STATE OF NEW JERSEY

In the Matter of John Joseph Mulholland, Ringwood, Department of Public Works	**DECISION OF THE CIVIL SERVICE COMMISSION**
CSC DKT. NO. 2023-200 OAL DKT. NO. CSV 06623-22	

ISSUED: NOVEMBER 27, 2024

The appeal of John Joseph Mulholland, Senior Public Works Repairer, Ringwood, Department of Public Works, removal, effective July 12, 2022, was heard by Administrative Law Judge Julio C. Morejon, who rendered his initial decision on October 29, 2024. Exceptions were filed on behalf of the appointing authority and a reply was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, including a thorough review of the exceptions and reply, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of November 27, 2024, accepted and adopted the Findings of Fact and Conclusions as contained in the attached ALJ's initial decision and his recommendation to reverse the removal.

As indicated above, the Commission has thoroughly reviewed the exceptions filed by the appointing authority in this matter and finds them unpersuasive. In this regard, the ALJ's determinations are predominantly based on his assessment of the credibility of the witnesses. In his initial decision, the ALJ stated:

> I **FIND** Stout's testimony not credible in characterizing Mulholland's behavior on June 16 and 17, as "belligerent", "argumentative" and "loud", to justify a termination of Mulholland because he violated the Last Chance Agreement. For example, Stout conceded on cross-examination that Mulholland's conduct on both dates was "not threatening" to him or the employees, but "loud". Another example was Stout's description of Mulholland's conduct as "belligerent" or "insubordinate" is also not credible, inasmuch as Stout's testimony on cross examination regarding the report he prepared on June 16

> regarding the dangling chain (Exhibit S) revealed he did not deem Mulholland's conduct to be belligerent or threatening.

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 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. Moreover, as the ALJ and Commission agree the charges underlying the alleged misconduct were not proven, any assertion that the appellant violated the Last Change Agreement must also fail.

The Commission also rejects the appointing authority's argument that since the appellant had previous disciplinary action for conduct similar to the alleged current misconduct, that he should be similarly found guilty. Clearly, past disciplinary action or misconduct cannot be used to prove current alleged misconduct. In this matter, both the ALJ and Commission have found that the appointing authority has not sustained its burden of proving the current charges based on the credible evidence in the record. The Commission notes that an employee's past disciplinary record is properly used as a factor in determining the proper *penalty* for a current disciplinary action, where, unlike in this matter, charges are ***sustained.***

Additionally, the appointing authority argues that the ALJ improperly used the enhanced standard of "clear and convincing evidence" when finding that it had not satisfied its burden of proof. While the ALJ does use that language at the end his "Legal Analysis and Conclusion" section of the initial decision, based on his credibility and other findings, it is clear that the appointing authority did not sustain its burden of proving the charges under the proper standard of a "preponderance of the evidence." In fact, the ALJ referred to that proper standard several times earlier in the same section. As such, the Commission finds any reference to the "clear and convincing" standard to be a *de minimis* typographical error, and at most, an error that does not change the outcome as the Commission has found, in its *de novo* review, that the credible evidence in the record does not support that the appointing authority sustained its burden of proof **by a preponderance of the evidence.**

The Commission similarly rejects the appointing authority's allegation that since the ALJ's initial decision was issued more than a year from when it perceived the record to be closed, and it did not "agree" to such a delay, that the decision should be invalidated, or any award of back pay should be limited. Initially, per the ALJ's determination, the record in this matter closed on October 16, 2024, and the initial decision was rendered on October 29, 2024. The Commission finds no reason in the record to discredit this recitation. Moreover, even if the record closed in November 2023 when the appointing authority contends, extensions to file an *initial decision* are not subject to "agreement" of the parties. Rather, requests for extensions to file an initial decision are properly initially filed by an ALJ with the Director of OAL, and subject to the ultimate approval of the transmitting agency. *See N.J,A.C.* 1:1-18.8(c). As such, if such extensions were required, they would have been properly made as per above and ultimately approved by the Chairperson of the Commission. Regardless, failure by an ALJ to secure such extensions does not invalidate an initial decision. Moreover, even assuming, *arguendo*, that extensions were not properly secured, the Commission would decline to limit any potential award of back pay, as back pay is subject to mitigation under *N.J.A.C.* 4A:2-2.10.

