THOMAS MALONEY, Plaintiff-Respondent, v. BOROUGH OF CARLSTADT, Defendant-Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001438-23 CIVIL ACTION On Appeal from the Final Judgment of the Superior Court of New Jersey, Law Division, Bergen County Docket No. BER-L-003281-21 Sat Below: Hon. Christine A. Farrington, J.S.C. (retired and temporarily assigned on recall) ***Date of Submission: June 17, 2024***

BRIEF ON BEHALF OF DEFENDANT-APPELLANT BOROUGH OF CARLSTADT

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PRELIMINARY STATEMENT

The within matter involves the Borough of Carlstadt's ("Defendant" or "Borough") removal of a public official, Thomas Maloney, Commissioner of the Carlstadt Sewerage Authority ("Plaintiff" or "Maloney"), for misconduct and/or neglect of duty pursuant to N.J.S.A. 40:14A-5(c). Upon initial appeal to this Court, Maloney's removal was reversed on procedural grounds and remanded for a ruling on the merits. Upon remand, the Trial Court granted Maloney's motion for summary judgment and denied the Borough's motion for summary judgment. The Borough now appeals.

In assessing whether the Borough met its burden of proof in finding that Thomas Maloney engaged in misconduct and/or neglect of duty in violation of N.J.S.A. 40:14A-5(c), a review of the following relevant facts is necessary:

1. On February 8, 2020, Maloney logged into a chat room that consisted of members who were residents of Carlstadt and included Carlstadt Council members and at least one member of the Carlstadt Board of Education. At that time, he posted a revolting and misogynistic pornographic video. Specifically, the video depicted a naked man defecating into a naked woman's mouth and onto her face and ended with the words on the screen "Shit happens," "Thug life," "Dug life," and "Bitch."

2. Along with the video, Maloney posted the caption, "Don't say nothing. Just keep it going lmao! [laughing emoticons]."

3. The video was visible in the chat room for most of the day and accessible to all members in the chat room.

The courts have consistently held that public officials – whether elected or appointed – are held to a higher standard of conduct. There is no reason to deviate from those rulings here. Maloney was a public official who had a fiduciary duty of honesty and integrity to the public as well as a duty to respect all individuals, including women. That Maloney's misogynistic conduct was not in conformance with these requirements is an understatement. It is of no moment that what Maloney posted to various individuals was accomplished when not performing any sewerage commission duties. An individual either has integrity and respect for others or doesn't. Such values don't click on or off depending on whether official duties are being conducted. The video distributed by Maloney, and the comment to it, makes clear that Maloney lacks the integrity and respect to hold a public position. For this reason, the Borough's motion to remove Maloney was not arbitrary or unreasonable. The Trial Court's ruling denying same must, therefore, be reversed.

PROCEDURAL HISTORY

On November 3, 2020, the Borough, filed a Preliminary Notice of Disciplinary Action ("PNDA") against Maloney, a Commissioner of the Carlstadt Sewerage Authority (Da 27-30). The PNDA charged Maloney with: Misconduct, Inefficiency, and Neglect of Duty, in violation of N.J.S.A. 40:14A-5(c) and therefore sought his removal (Maloney was also charged with violating the Carlstadt Sewerage Authority Employee Handbook Discipline Policy).

On November 2, 2020, the Borough appointed Benjamin B. Choi, Esq., as the Hearing Officer for the hearing on the charges. The parties engaged in discovery and had several pre-hearing conferences. On February 8, 2021, a Zoom virtual hearing was conducted. Both parties presented one witness each and introduced exhibits. They then submitted post-hearing briefs.

On March 26, 2021, Hearing Officer Choi rendered his decision (Da 31-42). He sustained the charge that Maloney violated N.J.S.A. 40A:14-5, id., and forwarded the matter to the Borough Council for final determination.

On April 7, 2021, the Borough Council accepted Hearing Officer Choi's recommendation and resolved that "Thomas Maloney is removed as a Commissioner of the Carlstadt Sewerage Authority, effective immediately." (Da 43).

On May 19, 2021, Maloney filed an "Action in lieu of prerogative writs", appealing his removal from the Carlstadt Sewerage Authority. On June 1, 2021, the Borough filed its Answer, generally denying the Complaint's allegations and asserting that proper cause existed to warrant Maloney's removal from the Authority.

On July 23, 2021, both parties moved for summary judgment. The Borough specifically argued that Maloney's conduct constituted misconduct and neglect of duty in violation of N.J.S.A. 40:14A-5(c).

On September 9, 2021, the Trial Court heard oral argument from both parties. (Da 220) On the same day, the Trial Court issued an Order granting summary judgment in favor of Maloney and ordered his reinstatement. (Da 1-22).

On September 20, 2021, the Borough filed a Notice of Appeal challenging the Trial Court's order for Maloney's reinstatement. (Da 241).

On September 20, 2021, the Borough sent notice to the Trial Court advising that it filed a Notice of Appeal and requested a stay of the order reinstating Maloney. (Da 23).

On September 23, 2021, the Trial Court denied the Borough's request for a stay of its order. (Da 26). However, on October 29, 2021, the appellate court reversed that denial and granted the Borough's motion for a stay pending appeal. (Da 346).

On July 10, 2023, the appellate court reversed the Trial Court's ruling and remanded for a ruling on the merits. (Da 347). In its ruling, the appellate court held that Maloney was the holder of a public office. (Da 355).

On December 1, 2023, Maloney filed a motion for summary judgment. On December 4, 2023, the Borough also filed a motion for summary judgment. (Da 359-366). The parties submitted reply/opposition briefs.

On January 5, 2024, the Trial Court granted Maloney's motion for summary judgment and denied the Borough's motion for summary judgment. (Da 372).

On January 15, 2024, the Borough filed a Notice of Appeal and Case Information Statement appealing the Trial Court's ruling. (Da 367).

STATEMENT OF FACTS

At the time the matter in dispute arose, Maloeny was a Commissioner of the Carlstadt Sewerage Authority ("Authority") having been appointed to a five (5)-year term from February 1, 2018 until January 31, 2023. (Da 210).

While a Commissioner, Maloney was a member of a Facebook group chat that consisted of at least 86 members of the Carlstadt and Bergen County communities (Da 187-193). Members in the Facebook group chat included the current Mayor of Carlstadt, the official Facebook page of the Borough of Carlstadt, former Mayors of Carlstadt, members who live in the town of Carlstadt or in Bergen County, Borough of Carlstadt Council Members, the former Bergen County Executive, and at least one member of the Carlstadt Board of Education. (Da 33; Da 37; Da 187-193; Da 218).

On February 8, 2020, Maloney was logged into the chat room and, at approximately 11:30 a.m., transmitted a vulgar, obscene, misogynistic, pornographic video to all members of the chatroom. (Da 37; Da 68; Da 183; Da 195 (the video)). The video depicted a naked man defecating into a naked woman's mouth and onto her face, id., and ended with the words on the screen "Shit happens," "Thug life," "Dug life," and "Bitch." Id. Maloney posted the video to the chat room with the caption "Don't say nothing. Just keep it going lmao! [laughing emoticons]."

(Da 38; Da 183). Later that day, at approximately 6:57 p.m., almost eight (8) hours later, Maloney referred to the video he posted and said, "Omg how did so many people get to see this wow." (Da 38; Da 185).

This video was visible in the chat room for most of the day and could be accessed and/or viewed by the members of the group. (Da 33; Da 37; Da 187-193; Da 218). Indeed, Cheryl Rivera, a former Borough employee, did see the video and emailed the Borough to express her outrage that Maloney still had his appointed position (Da 213). Ms. Rivera's email to the Mayor and Council Members stated:

> "it was brought to the Borough's attention that an appointed member of our volunteer Board of Health used his personal social media to make racist and threatening comments to participants of that rally [in support of Black Lives Matter]. This behavior is unacceptable and the individual has been removed from his volunteer position effective immediately. **Yet, Tom Maloney who posted a pornographic, misogynistic video to the Carlstadt Republican Club Facebook board a few months ago is still a Sewerage Authority commissioner. The video showed a naked man defecating on a naked woman's face. At the time, I told [a Borough managerial employee] and he laughed it off. I was offended by the post and am disgusted that he still has his appointed position."**

Id. (emphasis added).

Upon the discovery of Maloney's post, the Borough had the matter investigated (Da 197), but Maloney would not respond to requests for an interview. (Da 197-209). After several failed attempts to interview Maloney, the Borough

issued the PNDA to Maloney on November 3, 2020 seeking his removal pursuant to the statutory mechanism to do so. (Da 27-30). The PNDA charged Maloney with the N.J.S.A. 40:14A-5(c) statutory grounds of misconduct, inefficiency, neglect of duty, as well as violations of the Carlstadt Sewerage Authority Employee Handbook Discipline Policy, including:

1. Harassment of co-workers and/or volunteers and/or visitors; and/or members of the public;
2. Conduct unbecoming a public employee;
3. Violating any Carlstadt Sewerage Authority rules or policies;
4. Violation of Carlstadt Sewerage Authority policies, procedures and regulations; and
5. Other sufficient cause.

