On October 26, 2020, Nolen appealed the determination. On February 24, 2021, the Civil Service Commission, Division of Appeals and Regulatory Affairs, transmitted the case to Office of Administrative Law under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the office, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6. On February 15, 2022, and February 23, 2022, I held the hearing.

DISCUSSION AND FINDINGS OF FACT

George Phipps is the superintendent of Public Works, and he has worked for the Department of Public Works for twenty years. At the hearing, Phipps testified that during the end of the workday on February 26, 2020, he was in his office, facing the yard, when he saw Nolen and another worker, Omar Carter-Nadir, having an argument by the gate at the edge of the property. He did not know if they were still “on the clock.”

Phipps testified that the argument, which he called an “exchange of words,” began in the locker room but continued to the yard, where it ultimately ended by the gate. Phipps explained that he could not discern what either Nolen or Carter-Nadir said, but that he could confirm that both Nolen and Carter-Nadir had been swearing. According to Phipps, Nolen was the “instigator,” Carter-Nadir “did not want to be there,” and that Nolen and Carter-Nadir stood “too close to one another.”

Phipps further testified that when he left his office for the yard, he saw the supervisor of the Department of Public Works, Carrington Harrell, step between Nolen and Carter-Nadir to separate them, though he admitted on cross-examination that neither Nolen nor Carter-Nadir had touched the other. Phipps explained that Nolen was upset, that he had gone to his car only to return, and that he took offense to Harrell stepping in. “All I know is that nobody better not fucking touch me,” Phipps said Nolen said to Harrell.

Phipps testified that this statement is the statement that constitutes the threat in this case—but Phipps qualified his testimony immediately thereafter. He explained that he did not know if the threat was “genuine.” More significantly, on cross-examination, Phipps admitted that the statement was not a threat. He also admitted that Nolen never touched anyone.

Still, Phipps testified that Nolen did not leave the yard when either he or Harrell asked him to. He explained that once Nolen said what he had to say, and once he saw Carter-Nadir leave for his car, which was parked behind the premises, Nolen went to his truck, which was parked in front of the premises, only to circle back to meet Carter-Nadir

in the back where he was parked. Phipps admitted that he did not know what happened once Nolen circled back to meet Carter-Nadir.

Finally, Phipps testified that the next day, or soon thereafter, when he was in a departmental vehicle at a stoplight, he saw Nolen drive past him in a "menacing" or "threatening" manner, namely, by driving slowly past him and glaring at him. Nolen denies this. Meanwhile, I do not countenance Phipps's characterization. For example, Phipps had testified earlier about what was in his mind when the argument took place in the yard. Phipps characterized Nolen as the "instigator," narrated that Carter-Nadir "did not want to be there," and declared that Nolen and Carter-Nadir had been standing "too close to one another." These events, which played out in Phipps's mind, are not facts. These are his impressions. As such, a preponderance of evidence does not exist that Nolen drove in a "menacing" or "threatening" manner. Likewise, a preponderance of the evidence does not exist that Nolen was the "instigator," that Carter-Nadir "did not want to be there," or that Nolen and Carter-Nadir stood "too close to one another." Indeed, no other witness who testified at the hearing corroborated what Phipps said.

In particular, Daveron Woods, who also works for the Department of Public Works, testified otherwise. He explained that Nolen was not physical, that he was "not in Carter-Nadir's face," and that Carter-Nadir participated in the conversation. In fact, Woods further explained that it was Harrell who was physical—that he "put his hands on Nolen to push him back"—which escalated a "disagreement" between the two friends. Like Phipps, Woods too characterized the argument, but he declared that it was a "manly way of talking."

Similarly, Damien Johnson, an assistant supervisor for the Department of Public Works, testified that Nolen did not touch or threaten Carter-Nadir. He too explained that it was Harrell who touched Nolen—that he "pushed back in a physical manner"—which is what escalated the incident. Indeed, Johnson was there the entire time, and he contradicted Phipps, stating that he did not believe that the possibility existed of anyone getting into a fight. He also said that no one threatened anyone.

Nolen testified on his own behalf. He asserted that he and Carter-Nadir are friends; that they had a disagreement or argument on the date in question; that the disagreement or argument lasted only three minutes; and that they resolved their differences at Carter-Nadir's house. Nolen explained that once he and Carter-Nadir left the yard, they drove to Carter-Nadir's home, where they "shook on it." According to Nolen, they have never had a problem since. Finally, Nolen testified that he has no prior discipline.