Since the removal has been reversed, 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 the first date of separation without pay until the date of actual reinstatement. Further, as the appellant has prevailed, he is entitled to reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, per 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 or counsel fees 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 reverses the removal and grants the appeal of John Joseph Mulholland.

The Commission orders that the appellant be granted back pay, benefits, and seniority from the appellant's first date of separation without pay 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.

The Commission further orders that counsel fees be awarded to the attorney for the appellant pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of services in support of reasonable counsel fees 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 and *N.J.A.C.* 4A:2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay or counsel fees 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.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 27TH DAY OF NOVEMBER, 2024

Allison Chris Myers

Allison Chris Myers
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 06623-22
AGENCY DKT. NO. 2023-200

IN THE MATTER OF JOHN JOSEPH MULHOLLAND,
BOROUGH OF RINGWOOD,
DEPARTMENT OF PUBLIC WORKS.

Matthew Rocco, Esq., (Rothman, Rocco, Laruffa, LLP., attorneys) for appellant, John Joseph Mulholland

Justin D. Santagata, Esq., attorneys, for respondent Borough of Ringwood, Department of Public Works

Record Closed: October 16, 2024 Decided: October 29, 2024

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE

Appellant, John Joseph Mulholland, (appellant or Mulholland), appeals the Final Notice of Disciplinary Action (FNDA) dated July 6, 2022, issued by the respondent, Borough of Ringwood (respondent or Ringwood), terminating appellant for insubordination and other sufficient cause, for violating the terms of a Last Chance Agreement.

PROCEDURAL HISTORY

On June 23, 2022, Ringwood issued a Preliminary Notice of Disciplinary Action (PNDA), suspending Mulholland effective June 23, 2022, seeking a removal from employment effective the same date.

Ringwood alleged the following charges in the PNDA:

- N.J.A.C. 4A: 2-2.3(a), An employee may be subject to discipline for:

    2. Insubordination and
    12. Other sufficient cause.

The incident giving rise to the charges in the PNDA were as follows:

> On June 16, 2022, during a morning meeting, the crew working on the Stonewall Court project was brought together by Assistant Superintendent George Stout to discuss broken equipment and the hiding of broken equipment. Mr. Mulholland unreasonably raised his voice and argued that the broken equipment was not a big deal. Despite attempts to stop the exchange, Mr. Mulholland continued arguing in a belligerent manner.
>
> On June 17, 2022 during a meeting to discuss safety reminders regarding the work zone on Westbrook Road, Mr. Mulholland became unreasonably belligerent and snapped at the Assistant Superintendent" I have done this before" and stated he did not need safety instructions.

Mulholland waived the departmental hearing, and Ringwood then issued a Final Notice of Disciplinary Action (FNDA) dated July 6, 2022, confirming the PNDA charges and allegations, and the penalty of removal.

Thereafter, on or about July 19, 2022, Mulholland filed an appeal with the New Jersey Civil Service Commission (Commission) contesting the FNDA. On July 26, 2022,

the Commission transmitted this matter to the Office of Administrative Law (OAL), to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 14F-1 to 13. This matter was then filed with the OAL on August 3, 2020.

On June 27, 2023, a Zoom hearing was held. Mulholland did not call any witnesses and testified on his behalf. Ringwood called Scott Heck (Heck) and George Stout (Stout) to testify. Following the hearing, Mulholland and Ringwood submitted post hearing submissions. After reviewing the exhibits in evidence, hearing transcript and post hearing summations of both parties, and the parties confirmation of the exhibits, closed the record on October 16, 2024.