Id.[1]

The Sewerage Authority's social media policy, states in relevant part:

> If employees choose to identify themselves as a Carlstadt Sewerage Authority employees on their personal social media accounts, **and even those that do not should be aware that he or she may be viewed as acting on behalf of the Carlstadt Sewerage Authority, as such no employee shall** knowingly represent themselves as a spokesperson of the Carlstadt Sewerage Authority, **post**

[1] The Carlstadt Sewerage Authority Employee Handbook plainly applies to Maloney as it specifies that "The Personnel policies and procedures of the Carlstadt Sewerage Authority "**shall apply to all employees, volunteers, appointed officials and independent contractors.**" (Da 108).

> **any comment, text, photo, audio, video, or other multimedia file that negatively reflects upon the Carlstadt Sewerage Authority's mission or undermine the public trust or is insulting or offensive to other individuals or to the public in regard to religion, sex, race, or national origin.**

(Da 127) (emphasis added).

On March 26, 2021, Hearing Officer Benjamin Choi, Esq. issued his decision. (Da 31-42). He found that Maloney admitted to posting the video, which was visible to everyone in the chat room, but claimed it was transmitted mistakenly and was intended to be sent to just one person. (Da 87). Ms. Rivera saw the video in the chat room and was disgusted and offended by the "misogynistic" video. Id. He stated that "There is no room to doubt that this pornographic video would be regarded as highly offensive, misogynistic, and demeaning to women, to any person of ordinary sensibilities who had the misfortune to view it." Id. He stated that "the fact remains, however, that the transmittal of such vulgar, offensive, and pornographic material, even if unintentional, **places into question the Respondent's [Maloney] judgment, character, and fitness to serve in a public appointed position as Commissioner of the Carlstadt Sewerage Authority."** (Da 40) (emphasis added).

The Hearing Officer also found legal justification for Maloney's termination. The Hearing Officer found, *inter alia,* that Maloney's removal as Commissioner of the Sewerage Authority was governed by N.J.S.A. 40:14A-5(c), (Da 39), which states in pertinent part that, "A member of a sewerage authority may be removed

only by the governing body by which he was appointed and only for inefficiency or neglect of duty or misconduct in office." N.J.S.A. 40:14A-5(c). He found that the Borough Municipal Code was applicable to Maloney, and that his violations of the Municipal Code constituted misconduct and neglect of duty under N.J.S.A. 40:14A-5(c). (Da 39).

In so ruling, the Hearing Officer relied on New Jersey Supreme Court precedent which holds that misconduct need not be predicated on the violation of any particular department or regulation but may be based merely upon the implicit standard of good behavior which devolves upon one who stands in the public eye as the upholder of that which is morally and legally correct. (Da 40) (citing In re Phillips, 117 N.J. 567, 569, 576 (1990); In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960)).

The Hearing Officer also relied on Karins v. Atlantic City, 152 N.J. 532 (1998), where the Supreme Court of New Jersey held that conduct unbecoming a public employee " is an elastic phrase that has been defined as "any conduct which adversely affects the morale or efficiency of the bureau, or which has a tendency to destroy the public respect for municipal employees and confidence in the operation of municipal services." Id. at 554. The Hearing Officer held that like in Karins, Maloney's conduct adversely affected the morale, the public trust, and confidence necessary to the effective operation of Carlstadt's departments. (Da 41). He held that

"it matters not whether the misconduct relates directly to performance of the Respondent's [Maloney] official duties, so long as the acts charged tend to reflect upon and impair the morale and discipline of his position." Id.

Having determined that Maloney was an employee under the Borough's Municipal Code and as such was subject to disciplinary action under their ordinances, he also found that Maloney's heinous conduct was a violation of the Municipal Code and clearly misconduct and neglect of duty which warranted his removal under N.J.S.A. 40:14A-5(c). (Da 41). He stated, "It is this Hearing Officer's determination that the transmission of the pornographic and highly offensive, sexist, and misogynistic video, **in and of itself, constitutes misconduct and neglect of duty,**" id., and recommended Maloney's removal (Da 42).

On April 7, 2021, the Mayor and Council removed Maloney as the Sewerage Authority Commissioner through Resolution No. 2021-80A. (Da 43).

LEGAL ARGUMENT

I. STANDARDS OF REVIEW

A. *The standard of review of this summary judgment decision is plenary.*

Here, this court is reviewing an order granting Maloney summary judgment and denying the Borough's motion for summary judgment. In conducting such a review, "[the Trial Court's] interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference, and, hence, an "issue of law [is] subject to de novo plenary appellate review." Estate of Hange v. Metro. Prop. & Case. Ins. Co., 202 N.J. 369, 382 (2010) [internal quotation marks and citations omitted].

And, of course, the standard for determining whether summary judgment should be granted is set forth in R. 4:46. That rule provides that a Court may enter summary judgment:

> [I]f the pleadings, depositions, answers to interrogatories and admissions on file together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.

R. 4:46-2(c) (emphasis added).

Summary judgment is a proper remedy where, as here, there is no genuine issue of material fact challenged, and the moving party is entitled to judgment as a

matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); see also, R. 4:46-2. In Brill, the Court stated:

> [W]hen deciding a motion for Summary Judgment under Rule 4:46-2, the determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

Brill, 142 N.J. at 523.

Courts granting summary judgment a motion for summary judgment view the evidence in a light most favorable to the non-moving party. Id. This assessment of the evidence is to be conducted in the same manner as that required under R. 4:37-2(b). Id. Thus, a court must determine whether the evidence presents sufficient disagreement to require submission to the fact-finder or whether the evidence is so one-sided that one party must prevail as a matter of law by the same standard of proof that would apply at the time of trial. Id.

Once the moving party has met its burden of excluding all reasonable doubt as to the existence of any genuine issue of material fact, Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954), the burden shifts to the non-moving party to produce concrete evidence, setting forth the specific facts that prove there is a genuine issue for trial, that would support a jury verdict in his or her favor. Housel

v. Theodridis, 314 N.J. Super. 597, 604 (App. Div. 1998). As the Supreme Court stated, "by its plain language, Rule 4:46-2 dictates that a court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to **any** material fact challenged'." Brill, 142 N.J. at 529 (emphasis in the original).

Critically, what is of vital importance in the requirements for successfully opposing a motion for summary judgment is the word "genuine." Swarts v. Sherwin-Williams Co., 244 N.J. Super. 170, 178 (App. Div. 1990). If the disputed issues of fact are insubstantial in nature summary judgment is proper and should be granted. Brill, 142 N.J. at 529. Furthermore, only competent documentary evidential materials that lead to substantial issues of fact can defeat a motion for summary judgment. Id. Thus, in order for a non-moving party to defeat a motion for summary judgment they are required to do more than merely deny the facts set forth in the moving party's papers. Sagendorf v. Selective Ins. Co., 293 N.J. Super. 81, 94 (App. Div. 1996). When the non-moving party is unable to come forward with any concrete evidence that would enable a rationale fact finder to return a verdict in his or her favor, summary judgment must be granted. Housel, 314 N.J. Super. at 604.

Here, there are no material issues of fact as to the issue of the Borough's authority and grounds to remove Maloney from his position as Sewerage Authority Commissioner. Maloney received a fair hearing before an impartial hearing officer.

Maloney possessed a video tape of a naked man defecating in the mouth and on a naked female followed by the following words "Shit Happens, Thug Life, Dug Life, and Bitch". He was in a chat room and, according to his testimony, he intended and did, in fact, send it to another member. In doing so, he made it accessible to all members. He then joked about it. After the investigation commenced, he failed to cooperate by being interviewed and did not admit to transmitting the offensive video until Ms. Rivera testified. It was only then that he apologized. The undisputed proofs establish that Plaintiff's behavior in disseminating vulgar, misogynistic pornography constitutes misconduct in office and neglect of his duty to the public to act with integrity and respect towards all individuals thereby warranting removal. On these bases, the Borough respectfully submits that the Trial Court's ruling denying the Borough's motion for summary judgment is reversed.

B. *Prerogative Writ Standard of Review*

This is a prerogative writ action. Maloney is seeking to have this court overturn the Borough's decision to remove him as a Commissioner of its Sewerage Authority because he possessed and distributed highly offensive misogynistic and pornographic material.

It is well settled that, in a prerogative writ action, a court will set aside a municipality's decision only where it is shown to be arbitrary, capricious or unreasonable, not supported in the evidence, or is otherwise contrary to law. Rivkin

v. Dover Tp. Rent Leveling Bd., 143 N.J. 352, 378 (1996). Thus, as noted in Kramer v. Bd. of Adjustment, 45 N.J. 268 (1965), in dismissing a prerogative writ challenge:

> Courts cannot substitute an independent judgment for that of the boards in areas of factual disputes; neither will they exercise anew the original jurisdiction of such boards or trespass on their administrative work. So long as the power exists to do the act complained of and there is substantial evidence to support it, the judicial branch of the government cannot interfere. [Such a determination] will be set aside only when it is arbitrary, capricious or unreasonable. Even when doubt is entertained as to the wisdom of the action, or as to some part of it, there can be no judicial declaration of invalidity in the absence of clear abuse of discretion by the public agencies involved.