Significantly, Carter-Nadir corroborated what Nolen said. Carter-Nadir testified that he and Nolen had a disagreement in the yard; that he was not afraid of Nolen; that Nolen did not touch him or threaten him; and that they merely exchanged words. Carter-Nadir explained that they were "off the clock"; that they walked away together; and that they went to his house, where they "shook hands and it was over." As Carter-Nadir stated, "[We] continued on with our friendship like nothing happened."

On redirect-examination, Carter-Nadir clarified that it was "just a normal argument." He continued that they were never going to "put hands on each other," and that he never provided a statement because he did not believe that it was necessary. He said that they resolved their differences within the hour.

Given this discussion of the facts, I **FIND** that on February 26, 2020, Nolen and Carter-Nadir had a disagreement in the yard at the Department of Public Works. They were both "off the clock" and leaving for the day when their disagreement culminated in an exchange of words in the yard. Nolen was animated; Carter-Nadir was not. It was a disagreement between friends; a physical altercation was never imminent. Phipps and Harrell, however, misunderstood. They thought that the disagreement was something more; both thought a physical altercation was imminent. That is why Harrell stepped between Nolen and Carter-Nadir, and that is why Harrell pushed Nolen back. Nolen took offense to the touching, but he never threatened Harrell. In fact, Nolen threatened no one. Phipps told Nolen to leave, and Nolen eventually did so. He left with Carter-Nadir, and they drove to Carter-Nadir's house, where they settled their differences. They shook hands and remained friends. To be sure, Nolen and Carter-Nadir remain friends to this day.

CONCLUSIONS OF LAW

In appeals concerning major disciplinary actions, the appointing authority bears the burden of proof. N.J.A.C. 4A:2-1.4(a). The burden of proof is by a preponderance of the evidence, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), and the hearing is de novo, Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980). On such appeals, the Civil Service Commission may increase or decrease the penalty, N.J.S.A. 11A:2-19, and the concept of progressive discipline guides that determination, In re Carter, 191 N.J. 474, 483–86 (2007). Thus, an employee's prior disciplinary record is inherently relevant to determining an appropriate penalty for a subsequent offense, id. at 483, and the question upon appellate review is whether such punishment is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness," id. at 484 (quoting In re Polk, 90 N.J. 550, 578 (1982) (internal quotes omitted)).

Progressive discipline, however, may be bypassed when the misconduct is severe, when it renders the employee unsuitable for continuation in the position, or when the application of progressive discipline would be contrary to the public interest, such as when the position involves public safety and the misconduct causes risk of harm to persons or property. In re Herrmann, 192 N.J. at 33.

In this case, Nolen created a scene at work and did not leave as soon as his supervisor asked him to do so. By failing to leave as soon as his supervisor asked him to do so, Nolen was insubordinate. His animated disagreement in the yard and refusal to leave as soon as he was asked to do so was conduct unbecoming a public employee, but in no way do these violations require major discipline, let alone removal from employment, especially when the employee has no prior discipline, the misconduct is minor, and the misconduct causes no risk of harm to persons or property. As a result, I **CONCLUDE** that Nolen was insubordinate in violation of N.J.A.C. 4A:2-2.3(a)(2), that he engaged in conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6), and that he should be suspended for two days for such minor misconduct.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that Nolen should be **REINSTATED** to his position as a laborer, that his record should reflect a **SUSPENSION** of three days, and that he should be **AWARDED** all requisite back pay and benefits.

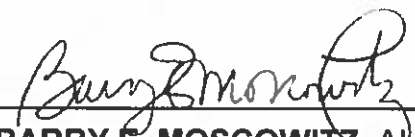
I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

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.

April 7, 2022

DATE



BARRY E. MOSCOWITZ, ALJ

Date Received at Agency:

April 7, 2022

Date Mailed to Parties:

April 7, 2022

dr

APPENDIX

Witnesses

For Appellant:

Daveron Woods
Omar Carter-Nadir
Damien Johnson
Glenn Nolen

For Respondent:

George Phipps

Documents

For Appellant:

None

For Respondent:

R-1 Text message from Nolen dated February 27, 2020
R-2 Borough of Roselle Personnel Policy Manual