FINDINGS

The following is derived from the exhibits jointly admitted in evidence herein, which I **FIND** as **FACT** herein:

The exhibits admitted jointly in evidence reveal that from the year Mulholland was hired by Ringwood in 2006 through June 2022, Mulholland has received ten written warnings, eight PNDAs, four FNDAs, four "Last Change Agreements," and seventy-two (72 days) of suspension (Exhibits A through N). The collective theme of inappropriate conduct by Mulholland as alleged by Ringwood in all of the previous and current disciplinary charges concerned are insubordination, belligerence, failure to follow supervision, and constantly disrupting the workplace. Id.

ADDITIONAL FINDINGS

Testimony

Scott Heck

Heck is the Ringwood Manager and Director of Public Works and has been in said position for over fifteen years. As the Ringwood Manager, Heck is responsible for, among other things, the hire and discipline of Ringwood employees. Heck testified that he is

familiar with Mulholland and his personnel history (Exhibit M).[i] Heck testified concerning several Last Chance Agreements involving Mulholland and Ringwood, commencing in 2008 (Exhibits A, C, E, and G). Heck stated that Mulholland's primary disciplinary issue is his "inability to with other employees, his belligerent behavior, his difficulties with having getting along with other employees, and authority." T19:17-21.

Heck then testified concerning the final Last Chance Agreement dated May 18, 2022 (Exhibit H), which is alleged to have been violated by Mulholland herein. Heck read paragraph 11 of the final Last Chance Agreement, into the record:

> Mr. Mulholland agrees and understands that he is subject to termination for any infractions similar to the action including but not limited to aggressive or threatening behavior towards employees, screaming and yelling at employees, or any other conduct which is reasonable or objectively constitute belligerent or behavior towards another employee in the workplace. Mr. Mulholland agrees and understands that if he is subject to further discipline as described in the paragraph the appropriate penalty is termination. Mr. Mulholland retains all rights to contest the fact of such discipline but really understands and acknowledges that if such facts are proven he may not contest the penalty which is termination.
>
> [Id.; T:38:3-39:8]

Heck affirmed that the final Last Chance Agreement was specifically written for Mulholland because of prior years and his conduct toward fellow employes. Id. Heck testified that in June 2022, less than one month after signing the final Last Chance Agreement, Mulholland had several disputes with his supervisor, George Stout (Stout). Specifically, Heck testified that on June 16 and 17, 2022, there were two incidents involving Mulholland and Stout (Exhibit L), which led to Stout signing off on the subject PNDA dated June 23, 2022 (Exhibit J), and the eventual FNDA dated July 6, 2022, (Exhibit K), and recommending Mulholland's termination because his conduct toward Stout had resulted in Mulholland violating his final Last Chance Agreement.

[i] All hearing exhibits presented were admitted as Joint Exhibits and are identified as Exhibits A through S in the Appendix herein.

On cross-examination, Heck testified that Mulholland had successfully completed a required Angry Management counseling (Exhibit R). Further on cross, Heck testified that he did not witness the June 2022, incidents, and that in addition to Stout, two DPW employees provided verbal statements to Heck regarding the June 2022 incidents. Finally, Heck testified that Mulholland had filed a prior complaint with Heck alleging that Stout was harassing Mulholland, but no finding was made to support the same.

Stout testified that he had been employed with Ringwood for fifteen (15) years and held the position of Assistant Superintendent of Public Works. His duties and responsibilities are to oversee the day-to-day operations of the Public Works Department, assign the work to the Public Works employees. Stout stated that he became Mulholland's supervisor eight years prior. Stout described his relationship as Mulholland's supervisor as "boisterous or belligerent", and that Mulholland was a "little bit harder... to deal with as assigning work and making sure that the work was done." T68:4-9.