Id. at 296-297.

Based on the foregoing precedent, the issue presented here is whether the Borough's decision to remove Maloney as a Sewerage Authority Commissioner was arbitrary and capricious. For the reasons set forth below, the decision was not. Maloney was properly removed.

II. CARLSTADT'S REMOVAL OF MALONEY WAS NOT ARBITRARY OR CAPRICIOUS AS MALONEY'S CONDUCT CONSTITUTES "MISCONDUCT" AND "NEGLECT OF DUTY" UNDER N.J.S.A 40:14A-5(c). (Raised Below: Da 377)

The Facts are not in dispute and may be summarized as follows:

1. Maloney was a Commissioner of the Carlstadt Sewerage Authority at the time he possessed and transmitted a video that depicted a naked man defecating into a naked woman's mouth and onto her face, and ended

with the words on the screen "Shit happens," "Thug life," "Dug life," and "Bitch;"

2. Maloney transmitted the video in a chat room composed of leaders and residents of the Borough of Carlstadt and Bergen County; and

3. Upon realizing that the video had been so communicated, Maloney said: "OMG, how did so many people get to see this. . .wow."

A. ***As an appointed public official/officer, Maloney neglected his duty under N.J.S.A. 40:14A-5(c) to act ethically in his private life and to treat all people equally with respect and dignity.*** **(Raised Below: Da 376)**

It is undisputed that an appointment as Commissioner to the Carlstadt Sewerage Authority is an appointment to a public office. As such, Maloney is to be held to a higher standard of conduct. As set forth by New Jersey Attorney General Matthew Platkin when addressing a matter involving a New Jersey Chief of Police who had been implicated in separate racist and criminal investigations,

> There is a social contract that imposes an expectation that officials in positions of governmental and law enforcement leadership will do the right thing, act not in self-interest but in service to the greater good, and treat all people with respect and dignity as equals. These are not naive ideals or lofty ambitions but rather the bare minimum expectations communities should have in their leaders.

(Da 380).

In New Jersey, it is well-settled that public officials hold positions of trust and are under an inescapable obligation to serve the public with the highest fidelity, good

faith and integrity. Driscoll v. Burlington-Bristol Bridge Co., et al., 8 N.J. 433, 474 (1952), cert. denied, 344 U.S. 838 and reh'g denied, 344 U.S. 888 (1952). "They stand in a fiduciary relationship to the people whom they have been elected or appointed to serve." Id.

In referencing the elected members of the Board of Chosen Freeholders and of the bridge commission, the Driscoll Court held,

> As fiduciaries and trustees of the public weal they are under an inescapable obligation to serve the public with the highest fidelity. In discharging the duties of their office they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, **and above all to good faith, honesty and integrity.**

Id. at 474-475 (emphasis added).

The Driscoll Court further held that such obligations are not

> mere theoretical concepts or idealistic abstractions of no practical force and effect; **they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon their entering public office**. The enforcement of these obligations **is essential to the soundness and efficiency of our government, which exists for the benefit of the people who are its sovereign.**

Id. (citing N.J. Const., art. I, ¶ 2) (emphasis added).

The higher standard of conduct imposed upon public officials whether or not they are performing their official duties, In Karins, supra, the New Jersey Supreme Court addressed the issue as to whether discipline could be imposed upon a

firefighter, who, while being interviewed by a police officer during a drunk driving stop, used a racial epithet when an African-American officer arrived as a backup officer. The racial epithet was directed at a fellow public employee in public.

The Karins Court upheld his suspension ruling, inter alia, that the racial epithet, while made off duty, was not protected speech as per Pickering/Connick test:

> First, can the employee's speech be fairly characterized as relating to a matter of public concern? This is known as the employee's interest prong because it focuses on the interest of an employee, as a citizen, in commenting upon matters of public concern. Second is there a governmental interest, as an employer in the effective and efficient fulfillment of its responsibilities to the public through its employees? This is known as the public's interest or the governmental interest prong. To summarize, when private expression is involved, the Pickering/Connick balancing test looks not only to the content of speech, but also the "manner, time, and place in which it is delivered."

Karins, 152 N.J. at 550 (internal citations omitted).

Applying Pickering/Connick, the Karins Court held that the racial epithet: 1) was not related to any matter of public concern and, 2) the City had an interest in maintaining order discipline, harmony and a professional working relationship between the police and fire departments that substantially outweighed the firefighter's right to make abusive, insulting, racially motivated comments. Id. at 551-552. The Court also noted that such statements "have a tendency to disrupt morale and good working relationships." Id.

Here, by his misogynistic conduct that degraded and demeaned women, Maloney neglected the statutory duty imposed upon him as a public official pursuant to N.J.S.A. 40:14A-5(c), to treat all individuals with dignity and respect and to act with integrity. Maloney demonstrated not only a disturbing level of a lack of respect for women, but extreme poor judgment which was aggravated by his failure to admit to his actions or timely apologize for his conduct. While the Trial Court described Maloney's transmission of the revolting video a "mistake," such conduct can is better described as extremely careless or reckless.

For these reasons, the Trial Court's ruling that "there is no connection between the conduct and sewerage authority business, operations or personnel," (Da 377), and that Maloney's conduct does not violate the higher standard of conduct imposed upon him as he is not performing his duties 24/7, (Da 376), contravenes Driscoll and Karins, that prescribe a certain course of conduct for public officials whether or not performing official duties.

Further, Maloney chose to make his private conduct public by dissemination of the subject video. This State's Supreme Court has ruled that when the necessities of discipline, morale, and public confidence are implicated, an agency should be permitted "the establishment of a broad range of proscribed conducted without detailing every possible offense, and thus, without the precision required in criminal

statutes and procedure." Karins, 152 N.J. at 546, (citing Milani v. Miller, 515 S.W. 2d 412, 417 (Mo. 1975)).

Further, Maloney's conduct is not protected under the Pickering/Connick test[2]: The subject video was not related to any matter of public concern; and, the Borough had an interest in maintaining order, discipline, harmony and a professional working relationship between members of the Carlstadt Sewerage Commission. The release of the video to the public could also foreseeably engender mistrust and acrimony between Maloney and both the public and fellow commissioners. "It is not too great a price to pay that the public may have the utmost confidence in the honesty and integrity of the officials that have been chosen to govern them and conduct the public's business." State v. Botti, 189 N.J. Super. 127, 140 (Super. Ct. 1983). Confidence in the honesty and integrity of Maloney could be easily lost by his conduct in not only possessing the video, but disseminating it.

The Trial Court's restrictive reading of N.J.S.A. 40:14A-5(c) would lead to the unfathomable conclusion that a public official using a racial slur or acting in a racist manner, as long as not in the performance of official duties, would not be cause

[2] While the Trial Court found that the Borough took issue with Maloney's "mere possession of the video," (Da 377), this is a misinterpretation of the facts. Clearly, it was Maloney's careless/reckless dissemination of the video to the public, that included Carlstadt councilmembers, and not mere possession that is at issue. Further, it is not a simple video of a wedding, vacation or other benign event, but, instead, revolting pornography degrading women.

for removal under the statute. Such an interpretation clearly violates the rulings of the Supreme Court in Karins and Driscoll, and the ruling of the Appellate Division in Botti.

On the foregoing bases, the Borough had a statutory right to remove Maloney for neglect of duty.

B. *As per Karins, supra, as an appointed official, Maloney engaged in "misconduct" in violation of N.J.S.A. 40:14A-5(c).* (Raised Below: Da 375)

The Borough has statutory authority to remove a Commissioner of the Carlstadt Sewerage Authority pursuant to N.J.S.A. 40:14A-5(c) for "inefficiency or neglect of duty or **misconduct in office**." N.J.S.A. 40:14A-5(c). See also, Tp. Comm. of Tp. of Neptune v. Stagg, 312 N.J. Super. 312, 317 (App. Div. 1998). Relevant to the Court's analysis of the applicability of the statute here, it is noted that municipal corporations such as Carlstadt are entitled to have statutes concerning them liberally construed in their favor. The N.J. Const., art. IV, § 7, ¶ 11, states,

> The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The powers of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law.

N.J. Const., art. IV, § 7, ¶ 11.

Accordingly, "misconduct in office" under N.J.S.A. 40:14A-5(c) is to be liberally construed. Thus, and contrary to the Trial Court's ruling, reliance on precedent interpreting "misconduct" as relating to public officers and/or officials such as law enforcement officers, is proper. In this regard it is noted that this State has ruled police officers are "public officials," Costello v. Ocean County Observer, 136 N.J. 594, 613 (1994), just as Plaintiff here.

In Karins, supra, the New Jersey Supreme Court ruled that "misconduct" is akin to conduct unbecoming a public employee. Karins, 152 N.J. at 554. Relevant here, the Karins Court ruled, "Conduct unbecoming a firefighter or other public employee, in many ways, is reminiscent of the common-law offense of misconduct in office and the statutory offense of official misconduct." Id. at 553-54.