George Stout

Stout testified that he had been Mulholland's supervisor for about eight years. He described his overall experience in dealing with Mulholland as an employee as "there was days when Joe was good, and there were days when Joe was very hard to deal with, and belligerent in his actions at the workplace." (T67:4-10). Specifically, Stout stated that it was difficult to assign Mulholland work, and the quality of the work that he produced, and as a result Stout "would have to follow up a lot of times and make sure that everything was completed." (T66:13-19). As to his definition of Mulholland's conduct being "belligerent," Stout testified that "the right word, he [Mulholland] would be very -- not combative but, you know, not wanting to really be in the same rhythm with the rest of the guys and work cohesively together with the department. Joe was always a little bit harder, you know, to deal with as assigning work and making sure that the work was done." (T67:25-T68:1-6). Stout also testified that he was aware of Mulholland's Last Chance Agreement of May 2022, after the same was issued.

Stout testified regarding the underlying incidents with Mulholland in June 2022. The first incident occurred on June 16, 2022, concerned a broken shovel, that was included in the PNDA (Exhibit J). Stout testified that he was upset after he was informed by one of the Public Works employees that a brand-new shovel had the handle cut off. Stout stated that he spoke with the work crew regarding the same, and that Mulholland then yelled out that "this is not a big deal, I could fix the handle." (T:71:11-25). Stout stated he informed Mulholland that the shovel handle could not be repaired because it was fiberglass. Stout testified and characterized Mulholland's conduct with him as "argumentative", and "raised his voice" at Stout as he walked away. (T71:12-25; T72:1-25). Stout testified that he wrote a memo to Heck regarding the June 16 incident (Exhibit S).

Stout then testified that concerning another incident with Mulholland that occurred later on June 1, 2022, that is not included as an incident in the PNDA (Exhibit J). Stout testified that he issued Mulholland a written warning (Exhibit L) for allowing a chain to drag from his truck. Stout testified that he prepared the memo, and that Mulholland refused to sign for the same.

Stout then testified concerning a third incident on June 17, 2022, which was included as an incident in the PNDA of June 2022 (Exhibit J), that during a routine safety meeting among employees. Stout testified that Mulholland stated that he did not need to listen to Stout concerning safety instructions. Stout testified that Mulholland "raised" his voice and got "loud" but he "did not threaten" Stout or the other Public Works employees (T89:15-25).

Stout testified that he considered the three incidents involving Mulholland and his past incidents of behavior for several days before issuing the PNDA (Exhibit J). Specifically, Stout testified that he believed Mulholland's conduct was negatively impacting the other employees as they were afraid of his behavior. Stout testified that the main reason for terminating Mulholland was the impact on the other employees. (T81:1-18]. Stout further testified that following the issuance of the FNDA terminating Mulholland, he experienced the Public Works employees as relived that they did not have

to work with Mulholland because of his past conduct. Stout explained that Mulholland's termination positively impacted the workplace.

On cross examination Stout was shown a meme (Exhibit S) that he had written concerning the first incident on June 16, 2022, and he conceded that Mulholland did not threaten him or any other employee, but that Mulholland's "demeanor changed" and he raised his voice to say he could "fix" the shovel. (T88:17-25; T89:1-2)

Stout testified that he did not consider Mulholland's Last Chance Agreement as the incidents occurred, but that he considered the same a few days later when he was considering disciplining Mulholland. Further on cross, Stout stated that he was aware of Mulholland's complaint of harassment against him at the time he issued the PNDA on June 23. (T94:19-23).

On re-direct, Stout testified that it "wasn't any one incident" that resulted on his decision on June 23, 2022 to terminate Mulholland and that he had to "think about the other group of men that are there, too" in considering the decision to terminate Mulholland. (T98:9-20).

In responding to questions from the undersigned concerning the timeline of events leading to his decision to terminate Mulholland, Stout stated he made his decision to recommend Mulholland's termination on June 23, 2022, which was several days after the last incident on June 17, because termination is a "very serious thing", and he wanted to fully consider his decision. [T104:25, T1051-25 and T106:1-4]

John Joseph Mulholland

Mulholland testified that he had been employed with Ringwood for sixteen (16) years. He was hired as a mason and did all work assigned to him by the Ringwood Public Works Department. Mulholland stated he was in the Navy from 1980 to 1984 and received an honorable discharge (Exhibit P). He acknowledged his prior conduct that led to his suspensions and several Last Chance Agreements (Exhibit M), and acknowledged

he had attended anger management training that helped him interact better with others (Exhibit R).