The Karins Court further held,

> New Jersey courts have applied the standard of "conduct unbecoming" in numerous cases involving the discipline of police officers. For instance, in In re Emmons, 63 N.J. Super. 136 (1960), the Appellate Division confronted the issue whether an off-duty police officer's refusal to cooperate and to submit to a sobriety test following an automobile accident constituted 'conduct unbecoming an officer.' Id. at 140. **The court observed that '[t]he phrase is an elastic one, that has been defined as any conduct which adversely affects the morale or efficiency of the bureau…[or] which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services.'** Ibid. [internal quotation marks and citation omitted].

Id. at 554 (emphasis added).

The Karins Court also relied upon Emmons, supra, in ruling that for a violation of "misconduct" or "conduct unbecoming a public employee" to be found, "it is sufficient that the complained of conduct and its attending circumstances be such as to offend publicly accepted standards of decency." Id. (quoting Emmons, 63 N.J. Super. at 140). The Emmons Court ruled that such misconduct does not need to "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 it he public eye** as an upholder of that which is morally and legally correct." Emmons, 63 N.J. Super. at 140 (citing Asbury Park v. Dep't of Civil Service, 17 N.J. 419 (1955)). See also, Hartmann v. Police Dep't of Vill. of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992)), and Phillips, supra, 117 N.J. at 576.

As to the off-duty racist conduct of a public official addressed in Karins, the Supreme Court further held :

> Here, Karins did not simply use a racial epithet against a private citizen, but against a police officer who was in the course of performing his duties. To make matters worse, he identified himself as an A.C.F.D. employee prior to conducting himself in such a manner. He exhibited this behavior in public, toward other City employees, and without regard to who may have witnessed the incident. Such conduct adversely affects the morale of both the police and fire departments; It also has the tendency to destroy public respect for City employees and public

> confidence in the operation of the respective departments. **Such behavior clearly offends accepted standards of decency.** We find that by a preponderance of the evidence that Karin's conduct constituted, "conduct unbecoming" both a public employee and an A.C.F.D. member, in violation of N.J.A.C. 4A:2-2.3(a)(6) and Article VII, Sect. 2-A(a) of the A.C.F.D. rules and regulations…

Karins, 152 N.J. at 556-557 (emphasis added).

Certainly, the revolting video Maloney distributed **publicly** offends accepted standards of decency. Relevant also are those cases wherein "misconduct" and "conduct unbecoming" a public employee have been found in cases involving non-law enforcement or firefighting personnel who committed off-duty acts of indecency. See In re Malayter, No. A-2621-07T1, 2009 N.J. Super. Unpub. LEXIS 2471, at *12 (App. Div. Sept. 29, 2009) (public employee was guilty of conduct unbecoming where he danced nude at a party and where he urinated out of a window because he committed "vulgar and socially unacceptable conduct" Id. Misconduct and conduct unbecoming a public employee has also been found where the employee has violated the rules and regulations of their department. See Leek v. N.J. Dep't of Corr., No. A-2350-06T3, 2008 N.J. Super. Unpub. LEXIS 596 (App. Div. May 14, 2008) (violating four rules and regulations of the Department of Corrections constitutes conduct unbecoming a public employee); see also, In re Griffin, No. A-5042-09T3, 2011 N.J. Super. Unpub. LEXIS 2756, at *14 (App. Div. Nov. 4, 2011)

(violation of the Department of Corrections cell phone policy constitutes conduct unbecoming a public employee).

New Jersey has also routinely applied the standards in Emmons, Phillips, and Karins, to non-law enforcement and firefighters. See, Rinnier v. Department of Transp., 94 N.J.A.R.2d (Vol.2B) 440(CSV), 1994 WL 183662, Final Agency Decision (Feb. 22, 1994); Bound Brook Bd. of Educ. v. Ciripompa, 228 N.J. 4 (2017); In re Kellish, No. A-1445-18T1, 2019 N.J. Super. Unpub. LEXIS 2082 (App. Div. Oct. 9, 2019); Somerset Cty. Vocational & Tech. Sch. Bd. of Educ. v. Vingara, No. A-5456-16T4, 2018 N.J. Super. Unpub. LEXIS 2825 (App. Div. Dec. 27, 2018); Spencer v. Dearborn (In re Spencer), Nos. A-0239-08T2, A-5344-08T3, 2010 N.J. Super. Unpub. LEXIS 1006 (App. Div. May 7, 2010); In re Vena, No. A-4128-05T1, 2007 N.J. Super. Unpub. LEXIS 1325 (App. Div. Oct. 26, 2007); and, In re Wilkinson, No. A-2355-11T1, 2014 N.J. Super. Unpub. LEXIS 353 (App. Div. Feb. 24, 2014).

The Trial Court's reliance on State v. Weleck, 10 N.J. 355 (1952), (Da 375), to exclude private conduct from constituting a violation of a "misconduct in office" charge is misplaced. The definition ascribed by the Trial Court fails to consider the entirety of the Weleck Court's ruling, which states, in part:

> 'Misconduct in office, or 'official misconduct,' means, therefore, any unlawful behavior in relation to official duties by an officer intrusted in any way with the administration of law or justice, **or, as otherwise defined,**

> **any act of omission in breach of a duty of public concern, by one who has accepted public office.**

Id. at 365 (emphasis added). The Weleck Court's definition is thus broader than that relied upon by the Trial Court and includes a breach of duty of public concern by one who has accepted office. As previously demonstrated, such is the case here.

The impact the type of improper conduct Maloney engaged in on those with whom the individual must work has been found by the courts to be of significant relevance. It is well-settled that, "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." Connick v. Myers, 461 U.S. 138, 151-52 (1983). The Supreme Court of the United States has further held that there is no necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." Id.

Here, the offensive, sexist, demeaning, and misogynistic video that Maloney posted in a well-attended chat room, "reflects poor judgment, even if it was accidentally sent to the group, reflects Maloney's attitude towards women, impacts the morale of subordinates and co-workers [many of whom are women] and demonstrates a total disrespect for his position as Commissioner." (Da 41). The public interest is at the forefront of Maloney's conduct because having a Commissioner who would casually send such an offensive and misogynistic video,

laugh about it and encourage it to be passed on, "further destroys the public trust and confidence in the operation of the municipality and its' leaders." Id.[3] The public's interest in not being served by a misogynist like Maloney is of equal weight to the public's interest in not being served by a racist. "It is not too great a price to pay that the public may have the utmost confidence in the honesty and integrity of the officials that have been chosen to govern them and conduct the public's business." Botti, supra, 189 N.J. Super. at 140.

There can be no debate that Maloney's posting of a highly inappropriate, misogynistic, and pornographic video onto a public chat room, visible by over 80 former employees, current employees, the current Mayor, former mayors, and members of the public in Carlstadt and Bergen County, is such conduct which adversely affects the morale or efficiency of the Borough, and has a near certainly to destroy public respect for municipal employees as well as confidence and trust in the operation of Borough services. See In re Emmons, supra. As stated by the Supreme Court in Karins, misconduct and conduct unbecoming a public employee are interchangeable. 152 N.J. at 553. It is, therefore, indisputable that Maloney

[3] While the Trial Court found it relevant that no one saw the video and that the degree of offensiveness did not elevate the conduct to misconduct in office, the Trial Court provided no precedent to support these holdings. (Da 377).

committed the offense of conduct unbecoming a public employee, or, misconduct touching upon his office.

N.J.S.A. 40:14A-5(c) provides in pertinent part: "A member of a sewerage authority may be removed only by the governing body by which he was appointed and only for inefficiency or neglect of duty or misconduct in office." N.J.S.A. 40:14A-5(c). There can be no question that if Maloney posted a racist video or made racist comments on a public chat room, whether or not in the performance of his official duties, he would be subject to removal for misconduct. This case should not have a different result.

The Constitution of the United States has long recognized the protection of special classes of individuals, including classes of race and gender, and the misogynistic, sexist, and highly offensive video posted by Maloney portrays a degrading and vile image and attitude towards women. The Borough would not be forced to tolerate a racist as a public officer of the Borough; it should not be forced to tolerate a misogynist. The Trial Court's Order must, therefore, be reversed as depriving the Borough Council (the governing body who appointed Maloney) of its right and discretion to determine that Maloney has committed misconduct touching upon his office such that his removal is in the best interest of the Borough and the Sewerage Authority.

The Borough cannot gain back trust and confidence lost from the public and cannot be compensated for it, nor can it be adequately compensated for any internal issues, especially amongst female employees, that may arise if Maloney were able to remain as Commissioner of the Sewerage Authority despite the Borough's legal right and valid justification for removing him.

While the Trial Court suggests that removing Maloney opens the door to inquiring into private emails, texts and chats and conducting illegal searches without a warrant, (Da 377), this is a quantum leap and not a reasonable analogy based on the facts here as Maloney widely disseminated the revolting video to the public of his own free will. It is Maloney that put the video out to the public for others to see. It is his own actions that set his removal in motion; the consequences of his actions are, therefore, a self-inflicted wound. Further, the video was misogynistic and degrading to women. He is a public official, whether appointed, or full or part time, is of no moment. In this State, public officials must be respectful to all members of the public, including women, and must act with dignity. Maloney's conduct was a far cry from these requisite obligations.