As to the incidents contained in the PNDA (Exhibit J) that form the basis of this case, Mulholland does not dispute the facts concerning the incidents occurred that occurred on June 16 and June 17, 2022, he does, however, dispute Stout's characterization of his behavior as alleged in the PNDA. Specifically, Mulholland denies raising his voice, being belligerent or that he threatened Stout or any of the Public Works employees who were present at both incidents.

Concerning the Last Chance Agreement of May 18, 2022 (Exhibit H), he testified that he acknowledged that his conduct was inappropriate (T116:15-25), and that he executed the Last Chance Agreement because he needed to "take care of his family, pay the mortgage" (T117:1-17). As to paragraph 11 of the Last Chance Agreement (Exhibit H), concerning Mulholland's understanding of what conduct would constitute his termination from employment, he testified that he understood that he could not yell at his co-workers and if he had a problem with them he should "report the same to his supervisor." (T120:11-17). Mulholland also acknowledged that he knew that if he did not behave as stated in the Last Chance Agreement he could lost his job.

Mulholland elaborated on why he thought Stout's conduct toward him was a form of harassment, as he believed that Stout was filing "frivolous write ups" regarding his conduct and he had spoken to Heck regarding the same (T124: 1-7). Specifically, Mulholland stated:

> Q What prompted you to contact Mr. Heck?
>
> A Because George Stout was going out of his way to-- to make my life miserable, to micro manage everything, try to act like I didn't know what I was doing for a simple traffic safety post, it's -- it's not right. I've had problems in the past, myself, Mr. Heck and Mr. Stout and Mr. McCart had a meeting where I claimed that Mr. Stout was harassing me …
>
> T128:8-18]

Mulholland also disclosed that he and Stout interacted outside of work, as they both were volunteer firefighters with the Town of Ringwood. Mulholland stated that Stout had even been his fire chief and that he never had any issues with Stout as a firefighter his fire chief.

CREDIBILITY

When witnesses present conflicting testimonies, it is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story in light of its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see Polk, 90 N.J. 550.

Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record. State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973).

The finder of fact is not bound to believe the testimony of any witness, and credibility does not automatically rest astride the party with more witnesses. In re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved but may not be disregarded at an administrative proceeding. Middletown Twp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962). Credible testimony must not only proceed from the mouth of credible witnesses but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546 (1954).

I **FIND** that Heck provided credible testimony, as he presented testimony that was consistent and corroborated by the record concerning the allegations made against Mulholland contained in the disciplinary records admitted herein (Exhibit M). I **FIND** Heck had no bias toward Mulholland in providing his answers concerning Ringwood's termination of Mulholland. I **FIND** Heck's testimony credible and reliable, as he testified concerning the disciplinary procedures employed by Ringwood, and specifically as to

Mulholland, which are corroborated by the exhibits in evidence. Id. Heck's testimony cannot be used to establish that Mulholland's conduct violated the terms of the Last Chance Agreement, as he admitted he did not see or hear Mulholland behave in the manner alleged therein, and he therefore allowed Stout to bring the charges in the PNDA and FNDA, and I **FIND** the same as unable to establish that Mulholland violated the Last Chance Agreement.

Therefore, I **FIND** Heck's testimony to be **FACT** herein.

I **FIND** that Stout provided credible testimony concerning his interactions with Mulholland during his eight years as his supervisor. I also **FIND** that Stout provided credible testimony concerning the events that occurred on June 16, regarding the broken shovel, and later the same day regarding the dangling chain on the truck, and on June 17, the roadside instruction, as the events themselves are not disputed by the evidence or even Mulholland's testimony. With the exception of Stout's characterization of Mulholland's conduct in the three incidents, I **FIND** said testimony concerning their occurrence as **FACT** herein. .

I **FIND** Stout's testimony not credible in characterizing Mulholland's behavior on June 16 and 17, as "belligerent", "argumentative" and "loud", to justify a termination of Mulholland because he violated the Last Chance Agreement. For example, Stout conceded on cross-examination that Mulholland's conduct on both dates was "not threatening" to him or the employees, but "loud". Another example was Stout's description of Mulholland's conduct as "belligerent" or "insubordinate" is also not credible, inasmuch as Stout's testimony on cross examination regarding the report he prepared on June 16 regarding the dangling chain (Exhibit S) revealed he did not deem Mulholland's conduct to be belligerent or threatening.

I **FIND** Stout's testimony not credible that Mulholland's Last Chance Agreement did not influence his decision to terminate Mulholland, as Stout testified that he has had a rocky relationship with Mulholland during the eight years he was his supervisor and that he was aware of the Last Chance Agreement after it was issued and before the alleged infractions on June 16 and June 17. I make my **FINDING** based upon my observation of

Stout and his demeanor when answering questions concerning Mulholland's disciplinary history, and his concern for workplace morale as his primary reason to terminate Mulholland.

I **FIND** Mulholland's testimony credible as to the events that occurred on June 16 and 18 2022, inasmuch as he admits to the events that are reported in the PNDA but disputes the characterization of his conduct on said dates. I **FIND** Mullholland's testimony credible as to his understanding of paragraph 11 of the Last Chance Agreement, that he could be terminated if he argued with Public Works personnel. I further **FIND** Mulholland's testimony credible concerning Stout's interactions with him as supervisor, when delegating Mulholland work assignments and patronizing behavior toward Mulholland regarding the June 16 and June 17 incidents. As such, I **FIND** said credible testimony as **FACT** herein.

Legal Analysis and Conclusion

The Civil Service Act and the implementing regulations govern the rights and duties of public employees. N.J.S.A. 11A:1-1 to 12-6; N.J.A.C. 4A:1-1.1 to 4A:10-3.2. An employee who commits a wrongful act related to his or her duties or who gives other just cause may be subject to major discipline. N.J.S.A. 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). In a civil service disciplinary case, the employer bears the burden of sufficient, competent, and credible evidence of facts essential to the charge. N.J.S.A. 11A:2-6(a)(2), -21; N.J.S.A. 52:14B-10(c); N.J.A.C. 1:1-2.1, "burden of proof"; N.J.A.C. 4A:2-1.4. That burden is to establish by a preponderance of the competent, relevant, and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982).

An appointing authority may discipline an employee on various grounds, including conduct unbecoming a public employee, neglect of duty, and other sufficient cause. N.J.A.C. 4A:2-2.3(a). Such action is subject to review by the Civil Service Commission, which after a de novo hearing makes an independent determination as to both guilt and the "propriety of the penalty imposed below." W. New York v. Bock, 38 N.J. 500, 519 (1962). In an administrative proceeding concerning a major disciplinary action, the

appointing authority must prove its case by a "'fair preponderance of the believable evidence.'" Polk, 90 N.J. at 560 (citation omitted); N.J.A.C. 4A:2-1.4(a); Atkinson, 37 N.J. at 149.

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). The greater weight of credible evidence in the case—the preponderance—depends not only on the number of witnesses, but "the greater convincing power to our minds." State v. Lewis, 67 N.J. 47, 49 (1975) (citation omitted). Similarly, credible testimony "must not only proceed from the mouth of a credible witness but must be credible in itself." In re Estate of Perrone, 5 N.J. 514, 522 (1950).

Ringwood alleges that Mulholland has violated N.J.A.C. 4A: 2-2.3(a)(2), insubordination and N.J.A.C. 4A: 2-2.3(a)(12) other sufficient cause, because his conduct as contained in the FNDA resulted in his violation of the terms of the Last Chance Agreement dated May 18, 2022. (Exhibit H, paragraph 11). The allegations contained in the PNDA and as adopted in the FNDA giving rise to Ringwood's requested penalty to remove Mulholland as an employee provide in relevant part that on June 16, 2022, Mulholland "unreasonably raised his voice and argued that the broken equipment was not a big deal", ...and notwithstanding attempts "to stop the exchange, Mr. Mulholland continued arguing in a belligerent manner." (Exhibit J). Ringwood further alleges that on June 17, 2022, during a meeting to discuss safety reminders Mulholland became "unreasonably belligerent and snapped" at Stout that "I have done this before" and stated he did not need safety instructions. Id.