CONCLUSION

Based on all statutes and precedent cited, the Trial Court's ruling denying the Borough's motion for summary judgment must be reversed and its ruling granting summary judgment to Plaintiff also reversed.

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001438-23
Bergen County Docket No. BER-L-3281-21

THOMAS MALONEY	:	Civil Action
	:	
Plaintiff-Respondent	:	BRIEF IN OPPOSITION TO
	:	DEFENDANT'S APPEAL FROM AN
v.	:	ORDER OF THE SUPERIOR COURT,
	:	LAW DIVISION - BERGEN COUNTY,
BOROUGH OF CARLSTADT	:	GRANTING SUMMARY JUDGMENT
	:	TO PLAINTIFF
Defendant-Appellant	:	
	:	Sat Below:
		Hon. Christine Farrington, J.S.C., ret. t/a

BRIEF FOR PLAINTIFF – RESPONDENT

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August 19, 2024

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Preliminary Statement

Defendant Borough of Carlstadt's governing body appointed Plaintiff Thomas Maloney to serve as a commissioner of the Carlstadt Sewerage Authority. During his term, someone alleged that Mr. Maloney posted an offensive video in a Facebook Group. Carlstadt's governing body terminated Mr. Maloney from office, asserting that his personal conduct reflected negatively on the town.

Mr. Maloney challenged the removal in the Superior Court.

Carlstadt acted in an arbitrary, capricious, or unreasonable manner when it terminated Mr. Maloney from his position because Carlstadt did not follow the correct standard which is explicitly set forth by statute:

> . . . A member of a sewerage authority may be removed only by the governing body by which he was appointed and only for inefficiency or neglect of duty or misconduct in office. . .
> N.J.S.A. 40:14A-5(c) (in relevant part)

The issue presented here is whether an appointed public official's *private conduct* can constitute "*misconduct in office*" under N.J.S.A. 40:14A-5(c).

Mr. Maloney received summary judgment in the Law Division because it is undisputed that the allegations made by Carlstadt against him in the termination action were based on purely "private" acts and not "misconduct in office."

The motion judge's well-reasoned opinion agrees that the allegations against Mr. Maloney involve "private conduct." Because the alleged acts were not

connected to his public role and because "private conduct" is not within the scope of the removal statute, Mr. Maloney received summary judgment.

On this appeal, Carlstadt relies on graphic arguments about the nature of the video to inflame the reader against Mr. Maloney. Further, Carlstadt erroneously claims that removal is justified by a standard of "misconduct" or "conduct unbecoming," when the statutory threshold is more specifically "misconduct in office." Carlstadt goes as far as to argue that the statutory phrase "misconduct in office" should be "liberally construed" to apply to Mr. Maloney. But that is wrong.

Mr. Maloney properly received summary judgment because under the controlling statute private conduct cannot justify removal from office. Carlstadt's termination decision was arbitrary, capricious, or unreasonable because it ignored the controlling statute's clear language.

The summary judgment order for Mr. Maloney should be affirmed. The motion judge also properly directed that a plenary hearing should be held to determine Mr. Maloney's damages caused by the Borough's unlawful removal action. This matter should be remanded for that hearing.

Counter-Statement of Procedural History

In November 2020, Defendant-Appellant Borough of Carlstadt ("Carlstadt") initiated a disciplinary action against Plaintiff-Respondent Thomas Maloney, an appointed commissioner of the Carlstadt Sewerage Authority. (Da 27-30)

Carlstadt's hearing officer held a hearing on February 8, 2020. The next month, Carlstadt's hearing officer recommended Mr. Maloney's removal from office. (Da 31-42)

On April 7, 2021, Carlstadt's governing body passed a Resolution adopting the hearing officer's findings, removing Mr. Maloney from office. (Da 43)

Mr. Maloney filed an Action in Lieu of Prerogative Writs in the Superior Court challenging his removal. (Da 44-49) Carlstadt filed an Answer. (Da 50-54) Both parties moved for summary judgment. (Da 55; Da 63)

On September 9, 2021, Hon. Christine A. Farrington, J.S.C. ret'd t/a, heard argument, granted Mr. Maloney summary judgment, and denied Carlstadt's motion. (Da 1) Judge Farrington concluded that Carlstadt improperly relied on a local ordinance that is applicable to town employees as the basis to remove Mr. Maloney, instead of properly following the statute that applies to the potential removal of a sewerage authority commissioner, N.J.S.A. 40:14A-5(c). This statute sets forth that a sewerage authority commissioner shall only be removed from office for misconduct in office, inefficiency, or neglect of duty.

Carlstadt appealed the summary judgment order.[1] (Da 241) Carlstadt also moved to stay Mr. Maloney's return to his position. Judge Farrington denied this request (Da 346) but the Appellate Division reversed this ruling. This decision to grant the stay essentially removed Mr. Maloney from office because Mr. Maloney never again sat as a commissioner prior his term expiring.

On July 10, 2023, (nearly two years after the motion judge granted summary judgment to Mr. Maloney) the Appellate Division issued an opinion reversing summary judgment[2] (Da347), remanding the matter to the motion judge to determine the issue of "whether an appointed public official's private conduct can constitute misconduct in office under N.J.S.A. 40:14A-5(c)." (Da 357-58)

Judge Farrington considered further briefing and oral argument, then granted Mr. Maloney summary judgment and denied summary judgment to Carlstadt again. Judge Farrington found that the allegations made by Carlstadt against Mr. Maloney could not establish grounds for removal under the statute because the allegations were clearly of "private conduct" and not "misconduct in office." Judge Farrington

[1] The summary judgment granted to Mr. Maloney is a final order appealable as of right by Carlstadt. Rule 2:2-3. However, the denial of summary judgment to Carlstadt is an interlocutory order and cannot be appealed without leave granted. Rule 2:2-4.

[2] Although the Borough's Resolution cites only a local ordinance as the basis for terminating Mr. Maloney – and not the statute - the panel chalked this up to an "apparent drafting error" despite an absence of any indication in the record.

also directed that a plenary hearing would be conducted on the issue of Mr. Maloney's damages. (Da 372)

Defendant Borough of Carlstadt filed this appeal. (Da 367)

Counter-Statement of Facts

In 2018, Mr. Maloney was appointed to a five-year term as a commissioner of the Carlstadt Sewerage Authority. (Da 170)

In June 2020, Cheryl Rivera complained to Carlstadt's governing body that Mr. Maloney posted an offensive video in a Facebook Group. (Da 212)

Based on this complaint, on November 3, 2020, Carlstadt brought a disciplinary action against Mr. Maloney seeking his termination from the sewerage authority board. (Da 27)

Carlstadt's appointed hearing officer held a hearing on February 8, 2021, via Zoom. Carlstadt's counsel arranged for the testimony and colloquy at the hearing to be recorded. However, due to a technical issue or error the proceeding was not recorded. No verbatim transcript exists of the testimony.

Many of the "facts" relied upon in Carlstadt's arguments are not supported by the record. But several facts are clear. Only Cheryl Rivera testified for the Defendant at the hearing. In her email to the governing body (Da 212), Mrs. Rivera urged the governing body to remove Mr. Maloney from office. She met privately with council members to press her demand for Mr. Maloney's termination.

Mrs. Rivera testified about her bias against Mr. Maloney. Ms. Rivera testified that she and her husband believe that Mr. Maloney was unfair to her husband while he was employed by the Carlstadt Sewerage Authority. This was a significant factor regarding her credibility and bias in making the accusation against Mr. Maloney.

Mrs. Rivera acknowledged that she was not a member of the Facebook Group but had gained access to it through her husband's log-in. She is the only person on record claiming to have seen the video in the Facebook Group. (Da 377)

Carlstadt never established that a "public" airing of the video in the Facebook Group occurred. Carlstadt's claims of who saw the video or how long it may have been posted are speculative. Who belonged to the Facebook Group is irrelevant.

Mr. Maloney testified at the hearing that he intended to send the video to one other person, who apparently belonged to the Facebook Group. He denied that he intentionally sent the video out to an entire Facebook Group. (Da 169) He felt remorseful and "completely embarrassed" over the incident. (Da 374)

It is undisputed that the video had no connection to the Carlstadt Sewerage Authority or Mr. Maloney's role or duties as a commissioner. Mr. Maloney did not use Carlstadt's equipment, such as a computer or smartphone, to send the video. He did not send it while on duty for Carlstadt or transmit it on Carlstadt's email system. The video does not refer to or depict anyone in Carlstadt, does not target anyone in

Carlstadt for harassment and it has nothing to do with Carlstadt official business. (Da 60-61)

Carlstadt's hearing officer subsequently recommended that Mr. Maloney be terminated from his position. (Da 31) Carlstadt's Borough Council ratified this finding with a Resolution removing Mr. Maloney from office. (Da 43)

Legal Argument

> Mr. Maloney was properly granted summary judgment because he was unlawfully removed from the Carlstadt Sewerage Authority by the Carlstadt's arbitrary, capricious, or unreasonable conduct.