It is clear that these allegations can only be established by the testimony of Stout and Mulholland, as no other corroborating evidence has been presented to substantiate the charges. Heck's testimony cannot be used to establish that Mulholland's conduct violated the terms of the Last Chance Agreement, as he admitted he did not see or hear Mulholland behave in the manner alleged therein. Having had an opportunity to consider the full record herein, including the benefit of hearing the testimony of Heck, Stout and Mulholland, and the submission of the joint exhibits, I **CONCLUDE** that Ringwood has failed to prove its case by a "'fair preponderance of the believable evidence.'" Polk, 90

N.J. at 560 (citation omitted); N.J.A.C. 4A:2-1.4(a); Atkinson, 37 N.J. at 149, and I **CONCLUDE** that its decision contained in the FNDA is **DISMISSED**.

There is no dispute that Mulholland has failed to be an exemplary employee. A review of his personnel file admitted in evidence reveals that Mulholland was subject to no less than 72 days of suspension during his employment. (Exhibit M). However, Ringwood has chosen to terminate Mulholland for violating the Last Chance Agreement based upon allegations as defined in paragraph 11 therein (Exhibit H), that are not substantiated by the record.

For example, the FNDA alleges that on June 16, 2022, "Mr. Mulholland unreasonably raised his voice and argued that the broken equipment was not a big deal. Despite attempts to stop the exchange, Mr. Mulholland continued arguing in a belligerent manner." (Exhibit J). However, Stout's testimony concerning Mulholland's conduct on June 16, failed to establish that Mulholland engaged in said conduct. Specifically, Stout did not provide any testimony, and the record does not contain any proofs that on June 16, 2022, Mulholland engaged in conduct alleged as arguing in a "belligerent" manner as alleged in the FNDA. Stout did not testify that Mulholland yelled or screamed, was aggressive, or threatening. Stout testified that Mulholland "raised his voice" in speaking to him, which caused Stout to walk away. I **CONCLUDE** that said conduct cannot alone be described as Mulholland "unreasonably" raised his voice or was "belligerent", as stated in the FNDA.

Similarly, the FNDA allegations regarding the June 17, 2022 event provide that "Mulholland became unreasonably belligerent and snapped at the Assistant Superintendent 'I have done this before and stated, 'he did not need safety instructions". As stated previously, Stout's testimony did not describe an instance where Mulholland was not only "unreasonably belligerent", let alone just belligerent at all. I **CONCLUDE** that while Mulholland's testimony provided context evidencing that he did not agree with Stout's instructions, and perhaps could be interpreted as challenging it did not rise to a level of being belligerent or that he "snapped" at Stout.

Ringwood argues that Mulholland's conduct on June 16 and June 17, rise to the level of termination as stated in paragraph 11 of the Last Chance Agreement. However, a review of the same reflects that Ringwood's argument is not substantiated by the record. Specifically, Paragraph 11 provides in part: "Mr. Mulholland agrees and understands that he is subject to termination for any infraction similar to the Action, including but not limited to: (i) aggressive or threatening behavior toward employees; (ii) screaming and yelling at employees or (iii) any other conduct which reasonably and objectively, constitutes belligerent behavior towards another employee in the workplace. (emphasis supplied) (Exhibit H).

On cross examination, Stout denied that Mulholland's conduct on June 16 and June 17 was "aggressive or "threatening behavior", "screaming and yelling", at not only other employees but toward Stout as well. The record is also devoid of any proofs that Mulholland's conduct was "reasonably and objectively, constitutes belligerent behavior" towards not only other employees but Stout as well. I **CONCLUDE** that Mulholland's conduct does not violate the letter of the Last Chance Agreement.