To prevail in an action in lieu of prerogative writs, a plaintiff must demonstrate that the challenged action by the government body was arbitrary, capricious, or otherwise unreasonable. Trust Co. of New Jersey v. Planning Board of Borough of Freehold, 244 N.J. Super. 553 (App. Div. 1990). The trial court looks to the record below for factual context. Roth v. Rutherford Rent Bd., 239 N.J. Super. 378 (Law Div. 1989).

A local authority's resolution of factual issues will stand if supported by credible evidence in the record. Resolution of a legal issue is "entitled to no particular deference since the courts are equipped to resolve issues of law." Urban v. Planning Bd. Of Borough of Manasquan, 238 N.J. Super. 105, 111-12 (App. Div. 1990) (citations omitted).

This appeal presents a legal issue: whether an appointed public official's *private conduct* can constitute misconduct in office under N.J.S.A. 40:14A-5(c) (Da 357-358). Therefore, the deference sometimes extended to actions by local authorities is not applicable to this review.

Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). The evidence considered on a summary judgment motion is viewed in the light most favorable to the non-movant. Judson v. People's Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954); Brill v. Guardian Life Insurance, 142 N.J. 520, 523 (1995).

A trial court's summary judgment dismissal decision is reviewed *de novo*. Giannakopoulos v. Mid State Mall, 438 N.J. Super. 595, 599 (App. Div. 2014). Utilizing the same standard as the motion court, the appellate court considers "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill at 540.

These critical points are undisputed:

- Mr. Maloney held the appointed office of municipal sewerage authority commissioner at the time of the alleged incident.

- A sewerage authority commissioner can be removed from office "only for inefficiency or neglect of duty or misconduct in office." N.J.S.A. 40:14A-5(c).
- The allegation against Mr. Maloney is not connected to sewerage authority business, operations, or personnel. The allegation does not involve misappropriation of borough resources or improper dealings with borough employees. Nothing occurred on Borough "time." Mr. Maloney never identified himself by his full name or represented himself as acting as a commissioner during the incident.
- Carlstadt never established that anyone besides Mrs. Rivera saw the video.

The motion judge correctly recognized that Mr. Maloney is entitled to summary judgment on these undisputed facts because Carlstadt cannot connect any acts by Mr. Maloney to his role as a commissioner to meet the statutory standard for removal of "misconduct in office."

A. Mr. Maloney was properly granted summary judgment because an appointed public official's private conduct cannot constitute misconduct in office under N.J.S.A. 40:14A-5(c).

A sewerage authority commissioner is not a town employee serving in an "at-will" position. Once appointed, the commissioner's officeholding is not "at will" or at the unfettered discretion of the governing body. A sewerage authority

commissioner is an appointee falling under a specific provision for termination from office, N.J.S.A. 40:14A-5(c). The statute sets forth the *only* grounds for removal of a commissioner by the governing body. Carlstadt's governing body could not remove Mr. Maloney from the Authority for *any reason* except "*inefficiency or neglect of duty or misconduct in office*." N.J.S.A. 40:14A-5(c). The acts alleged in Carlstadt's disciplinary action against Mr. Maloney do not meet this standard.

Under the statute, a commissioner may be removed only for abusing the position or failing to perform the duties and business of the authority. Balanced against this protection is that a commissioner's term expires at a set date; if the governing body does not approve of a commissioner's character, judgment, or private behavior then at the end of the commissioner's term the governing body is free to use their discretion and appoint someone else.

Carlstadt's arguments emphasize the offensive nature of the video, degrade Mr. Maloney's character, and claim that the removal is justified by how it reflects negatively on the town to be connected to Mr. Maloney.

None of these points are relevant to the legal issues presented to this Court.

After inflaming the reader with these arguments, Carlstadt attempts to draw a legal connection between "offensive" conduct and what constitutes "misconduct in office." Carlstadt erroneously conflates "misconduct in office" with general "misconduct" or "conduct unbecoming a public employee."

Under a plain reading of N.J.S.A. 40:14A-5(c), "misconduct in office" must have a direct connection to the actual performance of the duties of the office. The statute's language clearly requires this nexus. By its direct words, the statute addresses "misconduct in office" - misdeeds in the performance of the public role – not an officeholder's "misconduct" in their private behavior.[3] If the Legislature wanted the governing body to have the power to remove a sewerage authority commissioner for personal bad behavior during the term of office, then the Legislature would have written that into the statute.

Prior decisions are clear on what constitutes misconduct in office. For decades, the New Jersey Supreme Court has "approved the classic definition of "misconduct in office" as 'corrupt misbehavior by an officer *in the exercise of the duties of his office or while acting under color of his office*. . .' State v. Begyn, 34 N.J. 35 (1961);" State v. Tirelli, 208 N.J. Super. 628, 636 (App.

[3] Statutory language should be given its "ordinary meaning and significance." Courts may not "rewrite a plainly written statute or . . . presume that the Legislature meant something other than what it conveyed in its clearly expressed language." DiProspero v. Penn, 183 N.J. 477, 492 (2005). "If the plain language leads to a clear and unambiguous result, then our interpretive process is over." Johnson v. Roselle EZ Quick LLC, 226 N.J. 370, 386 (2016). "A statute should be given its plain meaning if it is "clear and unambiguous on its face and admits only one interpretation." Twp. Of Neptune v. Stagg, 312 N.J. Super. 312, 316 (App. Div. 1998). (Sewerage commissioner could not be removed from office due to residency, because a residency requirement is not in the statute).

Div. 1986), citing State v. Schultz, 71 N.J. 590 (1976). The New Jersey Supreme Court references the definition of the common law crime of misconduct in office as:

> 'By 'misconduct in office,' or 'official misconduct,' is not meant misconduct, criminal or otherwise, which is committed by a person who happens to be a public officer, but which is not connected with his official duties. Such conduct is sometimes called private misconduct to distinguish it from official misconduct.
>
> 'Misconduct in office, or 'official misconduct,' means, therefore, any unlawful behavior in relation to official duties by an officer intrusted in any way with the administration of law and justice, or, as otherwise defined, any act or omission in breach of a duty of public concern, by one who has accepted public office.'
> State v. Weleck, 10 N.J. 355, 365 (1952).

"The 'prescribed duties of an office are nothing more nor less than the duties cast by law on the incumbent of the office.' State v. Silverstein, 76 N.J. Super. 536, 541 (App. Div. 1962), citing Weleck, 10 N.J. at 366 (1952). The criminal code defines "touching upon the office" as circumstances in which the "offense was related directly to the person's performance in, or circumstances flowing from the specific public office, position or employment held. . ." N.J.S.A. 2C:51-2.

Carlstadt charges Mr. Maloney with disseminating an inappropriate, offensive video on his personal time in a privately organized social media group. The alleged conduct did not directly or indirectly involve the sewerage authority, the performance of Mr. Maloney's duties as a commissioner, or Carlstadt's time, equipment, or personnel. It did not occur while Mr. Maloney was on duty; did not occur during a public meeting; did not involve public business; had no relation to

any official act Mr. Maloney would ordinarily perform; did not involve public resources or equipment; did not involve another employee; and was not directed at any local official or the subject of any borough activities or policies.

Carlstadt's arguments stretch the legal discussions in the cited cases to try to apply these to Mr. Maloney's situation. (Db 20-22). But this is wrong because the cases cited by Carlstadt do not apply the specific standard of "misconduct in office" to their facts and are irrelevant to the issue here. The cases cited by Carlstadt do not support the conclusion that the allegations made against Mr. Maloney fit the definition of "misconduct in office."

For example, in In re Phillips, 117 N.J. 567 (1990), the respondent was subject to discipline under the police disciplinary statute broadly covering any "*misconduct*" - not specifically "*misconduct in office,*" the language which is at issue here. The incident in Phillips easily connected to the respondent's public position. Respondent police chief, off duty and in the town where he was employed, caused a single car crash in an unmarked police car. Officers from his department responded to investigate. He was cited for driving while intoxicated and for consuming alcohol while armed in violation of police department rules and regulations.

In upholding the disciplinary action, the Court noted that a police officer is a "special kind of public employee" whose conduct and behavior would be strictly scrutinized. Phillips at 576.

In Karins v. Atlantic City, 152 N.J. 532 (1998), a firefighter was subject to discipline under a local regulation applicable to "conduct unbecoming a firefighter" - not "misconduct in office." This is a different standard from misconduct in office. "Conduct unbecoming" has an expansive definition that does not apply to the statutory standard for removal of a sewerage authority commissioner.

Karins identified himself as a city firefighter during a public confrontation with a fellow municipal employee, an on-duty police officer. He used a racial epithet (for which he had been previously disciplined) and appeared intoxicated. Again, the court connected these events to the public role of appellant, upholding the disciplinary action imposed, finding that, "Firefighters are not only entrusted with the duty to fight fires; they must also be able to work with the general public and other municipal employees, especially police officers, because the police department responds to every emergency fire call. Any conduct jeopardizing an excellent working relationship place at risk the citizens of the municipality as well as the men and women of those departments who place their lives on the line on a daily basis." Karins at 552.

There are different standards for discipline in both cases from this matter. Carlstadt's arguments erroneously conflate "misconduct in office" with the high

standard imposed on a law enforcement officer (Phillips[4]) and with "conduct unbecoming a public employee" (Karins).[5] These are different standards than "misconduct in office." Also, the public policy considerations relied on by the courts in Phillips and Karins are absent from this matter.

Two other cases also are distinguishable. Appeal of Emmons involved a police officer's "refusal to cooperate in an examination to determine his sobriety following an off-duty automobile accident in [the town he was employed] in which he was personally involved." 63 N.J. Super. 136, 138 (App. Div. 1960). Herbert v. Atlantic City addressed allegations that a "semi-intoxicated" off-duty police officer "acting as a collector for a bawdyhouse keeper" through threat of official action against a third-party hotel where the presumed debtor was ensconced. 87 N.J.L. 98, 101 (1915). Both instances were clearly connected to the public employee's jobs.

In summary, these cases involve a different type of public servant whose position was controlled by a different statutory standard for removal than a sewerage

[4] Police officers have far-reaching powers and a duty to always enforce the law (on or off duty). As a result, police officers must adhere to higher standards than other public officials. This is vastly different than the role held by Mr. Maloney, a part-time commissioner serving a set term in office, whose removal is governed by a specific statute with a different standard than that applicable to police officers.

[5] This phrase is also used in Carlstadt's borough code (applicable to its regular employees) that Carlstadt previously tried to enforce against Mr. Maloney that was found improper in the prior Appellate Division opinion.

authority commissioner.[6] Judge Farrington analyzed the law and made express findings that these cases are inapplicable to Mr. Maloney's situation.

Carlstadt also cites to unreported and administrative decisions, which are not binding on this appeal, distinguishable factually, and apply different legal standards then the statute that controls here.

It is undisputed that Mr. Maloney is charged for an act occurring on his personal time involving a private social media group. This alleged conduct did not directly or indirectly involve the sewerage authority, the performance of his duties as a commissioner, or the borough's time, equipment, or personnel. It did not occur while he was on duty; did not occur during a public meeting; did not involve public business; had no relation to any official act he would ordinarily perform; did not involve public resources or equipment; did not involve another employee; and was not directed at any local official or the subject of any borough activities or policies.

As a result, the allegation against Mr. Maloney is beyond the clear statutory basis for which Carlstadt could remove him as a commissioner. The inapplicability of the statute is dispositive of Carlstadt's allegations and Mr. Maloney's Motion for Summary Judgment. Carlstadt's argument that any dissemination of the video by Mr. Maloney amounts to "misconduct" and "neglect of duty" is erroneous. Mr.

[6] Ironically, despite the described conduct of Phillips, Karins, and Emmons none lost their public job as Plaintiff is facing here.

Maloney's alleged actions had no connection to his role as a commissioner or to the sewerage authority's business.

No matter one's opinion of the propriety of the video, possession of the video is not criminal or illegal.

Carlstadt's removal of Mr. Maloney was "arbitrary and capricious" because the governing body substituted its own opinion of its power to remove Mr. Maloney from the authority while completely disregarding the standard that the Legislature created. A town's governing body must follow the law, and not decide instead to substitute its own opinion of what the State's laws should be for its own purposes.

B. Carlstadt was properly denied summary judgment because the undisputed facts show that Mr. Maloney's did not commit "misconduct in office," the only basis for removal of a sewerage authority commissioner.

The *denial* of summary judgment to Carlstadt by the Law Division judge is an interlocutory ruling, only appealable on leave from this Court. Rule 2:2-4.

Besides the matter not being properly before this Court, two issues preclude granting summary judgment to Carlstadt.

First, the "material facts" relied upon by Carlstadt in support of this motion do not exist in the record. Carlstadt's asserted "material facts" are in dispute; therefore, summary judgment is not appropriate. For example, Carlstadt contends that Mr. Maloney "sent" the video to members of the Carlstadt Community;

however, *only* Ms. Rivera testified to seeing the video. There is no proof Mr. Maloney intended to or did disseminate the video to the "community."

Second, it is dispositive of the motions that Mr. Maloney's actions are not "misconduct in office," the only statutory basis for removal of a sewerage authority commissioner under N.J.S.A. 40:14A-5(c). The reasons why the contested allegations, even if true, are not misconduct in office are set forth in the arguments in support of Mr. Maloney's motion for summary judgment herein.

Carlstadt is not entitled to summary judgment because removal of Mr. Maloney as a commissioner for any other reason besides those allowed in the statute constitutes arbitrary, capricious, or unreasonable conduct, directing resolution of this action to Mr. Maloney.

Conclusion

Carlstadt improperly and unlawfully removed Mr. Maloney as a sewerage authority commissioner, an arbitrary, capricious, or unreasonable action.

The controlling statute, N.J.S.A. 40:14A-5(c), does not recognize a commissioner's private behavior as a legal basis for removal by the governing body. Inherent in the statutory standard for removal for "misconduct in office" is a connection between the offending behavior and the duties, powers, and role of the sewerage authority commissioner. The allegation against Mr. Maloney, even if true, is "private conduct" unrelated to his role as a commissioner.

The statutory standard for termination of a sewerage authority commissioner is not "misconduct while holding office." Carlstadt's removal of Mr. Maloney was unreasonable and unlawful, entitling Mr. Maloney to summary judgment. Mr. Maloney suffers damages as asserted in the Complaint, including, but not limited to, loss of compensation and service credit, attorney fees and costs, and other benefits and compensation to which he is entitled.

It is respectfully requested that this Court affirm the Law Division motion judge's decision granting summary judgment to Mr. Maloney and remand for a plenary hearing on damages.

Respectfully submitted,

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Attorneys for Plaintiff-Respondent

By:

Kenneth Ralph
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Of Counsel and on the Letter Brief

THOMAS MALONEY, Plaintiff-Respondent, v. BOROUGH OF CARLSTADT, Defendant-Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001438-23 CIVIL ACTION On Appeal from the Final Judgment of the Superior Court of New Jersey, Law Division, Bergen County Docket No. BER-L-003281-21 Sat Below: Hon. Christine A. Farrington, J.S.C. (retired and temporarily assigned on recall) ***Date of Submission: August 29, 2024***

REPLY BRIEF ON BEHALF OF DEFENDANT-APPELLANT BOROUGH OF CARLSTADT

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August 29, 2024

VIA Ecourts

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Attn: Susan M. Brown, Case Manager

Re: Maloney v. Borough of Carlstadt
Docket No. A-001438-23

On Appeal from the Trial Court's Ruling Granting Summary Judgment
Sat Below: Hon. Christine Farrington, J.S.C., ret. t/a

Letter brief of Appellant, Borough of Carlstadt, in reply to Respondent's Opposition to Appellant's moving brief

Dear Mr. Orlando:

Pursuant to *R.* 2:6-2(b), please accept this reply letter brief on behalf of Appellant Borough of Carlstadt.

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REPLY PRELIMINARY STATEMENT

The issue before this Court is whether the Borough of Carlstadt acted arbitrarily and unreasonably in finding that Respondent neglected his duty to the public to act with integrity and respond towards all individuals, and/or engaged in misconduct in office, as per N.J.S.A. 40:14A-5(c). The conduct in question is Respondent's posting of a vulgar, obscene, pornographic, and misogynistic video in a "chat room" that included various individuals. While Respondent contends that his conduct in creating the post was "private," his alleged "private" conduct became public when he shared the post with various members of the public. Notably, as to the post's dissemination, Respondent posted, "Omg how did so many people get to see this wow." Accordingly, Respondent's reliance on the argument that this matter involves "private conduct" is unavailing.

Respondent would also have this Court believe that egregiously improper conduct, as long as occurring in private, could not constitute cause for removal of a commissioner under *N.J.S.A.* 40:14A-5(c). Such an interpretation is an abomination of this State's precedent, as well as legislative intent, to hold public officials to a higher standard of conduct, both in their public and private lives. By any stretch of the imagination, Respondent's dissemination of the subject post cannot be said to uphold this standard.

REPLY STATEMENT OF FACTS

Contrary to Respondent's statement that a complaint brought by Cheryl Rivera resulted in disciplinary action against Respondent, (RB-5), the evidence shows that while such complaint brought the matter to the Borough's attention, it was the resultant investigatory findings that underly the disciplinary charges ultimately preferred. (Da-76-78)

Contrary to Respondent's statement that witness Cheryl Rivera met privately with council members to press her demand for Respondent's termination, there is no evidence of such as noted by Respondent's failure to cite to the record any evidence in support of this proposition. (RB-5)

Respondent's statements regarding Rivera's alleged bias and credibility are not facts, but arguments. (RB-6)

Respondent's claims of evidence that is relevant or irrelevant as to those who viewed Respondent's posts, (RB-5), are also argument, not facts.

TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

January 5, 2024 – Order Granting Plaintiff Thomas Maloney's Motion for Summary Judgment

January 5, 2024 – Order Denying Defendant Borough of Carlstadt's Motion for Summary Judgment

January 5, 2024 – Order and Opinion of the Hon. Christine Farrington, J.S.C., Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment

LEGAL ARGUMENT

I. RESPONDENT SHARED HIS POST WITH THE PUBLIC WHEN HE POSTED IT IN A CHATROOM CONSISTING OF AT LEAST EIGHTY INDIVIDUALS; AS SUCH, "PRIVATE" CONDUCT IS NOT IN ISSUE.

The appellate court has already ruled Respondent as the holder of a public office. (Da355).

In defending the position that Respondent's post was "private conduct," Respondent asserts the following: 1) the witness who testified at the hearing below was biased; 2) there was no "public" airing of the video on Facebook; 3) Respondent did not intend his post to viewed by more than one individual; 4) only one individual was identified as viewing the post; 5) the post was not created on, or transmitted from, any Borough equipment, (RB-6); 6) the post was not done on Borough time or during a public meeting; and, 7) the post did not involve public business or another employee. (RB-12-13). Such assertions, are, however, irrelevant as Respondent's post became public upon its dissemination to various individuals in a chat room including, but not limited to: the current Mayor of Carlstadt, the official Facebook page of the Borough of Carlstadt, former Mayors of Carlstadt, members who live in the town of Carlstadt, Borough of Carlstadt Council Members, the former Bergen County Executive, and at least one member of the Carlstadt Board of Education. (Da

33; Da 37; Da 187-193; Da 218). Accordingly, the factual premise of Respondent's primary argument - that the subject conduct was "private" – is indisputably false.

While Respondent now claims that there is no proof that he disseminated the post, (RB-18), a post he made subsequent to dissemination indicates otherwise. Respondent posted, "Omg how did so many people get to see this wow." (Da38; Da185.) Further, Respondent had the opportunity to defend against the allegation that he disseminated the subject post when the Borough requested his interview during the investigation of the incident; Respondent, however, refused to respond for the interview. (Da77-78; Da197-209). Finally, the record reflects that Respondent apologized for his conduct after testimony in the departmental hearing and stated that he felt remorseful and "completely embarrassed" by the incident. (RB-6).

II. A PUBLIC OFFICIAL'S DISSEMINATION TO THE PUBLIC OF A VULGAR, PORNOGRAPHIC, MISOGYNISTIC VIDEO, IS VIOLATIVE OF THE HIGHER STANDARD OF CONDUCT EXPECTED OF PUBLIC OFFICIALS VIA PRECEDENT AND STATUTE AND, THEREFORE, IS A VIOLATION OF *N.J.S.A.* 40:14A-5(c)

N.J.S.A. 40:14A-5(c) states, in part, "A member of a sewerage authority may be removed only by the governing body by which he was appointed and only for inefficiency or neglect of duty or misconduct in office."

It is notable that Respondent fails to address both the "neglect of duty" aspect of the statute as well as the New Jersey Supreme Court's ruling in Driscoll v. Burlington-Bristol Bridge Co., et al., 8 N.J. 433, 474 (1952), *cert. denied,* 344 U.S. 838 and *reh'g denied*, 344 U.S. 888 (1952), which are directly applicable to the issues in this case. As set forth in Appellant's moving brief, the New Jersey Supreme Court held that there are obligations imposed on public officers upon entering public office, including to serve the public with the highest fidelity and to discharge their duties in good faith and with honesty and integrity. Id. at 474-475. This standard of conduct is imposed whether or not the public official is performing official duties. Karins v. Atlantic City, 152 N.J. 532, 550-552 (1998).

Consistent with the Driscoll court's ruling, the Carlstadt Sewerage's Authority's social media policy states, in relevant part:

> If employees choose to identify themselves as a Carlstadt Sewerage Authority employees on their personal social media accounts, and even those that do not should be aware that he or she may be viewed as acting on behalf of the Carlstadt Sewerage Authority, as such no employee shall knowingly represent themselves as a spokesperson of the Carlstadt Sewerage Authority, **post any comment, text, photo, audio, video, or other multimedia file that negatively reflects upon the Carlstadt Sewerage Authority's mission or undermine the public trust or is insulting or offensive to other individuals or to the public in regard to religion, sex, race, or national origin.**

(Da 127) (emphasis added)

While Respondent agrees that public officials are held to a higher standard of conduct, Respondent argues that the public must, nevertheless, endure any improper and offensive conduct undermining the public trust if the commissioner has already been appointed. Respondent argues that the Borough is then left with the sole option of not reappointing him/her at the end of the term. Respondent states the following:

> Under the statute, a commissioner may be removed only for abusing the position for failing to perform the duties and business of the authority. Balanced against this protection is that a commissioner's term expires at a set date; **if the governing body does not approve of a commissioner's character, judgment, or private behavior then at the end of the commissioner's term the governing body is free to use their discretion and appoint someone else.**

(RB-10), (Emphasis added).

As a public official's disrespect, offensiveness, and indignity towards the female portion of the population does not serve the public with the highest fidelity, good faith, or integrity, Driscoll v. Burlington-Bristol Bridge Co., et al., 8 N.J. 474, Respondent's argument that the public must endure such conduct until the end of Respondent's appointment is not only contrary to precedent, but senseless. *See, also,* Connick v. Myers, 461 U.S. 138, 151-152 (1983), (the court held there is no necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." Id. at 151-152.)

Public officials are held to a higher standard of conduct than those they serve to ensure the public trust. Respondent's conduct here cannot be said to have served that purpose. Respondent neglected his duties under N.J.S.A. 40:14A-5(c). For the same reasons, Respondent's conduct also constitutes "misconduct in office." In interpreting the term, Appellant relied on various cases involving public officials who violated the implicit standard of good behavior that devolves upon public officials while not in the performance of their official duties. For instance, in Karins v. Atlantic City, 152 N.J. 532 (1998), the court addressed the same conduct at issue here - that which adversely affects the morale, public trust and public confidence in the operation of the agency - even though the conduct did not relate specifically to the performance of official duties. (Da41). As in Karins, the hearing officer here determined that Respondent's conduct reflected upon and impaired the morale and discipline of his position. Id. (AB-19-28)

Similarly, the cases of In re Phillips, 117 N.J. 567 (1990) and In re Emmons, 63 N.J.Super. 136 (App.Div. 1960), (Da40), involved public officials held accountable for off-duty conduct found to be violative of the implicit standard of good behavior that devolves upon one who stands in the public eye as the upholder of that which is morally and legally correct and/or conduct not specifically proscribed by departmental rules or regulations. (AB-10; 23-24).

In interpreting the term "misconduct in office,[1]" Respondent relies on criminal statutes, N.J.S.A. 2C:51-2, and criminal cases, such as State v. Begyn, 34 N.J. 35 (1961); and, State v. Tirelli, 208 N.J.Super. 628 (App.Div. 1986). (RB-11-12). As set forth in Karins, supra,, however, this State's Supreme Court ruled that when the necessities of discipline, morale, and public confidence are implicated, an agency should be permitted, "the establishment of a broad range of proscribed conduct without detailing every possible offense, and thus, without the precision required in criminal statutes and procedure." Karins, 152 N.J. at 546, citing, Milani v. Miller, 515 S.W. 2d 412, 417, (Mo.1975). Here, morale and public confidence are implicated; accordingly, criminal statutes and interpretations of such statutes are not applicable.

Respondent's reliance on State v. Weleck, 10 N.J. 355 (1952), is misplaced as actually supporting Appellant's arguments. The Weleck court defined "misconduct in office" or "official misconduct" as "any unlawful behavior relating to official duties by an officer intrusted in any way with the administration of law or justice, or, **as otherwise defined** any act of omission in breach of a duty of public

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[1] While Respondent also relies on various canons of statutory interpretation referring to the "ordinary meanings" of words and plain language, (RB-11, FN3), "misconduct in office" is not a term with an "ordinary meaning," but a term subject to varying interpretations.

concern, by one who has accepted public office." Id. at 365. As Respondent - a public official - breached a duty of public concern, specifically, the duty of highest fidelity to the public, and the duty to conduct himself - in private and public - with honesty and integrity, he committed misconduct in office as per the Weleck holding.

III. THIS MATTER IS PROPERLY BEFORE THIS COURT

This matter is a prerogative writ matter with no facts in dispute. This Court's ruling is one of law, and a summary judgment ruling disposes of all issues. Accordingly, it is properly before this Court.

CONCLUSION

The undisputed facts establish that Respondent engaged in conduct, utterly degrading to women, that adversely affects the morale and efficiency of the Borough and has a near certainty to destroy public respect for municipal employees, as well as confidence and trust in the operation of governmental services. As a public official, Respondent breached his fiduciary duty to the public by violating the duties of fidelity, honesty, and integrity.

For the foregoing reasons, the Borough did not act arbitrarily, capriciously or unreasonably, or in violation of N.J.S.A. 40:14A-5(c), as Respondent neglected his duties as a public official and engaged in misconduct in office. For these reasons, Respondent's removal must be upheld.

Respectfully submitted,

By: Catherine M. Elston

Catherine M. Elston, Esq.