Finally, the Last Chance Agreement provides that if Mulholland is found to have violated any of the inappropriate conduct listed therein, and Mulholland is subject to further discipline "the appropriate penalty is termination." Id. Since I have **CONCLUDED** that Mulholland's conduct does not give rise to a violation of the Last Chance Agreement, it follows that he is not subject to a penalty of termination.

Mulholland argues that the word belligerent is defined as: 1) inclined to or exhibiting assertiveness, hostility, or combativeness; 2) waging war, specifically belonging to or recognized as a state at war and protected by and subject to the laws of war; (https://www.merriam-webster.com/dictionary/belligerent). Clearly, the record herein evidencing Mulholland's conduct on June 16 and June 17 does not rise to the level of being belligerent, or threatening, as defined and within the meaning of the Last Chance Agreement, and alleged in the FNDA. For these reasons, I **CONCLUDE** that Ringwood has not demonstrated by clear and convincing evidence that Mulholland has violated N.J.A.C. 4A: 2-2.3(a)(2), insubordination and N.J.A.C. 4A: 2-2.3(a)(12) other sufficient cause, and therefore the FNDA should be **DISMISSED**.

PENALTY

When dealing with the question of penalty in a *de novo* review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and penalty on appeal based on the charges. N.J.S.A. 11A:2-19. Factors determining the degree of discipline include the employee's work history, his prior disciplinary record, and the gravity of the misconduct. In West New York v. Bock, 38 N.J. 500, 522 (1962), our Supreme Court first recognized the concept of progressive discipline, under which "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct."

Having **CONCLUDED** that Ringwood has failed to prove its case by a "'fair preponderance of the believable evidence.'" Polk, 90 N.J. at 560, I further **CONCLUDE** that Ringwood's decision to terminate as stated in the FNDA for violating the terms of his Last Chance Agreement dated May 22, 2022, is **DISMISSED** and therefore, no penalty is issued herein.

ORDER

Having concluded that Ringwood has not sustained its burden of proof the charges contained in the FNDA, I **ORDER** that the charges contained in the FNDA dated July 6, 2022, are **DISMISSED**, and I further **ORDER** that the penalty of removal of Mulholland by Ringwood is **DISMISSED**.

It is further **ORDERED** that Mulholland be reinstated and awarded back pay, benefits, and seniority in accordance with the guidelines set forth in N.J.A.C. 4A:2-2.10.

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.

October 29, 2024 Julio Morejon

JULIO C. MOREJON, ALJ

Date Received at Agency: October 29, 2024

Date E-Mailed to Parties: October 29, 2024

lr

APPENDIX

Witnesses

For Appellant:

John Joseph Mulholland

For Respondent:

Scott Heck

George Stout

Exhibits

For Appellant:

See Joint Exhibits

For Respondent:

See Joint Exhibits

Joint Exhibits

A	Settlement Agreement & Release 5/12/08 (Last Chance Agreement)
B	PNDA dated 5/5/08
C	Settlement Agreement & Release 4/2009
D	PNDA - 1/30/09 & FNDA - 3/6/09
E	Settlement Agreement 2/9/12
F	PNDA - 4/27/10 & FNDA – 10/14/10
G	Memos-6/19/15; 5/23/18; 6/19/18; 7/20/18; & 12/10/19 & Ringwood Police Operation Report
H	Last Chance Agreement 5/18/22
I	PNDA 3/25/22
J	PNDA 6/23/22
K	FNDA 7/6/22

L Memo Written warning re: chain 6/17/22 & 6/19/15

M Stipulations as to petitioner's disciplinary history

N "Timeline Documents" regarding stipulations as to petitioner's disciplinary history (submitted with post hearing summations)

O Phone message 1/28/16 & Letter of thanks from citizen12/30/15

P Discharge from Active Duty Certificate

Q Borough of Ringwood permanent position letter 3/18/16 & provisional appointment letter 7/20/15

R The Counseling and Wellness Center letter 4/11/22

S Memo 6/16/22 from Stout to Heck